

IN THE NEBRASKA COURT OF APPEALS

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

STATE V. CUNNINGHAM

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STATE OF NEBRASKA, APPELLEE,

v.

TRAVIS J. CUNNINGHAM, APPELLANT.

Filed August 25, 2026. No. A-25-751.

Appeal from the District Court for Fillmore County: DAVID J. A. BARGEN, Judge. Affirmed.

Tad D. Eickman for appellant.

Michael T. Hilgers, Attorney General, and Nathan A. Liss for appellee.

RIEDMANN, Chief Judge, and BISHOP and FREEMAN, Judges.

FREEMAN, Judge.

INTRODUCTION

Travis J. Cunningham appeals from his plea based convictions in the Fillmore County District Court for child abuse and witness tampering. Cunningham assigns that the district court erred in denying his motion to suppress and imposing excessive sentences. He further argues that his trial counsel was ineffective. For the reasons set forth below, we affirm.

BACKGROUND

Incident and Charges.

In November 2022, Nebraska Attorney General investigator Troy Cockle was assigned to assist the Fillmore County Sheriff's Department in an investigation regarding allegations that Cunningham had sexually assaulted his daughters. On February 21, 2023, Cockle obtained a statement from one of Cunningham's daughters, M.C., confirming allegations of sexual assault. That same day, law enforcement officials received reports that Cunningham attempted to commit

suicide by ingesting a large amount of prescription medication. Cockle subsequently interviewed Cunningham at a crisis center in which he admitted to sexually assaulting M.C.

In April 2023, the State charged Cunningham by information with two counts of first degree sexual assault of a child, a Class II felony; two counts of incest, a Class III felony; three counts of child abuse, a Class IIIA felony; and witness tampering, a Class II felony. The witness tampering charge alleged that, after his arrest and while the case was pending, Cunningham attempted to persuade M.C. to skip court-ordered depositions and recant the allegations against him.

Pretrial Proceedings and Plea.

In September 2023, Cunningham filed a motion to suppress his statements made to law enforcement, arguing that the statements were obtained in violation of his rights under the U.S. and Nebraska Constitutions. Cunningham alleged that he did not voluntarily, knowingly, and intelligently waive his *Miranda* rights because he remained under the effects of a medication overdose.

Following the suppression hearing, the district court denied Cunningham's motion to suppress. The court determined that Cunningham was advised of his *Miranda* rights, and he knowingly and voluntarily waived these rights. The court noted that Cunningham showed no signs of intoxication, sleepiness, or unsteadiness during the interview and that Cunningham was not threatened or coerced.

In June 2025, pursuant to a plea agreement with the State, Cunningham pled guilty to the child abuse charge, a Class IIIA felony, and no contest to the witness tampering charge, a Class II felony. Cunningham further stipulated that the child abuse charge constituted an "aggravated offense" under the Sex Offender Registration Act. At the plea hearing, Cunningham was advised of the charges to which he was pleading, the possible penalties, and the constitutional rights he was waiving by accepting the plea agreement. Cunningham also affirmed that he had sufficient time to discuss the case and plea with counsel, was satisfied with counsel's representation, and believed counsel had adequate information to prepare his defense.

The State set forth the above facts in the factual basis and further specified that the child abuse occurred on or about May 22, 2005, to December 31, 2011, when Cunningham, born May 1972, sexually assaulted M.C., born May 2003, by licking her vagina and making her lick his penis.

Following the State's recitation of the factual basis, the court found it was sufficient to support the pleas. The district court accepted Cunningham's pleas, found him guilty of both charges, and ordered a presentence investigation report (PSR) to be completed.

Sentencing.

During the sentencing hearing, the district court noted that it had reviewed the PSR and the required relevant factors. The court determined that Cunningham was not a fit candidate for probation and that a lesser sentence would depreciate the seriousness of the crime or promote disrespect for the law.

The district court sentenced Cunningham to 4 to 5 years' imprisonment on the aggravated child abuse charge and to 43 to 45 years' imprisonment on the witness tampering charge and

ordered that the sentences be served consecutively. Cunningham received credit for 929 days served.

Cunningham appeals, represented by new counsel.

ASSIGNMENTS OF ERROR

Cunningham assigns, reordered and restated, (1) that the district court erred in denying his motion to suppress, (2) the sentences imposed were excessive, and (3) his trial counsel was ineffective for “failing to fully discuss the plea agreement with [him] and the consequences of entering pleas of guilty and no contest and reviewing all evidence and discovery with [him].”

STANDARD OF REVIEW

A voluntary guilty plea or plea of no contest generally waives all defenses to a criminal charge; thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel. *State v. Blake*, 310 Neb. 769, 969 N.W.2d 399 (2022).

Absent an abuse of discretion by the trial court, an appellate court will not disturb a sentence imposed within the statutory limits. *State v. Jones*, 318 Neb. 840, 19 N.W.3d 499 (2025).

Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law. *State v. Reeves*, 321 Neb. 427, 35 N.W.3d 46 (2026). 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 and whether the defendant was or was not prejudiced by counsel’s alleged deficient performance. *Id.*

ANALYSIS

Motion to Suppress.

Cunningham assigns that the district court erred in denying his motion to suppress all statements made by him to law enforcement during his February 22, 2023, interview. Cunningham maintains that he was experiencing a severe mental health crisis and remained under the influence of medication he had ingested in a suicide attempt, rendering him incapable of knowingly, intelligently, and voluntarily waiving his *Miranda* rights.

The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, except for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction. See *State v. Manjikian*, 303 Neb. 100, 927 N.W.2d 48 (2019). Thus, when a defendant pleads guilty or no contest, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel. *State v. Anderson*, 305 Neb. 978, 943 N.W.2d 690 (2020).

Here, Cunningham’s guilty pleas waived every defense to those charges except for insufficiency of the information, ineffective assistance claims, and lack of jurisdiction claims. The denial of his motion to suppress does not fall within one of the exceptions. This assignment of error fails.

Excessive Sentences.

Cunningham next assigns that the sentences imposed by the district court were excessive and constituted an abuse of discretion. Specifically, Cunningham argues that the court did not take into consideration the appropriate factors with respect to sentencing, including his mentality, motivation for the offense, low risk to reoffend score, lack of prior criminal record, low score on the Simple Screening Instrument, the need for continued mental health treatments, and his willingness to enter a plea.

The sentences imposed were within the statutory limits, and Cunningham does not contend otherwise. 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, 32 N.W.3d 868 (2026). 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. *State v. Geller*, 318 Neb. 441, 16 N.W.3d 365 (2025).

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. *State v. Jones*, 318 Neb. 840, 19 N.W.3d 499 (2025). A sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id.*

At the time of sentencing, Cunningham was 53 years old with no prior convictions. Cunningham scored in the medium-low-risk range to reoffend on the overall Level of Service/Case Management Inventory assessment. He scored in the high-risk range in the domains of family/marital and leisure/recreation; in the medium-risk range in the domain of companions; in the low-risk range in the domains of education/employment and alcohol/drug problems; and in the very low-risk range in the domains of criminal history, procriminal attitude, and antisocial pattern. Cunningham also scored in the low-risk range on the Vermont Assessment of Sex Offender Risk and in the high-risk range on the Sex Offender Treatment Intervention and Progress Scale (SOTIPS).

Cunningham reported childhood abuse associated with his parents' alcohol abuse, as well as childhood sexual assault by two older siblings. He further reported he has been diagnosed with schizophrenia, anxiety, and depression and has been "on and off" psychiatric medications since 2005 when he completed an evaluation to qualify for disability.

At the sentencing hearing, Cunningham expressed regret for his actions and willingness to "take full responsibility" for those actions. Cunningham's attorney asked the district court to consider imposing a term of probation. The district court stated that it had reviewed the PSR and considered the comments of counsel and the relevant statutory factors. It found substantial and compelling reasons existed for a period of incarceration. The district court stated:

Cunningham, I want to address you directly today as well. As I often say, there are few crimes, if any, that come before this Court that present such a horrible mix of horrible crimes and outcomes.

You told the Court today that you didn't realize the damage you were inflicting through your actions, and that's partly what troubles the Court, because those actions were horrific and it was to your own children. Those actions can and did cause lasting harm.

I reviewed every page of the [PSR] in this case. I read every victim impact statement. I read the call transcript between you and your wife when you were in jail. The crimes themselves are horrific, but on top of that, then you blame others for them. You blame the victims. You blame your wife for the outcome. And, indeed, you did seek to tamper with the witnesses, and you sought to have -- I think at one point you said all one of your daughters had to do was come to the courthouse and sign a piece of paper and this all goes away. You sought your own interests above the victims, and that just adds insult to injury in this case.

Crimes against defenseless children are perhaps the worst -- among the worst that this Court deals with, and it takes very seriously the impact of those crimes. It certainly is my hope that your victims will find healing, will find the help they need, but today is the day of accountability.

In addition, you served in positions of public trust in the past, and in your very own home these awful things were occurring. So today -- again, today is the day of accountability for you. I trust that you will seek the programming you need where you're going, that you will get the assistance that you need, but today this sentence reflects the seriousness of these crimes and the outcome I believe that this case should have.

On appeal, Cunningham argues that the district court failed to meaningfully consider certain mitigating circumstances. The information Cunningham highlights was presented to the district court in the PSR. Cunningham is essentially asking that we reweigh the sentencing factors, but an appellate court does not conduct a de novo review of the record to determine what sentence it would impose. See *State v. Sutton*, 319 Neb. 581, 24 N.W.3d 43 (2025).

As to Cunningham's willingness to plead guilty, the Nebraska Supreme Court has long held the view that while a more severe punishment cannot be exacted because a defendant pleads not guilty and puts the State to the expense of a trial, a defendant nonetheless has no absolute right to a reduced sentence because he saves the State the expense of going to trial. See *State v. Rezac*, 318 Neb. 352, 15 N.W.3d 705 (2025).

Based on the record before us, the district court took the appropriate factors into consideration, including Cunningham's high risk range on the SOTIPS score, Cunningham's mentality, and the nature of the offense. There is no indication the court failed to consider any applicable factors. Accordingly, we conclude the district court did not abuse its discretion in the sentences it imposed. Cunningham's assignment of error fails.

Ineffective Assistance of Trial Counsel.

Finally, Cunningham assigns that he received ineffective assistance of counsel because trial counsel failed to "fully discuss the plea agreement with [him] and the consequences of entering

pleas of guilty and no contest,” and trial counsel failed to “revie[w] all evidence and discovery with [him].”

Generally, 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 his or her counsel’s performance was deficient and that this deficient performance actually prejudiced the defendant’s defense. *State v. Haas*, 317 Neb. 919, 12 N.W.3d 787 (2024). 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.* When a conviction is based upon a guilty or no contest plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Blaha*, 303 Neb. 415, 929 N.W.2d 494 (2019). The two prongs of the ineffective assistance of counsel test under *Strickland* may be addressed in either order. *State v. Blaha, supra*.

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 performance which is known to the defendant or is apparent from the record; otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. *State v. Haas, supra*. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. *Id.* The determining factor is whether the record is sufficient to adequately review the question. *Id.*

Applying these standards to Cunningham’s first claim that trial counsel failed to “fully discuss the plea agreement with [him],” we determine that Cunningham’s claim is refuted by the record. At the plea hearing, Cunningham confirmed that he had enough time to speak with his attorney about the plea, had told counsel everything he knew, and was not aware of any information that could help his case. He further acknowledged that he and counsel had discussed his options, including going to trial. When asked about counsel’s performance, Cunningham stated that he was satisfied with counsel’s work.

In his brief on appeal, Cunningham attempts to recant the affirmations he gave to the district court during the plea hearing. He argues that he had not, in fact, fully discussed the terms of the plea agreement with counsel and that counsel failed to meet with him before entering his plea. However, a defendant cannot secure relief by recanting assurances made to the trial court during the sanctity of a full and formal court proceeding “after the doors of the prison clang shut.” *State v. Vanderpool*, 286 Neb. 111, 118, 835 N.W.2d 52, 58 (2013).

The record also demonstrates that Cunningham understood the nature and consequences of his pleas. He confirmed that he wished to withdraw his prior pleas of not guilty and enter pleas of guilty and no contest. The district court specifically explained that a no contest plea would be treated the same as a guilty plea for sentencing purposes and that the court could consider the fact that he did not admit guilt. Cunningham stated that he understood both consequences. Consequently, this claim fails.

Cunningham also assigns that trial counsel failed to “revie[w] all evidence and discovery with [him].” This assignment of error lacks the specificity required for appellate review. In every appeal in Nebraska, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *State v. Lopez*, 321

Neb. 118, 32 N.W.3d 868 (2026). As we have stated, a defendant seeking to raise a claim of ineffective assistance on direct appeal is not required to make specific allegations of prejudice. See *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.*

An assigned error will be sufficiently specific when it addresses a specific issue that does not require additional information to understand precisely what the assignment attacks. See *State v. Kruger*, 320 Neb. 361, 27 N.W.3d 398 (2025). Although the argument section of the brief should elaborate on the alleged deficiencies by discussing legal authority and its application to the trial record, the argument section should not be used to set forth, for the first time, what the allegedly deficient conduct was. *State v. Lopez*, *supra*. Rather, an assignment of error, standing alone, must specifically allege what conduct constituted deficient performance. See *State v. Rupp*, 320 Neb. 502, 28 N.W.3d 74 (2025).

To sufficiently allege deficient performance, the assigned error must include a description of the specific conduct alleged to constitute deficient performance. See *id.* The description of deficient performance must be particular enough to (1) allow an appellate court to determine whether the claim can be decided upon the trial record and (2) allow a district court reviewing a later postconviction motion to recognize whether the claim was raised on direct appeal. *State v. Lopez*, *supra*.

Cunningham's assignment of error fails to allege what evidence and discovery his trial counsel may have had that was not shared with him or how it would have aided his defense. As such, his allegation of deficient performance is insufficiently assigned and therefore not preserved.

CONCLUSION

For the foregoing reasons, we find that Cunningham's challenge to the motion to suppress was waived, the record refutes his claim that trial counsel was ineffective for failing to fully discuss the plea agreement and consequence of entering his pleas, and Cunningham has insufficiently alleged his claim that trial counsel was ineffective for failing to review all evidence and discovery with him. Furthermore, the district court did not abuse its discretion and impose an excessive sentence. We therefore affirm Cunningham's convictions and sentences.

AFFIRMED.