means, of course, that not all of Union Pacific's opposition to Manuela's motion to compel was substantially unjustified.[101] In other words, even if some of Union Pacific's conduct was an "abuse" of the civil discovery procedures, not all of it was. Given that finding, the district court did not abuse its discretion in reducing the attorney fees that Manuela requested for the hearing on her motion to compel.

IV. CONCLUSION

For the foregoing reasons, we conclude that the district court erred in dismissing Manuela's wrongful death claim. As to that claim, the court's judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. But we conclude that the court correctly entered summary judgment against Manuela's fiduciary duty claim, and we affirm the court's judgment in that respect. We affirm the protective order and award of attorney fees. And finally, we neither affirm nor reverse the court's rulings on Manuela's motions to compel; instead, we direct the court upon remand to revisit any discovery issues that the parties continue to dispute.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS, AND IN PART REMANDED WITH DIRECTIONS.

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[101] See *Greenwalt, supra* note 99.

STATE OF NEBRASKA, APPELLEE, V.
HERCHEL HAROLD HUFF, APPELLANT.
802 N.W.2d 77

Filed August 26, 2011. No. S-10-562.

1. **Double Jeopardy: Lesser-Included Offenses: Appeal and Error.** Whether two provisions are the same offense for double jeopardy purposes presents a question of law, on which an appellate court reaches a conclusion independent of the court below.
2. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

3. **Double Jeopardy: Proof.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.
4. **Double Jeopardy: Sentences: Proof.** The *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), or "same elements," test asks whether each offense contains an element not contained in the other, or, more precisely, whether each provision requires proof of a fact which the other does not. If not, they are the same offense and double jeopardy bars additional punishment. If so, they are not the same offense and double jeopardy is not a bar to additional punishment.
5. **Constitutional Law: Criminal Law: Statutes.** The test of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is an aid to statutory interpretation, not a constitutional demand.
6. **Criminal Law: Statutes.** For purposes of *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the possible predicates of a compound offense should not be incorporated into the offense when determining whether it contains elements that another statute does not.
7. **Homicide: Motor Vehicles: Lesser-Included Offenses.** Under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), unlawful act manslaughter is a lesser-included offense of motor vehicle homicide.
8. **Double Jeopardy: Legislature: Statutes: Trial: Sentences.** Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), cumulative punishment may be imposed in a single trial.
9. **Sentences: Presumptions.** The collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.
10. **Appeal and Error.** Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.
11. ____. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
12. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.
13. **Lesser-Included Offenses: Proof.** A "lesser offense" is the one for which fewer elements are required to be proved. A court focuses on the elements of the offenses, and not comparison of the penalties.
14. **Lesser-Included Offenses: Convictions.** When a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.
15. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Judgments: Appeal and Error.** A trial court's ruling on a motion to

suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.

16. **Drunk Driving: Blood, Breath, and Urine Tests: Police Officers and Sheriffs: Probable Cause: Arrests.** If a law enforcement officer has probable cause to arrest a suspect for driving under the influence of alcohol and reasonable grounds to believe that the suspect committed driving under the influence of alcohol, the officer may arrest the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered.
17. **Police Officers and Sheriffs: Probable Cause: Arrests.** Under the collective knowledge doctrine, the existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.
18. **Statutes: Appeal and Error.** Statutory interpretation is a question of law on which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
19. **Prior Convictions: Drunk Driving: Blood, Breath, and Urine Tests: Sentences: Words and Phrases.** A "prior conviction" for purposes of enhancing a conviction for driving under the influence is defined in terms of other driving under the influence laws, while a "prior conviction" for purposes of enhancing a conviction for refusing a chemical test is defined in terms of refusal laws. There is no crossover between driving under the influence and refusal convictions for purposes of sentence enhancement.
20. **Statutes: Legislature: Appeal and Error.** In reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
21. **Criminal Law: Statutes.** A fundamental principle of statutory construction requires that penal statutes be strictly construed.
22. **Motions for Mistrial: Appeal and Error.** The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.
23. **Constitutional Law: Miranda Rights: Appeal and Error.** Requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential violations of *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).
24. **Constitutional Law: Miranda Rights: Arrests.** The State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or postarrest, is not unconstitutional.
25. **Trial: Evidence.** Only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.
26. **Rules of Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of prejudice under Neb. Evid. R. 403, so a trial court's decision under that rule will not be reversed absent an abuse of discretion.
27. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.

28. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, 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.
29. **Appeal and Error: Words and Phrases.** Plain error is error of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
30. **Trial: Expert Witnesses.** Under the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
31. **Trial: Expert Witnesses: Pretrial Procedure.** To sufficiently call specialized knowledge into question under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding. The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.
32. **Trial: Expert Witnesses: Pretrial Procedure: Notice.** Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.
33. **Trial: Courts.** A trial court has broad discretion in determining how to perform its gatekeeper function.
34. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
35. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
36. **Sentences: Appeal and Error.** When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.
37. **Legislature: Criminal Law: Public Policy: Sentences: Courts.** The Legislature declares the law and public policy by defining crimes and fixing their punishment.

The responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.

38. **Sentences.** 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 violence involved in the commission of the crime.

Appeal from the District Court for Furnas County: JAMES E. DOYLE IV, Judge. Affirmed in part, and in part vacated and remanded for resentencing.

Charles D. Brewster and Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, and Richard Calkins for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Herchel Harold Huff was driving a motor vehicle that struck and killed Kasey Jo Warner on a county road in Furnas County, Nebraska. Huff was convicted of several charges in connection with the accident, including manslaughter and motor vehicle homicide. The primary issue in this appeal is whether double jeopardy precludes punishment for both those offenses.

BACKGROUND

On the afternoon of the accident, Huff had been at a bar in Oxford, Nebraska, with some acquaintances, including Ryan Markwardt. Markwardt said that when he arrived at the bar, Huff was already there with a beer in front of him. Markwardt played pool, while Huff talked to his wife on the telephone. Both men were drinking beer. Markwardt estimated that Huff drank four or five beers. After about 1½ hours, Huff and Markwardt walked to another bar, where they drank more beers. Markwardt said they had a couple of beers and a couple of "Jägerbombs," which are cocktails made from a shot of Jägermeister liquor and a Red Bull energy drink. After a half hour, they left in Huff's vehicle and stopped at a general store.

Huff drove. Then they returned to the first bar and had a couple more beers and a cocktail. After another half hour or so, they left and stopped at a gas station on their way to Holbrook, Nebraska, where they both lived.

There was conflicting evidence regarding how much Huff had to drink that day. The bartender at the first bar that Huff and Markwardt went to testified that she served Huff only two beers and that he did not finish the second one. And Huff testified at trial that he had only four drinks that day. He admitted drinking a beer at the first bar, two Jägerbombs at the second bar, and part of another beer when they returned to the first bar.

Markwardt testified that Huff had been drinking more than him throughout the day. Markwardt's blood was tested at 8:48 p.m. on the day of the accident, and his blood alcohol content was .13 grams of alcohol per 100 milliliters of blood. At trial, Dr. Henry Nipper, a forensic toxicologist, opined over objection that Huff had been impaired by alcohol, calculating that Huff's blood alcohol content was .15 grams of alcohol per 100 milliliters of blood at the time of the accident.

Prior to the accident, Warner had been home with her family. She had dinner with her husband and two daughters at about 6 p.m. Warner, who exercised daily, said that she wanted to go for a run after dinner because it was a warm, sunny evening. Warner's 3-year-old daughter wanted to go along with her. Warner's daughter would keep up with her mother by riding a small gas-powered, four-wheel all-terrain vehicle (ATV) that had a governor on the throttle so that it would go only about as fast as Warner would jog. They left at about 7 p.m. Warner hesitated as they left the house, because the opening lineups were being announced for a televised volleyball game in which Warner had an interest. But Warner's daughter wanted to go, so Warner agreed and they headed east from their driveway on the "River Road."

At the same time, Huff and Markwardt were on their way to Holbrook. The "T-top" roof of Huff's vehicle was open, the windows were down, and they were playing loud rap music. Huff refused to let Markwardt drive, because his vehicle, a blue 1987 Chevrolet Camaro, was "his baby." Huff drove

toward Holbrook on what Markwardt described as a "packed, gravel road." They took a number of gravel county roads and Nebraska State Highway 283, until they were headed west on County Road 721, also known as the River Road. The speed limit on the River Road is 50 miles per hour, but it is a curvy, poorly maintained gravel road. Markwardt estimated that Huff was driving anywhere from 50 to 75 or 80 miles per hour, sometimes while on the telephone. Huff admitted that he was driving too fast.

Markwardt said that he was looking out the side window of Huff's vehicle, watching people harvesting, when Huff yelled and slammed on the brakes. Markwardt saw Warner and her daughter on the north shoulder of the road. The vehicle skidded as Huff braked, and Markwardt saw Warner throw her daughter out of the way. Then the vehicle hit Warner, and she went under it.

Brian Bauxbaum, an accident reconstructionist with the Nebraska State Patrol, opined that Huff's vehicle was traveling at least 72 miles per hour, and perhaps as fast as 84 miles per hour, when it started to skid. The vehicle skidded for 239 feet to the point of impact, which took about 2½ seconds. Bauxbaum opined that had Huff been traveling at 50 miles per hour, the speed limit for the River Road, he would have come to a stop before hitting Warner. Bauxbaum also opined that Warner could have been seen from 1,221 feet away, which would have given Huff 11½ seconds to avoid the collision, even at 72 miles per hour.

Warner was struck from behind by the left front wheel of the vehicle, near the driver's-side door. Warner's body was dragged under the vehicle until becoming dislodged when the vehicle finally left the road. Blood, flesh, and burn marks were later found on the underside of the vehicle. Warner died from severe, blunt force trauma to her head, trunk, and extremities.

The vehicle eventually came to a stop in a field north of the road. According to Markwardt, after the collision, Huff's immediate concern was that they "get [their] stories straight," and Huff said that he "couldn't take the fall for this," so he wanted Markwardt to say that he had been driving. Markwardt

refused. Then they got out of the vehicle and checked on Warner and her daughter. Huff covered Warner's body with his shirt, because much of her clothing had been dislodged or torn off. Markwardt made sure that Warner's daughter was all right, then ran to get help. Huff called the 911 emergency dispatch service.

Shawn and Mike Pruitt, who are brothers, had been "cutting beans" in a field near the accident, and Mike saw Huff's vehicle go off the road. Shawn headed toward the scene and came across Markwardt, who waved his arms and asked for help. Shawn went to Warner's nearby house, but no one answered the door, so Shawn entered and used a telephone to call the 911 emergency dispatch service. Then he returned to the accident scene, where he found Warner's daughter and took her to his van. Shawn also removed his shirt to help cover Warner's body. Warner's husband, who had been out in his fields, saw Shawn's van leaving his driveway, and when he heard sirens, he put his other daughter in her car seat in his pickup truck and followed Shawn's van to the accident scene.

Mike also followed Shawn to the accident scene about 6 to 8 minutes later, where he saw the ATV idling in the middle of the road, pointing southeast. Mike moved the ATV so an arriving ambulance could get through. He also found Warner's running shoes in the middle of the road. Mike said that when Huff asked to use his telephone, the smell of alcohol on Huff's breath was "[o]bvious." Mike also said that Huff was "stumbling around."

According to Markwardt, when he returned to the scene of the accident, Huff again said that they needed to "get [their] stories straight" and asked Markwardt more than once to say that he, not Huff, had been driving. But when law enforcement arrived, Markwardt reported that Huff had been driving.

The arriving officer was Sgt. Lee Lozo of the Furnas County sheriff's office. When Lozo arrived, he saw Huff's vehicle about 30 feet off the roadway and Warner's body lying on the shoulder of the road. Lozo also saw two shirtless men, one of whom was Huff. Huff was "very upset," and Lozo could smell a strong odor of alcohol coming from him. Lozo asked

who had been driving the vehicle, and Huff admitted that he had. Lozo immediately handcuffed Huff, whom Lozo described as "freaking out." Lozo later removed the handcuffs so that Huff could be examined by medical personnel, but when Huff became vocal and angry, Lozo put the handcuffs back on.

Lozo had Huff sit on the bumper of a firetruck and continued to question him, but Lozo stopped after Huff invoked his right to counsel. After Huff was examined by an emergency medical technician, Lozo arrested Huff for suspected driving under the influence (DUI) and had another deputy, Vernon Levisay, transport Huff to the hospital for a blood draw.

Lozo did not conduct a preliminary breath test or ask Huff to perform any field sobriety tests. Lozo explained that he was the only officer to have responded and was trying to manage emergency personnel and Warner's family at the scene in addition to Huff and Markwardt. Lozo also said that Huff's emotional state would not have been conducive to field sobriety tests, which depend on evaluating the suspect's ability to focus. And Lozo testified over objection that Huff had invoked his right to counsel, at which point "everything stops."

Levisay also said that he could smell a strong odor of alcohol coming from Huff, that Huff's eyes were bloodshot and glazed, and that Huff was having so much difficulty walking that he had to lean against Levisay's patrol car. Huff was crying and distraught, and he vomited before he got to the patrol car. Levisay took Huff to the hospital for a blood test. Huff vomited in the patrol car. Levisay testified that Huff was talking in the patrol car; Huff repeatedly said, "I'm fucked," but Levisay was unable to make out many of Huff's other remarks because Huff's speech was noticeably slurred.

After arriving at the hospital, Huff initially agreed to the blood test, but then changed his mind and refused the test. According to Huff, he wanted to take a breath test instead, although Levisay testified that Huff never asked for a breath test instead of a blood test. Levisay wrote down that Huff had refused to be tested, and Huff was taken to the sheriff's office to be processed and jailed. The county sheriff's deputy who took custody of Huff from Levisay also testified that Huff smelled strongly of alcohol.

Huff was charged by information with motor vehicle homicide,[1] manslaughter,[2] refusing to submit to a chemical test,[3] and tampering with a witness.[4] Huff pled guilty to manslaughter, but not guilty to the remaining charges. The court, finding that a factual basis existed for Huff's guilty plea, accepted the plea and found him guilty of manslaughter.

Huff filed a plea in bar alleging that because he had been found guilty of manslaughter, prosecution on the charge of motor vehicle homicide was barred by the Double Jeopardy Clause. But the court rejected Huff's argument that manslaughter is a lesser-included offense of motor vehicle homicide and overruled his plea in bar. Huff filed an interlocutory appeal, but we affirmed the district court's order in *State v. Huff* (*Huff I*),[5] reasoning that the case did not involve successive prosecutions, but, rather, a single prosecution involving multiple charges, only one of which had been resolved. So, we concluded, only if Huff was convicted and sentenced on the motor vehicle homicide charge could he assert a double jeopardy claim based upon alleged multiple punishments for the same offense.[6]

Huff also moved to suppress the evidence of his refusal to submit to a chemical test, arguing that no probable cause had existed to demand the test in the first place. The district court found that there had been probable cause to arrest Huff on suspicion of DUI, so the court overruled his motion to suppress. And Huff filed a motion in limine for an order directing the State and its witnesses to refrain from offering evidence that Huff had, after the accident, stated that he needed to contact a lawyer. Huff argued that his conduct had been constitutionally protected and that such testimony would be unfairly prejudicial. The court sustained that motion, which later resulted in an objection to Lozo's testimony that field sobriety tests

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[1] See Neb. Rev. Stat. § 28-306 (Reissue 2008).

[2] See Neb. Rev. Stat. § 28-305 (Reissue 2008).

[3] See Neb. Rev. Stat. § 60-6,197 (Reissue 2010).

[4] See Neb. Rev. Stat. § 28-919 (Reissue 2008).

[5] See *State v. Huff*, 279 Neb. 68, 776 N.W.2d 498 (2009).

[6] See *id.*

had not been performed because Huff had invoked his right to counsel.

The motor vehicle homicide charge was tried to a jury, while the charges of refusing a chemical test and tampering with a witness were tried to the court. Huff proposed that in addition to being instructed on DUI as a predicate offense for motor vehicle homicide, the jury should also be instructed on speeding as the predicate offense. If speeding was the predicate offense, as opposed to DUI, Huff's motor vehicle homicide conviction would be a misdemeanor, as opposed to a felony.[7]

The district court refused Huff's proposed instruction and instructed the jury to convict Huff of motor vehicle homicide only if it found that Huff had committed DUI. The court did, however, instruct the jury on manslaughter as a lesser-included offense of motor vehicle homicide, with speeding as the predicate offense for manslaughter. A step instruction was given instructing the jury to only consider the manslaughter charge if it found Huff not guilty of motor vehicle homicide.

But the jury found Huff guilty of motor vehicle homicide, and Huff was convicted pursuant to that verdict. In addition, the court found Huff guilty of tampering with a witness, based upon his attempt to persuade Markwardt to lie to authorities about who had been driving. And the court found Huff guilty of refusing to submit to a chemical test. Evidence was adduced that Huff had been convicted of DUI in 1999 and 2002. The court found that the prior convictions were sufficient evidence to enhance the motor vehicle homicide conviction to a Class II felony and that the two prior convictions for DUI enhanced the conviction for refusal to submit to a chemical test to a Class IIIA felony.

Huff objected to enhancement of the refusal conviction, arguing that the prior offenses had to be refusals, not DUI's. Huff also moved to discharge on double jeopardy grounds, alleging that because he had previously been convicted of manslaughter, the conviction for motor vehicle homicide should be dismissed.

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[7] See § 28-306.

But Huff was sentenced to not less than nor more than 45 years' imprisonment for motor vehicle homicide, and not less than nor more than 20 years' imprisonment for manslaughter, with those sentences to be served concurrently. Huff was also sentenced to not less than nor more than 5 years' imprisonment for refusal to submit to a chemical test, and not less than 20 nor more than 60 months' imprisonment for tampering with a witness, with those sentences to be served consecutively to the manslaughter and motor vehicle homicide sentences and to one another. Huff appeals.

ASSIGNMENTS OF ERROR

Huff assigns, restated, that the district court erred in:

(1) convicting and sentencing him to multiple punishments for the same offense, in violation of the Double Jeopardy Clauses of the state and federal Constitutions;

(2) failing to sustain his motion to suppress and allowing evidence at trial that failed to conform to constitutional and statutory requirements;

(3) enhancing his conviction for refusal to submit to a chemical test with prior DUI convictions;

(4) failing to grant a mistrial when the order in limine precluding mention of Huff's invocation of counsel was violated, denying him a constitutionally fair trial;

(5) finding sufficient evidence to convict him of tampering with a witness;

(6) ordering his counsel to guide the State through foundational evidence to introduce an expert opinion, denying his right to a constitutionally fair trial;

(7) failing to instruct the jury on "misdemeanor homicide," contrary to Nebraska law and the state and federal Constitutions; and

(8) sentencing him to excessive sentences.

ANALYSIS

Double Jeopardy

[1] Huff's first argument is that his convictions for manslaughter and motor vehicle homicide violate the Double Jeopardy Clauses of the state and federal Constitutions, because manslaughter is a lesser-included offense of motor vehicle

homicide. Huff's argument presents a question of law, on which we reach a conclusion independent of the court below.[8]

[2-4] The Double Jeopardy Clauses of both the federal and the Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[9] At issue here, as we explained in *Huff I*, are multiple punishments for the same offense. Under *Blockburger v. United States*,[10] where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one is whether each provision requires proof of a fact which the other does not.[11] The *Blockburger*, or "same elements," test asks whether each offense contains an element not contained in the other, or, more precisely, "whether each provision requires proof of a fact which the other does not."[12] If not, they are the same offense and double jeopardy bars additional punishment. If so, they are not the same offense and double jeopardy is not a bar to additional punishment.[13]

A person who causes the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance commits motor vehicle homicide. In addition, § 28-306(3)(a) provides that if the proximate cause of the death of another is the operation of a motor vehicle in violation of certain DUI statutes,[14] motor vehicle homicide is a Class III felony, instead of a Class I misdemeanor.[15]

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[8] See *Huff I, supra* note 5.

[9] *Id.*

[10] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[11] *State v. Winkler*, 266 Neb. 155, 663 N.W.2d 102 (2003).

[12] *Blockburger, supra* note 10, 284 U.S. at 304.

[13] See *id.*

[14] See Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.06 (Cum. Supp. 2008).

[15] See § 28-306(2) and (3)(b).

"A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act."[16] Clearly, motor vehicle homicide requires proof of elements that are not part of unlawful act manslaughter—we have so held in the context of jury instructions, and our conclusion under *Blockburger* is the same.[17] But taken in the statutory abstract, it is impossible to convict someone of motor vehicle homicide without proving facts that would also prove the necessary elements of manslaughter: unintentionally causing the death of a person while committing an unlawful act. Motor vehicle homicide simply requires the State to additionally prove that the unlawful act was the unlawful operation of a motor vehicle.

But it is far from clear how the *Blockburger* test is to be applied where compound and predicate offenses are involved. An examination of the U.S. Supreme Court's *Blockburger* jurisprudence will help explain the problem. *Blockburger* itself did not involve compound or predicate offenses. Rather, in *Blockburger*, the defendant was convicted of two federal narcotics laws: one prohibited the sale of a controlled substance except in the original tax-paid stamped package, and the other prohibited the sale of a controlled substance without a written order of the purchaser on an official form.[18] The Court found that the offenses were separate for double jeopardy purposes, because one element of each offense was unique. The emphasis was on the *elements* of the two crimes.[19]

The Court came closer to applying *Blockburger* to a compound offense in *Iannelli v. United States*,[20] in which the defendants were convicted of both a federal gambling statute

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[16] § 28-305(1).

[17] See *State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001).

[18] See *Blockburger, supra* note 10.

[19] See *id.* See, also, e.g., *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

[20] *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975).

and conspiring to violate that statute. The Court ultimately concluded that Congress intended that defendants could be convicted under both statutes. But, the Court also observed that the *Blockburger* test would be satisfied. An element of the conspiracy offense was an agreement, which was not present in the underlying gambling offense. But the underlying gambling offense also required proof of a fact that the conspiracy did not, because the gambling offense required proof that the defendants actually did "'conduct, finance, manage, supervise, direct, or own'" an illegal gambling business.[21] Because the "overt act" requirement in the conspiracy statute could be satisfied much more easily, the gambling offense also required proof of a fact that the conspiracy offense did not.[22] So *Iannelli* did not precisely present an instance of a compound and predicate offense, because the conspiracy statute at issue in *Iannelli* did not require proof that the "predicate" offense had been committed.

It is significant to note what the Court did *not* say in *Iannelli*: The Court assumed that conspiracy could potentially subsume its predicate offense, despite the fact that the conspiracy statute was general, such that the "predicate" offense could be *any* federal offense. The Court was not required to clarify that assumption in *Brown v. Ohio*,[23] in which the Court reaffirmed *Blockburger*, but not in the context of a compound offense. The Court finally addressed a compound offense in *Harris v. Oklahoma*,[24] a short per curiam opinion in which it summarily reversed a defendant's state court convictions for an armed robbery upon which a previous conviction for felony murder had been predicated. The Court explained that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser

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[21] *Id.*, 432 U.S. at 785 n.17.

[22] *Id.*

[23] *Brown, supra* note 19.

[24] *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977).

crime after conviction of the greater one."[25] But, while the Court's decision in *Harris* was consistent with *Iannelli*, the Court did not expressly state in *Harris* that its conclusion was based on *Blockburger* principles.

The Court made that connection in *Whalen v. United States*,[26] in which the defendant was convicted in the District of Columbia for both felony murder and the rape upon which the felony murder was predicated. Expressly applying *Blockburger*, the Court concluded that consecutive sentences for rape and for a killing committed in the course of the rape were not authorized. The Court reasoned that it was "plainly not the case that 'each provision requires proof of a fact which the other does not.' A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape."[27] The government, relying on the compound nature of felony murder, argued that felony murder and rape were not the "same" offenses under *Blockburger*, because felony murder could be predicated on other felonies and therefore did not in all cases require proof of a rape. But the Court rejected that argument, explaining:

> Where the offense to be proved does not include proof of a rape—for example, where the offense is a killing in the perpetration of a robbery—the offense is of course different from the offense of rape, and the Government is correct in believing that cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the

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[25] *Id.*, 433 U.S. at 682. See, also, *Payne v. Virginia*, 468 U.S. 1062, 104 S. Ct. 3573, 82 L. Ed. 2d 801 (1984).

[26] *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

[27] *Id.*, 445 U.S. at 693-94.

> alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it. To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity.[28]

In his dissent in *Whalen*, then-Justice Rehnquist came closer than the Court to addressing the theoretical issues raised by applying *Blockburger* to compound and predicate offenses. Justice Rehnquist explained that

> the *Blockburger* test, although useful in identifying statutes that define greater and lesser included offenses in the traditional sense, is less satisfactory, and perhaps even misdirected, when applied to statutes defining "compound" and "predicate" offenses. Strictly speaking, two crimes do not stand in the relationship of greater and lesser included offenses unless proof of the greater necessarily entails proof of the lesser. . . . In the case of assault and assault with a deadly weapon, proof of the latter offense will always entail proof of the former offense, and this relationship holds true regardless whether one examines the offenses in the abstract or in the context of a particular criminal transaction.
>
> On the other hand, two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present. To cite one example, 18 U. S. C. § 924(c)(1) states that "[w]hoever . . . uses a firearm to commit any felony for which he may be prosecuted in a court of the United States . . . shall . . . be sentenced to a term of imprisonment for not less than one year nor more than ten years." Clearly, any one of a plethora of felonies could serve as the predicate for a violation of § 924(c)(1).

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[28] *Id.*, 445 U.S. at 694.

> This multiplicity of predicates creates problems when one attempts to apply *Blockburger*. If one applies the test in the abstract by looking solely to the wording of § 924(c)(1) and the statutes defining the various predicate felonies, *Blockburger* would always permit imposition of cumulative sentences, since no particular felony is ever "necessarily included" within a violation of § 924(c)(1). If, on the other hand, one looks to the facts alleged in a particular indictment brought under § 924(c)(1), then *Blockburger* would bar cumulative punishments for violating § 924(c)(1) and the particular predicate offense charged in the indictment, since proof of the former would necessarily entail proof of the latter.[29]

Justice Rehnquist observed that because the Court had not previously applied *Blockburger* in the context of compound and predicate offenses, it had not had to decide whether to apply the test to the statutes in the abstract or specifically to the indictment as framed in a particular case. But, Justice Rehnquist wrote, the Court's past decisions seemed to have assumed that *Blockburger* stood or fell on the wording of the statutes alone. And, "because the *Blockburger* test is simply an attempt to determine legislative intent, it seems more natural to apply it to the language as drafted by the legislature than to the wording of a particular indictment."[30] In the end, Justice Rehnquist disagreed with the majority's decision to apply *Blockburger*, reasoning that "when applied to compound and predicate offenses, the *Blockburger* test has nothing whatsoever to do with legislative intent, turning instead on arbitrary assumptions and syntactical subtleties" and that if the polestar was to be legislative intent, there was no reason to apply *Blockburger* when it did not advance that inquiry.[31]

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[29] *Id.*, 445 U.S. at 708-09 (Rehnquist, J., dissenting; Burger, C.J., joins) (citations omitted) (emphasis omitted).

[30] *Id.*, 445 U.S. at 711.

[31] *Id.*, 445 U.S. at 712.

Had Justice Rehnquist's view in *Whalen* carried the day, the present case might be far simpler to resolve. But it did not, and the Court reaffirmed the principles of *Whalen* in *Illinois v. Vitale*,[32] in which a juvenile's vehicle had struck and killed two children. The juvenile was convicted of carelessly failing to reduce speed to avoid an accident, but then charged with involuntary manslaughter, which he claimed was barred by double jeopardy. Applying the *Blockburger* test, the Court disagreed, explaining:

> If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and [the juvenile's] trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because [the juvenile] has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*.[33]

To the same effect, the Court wrote in *Garrett v. United States*[34] that under the *Blockburger* test, the federal offense of engaging in a "'continuing criminal enterprise' (CCE)" was the same as its predicate offenses (in *Garrett*, importation of marijuana). Justice Rehnquist, writing for the Court, explained that under *Blockburger*, "each of the predicate offenses is the 'same' for double jeopardy purposes as the CCE offense because the predicate offense does not require proof of any fact not necessary to the CCE offense."[35]

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[32] *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

[33] *Id.*, 447 U.S. at 419-20.

[34] *Garrett v. United States*, 471 U.S. 773, 775, 105 S. Ct. 2407, 85 L. Ed. 2d 764 (1985).

[35] *Id.*, 471 U.S. at 778.

Then, in *United States v. Dixon*,[36] a sharply divided Court was unable to articulate a clear rule for how to apply *Blockburger* to compound and predicate offenses. In *Dixon*, a majority of the Court concluded that the Double Jeopardy Clause precluded prosecution of some, but not all, charges brought against a defendant who had previously been punished for criminal contempt arising out of the same conduct. But assembling that majority required five separate opinions. Justice Scalia wrote for the Court, but was joined only by Justice Kennedy in his *Blockburger* analysis.[37] Justice Scalia read the court order that formed the basis of the contempt conviction as directing the defendant not to commit assault, so, relying on *Harris v. Oklahoma*, Justice Scalia concluded that under *Blockburger*, simple assault was a lesser-included offense of the contempt. But other offenses that required proof of facts not implicated by the court order were not lesser included, because it was possible to violate the court order through the predicate offense of simple assault (and thus commit contempt) without committing the other offenses at issue.[38]

Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, did not join that part of Justice Scalia's opinion.[39] Chief Justice Rehnquist, echoing the concerns he had expressed in his *Whalen* dissent, contended that *Blockburger* required a focus on the elements of the generic offense of contempt of court, instead of the terms of the particular court orders involved. So, the Chief Justice would have concluded that because the generic crime of contempt of court had different elements than the substantive criminal charges at issue, they were separate offenses under *Blockburger*.

The Chief Justice argued that the Court's "double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be

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[36] *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

[37] See *id.*

[38] See *id.*

[39] See *id.* (Rehnquist, C.J., concurring in part and dissenting in part; O'Connor and Thomas, JJ., join).

proved under the particular indictment at issue—an indictment being the closest analogue to the court orders in this case."[40] The Chief Justice rejected Justice Scalia's conclusion that *Harris* suggested otherwise, concluding that the basis of *Harris* was that the two crimes at issue there were "akin to greater and lesser included offenses" because a lesser-included offense is one that is "'necessarily included'" within the statutory elements of another offense; for instance, as in *Harris*, "a defendant who commits armed robbery necessarily has satisfied one of the statutory elements of felony murder."[41]

The rest of the *Dixon* Court did not clearly express its understanding of how *Blockburger* should be applied, although Justice Souter, joined by Justice Stevens, seemed to agree with the Chief Justice's conclusion that because *Blockburger* is a test for statutory construction, it should emphasize the *elements* of the two crimes.[42] And again, had the Chief Justice's view carried the day, the appeal presently before this court would be much simpler to resolve. As it stands, however, *Dixon* leaves the matter far from clear. In its last opportunity to address *Blockburger* in the context of compound and predicate offenses, in *Rutledge v. United States*,[43] the Court concluded that the Double Jeopardy Clause precluded punishing a defendant for both continuing criminal enterprise (CCE) and conspiracy convictions, because conspiracy was a lesser-included offense. It is worth noting that although CCE and conspiracy are both arguably compound offenses, *Rutledge* does not help us in this case because both charges were based on the same predicates.

A few things are clear from all of this. First, it is clear that under the Court's precedent, *Blockburger* precludes punishing a defendant for both a compound offense and its predicate.[44]

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[40] *Id.*, 509 U.S. at 716-17.

[41] *Id.*, 509 U.S. at 718.

[42] See *Dixon, supra* (Souter, J., concurring in the judgment in part and dissenting in part; Stevens, J., joins).

[43] *Rutledge v. United States*, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996).

[44] See *Whalen, supra* note 26.

We have also held as much,[45] most pertinently in *State v. Hoffman*,[46] in which we concluded that the defendant's right to be free from double jeopardy was violated when he was convicted of both DUI and motor vehicle homicide predicated on the DUI. So, obviously, Huff could not have been punished for both motor vehicle homicide and DUI.

It is also clear that a defendant *can* be punished for both a compound offense and another offense that *could* have been, but actually was not, the predicate offense.[47] We held as much in *Hoffman*, in which we concluded that double jeopardy did not preclude the defendant from being punished for second degree assault for recklessly causing serious bodily injury to the victim, despite the fact that reckless driving had also been alleged, in the alternative, as a predicate for motor vehicle homicide. We explained that the motor vehicle homicide conviction had been predicated on DUI and that DUI and second degree assault were not the same offenses under a *Blockburger* analysis.[48] So, Huff could have been punished for motor vehicle homicide predicated on DUI and separately for speeding.

That precedent compels the conclusion that, at least as far as a compound offense is purportedly the greater offense, a court must consider the specific predicate offense alleged when comparing the "elements of the offense" for *Blockburger* purposes. For instance, in this case, the Court's decision in *Whalen* suggests that we treat motor vehicle homicide predicated on DUI as something akin to a separate offense of "motor vehicle homicide by DUI" for *Blockburger* analysis, just as the Court in *Whalen* treated the felony murder at issue in that case as a conviction of "a killing in the course of rape."[49]

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[45] See, e.g., *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008); *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[46] *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987).

[47] See, *Vitale, supra* note 32; *Whalen, supra* note 26.

[48] See *Hoffman, supra* note 46.

[49] See *Whalen, supra* note 26, 445 U.S. at 694 n.8.

But that does not tell us what to do when the allegedly lesser-included offense is a compound offense. The State suggests, based on our decision in *State v. Winkler*,[50] that we should also incorporate the elements of the predicate offense there. In *Winkler*, we confronted a similar *Blockburger* problem: how to determine the elements of the offense, for purposes of comparison, when the offenses at issue can be committed using *alternative* sets of elements. For instance, a person may commit manslaughter by killing *either* upon a sudden quarrel *or* while in the commission of an unlawful act.[51] In *Winkler*, we concluded that "in applying *Blockburger* to separately codified criminal statutes which may be violated in alternative ways, only the elements charged in the case at hand should be compared in determining whether the offenses under consideration are separate or the same for purposes of double jeopardy."[52] That is why the elements of manslaughter upon a sudden quarrel are not part of our analysis here. And the State points out that in *State v. Brouillette*,[53] we characterized manslaughter and motor vehicle homicide as "single crime[s] which may be committed in a number of ways."

We disagree with the State's reading of these cases. *Winkler* involved alternative elements to the offense—not merely different predicate acts that could be different ways of proving the same element of the offense. In other words, *Winkler* stands for the proposition that a court can look to the allegations in a case for determining which alternative elements of a crime are at issue for *Blockburger* purposes. But a predicate act is simply one element of a crime, and *Winkler* does not require, for *Blockburger* purposes, that the court look behind the statutory element to see what may be used to prove it.

Nor does *Brouillette* support the State's argument. The issue in *Brouillette* was not double jeopardy—it was the sufficiency of a charging information that alleged several different theories

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[50] *Winkler, supra* note 11.

[51] See § 28-305(1).

[52] *Winkler, supra* note 11, 266 Neb. at 163, 663 N.W.2d at 108.

[53] *State v. Brouillette*, 265 Neb. 214, 223, 655 N.W.2d 876, 886 (2003).

of the crime in the alternative. Motor vehicle homicide and manslaughter are crimes that may *factually* be committed in a number of ways. But motor vehicle homicide has only one set of elements, one of which is a predicate offense, and although manslaughter has alternative elements, only unlawful act manslaughter is at issue here. *Winkler* does not help the State.

Instead, we find the Eighth Circuit's decision in *U.S. v. Allen*[54] to be helpful in addressing this problem. In *Allen*, the defendant was convicted of two federal charges: count I, armed robbery by force or violence in which a killing occurs, and count II, carrying or using a firearm during a crime of violence and committing murder. Applying *Blockburger*, the court found that count II required proof of two facts that the first count did not: carrying or use of a firearm during the commission of a violent crime and murdering by firearm. The question was whether count I required proof of any facts that count II did not, given that count II did not require proof of a taking of bank property by force or violence or intimidation. Rather, count II only required proof of some underlying crime of violence which could have been armed robbery or any other violent felony. In other words, as in the present case, the potential lesser-included offense was a compound offense that could be satisfied by any number of unlawful acts. The court explained the problem:

> It is not exactly clear how predicate offenses are to be treated for purposes of *Blockburger*. There is some indication from the Supreme Court that *Blockburger* is simply a rule of statutory construction which is neither intended nor designed to apply to the particular facts of a case. . . .
>
> On the other hand, the Supreme Court has applied *Blockburger* by considering the nature of the underlying felony in a felony-murder indictment rather than based only on the elements of the statutes at issue. . . . Under this interpretation of *Blockburger*, predicate offenses which form the basis of other statutory offenses would

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[54] *U.S. v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated on other grounds and remanded for further consideration* 536 U.S. 953, 122 S. Ct. 2653, 153 L. Ed. 2d 830 (2002).

> always fail the *Blockburger* test. In the present case, the underlying bank robbery satisfies the "crime of violence" element of [count II]. By definition, therefore, there is no fact that must be proved in [count I] that is different from the elements required to be proved for conviction under [count II].[55]

The court concluded, based on that reasoning, that the *Blockburger* test had not been satisfied. In other words, the *Allen* court held that *Blockburger* was not met where the lesser-included offense could *satisfy* an element of another, even if it was not the exclusive means of doing so.[56]

Based on similar reasoning, several federal courts have concluded that the federal crime of using a firearm to commit a crime of violence was, under the *Blockburger* test, a lesser-included offense of the federal crime of carjacking, despite the fact that the "crime of violence" element of the use of a firearm charge could be satisfied in any number of other ways.[57] Because the carjacking statute required proof that the defendant used a gun, it necessarily proved that the defendant used or carried a firearm. And carjacking is always a crime of violence. So, while there are other crimes of violence, proof of the elements of carjacking will *always* prove the elements of use of a firearm to commit a crime of violence. In other words, the crimes fail the *Blockburger* test because conduct that violates one of the statutes will *always* violate the other, making the other a lesser-included offense.[58]

[5,6] We find this reasoning persuasive and helpful in this case, although we recognize that it is again distinguishable because in this case, both offenses are compound offenses. Nonetheless, we cannot escape the basic fact that it is *impossible* to prove the elements of motor vehicle homicide without

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[55] *Id.* at 767-68.

[56] See, *id.*; *U.S. v. Johnson*, 225 F. Supp. 2d 1022 (N.D. Iowa 2002), *reversed on other grounds* 352 F.3d 339 (8th Cir. 2003).

[57] See, *U.S. v. Moore*, 43 F.3d 568 (11th Cir. 1995); *U.S. v. Johnson*, 32 F.3d 82 (4th Cir. 1994); *U.S. v. Mohammed*, 27 F.3d 815 (2d Cir. 1994); *U.S. v. Singleton*, 16 F.3d 1419 (5th Cir. 1994).

[58] See, *Johnson, supra* note 57; *Singleton, supra* note 57.

also proving the elements of unlawful act manslaughter. While we adhere to *Blockburger*, and have attempted to abide by the test as the U.S. Supreme Court has applied it, we are mindful of the fact that *Blockburger* is an aid to statutory interpretation, not a constitutional demand.[59] We conclude that the better application of *Blockburger*'s principles is that the possible predicates of a compound offense should *not* be incorporated into the offense when determining whether it contains elements that another statute does not. And we so hold.

To hold otherwise would elevate formalism over the substance of constitutional protection and lead to anomalous results. For instance, it is clear that however the elements of the offenses are incorporated, a defendant could not be punished for both motor vehicle homicide and manslaughter based on the same predicate unlawful act. Nor could a defendant be punished for two instances of either motor vehicle homicide or manslaughter based on different predicate offenses, given that the unit of prosecution for those offenses is the death of the victim, not the predicate unlawful act.[60] It would be peculiar, then, if combining different predicates with different compound offenses could achieve a result that neither the different predicate offenses nor the different compound offenses could achieve separately.

[7] And most fundamentally, this holding is most consistent with the test first laid out in *Blockburger*: "whether each provision requires proof of a fact which the other does not."[61] Unlawful act manslaughter requires proof of no fact which motor vehicle homicide does not. To construe *Whalen* and the U.S. Supreme Court's other precedent regarding compound and predicate offenses to permit multiple convictions here would be to read *Blockburger* out of the *Blockburger* test. So, we conclude that under *Blockburger*,

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[59] See, e.g., *Garrett, supra* note 34.

[60] See, e.g., *Brouillette, supra* note 53; *Garris v. United States*, 465 A.2d 817 (D.C. 1983). Compare, e.g., *U.S. v. Beltran-Moreno*, 556 F.3d 913 (9th Cir. 2009); *U.S. v. Phipps*, 319 F.3d 177 (5th Cir. 2003) (discussing multiple weapons convictions based on different predicate offenses).

[61] *Blockburger, supra* note 10, 284 U.S. at 304.

unlawful act manslaughter is a lesser-included offense of motor vehicle homicide.

[8,9] We note, having reached that conclusion, that *Blockburger* is not always dispositive of a double jeopardy claim. Where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the same conduct under *Blockburger*, cumulative punishment may be imposed in a single trial.[62] But there is no indication of such legislative intent here, and the State does not argue that this principle is applicable. We are aware that the enactment of 2011 Neb. Laws, L.B. 667, may change this conclusion, but it does not take effect until January 1, 2012, so we do not address it here. We also note that double jeopardy is implicated despite the fact that Huff's sentences on the convictions at issue are to run concurrently; in *Rutledge*, the Court held that "the collateral consequences of a second *conviction* make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence."[63]

[10-12] The remaining question is which conviction and sentence should be vacated. Huff argues that his conviction and sentence for motor vehicle homicide should be vacated. Huff relies on the "timing of the 'conviction'"[64] and essentially asks us to revisit our determination in *Huff I* that this case involves a single prosecution.[65] But matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.[66] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon,

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[62] See *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

[63] *Rutledge, supra* note 43, 517 U.S. at 302 (emphasis supplied).

[64] Brief for appellant at 12.

[65] *Huff I, supra* note 5.

[66] *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005).

either expressly or by necessary implication.[67] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit.[68] Our conclusion in *Huff I* that this case does not involve successive prosecution is the law of the case, and we decline to reconsider it.

[13,14] Huff also asserts that motor vehicle homicide should be considered the lesser-included offense to manslaughter, arguing that the more general provision should yield to the more specific and that motor vehicle homicide is the more "specific" crime. But the principle that Huff invokes is applicable only when the requirements of different statutes conflict[69] and has no relevance in this instance. Indeed, the merits of Huff's double jeopardy claim rest on the fact that the statutes at issue do *not* conflict. Rather, the applicable rule is that the "lesser offense" is the one for which fewer elements are required to be proved.[70] We are focused on the elements of the offenses, and not comparison of the penalties.[71] Here, as explained above, motor vehicle homicide is the greater offense and unlawful act manslaughter the lesser-included offense. And when a defendant is convicted of both a greater and a lesser-included offense, the conviction and sentence on the lesser charge must be vacated.[72]

In summary, we find merit to Huff's argument that he has been subjected to multiple punishments, in violation of the Double Jeopardy Clause, by his convictions and sentences for motor vehicle homicide and manslaughter. But we find no merit to his argument that the motor vehicle homicide conviction should be vacated. Instead, it is his conviction and sentence for manslaughter that must be vacated.

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[67] *Id.*

[68] *Id.*

[69] See, e.g., *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

[70] See, *State v. Dragoo*, 277 Neb. 858, 765 N.W.2d 666 (2009); *State v. Gresham*, 276 Neb. 187, 752 N.W.2d 571 (2008).

[71] See *id.*

[72] *Dragoo, supra* note 70.

Motion to Suppress

[15] Next, Huff argues that the court should have suppressed evidence of his refusal to submit to a chemical test because there was no DUI investigation to establish grounds for such a test. A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.[73]

According to Huff, § 60-6,197(4) requires reasonable grounds for an officer to demand a chemical test, and Huff contends that reasonable grounds were not established by Lozo or communicated to Levisay before Huff's refusal of a blood test. Section 60-6,197(4) provides in part:

> Any person involved in a motor vehicle accident in this state may be required to submit to a chemical test of his or her blood, breath, or urine by any peace officer if the officer has reasonable grounds to believe that the person was driving or was in actual physical control of a motor vehicle on a public highway in this state while under the influence of alcoholic liquor or drugs at the time of the accident.

We note that Huff appears to be conceding that reasonable suspicion is the appropriate standard, despite the fact that to *arrest* him for suspicion of DUI, probable cause would have been required.[74] But regardless, Huff's argument is without merit.

[16] To begin with, if an officer has probable cause to arrest a suspect for DUI and reasonable grounds to believe that the suspect committed DUI, the officer may arrest the suspect and require a blood test notwithstanding the fact that a preliminary breath test was not administered.[75] And both reasonable grounds and probable cause were established in this case. Huff was observed to have bloodshot, glassy eyes and difficulty

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[73] *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[74] See *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[75] See, *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), *overruled on other grounds, State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983); *State v. Cash*, 3 Neb. App. 319, 526 N.W.2d 447 (1995).

standing. Nearly everyone who had contact with Huff that night reported a strong odor of alcohol coming from him. We have little difficulty in concluding that despite the lack of field sobriety tests or a preliminary breath test, there was ample evidence establishing probable cause to arrest Huff and reasonable grounds to demand a blood test.[76]

[17] Nor are we persuaded by Huff's argument that Lozo's purported failure to communicate his observations to Levisay is relevant. Levisay made his own observations, independent from Lozo, that easily established reasonable grounds to demand a blood test. And even had he not, we have explained that under the collective knowledge doctrine, the existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.[77]

For instance, in *State v. Wegener*,[78] an investigating officer sent a driver to the hospital without conducting field sobriety tests after the driver collided with a bridge guardrail. But the driver smelled strongly of alcohol and had admitted that he had been drinking. So when the investigating officer discovered several beer bottles in the vehicle, he had another officer dispatched to the hospital to obtain a blood test. On appeal from his conviction for DUI, the defendant argued that the blood test should have been excluded because the second officer, who actually arrested the defendant and obtained the blood test, had not independently determined probable cause, nor had the basis for probable cause been communicated to him. But we rejected that argument, reasoning that under the collective knowledge doctrine, an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who

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[76] See, e.g., *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987); *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986); *State v. Fischer*, 194 Neb. 578, 234 N.W.2d 205 (1975).

[77] See, *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010); *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992).

[78] *Wegener, supra* note 77.

does have probable cause. So, we concluded that because the investigating officer had probable cause to suspect the defendant of DUI, the arrest and blood test initiated by the second officer was valid.[79]

This case is functionally indistinguishable from *Wegener*. Thus, even had Levisay not made his own observations, Lozo's investigation would have been sufficient to support arresting Huff and demanding a blood test. We find no merit to Huff's argument that evidence of his refusal of a blood test should have been suppressed.

Enhancement of Refusal Conviction

[18] As noted above, Huff's conviction for refusal of a chemical test was enhanced by two previous convictions for DUI. Huff argues that a refusal conviction can only be enhanced by prior refusal convictions. This is a question of statutory interpretation, which is a question of law on which we have an obligation to reach an independent conclusion irrespective of the determination made by the court below.[80]

Huff relies on the Nebraska Court of Appeals' decision in *State v. Hansen*,[81] in which the Court of Appeals held that when a judge is sentencing for a violation of the DUI statute, the offense can be enhanced by prior DUI convictions, and that when a judge is sentencing for refusal, the offense then before the court can be enhanced, but only by prior refusal convictions. We agree with the Court of Appeals.

[19] The punishment for both DUI and refusal of a chemical test is set forth in Neb. Rev. Stat. § 60-6,197.03 (Supp. 2009), which provides that convictions for DUI and refusal may be enhanced by a "prior conviction." But a "prior conviction" is defined by Neb. Rev. Stat. § 60-6,197.02 (Reissue 2010), which differentiates between convictions for DUI and refusal. DUI is prohibited by § 60-6,196, DUI resulting in serious bodily injury is prohibited by Neb. Rev. Stat. § 60-6,198

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[79] See *id.*

[80] See *State v. Tamayo*, 280 Neb. 836, 791 N.W.2d 152 (2010).

[81] *State v. Hansen*, 16 Neb. App. 671, 749 N.W.2d 499 (2008).

(Reissue 2010), and refusing a chemical test is prohibited by § 60-6,197. Section 60-6,197.02(1) provides:

> (a) Prior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed as follows:
>
> (i) For a violation of section 60-6,196:
>
> (A) Any conviction for a violation of section 60-6,196;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,196;
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,196; or
>
> (D) Any conviction for a violation of section 60-6,198; or
>
> (ii) For a violation of section 60-6,197:
>
> (A) Any conviction for a violation of section 60-6,197;
>
> (B) Any conviction for a violation of a city or village ordinance enacted in conformance with section 60-6,197; or
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,197[.]

In other words, as the Court of Appeals correctly reasoned in *Hansen*, a "prior conviction" for purposes of DUI enhancement is defined in terms of other DUI laws, while a "prior conviction" for purposes of enhancing a refusal conviction is defined in terms of refusal laws. There is simply no crossover between DUI and refusal convictions for purposes of sentence enhancement.

[20,21] That may seem counterintuitive, because it could create an incentive for an individual who has previously been convicted of DUI to refuse a chemical test. But we have often said that in reading a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in

its plain, ordinary, and popular sense.[82] And beyond that, a fundamental principle of statutory construction requires that penal statutes be strictly construed.[83] We are not at liberty to disregard the plain language of § 60-6,197.02, particularly to construe it against the defendant. Therefore, we find merit to Huff's assignment of error and conclude that he must be resentenced on his conviction for refusing a chemical test.

Testimony Regarding Huff's Invocation of Right to Counsel

Next, Huff complains of two instances during Lozo's testimony in which, according to Huff, Lozo violated the court's ruling on his motion in limine by referring to Huff's invocation of his right to counsel. First, Lozo testified that while he had been questioning Huff at the scene of the accident, Huff had said that he would not answer questions until he had spoken to an attorney. Huff did not object to that testimony. But later, Lozo explained that one of the reasons that he had not performed field sobriety tests was that Huff had invoked his right to counsel. Huff objected and moved for a mistrial. The court overruled the motion for mistrial, but did instruct the jury that it was to consider that testimony solely for the purpose of understanding why field sobriety tests had not been performed, and not for any other purpose.

[22] Huff contends that the court erred in not granting a mistrial. The decision whether to grant a motion for mistrial is within the discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion.[84] Because Huff's objection at trial was based upon his motion in limine, we assume that the legal bases for his objection were the same as that for his motion: constitutional grounds[85] and unfair prejudice.[86]

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[82] *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

[83] *Id.*

[84] *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[85] See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002).

[86] See Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).

We address his constitutional argument first. The constitutional basis for objecting to evidence of a defendant's invocation of the right to counsel is set forth in the U.S. Supreme Court's decision in *Doyle v. Ohio*[87] and its progeny, which we addressed at length in our decision in *State v. Harms*.[88]

[23] In *Doyle*, the U.S. Supreme Court held that the State may not "seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda*[89] warnings at the time of his arrest."[90] And in *Wainwright v. Greenfield*,[91] the Court explained that with respect to post-*Miranda* warnings, "silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." So it is apparent that requests for counsel, as well as actual silence, constitute "silence" for purposes of analyzing potential *Doyle* violations.[92]

[24] But in *Wainwright*, the Court also confirmed and iterated its prior holdings in *Jenkins v. Anderson*[93] and *Fletcher v. Weir*,[94] which determined that the State's impeachment use of a defendant's pre-*Miranda* silence, whether prearrest or post-arrest, is not unconstitutional.[95] The Court explained that the reasoning of *Doyle* and subsequent cases is that "it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that

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[87] *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

[88] See *Harms, supra* note 85.

[89] See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[90] *Doyle, supra* note 87, 426 U.S. at 611.

[91] *Wainwright v. Greenfield*, 474 U.S. 284, 295 n.13, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).

[92] See *Harms, supra* note 85.

[93] *Jenkins v. Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980).

[94] *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).

[95] See *Harms, supra* note 85.

promise by using the silence to impeach his trial testimony."[96] So, in *Harms*, we declined the opportunity to expand the *Doyle* and *Wainwright* protections to bar any use by the State of a defendant's prearrest, pre-*Miranda* silence.[97]

In the present case, it is not clear when Huff was first advised of his *Miranda* rights. Huff was certainly advised of his rights when he was arraigned in district court. Before then, however, it is not clear that he was advised of his rights at all. The record suggests that at the very least, he was not advised of his rights before the sheriff's deputy transported him from the hospital to jail. Lozo testified in minute-to-minute detail about his interaction with Huff at the scene of the accident, but never said that he advised Huff of his *Miranda* rights. And Levisay expressly denied reading *Miranda* warnings to Huff at any time.

In that respect, this case is functionally indistinguishable from *Fletcher*, in which the Court treated the defendant's silence as pre-*Miranda* where the record did not indicate that he had received any *Miranda* warnings after his arrest.[98] In other words, the Court held in *Fletcher* that a silent record was fatal to the defendant's *Doyle* claim.[99] The same is true here. The testimony at issue was, pursuant to the court's limiting instruction, admitted solely for the purpose of explaining why field sobriety tests were not conducted. Given no evidence that *Miranda* warnings had been given at the time of Huff's remark and the limited purpose for which the evidence was admitted, it is clear that no *Doyle* violation occurred.

[25,26] We also find no merit to the contention that the testimony was unfairly prejudicial. Under rule 403, relevant

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[96] *Wainwright, supra* note 91, 474 U.S. at 292.

[97] See *Harms, supra* note 85.

[98] *Fletcher, supra* note 94.

[99] See, *id.*; *Branch v. Secretary, Fla. Dept. of Corrections*, 638 F.3d 1353 (11th Cir. 2011); *Folston v. Allsbrook*, 691 F.2d 184 (4th Cir. 1982); *Coleman v. State*, 111 Nev. 657, 895 P.2d 653 (1995); *People v Cetlinski*, 435 Mich. 742, 460 N.W.2d 534 (1990); *State v. Leecan*, 198 Conn. 517, 504 A.2d 480 (1986).

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.[100] But only evidence tending to suggest a decision on an improper basis is unfairly prejudicial.[101] And the exercise of judicial discretion is implicit in determinations of prejudice under rule 403, so a trial court's decision under that rule will not be reversed absent an abuse of discretion.[102]

In this case, it was evident from the pretrial proceedings that Huff intended to challenge the State's failure to perform field sobriety tests. We note, as an aside, that it is highly questionable whether Huff's invocation of his right to counsel (or his right to remain silent) would have legally precluded the administration of field sobriety tests or a preliminary breath test.[103] Nonetheless, it was appropriate to permit Lozo to testify as to Huff's invocation of his constitutional right to counsel for the limited purpose of explaining one of the reasons why Lozo did not perform field sobriety tests. The jury was instructed to consider the evidence only for that purpose, and we presume that the jury followed the instructions it was given in arriving at its verdict.[104]

[27] We have said that a defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial.[105] No such prejudice has been shown here. Finding no reversible error in the legal determinations upon which the court's overruling of Huff's motion for mistrial was based, we also find no abuse of discretion in overruling the motion. Huff's assignment of error is without merit.

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[100] See § 27-403.

[101] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

[102] See *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

[103] See, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966); *State v. Newman*, 250 Neb. 226, 548 N.W.2d 739 (1996); *State v. Green*, 229 Neb. 493, 427 N.W.2d 304 (1988).

[104] See *id.*

[105] See *Daly, supra* note 101.

SUFFICIENCY OF EVIDENCE OF WITNESS TAMPERING

[28] Huff was convicted of tampering with a witness in violation of § 28-919(1), which provides:

> (1) A person commits the offense of tampering with a witness or informant if, believing that an official proceeding or investigation of a criminal or civil matter is pending or about to be instituted, he or she attempts to induce or otherwise cause a witness or informant to:
>
> (a) Testify or inform falsely;
>
> (b) Withhold any testimony, information, document, or thing;
>
> (c) Elude legal process summoning him or her to testify or supply evidence; or
>
> (d) Absent himself or herself from any proceeding or investigation to which he or she has been legally summoned.

Huff's conviction was based on the evidence that after the accident, he tried to persuade Markwardt to say that he, not Huff, had been driving. Huff argues that this evidence was insufficient to sustain the conviction. In reviewing a sufficiency of the evidence claim, 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.[106]

Huff argues that the "element missing" in his witness tampering conviction is proof that Huff believed that an official proceeding or investigation of a criminal or civil matter was pending or about to be instituted.[107] But Markwardt testified that Huff tried to persuade him to say he had been driving, because Huff did not want to "take the fall" for the accident. Those remarks clearly imply an awareness that potentially serious consequences could result from what had happened. Markwardt's testimony certainly supported Huff's conviction for violating § 28-919(1).

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[106] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[107] Brief for appellant at 28. See § 28-919(1).

Huff's primary contention seems to be that Markwardt was not a credible witness. But the credibility and weight of witness testimony are for the trier of fact, and we do not reassess witness credibility on appellate review.[108] There was sufficient evidence in this case for the trier of fact to find Huff guilty of witness tampering.

Foundational Testimony

Huff's sixth assignment of error is based on a foundational objection he made to Nipper's testimony regarding his opinion about determining Huff's blood alcohol level. When asked by the court to be more specific about his objection, Huff's counsel invoked *Daubert*/*Schafersman*[109] principles in addition to "general foundation." The court explained that Huff would need to articulate what part of Nipper's methodology was suspect. The court said it wanted Huff to advise the State concerning "what he thinks is missing so that we can get to the point of whether or not I'm going to let the witness testify or not." The court explained that it did not want to waste the jury's time, noting that had the objection been raised before, it could have been handled at a pretrial hearing. Huff reasserted *Daubert*/*Schafersman*, but did not object to the court's instruction to specifically explain the grounds for his foundational objections. After Nipper's foundational testimony, Huff's *Daubert*/*Schafersman* objection was overruled.

[29] Huff now asserts that the court erred in handling Huff's objection in the way it did. Huff contends that his "substantial legal right . . . to have a fair and meaningful adversarial proceeding was quashed by the trial judge directing [his] attorney to instruct State's counsel on how to properly question the State's expert."[110] Huff concedes that he did not object at trial on that basis, but contends the court committed plain error. Plain error is error of such a nature that to leave it uncorrected

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[108] See *State v. Archie*, 273 Neb. 612, 733 N.W.2d 513 (2007).

[109] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[110] Brief for appellant at 31.

would result in damage to the integrity, reputation, or fairness of the judicial process.[111]

[30,31] We find no plain error on this issue, primarily because we do not interpret the record in the way that Huff suggests. Rather, in our view, the district court was simply requiring Huff to make a specific foundational objection, as he was required to do. Under the principles set forth in *Daubert* and *Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[112] But to sufficiently call specialized knowledge into question under *Daubert* and *Schafersman* is to object with enough specificity so that the court understands what is being challenged and can accordingly determine the necessity and extent of any pretrial proceeding.[113] The initial task falls on the party opposing expert testimony to sufficiently call into question the reliability of some aspect of the anticipated testimony.[114]

[32] Assuming that the opponent has been given timely notice of the proposed testimony, the opponent's challenge to the admissibility of evidence under *Daubert* and *Schafersman* should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert* and *Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.[115]

In this case, Huff did none of those things. The court would not have abused its discretion had it simply overruled Huff's objection for being insufficiently timely or specific. Instead, the court demanded that Huff make his objection with more specificity, so that the State could address the basis of Huff's

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[111] *State v. Sellers*, 279 Neb. 220, 777 N.W.2d 779 (2010).

[112] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[113] *Id.*

[114] *State v. Mason*, 271 Neb. 16, 709 N.W.2d 638 (2006).

[115] *Casillas, supra* note 112.

objection and the court could determine the admissibility of Nipper's opinion without wasting the jury's time. Contrary to Huff's argument, the court did not direct his counsel to "instruct or educate the prosecutor [on] what was necessary to lay the proper foundation for the State's expert witness's opinion"[116]—rather, the court instructed Huff on what was necessary to make a proper objection to that opinion and, in so doing, inform the State as to the basis for Huff's objection.

[33] A trial court has broad discretion in determining how to perform its gatekeeper function.[117] In this case, the court did not abuse its discretion, much less commit plain error, in requiring Huff to make his foundational objection with the required specificity. There is no principle of due process that requires a court or party to guess at the basis for a general foundational objection. Therefore, we find Huff's assignment of error to be without merit.

Lesser-Included Offense Instruction on Motor Vehicle Homicide

[34] As noted above, motor vehicle homicide is a Class I misdemeanor, unless the predicate act is, among other things, DUI, in which case it is a Class III felony. Huff argues that the jury in this case should have been instructed on the predicate act of speeding, in addition to DUI. Whether jury instructions are correct is a question of law, which we resolve independently of the lower court's decision.[118]

Huff's argument is based on *Beck v. Alabama*,[119] in which the U.S. Supreme Court explained the rationale for requiring an instruction on a lesser-included offense in a death penalty case when the evidence supports such an instruction. The Court explained that

> "if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if

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[116] Brief for appellant at 33.

[117] *Daly, supra* note 101.

[118] *State v. Miller*, 281 Neb. 343, 798 N.W.2d 827 (2011).

[119] *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

> no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."[120]

Huff argues that the jury could have concluded that he was not under the influence of alcohol at the time of the accident, but had been speeding. And, he claims, the jury was not given an option that would be consistent with that finding.

But *Beck* is not applicable in this case. We note that it is quite questionable, given the evidence, whether any rational trier of fact could have found that Huff was not under the influence of alcohol. That aside, when the jury instructions are considered as a whole, it is apparent that the jury was not confronted with the "all or nothing" dilemma that the Court held was impermissible in *Beck*.[121]

Instead of being instructed on "misdemeanor motor vehicle homicide"[122] as a lesser-included offense, the jury in this case was instructed on manslaughter as a lesser-included offense. The predicate act for the manslaughter instruction was speeding. And the jury was instructed that it should proceed to the manslaughter charge only if it acquitted Huff of motor vehicle homicide. Instead, he was found guilty of motor vehicle homicide. We presume that the jury followed the step instruction and did not consider the manslaughter offense after finding that Huff was guilty of motor vehicle homicide.[123] And the manslaughter instruction gave the jury an alternative had it concluded that Huff was not guilty of DUI, but guilty of speeding as the unlawful act that caused Warner's death, so

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[120] *Id.*, 447 U.S. at 634 (emphasis in original).

[121] See *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

[122] See brief for appellant at 35.

[123] See *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

the "all or nothing" dilemma addressed in *Beck* was not present here.

[35] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[124] Huff has not done so here. We need not determine whether, in an appropriate case, a defendant might be entitled to an instruction based on a lesser degree of motor vehicle homicide because, in this case, Huff was clearly not prejudiced by the denial.

Excessive Sentences

[36] Finally, Huff argues that his sentences are excessive. When a trial court's sentence is within the statutory guidelines, the sentence will only be disturbed by an appellate court when an abuse of discretion is shown.[125] Huff suggests that his sentences are not "'within'" the statutory limits because they are at the maximum—so, Huff claims, the sentencing is "at its limit, not within it. To sentence in such a manner is an abuse of discretion."[126]

[37] Huff seems to be suggesting that a maximum sentence is, per se, an abuse of discretion. That suggestion is plainly without merit. A sentence at the maximum limit is still within that limit—it is only if the sentence *exceeds* the statutory limit that it becomes "excessive" as a matter of law.[127] We have often said that the Legislature declares the law and public policy by defining crimes and fixing their punishment and that the responsibility of the judicial branch is to apply those punishments according to the nature and range established by the Legislature.[128] We would be ignoring that principle were we to conclude that the end of the legislatively established statutory range was somehow "out of bounds" as a possible sentence.

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[124] *Miller, supra* note 118.

[125] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[126] Brief for appellant at 38.

[127] See *State v. Alba*, 270 Neb. 656, 707 N.W.2d 402 (2005).

[128] *State v. Lamb*, 280 Neb. 738, 789 N.W.2d 918 (2010).

[38] Huff also argues that the "nature of the offense here is accidental"[129] and that because Huff did not intend to harm anyone, the sentences are excessive. 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 violence involved in the commission of the crime.[130] So, the fact that Huff may not have specifically intended to harm anyone is a relevant consideration in sentencing.

But in addition to the circumstances underlying this case, the presentence report establishes a substantial foundation for the sentences imposed. Huff has a long criminal history, including reckless driving, possession of drug paraphernalia, several assaults, disturbing the peace, resisting arrest, attempted sexual assault, multiple DUI convictions, several instances of driving under suspension, and many other traffic violations. And a review of the presentence report suggests that Huff has been unwilling to accept responsibility for his conduct and less than remorseful about its effects.

Given the evidence, it is apparent that the district court did not abuse its discretion at sentencing.

CONCLUSION

For the foregoing reasons, we find merit to two of Huff's assignments of error. First, we conclude that unlawful act manslaughter is a lesser-included offense of motor vehicle homicide, and second, we conclude that prior convictions for DUI cannot be used pursuant to §§ 60-6,197.02 and 60-6,197.03 to enhance a defendant's conviction for refusing a chemical test. But we find no merit to Huff's remaining assignments of error. Huff's convictions and sentences for motor vehicle homicide and witness tampering are affirmed. Huff's conviction and sentence for manslaughter are vacated. And finally, while Huff's conviction for refusing a chemical test is affirmed,

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[129] Brief for appellant at 38.

[130] *Erickson, supra* note 123.

the sentence is vacated, and the district court is directed on remand to resentence Huff on that conviction consistent with this opinion.

AFFIRMED IN PART, AND IN PART VACATED AND REMANDED FOR RESENTENCING.

TERI A. LATHAM, APPELLANT, V. SUSAN RAE SCHWERDTFEGER, APPELLEE.

802 N.W.2d 66

Filed August 26, 2011. No. S-10-742.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
4. **Standing.** Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination.
5. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
6. **Standing: Claims: Parties.** To have standing, a litigant must assert the litigant's own rights and interests.
7. **Parent and Child: Words and Phrases.** A person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
8. **Parent and Child.** The primary determination in an in loco parentis analysis is whether the person seeking in loco parentis status assumed the obligations incident to a parental relationship.
9. **Parent and Child: Intent.** The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred.