

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

STATE V. TOLAN

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STATE OF NEBRASKA, APPELLEE,

v.

MARQUEZ A. TOLAN, APPELLANT.

Filed September 8, 2026. No. A-25-635.

Appeal from the District Court for Lancaster County: LORI A. MARET, Judge. Affirmed.
Jonathan M. Braaten, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.
Michael T. Hilgers, Attorney General, and Jacob M. Waggoner for appellee.

BISHOP, WELCH, and FREEMAN, Judges.

WELCH, Judge.

I. INTRODUCTION

Marquez A. Tolan appeals from his convictions and sentences in the Lancaster County District Court for one count of third degree domestic assault (subsequent offense) and three counts of violating a protection order (subsequent offense). Tolan contends that the district court erred in finding that he knowingly and voluntarily waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); that the evidence was insufficient to support his convictions; that the sentences imposed were excessive; and that his trial counsel was ineffective. For the reasons stated herein, we affirm.

II. STATEMENT OF FACTS

1. BACKGROUND

On October 31, 2024, law enforcement responded to a report that Tolan had assaulted Katherine Geardino at her residence. Although Geardino had an active protection order against

Tolan, she and Tolan were in a relationship and resided together. Geardino reported to law enforcement that, during an argument, Tolan put his hand or his forearm around her neck, which made it difficult for her to breathe. Although officers were unable to locate Tolan at that time, Julia Labbe, Geardino's neighbor, provided video footage from her surveillance camera that captured an individual, later identified as Tolan, leaving Geardino's residence.

On November 7, 2024, Labbe reported to law enforcement that Tolan was at Geardino's residence in violation of the active protection order against him. Although law enforcement was unable to contact Tolan or Geardino at that time, officers subsequently obtained video footage from Labbe. Thereafter, law enforcement put out a "broadcast" for Tolan regarding the protection order violation, and on November 13, 2024, Tolan was arrested at Geardino's residence. Officer Jacob Wilkinson, who initially put out the broadcast, responded to the scene and contacted Tolan, who was seated in the back of a marked police cruiser. Tolan waived his rights pursuant to *Miranda v. Arizona*, *supra*, and admitted that on November 7, 2024, he was at Geardino's residence because she had called him asking for cigarettes. Tolan was arrested and subsequently charged, as amended, with assault by strangulation or suffocation, third degree domestic assault (subsequent offense), and three counts of violating a protection order (subsequent offense).

2. JACKSON V. DENNO HEARING

Prior to trial, the district court held a *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), hearing to consider whether Tolan's statements to Officer Wilkinson on November 13, 2024, were freely, voluntarily, knowingly, and intelligently made and whether those statements would be admissible during the trial. The State adduced testimony from Officer Wilkinson.

Wilkinson testified that on November 7, 2024, he put out a "broadcast" for Tolan regarding the protection order violation. On November 13, 2024, after being notified that the Metro Fugitive Task Force had taken Tolan into custody on a warrant, he responded to Geardino's residence. When he arrived, Tolan was seated in the back seat of a marked police cruiser. Officer Wilkinson contacted Tolan, identified himself as a police officer, informed Tolan that Tolan was under arrest, and asked if Tolan was willing to answer some questions. Officer Wilkinson testified that he advised Tolan of rights under *Miranda* prior to asking any questions and that, after being asked if he understood his rights, Tolan agreed to answer questions.

Officer Wilkinson testified that during his questioning of Tolan, he did not have his police-issued weapon drawn; Tolan did not appear to be under the influence; Tolan appeared to understand what Officer Wilkinson was saying to him; neither Officer Wilkinson nor any other officer threatened, coerced, or promised Tolan anything in exchange for Tolan agreeing to speak with him; and to the best of Officer Wilkinson's knowledge, Tolan was speaking to him freely and voluntarily.

Following the hearing, the district court found that Tolan agreed to speak to Officer Wilkinson freely, voluntarily, knowingly, and intelligently, and that Tolan's statements made during that time were admissible at trial.

3. JURY TRIAL

A jury trial was held over 2 days in July 2025. Testimony was adduced from Officer Logan Fitch, Officer Wilkinson, Labbe, and Geardino. The evidence reflected that Tolan had been served with a copy of the relevant protection order in 2024 and a copy thereof was admitted into evidence.

(a) Officer Logan Fitch's Testimony

Officer Fitch testified that on October 31, 2024, he was dispatched to an apartment regarding an assault. He contacted Geardino, who was the victim. Officer Fitch observed that Geardino was not wearing shoes, had blood on her shirt, and appeared to be very nervous. He further observed "obvious injuries to her person" including blood on her lips and several deep bleeding scratches to the sides of her neck. Officer Fitch photographed Geardino's injuries and the photos were received into evidence during the trial.

Officer Fitch testified that he contacted Labbe, who sent him video footage captured by her home surveillance camera that allegedly depicted Tolan at Geardino's residence. The video footage was received into evidence during trial without objection. Officer Fitch identified Tolan as the individual in the video footage leaving Geardino's home on October 31, 2024. Officer Fitch testified that he was unable to locate Tolan in the area on October 31.

(b) Officer Jacob Wilkinson's Testimony

Officer Wilkinson testified that on November 7, 2024, he responded to Geardino's residence after receiving a call from Labbe regarding a protection order violation at Geardino's residence. Officer Wilkinson testified that, although he was unable to contact anyone in Geardino's residence on that day, Labbe provided him with video footage from her home surveillance camera. Wilkinson testified that on November 13, he returned to Geardino's residence after receiving a notification from the Metro Fugitive Task Force that they had located Tolan and were attempting to serve an arrest warrant. When Officer Wilkinson arrived on scene, Tolan was in custody in a marked police cruiser. Officer Wilkinson testified that upon contacting Tolan, he observed that Tolan was wearing some of the same articles of clothing that Officer Wilkinson had observed in the November 7 video footage. Officer Wilkinson testified that while Tolan was seated in the back seat of the police cruiser, he interviewed Tolan regarding the protection order violation. In response to his questions regarding the November 7 incident, Tolan responded that Geardino had "called him to get cigarettes or something like that."

(c) Julia Labbe's Testimony

Labbe testified that between 2021 and 2024, she was Geardino and Tolan's neighbor. Labbe testified that she had a home surveillance camera, including a Ring doorbell and a camera facing her driveway that also captured part of Geardino's driveway. Labbe testified that on October 31, 2024, she was approached by law enforcement officers regarding a disturbance between Geardino and Tolan and asked whether her surveillance camera captured anything relevant to the disturbance. Labbe testified that she provided law enforcement with video footage after recognizing Tolan in that footage.

Labbe testified that on November 7, 2024, believing that there was an active protection order against Tolan and observing Tolan at Geardino's residence leaving the garage area, she contacted law enforcement and provided them with video footage from her surveillance camera. During the trial, Labbe identified Tolan in both the October 31 and November 7 camera footage but testified that the video quality made it difficult to identify any distinguishing facial features of the person depicted in the videos. Despite this, Labbe testified that she was familiar with Tolan, having been his neighbor for a few years, and was aware that the only people residing in Geardino's home were Geardino, Tolan, and Geardino's young children.

(d) Katherine Geardino's Testimony

Geardino testified that she and Tolan began dating in April 2020 and moved in together in August. Although Geardino obtained a protection order against Tolan in February 2024, Tolan lived with her off and on until November 13, 2024.

Geardino testified that on October 31, 2024, she and Tolan began drinking after her daughters left to go trick or treating. Geardino testified that "things fell apart" sometime between 7 and 8 p.m. and they began arguing. Geardino testified that she had Tolan cornered between the door and the wall "and I kept on pushing him. I was yelling at him, pushing at him. Eventually he got tired of it and pinned me on the floor." Geardino testified that Tolan tackled her to the floor, had her arms pinned, and that at one point, Tolan grabbed her by the neck for a couple seconds, which made it difficult for her to breathe. Geardino testified that she could not remember if Tolan grabbed her neck but admitted that she had made that statement to law enforcement. Geardino testified that Tolan eventually let her up, went downstairs, and then tried to change the subject by asking if she wanted some cigarettes and whether she was going to contact law enforcement. Geardino testified that, in response to Tolan's question, she told him that she was not going to contact the police. However, Geardino testified that when Tolan left the home to purchase cigarettes, she contacted the police because she knew that when Tolan returned, "it would just be more shit, more crap, more everything. And I was tired of it at that point." Geardino testified that she had contact with law enforcement and paramedics that evening. Geardino testified that Tolan did not return home until a few days later.

Geardino testified that on November 7, 2024, when law enforcement came to her home, she and Tolan were home but did not open the door. Geardino explained that she did not open the door because "I knew that they were looking for [Tolan] at the time" and that she was concerned that they were going to arrest him because of the protection order. Then, on November 13, law enforcement returned to the home with a warrant for Tolan. She testified that Tolan eventually exited the residence and was arrested by law enforcement.

4. VERDICT AND SENTENCE

Tolan did not adduce any evidence at trial. Following the conclusion of the evidence, the jury found Tolan not guilty of assault by strangulation or suffocation but found him guilty of third degree domestic assault and three counts of violating a protection order. Following an enhancement hearing, the court determined that each conviction was a subsequent offense. The district court then sentenced Tolan to 3 years' imprisonment and 18 months of post-release

supervision for his conviction of third degree domestic assault (subsequent offense), and 2 years' imprisonment on each of his three convictions of violating a protection order (subsequent offense). Tolan's sentences were ordered to run consecutively, and he was given 278 days credit for time served. Tolan has appealed and is represented by different counsel on appeal.

III. ASSIGNMENTS OF ERROR

Tolan assigns, renumbered and restated, that: (1) the district court erred in finding that he knowingly waived his *Miranda* rights; (2) the evidence was insufficient to support his conviction for third degree domestic assault and two of his three convictions for violating a protection order; (3) the sentences imposed were excessive; and (4) his trial counsel was ineffective in failing to (a) "argue for a self-defense jury instruction" and (b) "impeach inconsistent witness testimony" regarding the third degree domestic assault charge.

IV. STANDARD OF REVIEW

Whether the *Miranda* warnings that were given were sufficient to form the basis of a knowing and intelligent waiver of the Fifth Amendment is reviewed de novo, but whether the waiver, based on the totality of the circumstances, was voluntary is reviewed for clear error. *State v. Sutton*, 319 Neb. 581, 24 N.W.3d 43 (2025). A district court's finding and determination that a defendant's statement was voluntarily made will not be set aside on appeal unless this determination is clearly erroneous. *Id.*

In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Clausen*, 318 Neb. 375, 15 N.W.3d 858 (2025). The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026).

It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes. *State v. Mora*, 298 Neb. 185, 198, 903 N.W.2d 244, 256 (2017).

Whether a claim of ineffective assistance of counsel may be determined on direct appeal is a question of law. *Id.* In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance. *Id.*

V. ANALYSIS

1. *MIRANDA* WAIVER

Tolan's first assignment of error is that the district court erred in finding that he knowingly waived his *Miranda* rights. Tolan argues that the totality of the circumstances show that he was not aware of the nature of the rights being abandoned based on his statements to law enforcement, his "apparent confusion," and his hesitation to immediately answer "yes" to the final question on

the *Miranda* form. Brief for appellant at 19. Tolan further argues that the district court erred in allowing his statements to be used at trial.

Whether a knowing and voluntary waiver has been made is determined by looking to the totality of the circumstances. *State v. Sutton*, *supra*. Factors to consider include the tactics used by the police, the details of the interrogation, and any characteristics of the accused that might cause his or her will to be easily overborne. *Id.* These characteristics of the accused include age, education, intelligence, prior contact with authorities, and conduct. *Id.* The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. *State v. Price*, 320 Neb. 1, 26 N.W.3d 70 (2025).

In a criminal trial, after a pretrial hearing and order which overrules a defendant's motion to suppress his statement, the defendant must object at trial to the receipt of the statement to preserve the question for review on appeal. *State v. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002). This rule also applies to pretrial determinations about the voluntariness of the statements. *Id.*

Following a *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), hearing, the district court found:

Based on the evidence presented, I do find that . . . Tolan did agree to speak with, both freely, voluntarily, knowingly, and intelligently, Officer Wilkinson. And that any statements he made during that time do or are -- are an acceptable -- are -- may be accepted as being allowed to be received into evidence during trial in this manner.

The record shows that on November 13, 2024, Officer Wilkinson was dispatched to Geardino's residence after the Metro Fugitive Task Force had located Tolan on an arrest warrant. When Officer Wilkinson arrived on the scene, Tolan had already been arrested and was seated in the back of a police cruiser. Officer Wilkinson read Tolan his *Miranda* warnings and proceeded to interview Tolan after Tolan stated he understood his rights and agreed to answer Officer Wilkinson's questions. A copy of Officer Wilkinson's body-worn camera footage was received into evidence during the trial without objection. Further, Officer Wilkinson testified during cross-examination by Tolan's trial counsel that when Wilkinson asked Tolan about the November 7, 2024, incident, Tolan stated that Geardino called him to get "cigarettes or something like that."

Because Tolan did not object during the trial to the admission of the body-worn camera footage or statements made therein, and Tolan specifically adduced testimony regarding a statement by Tolan to Officer Wilkinson, Tolan has failed to preserve this issue for appellate review. This assigned error fails.

2. INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTIONS

Tolan's second assignment of error is that the evidence was insufficient to support his convictions.

In reviewing a criminal conviction for sufficiency of the evidence, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. *State v. Hernandez*, 34 Neb. App. 162, 34 N.W.2d 425 (2026). In reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction,

the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

Here, Tolan was convicted of one count of third degree domestic assault and three counts of violating a protection order.

(a) Third Degree Domestic Assault

We first address Tolan's claim that the evidence was insufficient to support his conviction for third degree domestic assault because the evidence presented at trial did not indicate that he knowingly and voluntarily caused bodily injury to Geardino.

Pursuant to Neb. Rev. Stat. § 28-323 (Reissue 2016), which provides in relevant part:

(1) A person commits the offense of domestic assault in the third degree if he or she:

- (a) Intentionally and knowingly causes bodily injury to his or her intimate partner;
- (b) Threatens an intimate partner with imminent bodily injury; or
- (c) Threatens an intimate partner in a menacing manner.

....

(8) For purposes of this section, intimate partner means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

The evidence here established that on October 31, 2024, during an argument, the altercation between Tolan and Geardino turned physical. Geardino testified that she cornered Tolan between the bedroom door and the wall and pushed him until Tolan tackled her, pinned her to the floor, and choked her with his hand or forearm, making it difficult for Geardino to breathe. As a result of Tolan's actions, Geardino suffered injuries to her neck and her lip. Geardino testified that the parties resided together at that time and were involved in an intimate dating relationship. Tolan argues that this evidence was insufficient for a jury to find that he intentionally and knowingly caused bodily injury to Geardino. But "the intent with which an act is committed may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Blair*, 272 Neb. 951, 960, 726 N.W.2d 185, 192 (2007). Based on our review of the record, we find that the evidence, when viewed in the light most favorable to the State, was sufficient to establish that Tolan intentionally and knowingly caused bodily injury to Geardino. This claim fails.

(b) Violating Protection Order

Next, Tolan argues that the evidence was insufficient to support two of his three convictions of violating a protection order because the evidence failed to establish that he was present at Geardino's residence on October 31 and November 7, 2024. He does not dispute that

the evidence was sufficient to support his conviction for violation of a protection order on November 13.

Tolan argues that the images from the video footage from October 31, 2024, do not provide clear enough images to identify characteristics of the individual pictured. He also argues that, because his confession to Officer Wilkinson regarding his presence at Geardino's residence on November 7 was procured against the *Miranda* safeguards, the only evidence remaining regarding the alleged protection order violation was Geardino's testimony and the November 7 video footage, which does not clearly depict the face of the individual at Geardino's residence.

Tolan was convicted of three counts of violating a protection order pursuant to Neb. Rev. Stat. § 42-924 (Cum. Supp. 2024). Pursuant to § 42-924(4):

Any person, except the petitioner, who knowingly violates a protection order issued pursuant to this section or section 42-931 after service or notice as described in subsection (2) of section 42-926 shall be guilty of a Class I misdemeanor, except that any person convicted of violating such order who has a prior conviction for violating a protection order shall be guilty of a Class IV felony.

We note that, effective September 3, 2025, § 42-924 was transferred to Neb. Rev. Stat. § 26-103 (Supp. 2025).

Here, the evidence provided that a protection order was served on Tolán in February 2024. Geardino testified that, despite the protection order, Tolán continued to reside at her residence until his arrest in November 2024. Despite being served with the protection order, Tolán knowingly violated the February 2024 protection order by continuing to reside in Geardino's residence and continuing to contact Geardino.

Geardino testified that Tolán was at her residence on October 31 and November 7, 2024. Labbe provided video footage and identified Tolán in the video while at Geardino's residence. Additionally, Geardino identified the individual seen leaving her residence in the October 31, 2024, video footage as Tolán. Officer Wilkinson further identified Tolán in the video footage and observed that Tolán was wearing the same clothing during the November 7 video footage that Tolán was wearing during Officer Wilkinson's questioning of Tolán on November 13. Based on the evidence presented, viewed in the light most favorable to the prosecution, we find that the evidence was sufficient to support Tolán's convictions of violating a protection order on October 31 and November 7, 2024. This claim fails.

3. EXCESSIVE SENTENCES

Tolan assigns that the district court imposed excessive sentences. He argues that the district court failed to adequately consider the mitigating factors in the case and in imposing consecutive sentences.

Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether a sentencing court abused its discretion in considering and applying the relevant factors and applicable legal principles. *State v. Lopez*, 321 Neb. 118, 145, 32 N.W.3d 868 (2026). An abuse of discretion takes place when the sentencing court's

reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id.* We have acknowledged that while these factors should instruct a sentencing court, they do not comprise a mathematical formula that must be rigidly implemented, and that a sentence should be tailored and based on factors that fit the offender and not merely the crime. *Id.* The appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and of all the facts and circumstances surrounding the defendant's life. *Id.*

Here, Tolan was convicted of one count of third degree domestic assault (subsequent offense), a Class IIIA felony, and three counts of violating a protection order (subsequent offense), all Class IV felonies. See, § 28-323(1) and (4) (third degree domestic assault); § 42-924(4) (violation of a protection order). For the third degree domestic assault conviction (subsequent offense), the district court sentenced Tolan to 3 years' imprisonment and 18 months of post-release supervision which is within the sentencing range for Class IIIA felonies which are punishable by no minimum sentence and a maximum sentence of 3 years' imprisonment followed by 0 to 18 months of post-release supervision, a \$10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2024) (felonies; classification of penalties). The court sentenced Tolan to 2 years' imprisonment for each of Tolan's three convictions of violating a protection order (subsequent offense) which sentences are within the statutory sentencing range for Class IV felonies which are punishable by no minimum sentence and a maximum of 2 years' imprisonment, followed by 0 to 12 months of post-release supervision, a \$10,000 fine, or both. See *id.* Because the sentences were within the statutory guidelines, we consider only whether the district court abused its discretion in considering the relevant sentencing factors.

The district court, in fashioning Tolan's sentence, stated that it considered the parties' arguments, the presentence investigation report (PSR), the evidence presented during the trial, the nature and circumstances of the crimes, and the history, character, and condition of Tolan. At the time of sentencing, according to the PSR, Tolan was 41 years old, single, had six dependents, had a 10th grade education, and was unemployed. His criminal history included seven convictions each for failure to appear and driving under suspension; two convictions each for minor in possession, possession of marijuana (1 oz. or less), driving under the influence, and third degree domestic assault; and one conviction each for providing false information, assault and battery, obstructing the administration of law, disorderly conduct, child abuse, theft by unlawful taking, unauthorized use of a financial transaction device, attempted terroristic threats, violating a protection order, and other traffic offenses. Tolan had previously been sentenced to probation and had been unsatisfactorily released and had previously been sentenced to a term of post-release supervision, which had been revoked. According to the level of service/case management inventory, Tolan was assessed as a very high risk to reoffend and, according to the domestic violence matrix, Tolan scored in the medium high risk range to reoffend "due to the indication that [Tolan] has established

a clear pattern of abuse with this or past victims.” The PSR noted that Tolan generally appeared to be in good physical and mental/emotional health.

Based on our review of the record, in light of the fact that Tolan’s sentences are within the statutory guidelines, and the record does not indicate that the district court failed to consider the relevant sentencing factors, we find that the district court did not abuse its discretion in sentencing Tolan. We also note that the court did not abuse its discretion in ordering Tolan’s sentences to be served consecutively. This assignment of error fails.

4. INEFFECTIVE ASSISTANCE OF COUNSEL

Tolan’s final assignment of error is that his trial counsel was ineffective in failing to: (a) request a self-defense jury instruction and (b) impeach inconsistent witness testimony regarding the third degree domestic assault charge. Before considering Tolan’s specific assignments of error, we summarize the standard for ineffective assistance of counsel claims on direct appeal.

Generally, to prevail on a claim of ineffective assistance of counsel under the framework established by the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel’s performance was deficient and that this deficient performance actually prejudiced the defense. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). 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.* Trial counsel is afforded due deference to formulate trial strategy and tactics and, in considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel acted reasonably. *Id.* Thus, an appellate court will not second-guess the reasonable strategic decisions of trial counsel. *Id.*

To show prejudice in a claim of ineffective assistance of counsel, the defendant must demonstrate a reasonable probability that but for counsel’s deficient performance, the result of the proceeding would have been different. *Id.* A reasonable probability of prejudice is a probability sufficient to undermine confidence in the outcome. *Id.* In determining whether there is a reasonable probability that any deficient performance of trial counsel would have resulted in a different outcome in the proceeding, an appellate court may properly consider the strength of the admissible evidence relating to the controverted issues in the case. *Id.*

Although prevailing on a claim of ineffective assistance under *Strickland* requires proving both that counsel’s performance was deficient and that the deficient performance actually prejudiced the defendant, a defendant seeking to raise a claim of ineffective assistance on direct appeal is not required to make specific allegations of prejudice. *Id.* However, anytime a defendant seeks to raise an ineffective assistance claim, whether on direct appeal or in a postconviction motion, the defendant must specifically assign and specifically argue the alleged deficient performance, and must do so with sufficient particularity. *Id.*

The fact that a claim of ineffective assistance of counsel is properly raised on direct appeal does not mean it can be resolved on direct appeal. *Id.* The determining factor is whether all the facts necessary to the analysis are part of the appellate record. *Id.*

An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires examination of facts not contained in the record. *Id.* But if the record on direct appeal

conclusively establishes both that trial counsel's performance was deficient and that the deficient performance prejudiced the defendant's defense, an appellate court can determine trial counsel was ineffective. *Id.* Conversely, if the record on direct appeal conclusively establishes either that trial counsel's performance was not deficient or that any deficient performance did not prejudice the defendant's defense, an appellate court can determine trial counsel was not ineffective. *Id.* However, if the record on direct appeal does not conclusively establish or refute a claim of ineffective assistance, then the issue cannot be resolved on direct appeal and must be properly raised in a subsequent postconviction proceeding. *Id.*

With these principles in mind, we now turn to Tolan's specific allegations of ineffective assistance of counsel.

(a) Failure to Request Self-Defense Instruction

Tolan contends that he was denied effective assistance of counsel due to trial counsel's failure "to argue for a self-defense jury instruction" related to his assault charge.

Here, during the formal jury instruction conference, Tolan's counsel did not request a self-defense jury instruction and did not provide a proposed instruction to the district court. Nonetheless, whether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence. *State v. Adams*, 33 Neb. App. 212, 12 N.W.3d 114 (2024). Because of this duty, the trial court, on its own motion, must correctly instruct on the law. *Id.* As such, despite Tolan's failure to provide a proposed jury instruction, in considering whether trial counsel was ineffective in failing to request instruction on self-defense related to Tolan's assault of Geardino, we review whether the evidence warranted a self-defense instruction.

Self-defense is a statutorily created affirmative defense in Nebraska. *Id.* Neb. Rev. Stat. § 28-1409(1) (Reissue 2016) provides, in relevant part, that "the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." In the context of a self-defense instruction, a trial court must instruct the jury on the issue of self-defense where there is any evidence adduced which raises a legally cognizable claim of self-defense. *State v. Adams, supra*. To successfully assert the claim of self-defense, one must have a both reasonable and good faith belief in the necessity of using force. *Id.* The force used in defense must be justified under the circumstances. *Id.* A trial court is not required to give an instruction where there is insufficient evidence to prove the facts claimed; however, it is not the province of the trial court to decide factual issues even when it considers the evidence produced in support of one party's claim to be weak or doubtful. *Id.*

Tolan contends that a self-defense jury instruction was warranted "because a reasonable juror could have found that (1) Tolan had a reasonable and good faith belief in the necessity of using force[,] and (2) the force used in self-defense was justified under the circumstances." Brief for appellant at 27-28. However, a defendant's defense that he did not commit the crime is incompatible with a claim of self-defense. In *State v. Banks*, 278 Neb. 342, 368, 771 N.W.2d 75, 95-96 (2009), the Nebraska Supreme Court rejected a defendant's claim that the trial court erred in refusing to give defendant's request for a self-defense instruction even though the State adduced evidence which might have supported a self-defense instruction because the defendant did not

present any evidence which supported a self-defense instruction. Rather, the defense strategy was to attack the credibility of the witnesses and to infer that the defendant did not commit the offense. Under those circumstances, the court rejected Banks' claim that he was entitled to a self-defense instruction relying on *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds*, *State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007), wherein the court concluded that the trial court erred when it gave a self-defense instruction that was inconsistent with the defendant's theory of the case. In so finding, the Nebraska Supreme Court relied on its prior holding in *Faust* in which it held:

[W]hen the defendant makes no effort to meet the initial burden of proof to prove self-defense and when self-defense is not the defendant's theory of the case, a self-defense instruction is not warranted. A theory of self-defense necessarily involves an inference or admission that the defendant harmed the victim, but that the defendant's acts were justified. By giving a self-defense instruction when the defendant's theory of the case is that he or she did not commit the crime, the court risks confusing or misleading the jury.

State v. Banks, 278 Neb. at 366, 771 N.W.2d at 94-95 (quoting *State v. Faust*, *supra*).

Here, Tolan's defense to the assault charge which had allegedly occurred on October 31, 2024, was that he was not at Geardino's home on that date. Because Tolan's defense was that he did not commit the crime because he was not present at Geardino's home on the relevant date, he was not entitled to a self-defense instruction. Accordingly, we find that the district court did not err in not giving the jury a self-defense instruction. And, because, as matter of law, counsel cannot be ineffective for failing to raise meritless argument, we find that trial counsel was not ineffective in failing to request a self-defense instruction. See *State v. Rezac*, 318 Neb. 352, 15 N.W.3d 705 (2025).

(b) Failure to Impeach Inconsistent Witness Testimony

Tolan assigns that he received ineffective assistance of counsel when his trial counsel "failed to impeach inconsistent witness testimony" regarding the charge of third degree domestic assault.

Tolan's assigned error fails to indicate what witnesses and what inconsistent statements trial counsel failed to impeach. See *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026) (holding that allegation will be sufficiently specific when it addresses specific issue that does not require additional information to understand precisely what assignment attacks and that argument section should not be used to set forth, for first time, what allegedly deficient conduct was). We find that this assignment of error has not been pled with sufficient particularity and is not preserved.

VI. CONCLUSION

For the reasons stated above, we affirm Tolan's convictions and sentences.

AFFIRMED.