convictions or of the Court of Appeals' affirmance of the district court's rulings. Given the aiding and abetting instruction and the facts, the evidence is sufficient to support the convictions. Although for reasons which differ from the Court of Appeals' reasoning, we affirm.

AFFIRMED.

CASSEL, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM E. SMITH, APPELLANT.
___ N.W.2d ___

Filed November 16, 2012. No. S-10-442.

1. **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.
2. **Jury Instructions: Convictions: Appeal and Error.** Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.
3. **Homicide: Words and Phrases.** A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.
4. ____: ____. A sudden quarrel does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.
5. **Homicide: Intent.** It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.
6. ____: ____. In determining whether a killing constitutes murder or sudden quarrel manslaughter, the question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. The test is an objective one. Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.
7. **Lesser-Included Offenses: Jury Instructions: Evidence.** The rule in a nonhomicide case is that a trial court must instruct on a lesser-included offense only if requested to do so and the evidence supports the giving of the lesser-included instruction. However, a court may give a lesser-included instruction over a defendant's objection.

8. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.
9. **Trial: Lesser-Included Offenses: Jury Instructions: Case Disapproved.** In a nonhomicide case, a trial court has no duty to instruct on lesser-included offenses in the absence of a request for such an instruction; disapproving *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997), and *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2002).
10. **Criminal Law: Time: Appeal and Error.** A new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.
11. **Appeal and Error: Words and Phrases.** Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
12. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals affirmed.

Peter K. Blakeslee for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

STEPHAN, J.

William E. Smith was convicted by a jury of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. The Nebraska Court of Appeals affirmed the assault and weapon convictions and found that the trial court did not err in failing to give a self-defense instruction.[1] But it reversed, and remanded for a new trial on the attempted

[1] *State v. Smith*, 19 Neb. App. 708, 811 N.W.2d 720 (2012).

second degree murder conviction, finding the jury should have been instructed on both attempted second degree murder and attempted sudden quarrel manslaughter.[2] Both the State and Smith filed petitions for further review, which we granted. Although our reasoning differs in some respects from that of the Court of Appeals, we reach the same conclusion.

I. BACKGROUND

1. FACTS

The following facts are taken from the published opinion of the Court of Appeals. Additional facts will be discussed as pertinent to our consideration of the specific issues presented for further review.

> On November 12, 2008, a surprise 21st birthday party was thrown for Lorenzo Gaskins. [A] large group of 15 to 20 people—including Tyrone Gaskins, Matthew Weston, Winston Sanniola, Lorenzo, and [LeMarcus Gaskins (Marcus)]—took a limousine to a "gentlemen's club," then to the Spigot bar in downtown Lincoln. At the Spigot bar, some of the individuals went inside. While inside the Spigot bar, Tyrone exchanged words with Stacey Gant. Smith, an acquaintance of Gant, later approached Tyrone and told him: "'You don't . . . disrespect women like that.'" Tyrone exited the bar, as did Smith and Gant. Outside of the bar, Tyrone got into an altercation with Smith. Marcus stepped in and punched Smith in the mouth. The birthday group retreated to the limousine and left. Smith left with his friend Carlos Helmstadter in Helmstadter's Cadillac Escalade.
>
> The Escalade followed the limousine from the Spigot bar, located at approximately 17th and O Streets, to Save-Mart, located near North 11th Street and Cornhusker Highway—which according to one witness was a 5- to 10-minute drive. At Save-Mart, Smith got out of the passenger side of the Escalade and started yelling. [S]ome of the individuals [from the birthday group,] including

[2] *Id.*

> Marcus, went inside the store. When Marcus learned that Smith wanted to fight him, he went outside to engage in a fight. Some of Marcus' group joined in the fight, at which point Smith was outnumbered. The fight ended when Helmstadter fired two or three gunshots into the air. Smith then took Helmstadter's gun and began firing. One of Smith's shots hit Marcus [as Marcus ran away]. Helmstadter and Smith fled the scene. Marcus suffered life-threatening injuries, including a rib fracture, a punctured lung, a small kidney laceration, and a grade V liver laceration—the most serious survivable liver laceration, which Marcus did survive.
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> . . . .
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> The State charged Smith with one count of attempted second degree murder, a Class II felony; one count of first degree assault, a Class III felony; and one count of use of a weapon to commit a felony, a Class III felony.
>
> . . . .
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> . . . The jury found Smith guilty of attempted second degree murder, first degree assault, and use of a weapon to commit a felony. Smith was sentenced to 25 to 35 years' imprisonment for attempted second degree murder, 15 to 20 years' imprisonment for first degree assault, and 15 to 20 years' imprisonment for use of a weapon to commit a felony. The sentence for first degree assault was to run concurrently with the sentence for attempted second degree murder. However, the sentence for use of a weapon to commit a felony was to run consecutively to the other sentences.[3]

2. COURT OF APPEALS

In his appeal from these convictions, Smith argued that our opinion in *State v. Jones*[4] should be overruled to the extent it held that manslaughter was always an unintentional crime. He

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[3] *Id.* at 710-14, 811 N.W.2d at 727-29.

[4] *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994), *overruled, State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

further argued that because manslaughter can be committed intentionally, the jury should have been instructed that if his intent to kill was a result of a sudden quarrel, he should be convicted of attempted voluntary manslaughter. He also assigned and argued that the jury should have been instructed that he acted in self-defense.

Smith acknowledged in his appeal that his trial counsel did not request instructions on either attempted manslaughter or self-defense. But his new appellate counsel contended the instructions were nevertheless warranted based on two theories: (1) The trial court had a duty to sua sponte instruct on the law applicable to the case and/or (2) his trial counsel provided ineffective assistance when he failed to request the instructions.

After this case was briefed but before it was decided by the Court of Appeals, we decided *State v. Smith*,[5] an unrelated case involving a different defendant with the same surname. In that case, we overruled *Jones*[6] and reaffirmed our holding in *State v. Pettit*[7] that "an intentional killing committed without malice upon a 'sudden quarrel,' as that term is defined by our jurisprudence, constitutes the offense of manslaughter."[8] The Court of Appeals was thus faced with applying our decision in *Smith* to this case.

In doing so, the Court of Appeals determined that a self-defense instruction was not warranted by the evidence. It further determined that Smith's trial counsel could not have been deficient in failing to request an instruction on attempted sudden quarrel manslaughter, because at the time of the trial, that crime did not exist in Nebraska. The court reasoned that trial counsel could not have been ineffective "for not anticipating how the courts would rule."[9] But the Court of

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[5] *State v. Smith, supra* note 4.

[6] *State v. Jones, supra* note 4.

[7] *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989).

[8] *State v. Smith, supra* note 4, 282 Neb. at 734, 806 N.W.2d at 394.

[9] *State v. Smith, supra* note 1, 19 Neb. App. at 728, 811 N.W.2d at 738.

Appeals concluded that under our decision in *Smith*, the trial court had a sua sponte duty to instruct on attempted sudden quarrel manslaughter because it was a lesser-included offense of attempted second degree murder and there was some evidence of a sudden quarrel occurring immediately before the shooting. We granted petitions for further review filed by each party.

II. ASSIGNMENTS OF ERROR

In the State's petition for further review, it assigns that the Court of Appeals erred in determining that (1) the district court had a sua sponte duty to instruct the jury on attempted sudden quarrel manslaughter, (2) Smith was prejudiced by the lack of an instruction on attempted sudden quarrel manslaughter, and (3) there was evidence of a sudden quarrel.

In Smith's petition for further review, he assigns that the Court of Appeals erred in determining that (1) a self-defense instruction was not warranted by the evidence, (2) trial counsel was not ineffective in failing to request a self-defense instruction, and (3) the district court had no sua sponte duty to give a self-defense instruction.

III. STANDARD OF REVIEW

[1,2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[10] Before an error in the giving of instructions can be considered as a ground for reversal of a conviction, it must be considered prejudicial to the rights of the defendant.[11]

IV. ANALYSIS

1. EVIDENCE OF SUDDEN QUARREL

[3-6] The offense of manslaughter is defined by Neb. Rev. Stat. § 28-305(1) (Reissue 2008) as follows: "A person commits

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[10] *State v. Freemont, ante* p. 179, 817 N.W.2d 277 (2012); *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[11] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011); *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

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." A sudden quarrel is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self-control.[12] It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim.[13] It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent.[14] The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment.[15] The test is an objective one.[16] Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.[17]

In this case, the Court of Appeals summarized the evidence relevant to the existence of a sudden quarrel as follows:

> Marcus punched Smith in the face at the Spigot bar. Marcus and his friends left the Spigot bar in a limousine. Smith asked Helmstadter whether he had a gun, to which Helmstadter responded that he had a gun in his Escalade. Smith and Helmstadter then got into Helmstadter's

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[12] *State v. Smith, supra* note 4; *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[13] *State v. Smith, supra* note 4*; State v. Lyle*, 245 Neb. 354, 513 N.W.2d 293 (1994).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *State v. Smith, supra* note 4; *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992).

> Escalade and followed Marcus' limousine to Save-Mart. Outside of Save-Mart, Smith yelled at Marcus to fight. Marcus came out of the Save-Mart and engaged in a fight with Smith. At least two witnesses testified that at least three or four of Marcus' friends joined Marcus in his fight with Smith. Helmstadter testified that after he fired his gun two or three times into the air, Marcus and his friends "backed up, everybody dispersed." After Marcus and his friends backed away from Smith, Smith grabbed the gun from Helmstadter, fired several shots in the direction of Marcus' friends near the Save-Mart entrance, and fired at Marcus, who was running away from him. Thus, there is "some evidence" of a sudden quarrel, and evidence that the events in the Save-Mart parking lot could inflame Smith's passions and provoke him to the point of losing self-control, particularly when only minutes earlier he was unexpectedly punched in the mouth by Marcus at the Spigot bar. And Smith found himself being "jumped" by Marcus' friends minutes later as Smith apparently sought to "even the score" with Marcus, but instead got involved in a "lopsided" fight with Marcus and three or four of his friends.[18]

The court concluded that "[w]hether these facts equate to a sudden quarrel so as to constitute attempted sudden quarrel manslaughter is for the jury's determination—but there is certainly evidence upon which they could so find."[19]

The State argues that this was error because Smith had sufficient time between the end of the fistfight and the shooting to reflect on his intended course of action. It relies on *State v. Lyle*[20] and *State v. Davis*[21] as support for this argument. In *Lyle*, following a bench trial, a defendant convicted of first degree murder argued on appeal that the judge erred in not convicting him of sudden quarrel manslaughter. The evidence

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[18] *State v. Smith, supra* note 1, 19 Neb. App. at 725-26, 811 N.W.2d at 736.

[19] *Id.* at 726, 811 N.W.2d at 736.

[20] *State v. Lyle, supra* note 13.

[21] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

established that after the defendant and his brother fought, the defendant left the scene in his vehicle. He returned 20 minutes later and fatally shot his brother. We determined that by leaving the scene of the altercation and then returning 20 minutes later to shoot the victim five times, aiming the weapon up and down the victim's body, the defendant acted deliberately and with premeditation, not in the heat of passion. The operative facts in *Lyle* are clearly distinguishable from this case.

Davis is likewise distinguishable. The defendant in that case was convicted of second degree murder following a bench trial. He argued on appeal that the evidence was insufficient to sustain the conviction and that he should have been convicted of sudden quarrel manslaughter instead. The evidence established that the defendant loaded a handgun and placed it in his coat before leaving his home to go to a mall with several friends. At the mall, the defendant's group and another group of people engaged in a verbal confrontation. When a member of the defendant's group suggested that a member of the other group had a weapon, the defendant stated, "'I'll shoot him'" and fired a shot, which did not hit anyone.[22] Then, 5 to 30 seconds later, the defendant walked over to a member of the second group, placed the gun against the back of his head, and fired the fatal shot. Characterizing this as an "execution-style" killing, we concluded that the evidence showed no sudden quarrel or adequate provocation that hindered the defendant's ability to act rationally and reasonably.[23]

The evidence in this case was that Smith found himself in a lopsided fistfight with LeMarcus Gaskins (Marcus) and several others in the Save-Mart parking lot. There is conflicting evidence as to whether the fight ended immediately when Carlos Helmstadter fired the weapon into the air. One witness testified that after Helmstadter fired the shots, "[i]t wasn't like everybody just broke up, but you could tell that Marcus kind

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[22] *Id.* at 757, 757 N.W.2d at 371.

[23] *Id.* at 760, 757 N.W.2d at 373.

of stopped throwing blows, you know, there — it wasn't as intense as it was before, I guess." Helmstadter testified that after he fired the shots into the air, he approached Smith, who was 5 yards from his vehicle. Smith grabbed the gun from Helmstadter's hand and began shooting. From this evidence, a finder of fact could conclude that Smith was provoked when he was "jumped" by several persons in the parking lot and that as a result of this sudden occurrence, he acted rashly and from passion, without due deliberation and reflection, rather than from judgment. Certainly this conclusion is not compelled by the evidence, but it is at least fairly inferable.

2. Entitlement to Sudden Quarrel Manslaughter Instruction

The State argues that even if the evidence would have supported an instruction on attempted sudden quarrel manslaughter, Smith was not entitled to the instruction because his counsel did not request it and in fact expressly waived it.

(a) Waiver

Smith made a pretrial motion proposing that certain preliminary instructions be given to the jury prior to the introduction of evidence. Included in these proposed instructions was preliminary instruction No. 2. In relevant part, this instructed the jury that it could find him guilty of attempted second degree murder, guilty of attempted manslaughter, or not guilty. One of the "elements" of attempted second degree murder, as explained in this instruction, was that the intent to kill was not "the result of a sudden quarrel." An "element" of attempted manslaughter was that the conduct was done intentionally "as the result of a sudden quarrel." The district court informed Smith that it would not give such an instruction before hearing all the evidence. Smith replied that he understood, and the requested preliminary instruction was not given to the jury.

Instead, the jury was instructed at the close of evidence that it could find Smith guilty of attempted second degree murder or not guilty. The elements of attempted second degree murder given to the jury made no mention of a sudden quarrel. At the

final jury instruction conference, Smith withdrew his request or an instruction on attempted manslaughter and offered no objection to the attempted second degree murder instruction that was given.

The State contends that Smith's actions amount to an express waiver of a jury instruction on attempted sudden quarrel manslaughter. This argument is based on language in *State v. Pribil*[24] providing that "no error can be claimed for failure to instruct on a lesser-included offense where that instruction has been expressly waived by the defendant." But an express waiver occurs when a defendant specifically informs the court that he or she does not want an instruction on a specific offense.[25] Because Smith did not do so here, he has not waived his argument on the attempted manslaughter instruction.

(b) Failure to Request

In its opinion, the Court of Appeals noted that "[a] party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions."[26] But it then stated that "[w]hether requested to do so or not, a trial court has the duty to instruct the jury on issues presented by the pleadings and the evidence."[27] Also, the court stated the proposition that "[a] trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses."[28] The State contends that there is inconsistency between these propositions and the following language in *Pribil*[29]:

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[24] *State v. Pribil*, 224 Neb. 28, 36, 395 N.W.2d 543, 549 (1986).

[25] See *State v. Brock*, 245 Neb. 315, 512 N.W.2d 389 (1994).

[26] *State v. Smith, supra* note 1, 19 Neb. App. at 720, 811 N.W.2d at 733, citing *State v. Mowell*, 267 Neb. 83, 672 N.W.2d 389 (2003).

[27] *Id.*, citing *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

[28] *Id.*, citing *State v. James*, 265 Neb. 243, 655 N.W.2d 891 (2003).

[29] *State v. Pribil, supra* note 24, 224 Neb. at 36, 395 N.W.2d at 549.

> Either the State or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. However, absent such a request, it is not error for the trial court to fail to give such instruction even though warranted. The rationale for this conclusion is based on the rule that where the general charge as contained in the instructions fairly presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining.

We agree that clarification of the law in this area is in order.

Our starting point is this court's 1895 decision in *Carleton v. State*,[30] which addressed the issue of when error in a criminal case can be predicated on the trial court's failure to give a jury instruction which the defendant did not request. After examining prior case law, this court stated:

> [W]e deduce the rule that it is error for the trial court to fail entirely to instruct the jury on the law of the case, whether requested so to do or not; that it is likewise error to partially instruct the jury, but by the omission of certain elements impliedly to withdraw from the attention of the jury an issue or element in the case necessary to determine the rights of the parties, and that an exception to instructions so partially stating the case covers the error of omission; but that when the jury is instructed, and when the instructions given do not impliedly withhold from the jury some of the issues or elements proper for [its] consideration, error cannot be predicated upon the fact that the court failed to charge upon some particular phase of the evidence, or some particular feature of the case, unless a proper instruction was offered by the party complaining.[31]

Carleton thus announced a three-part rule. First, it is always error for the trial court to fail to instruct the jury at all, and

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[30] *Carleton v. State*, 43 Neb. 373, 61 N.W. 699 (1895).

[31] *Id.* at 403-04, 61 N.W. at 709.

a defendant can raise such failure as error whether or not he or she requested instructions. Second, it is error to omit from the jury instructions an issue or element in the case necessary to determine the rights of the parties, and a defendant can raise such error whether other instructions were requested or not. Third, when the instructions given are somehow lacking but do not withhold from the jury an issue or element, a defendant cannot assign error unless he or she requested a proper instruction on the matter. The question presented in the instant case is whether the failure to instruct on a lesser-included offense is subject to the second or third part of the *Carleton* rule.

Our early case law on this question is inconsistent. In *Dolan v. State*,[32] the defendant was charged with assault with intent to murder. The jury was not instructed on lesser grades of assault, and the defendant did not request such an instruction. Relying in part on *Vollmer v. State*,[33] the court held that the second part of the rule announced in *Carleton* applied and that because the "issue of the defendant's guilt of the lesser grades of assault was not in fact submitted to the jury," there was reversible error, even though no lesser instructions were requested.[34] But *Vollmer* was a murder case in which this court specifically noted that there was a statutory duty to instruct on all forms of homicide.

The holding of *Dolan* was essentially repeated the next year in *Pjarrou v. State*.[35] In that case, the defendant was charged with robbery. He contended the trial court erred because it failed to instruct the jury on lesser crimes of larceny and assault, even though he did not request such an instruction. We reasoned that

> [b]y the plea of not guilty the charge of the information was traversed and put in issue in all its constituent elements, and to the extent that the lesser crimes

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[32] *Dolan v. State*, 44 Neb. 643, 62 N.W. 1090 (1895), *disapproved in part, McIntyre v. State*, 116 Neb. 600, 218 N.W. 401 (1928).

[33] *Vollmer v. State*, 24 Neb. 838, 40 N.W. 420 (1888).

[34] *Dolan v. State, supra* note 32, 44 Neb. at 646, 62 N.W. at 1091.

[35] *Pjarrou v. State*, 47 Neb. 294, 66 N.W. 422 (1896).

> were included and entered into the charge of the greater they became the subjects in the case for necessary and strict proof.[36]

We thus held that the court should have instructed the jury on the lesser-included offenses despite the fact that it was not requested to do so.

But in *Barr v. State*,[37] we adopted a different approach. In that case, the defendant was charged with mayhem. In its instruction to the jury, the court defined mayhem and informed the jury that if it were not convinced of his guilt of that crime beyond a reasonable doubt, it could find him guilty of assault and battery. The instruction, however, did not define the elements of assault and battery. The jury convicted him of assault and battery, and he appealed, arguing the instruction was improper. We held that the "omission" of failing to define assault and battery was not error because the defendant had not requested the court to instruct the jury on the definition of those terms.[38]

Although *Barr* differed from *Dolan* and *Pjarrou* in that it did not completely remove a lesser-included offense from the jury, its holding, and not the holdings of either *Dolan* or *Pjarrou*, was extended in *McConnell v. State*.[39] There, the defendant was charged with and convicted of assault with intent to commit rape. On appeal, he argued that the court erred in failing to instruct the jury on lesser-included offenses such as assault and battery or simple assault. He had not requested the jury be so instructed. After concluding that the requested charges were indeed lesser-included offenses, this court noted that "authorities are divided on" the issue of whether a request must be made for lesser-included offense instructions and that the "weight of authority favors the defendant's contention."[40]

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[36] *Id.* at 297, 66 N.W. at 423.

[37] *Barr v. State*, 45 Neb. 458, 63 N.W. 856 (1895).

[38] *Id.* at 462, 63 N.W. at 857.

[39] *McConnell v. State*, 77 Neb. 773, 110 N.W. 666 (1906), *disapproved, State v. Pribil, supra* note 24.

[40] *Id.* at 775, 110 N.W. at 667.

Nevertheless, citing *Barr*, we held that "we are already committed to the rule that the failure of the court to give such an instruction is not reversible error, unless such request is tendered and refused."[41] The opinion makes no reference to *Dolan* or *Pjarrou*.

Dolan was expressly disapproved in *McIntyre v. State*.[42] There, the defendant was charged with and convicted of stabbing with intent to wound. On appeal, he alleged the trial court erred in failing to instruct on lesser-included offenses, even though no request was made. We held that the failure to request instructions waived any error and expressly disapproved the language in *Dolan* to the contrary.

In 1993, we readopted the statutory elements test for determining lesser-included offenses in *State v. Williams*.[43] In that case, we articulated the rule to be:

> [A] court must instruct on a lesser-included offense if (1) the elements of the lesser offense *for which an instruction is requested* are such that one cannot commit the greater offense without simultaneously committing the lesser offense and (2) the evidence produces a rational basis for acquitting the defendant of the greater offense and convicting the defendant of the lesser offense.[44]

In later cases in which we have stated this rule, we have sometimes omitted the italicized language regarding a request for a lesser-included offense instruction.[45] In other cases, we have included it.[46]

[7] But although there is inconsistency in the language we have used over the years, the holdings of our cases since

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[41] *Id.*

[42] *McIntyre v. State, supra* note 32.

[43] *State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993).

[44] *Id.* at 965, 503 N.W.2d at 566 (emphasis supplied).

[45] See, *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009); *State v. Weaver, supra* note 27.

[46] See, *State v. Erickson, supra* note 11; *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010); *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009); *State v. Sinica*, 277 Neb. 629, 764 N.W.2d 111 (2009); *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

the 1928 *McIntyre* decision have been consistent. The rule in a nonhomicide case is that a trial court must instruct on a lesser-included offense only if requested to do so and the evidence supports the giving of the lesser-included instruction.[47] However, a court may give a lesser-included instruction over a defendant's objection.[48] Thus, failure to instruct on lesser-included offenses in a nonhomicide case falls within the third part of the *Carleton* rule; because it does not "impliedly withhold from the jury some of the issues or elements proper for [its] consideration,"[49] it cannot be considered error if the defendant did not request the instruction. This rule is solely one of common law.

[8] But in a prosecution for murder, both the substance and the source of the rule are different. Neb. Rev. Stat. § 29-2027 (Reissue 2008) provides in relevant part: "In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter . . . ." This statute, although modified slightly over the years, has been in effect since the late 1800's. We have interpreted it to impose a mandatory rule that where murder is charged, a court is required to instruct the jury on all lesser degrees of criminal homicide for which there is proper evidence before the jury, whether requested to do so or not.[50]

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[47] See *State v. Pribil, supra* note 24. See, also, *State v. James, supra* note 28; *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Sotelo*, 197 Neb. 334, 248 N.W.2d 767 (1977); *State v. Bell*, 194 Neb. 554, 233 N.W.2d 920 (1975); *State v. Maxwell*, 193 Neb. 807, 229 N.W.2d 195 (1975); *State v. Warner*, 187 Neb. 335, 190 N.W.2d 786 (1971); *State v. Caha*, 184 Neb. 70, 165 N.W.2d 362 (1969); *Guerin v. State*, 138 Neb. 724, 295 N.W. 274 (1940); *Haynes v. State*, 137 Neb. 69, 288 N.W. 382 (1939); *McIntyre v. State, supra* note 32; *State v. Butler*, 10 Neb. App. 537, 634 N.W.2d 46 (2001); *State v. Britt*, 1 Neb. App. 245, 493 N.W.2d 631 (1992).

[48] See *State v. Pribil, supra* note 24.

[49] *Carleton v. State, supra* note 30, 43 Neb. at. 404, 61 N.W. at 709.

[50] See, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

Here, where the charge is attempted murder, we must decide whether to apply the common-law rule applicable to nonhomicide cases or the statutory rule applicable to murder cases. The answer is quite simple, as the plain language of § 29-2027 applies only to trials "for murder." Criminal attempt is a codified crime in Nebraska and is punished in a manner different from the fully accomplished crime.[51] Specific to this case, second degree murder is a Class IB felony codified at Neb. Rev. Stat. § 28-304 (Reissue 2008), while attempted second degree murder is a Class II felony codified at § 28-201. Had the Legislature meant § 29-2027 to apply to trials for *attempted* murder, it could have easily so provided. We therefore find the plain language of the statute applies only to murder trials.

We acknowledge that two prior cases appear to adopt a different interpretation of § 29-2027. In *State v. Al-Zubaidy*,[52] an appeal from a conviction of attempted first degree murder, we held that the trial court erred in not giving a lesser-included offense instruction on attempted second degree murder, despite the fact that the defendant had not requested the instruction. We did so in reliance on the rule stated in *State v. Rowe*[53] that where murder is charged, the court is required, without request, to charge on such lesser degrees of homicide as to which the evidence is properly applicable. *Rowe* was an appeal from a second degree murder conviction which we reversed because there was evidence that the killing resulted from a sudden quarrel, but the trial court failed to instruct on manslaughter. As we have noted above, a court's duty to instruct on lesser degrees of homicide supported by the evidence in a murder trial derives from § 29-2027. Our opinion in *Al-Zubaidy* did not recognize this distinction, nor did it explain how the statutory rule could apply in a trial for attempted murder.

[9] In *State v. Dixon*,[54] an appeal from a conviction for attempted first degree murder, we relied on *Al-Zubaidy* in

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[51] See Neb. Rev. Stat. § 28-201 (Cum. Supp. 2012).

[52] *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997).

[53] *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982).

[54] *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000).

concluding that the trial court erred in not instructing on attempted second degree murder despite the fact that the defendant had not requested this instruction. *Dixon* also relied on the principle that

> [i]t is the duty of a trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.[55]

But that principle is derived from the second part of the *Carleton* rule, and as we have discussed, failure to instruct on lesser-included offenses in a nonhomicide case is governed by the third part of the *Carleton* rule, which precludes a finding of error in the absence of a request for the instruction. We therefore conclude that our decisions in *Al-Zubaidy* and *Dixon* were incorrect on this point, and insofar as they hold that in a nonhomicide case, a trial court has a duty to instruct on lesser-included offenses in the absence of a request for such an instruction, we disapprove them.

Here, Smith did not request an instruction on attempted sudden quarrel manslaughter. Because he was charged with attempted murder, a nonhomicide charge, the district court had no duty to instruct on any lesser-included offenses in the absence of such a request. Smith has not preserved this issue for appellate review, and the Court of Appeals erred in relying on the court's sua sponte duty to instruct as a basis for remanding the cause for a new trial.

(c) Ineffective Assistance of Counsel

For the sake of completeness, we note that the Court of Appeals also addressed whether Smith's trial counsel was ineffective for failing to request an instruction on attempted sudden quarrel manslaughter. It concluded that his counsel could not have been deficient in failing to request the instruction, because at the time of the trial, the crime of attempted

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[55] *Id.* at 982, 614 N.W.2d at 294, citing *State v. Brown*, 258 Neb. 346, 603 N.W.2d 456 (1999).

voluntary manslaughter did not exist in Nebraska. The court reasoned that trial counsel could not have been ineffective "for not anticipating" how this court would rule in *Smith*.[56]

We agree with this rationale and holding. Therefore, because (1) the trial court had no duty to instruct on attempted sudden quarrel manslaughter in the absence of a request to do so and (2) Smith's trial counsel was not ineffective in failing to request such an instruction, we must conclude that Smith has presented no error which would entitle him to a new trial.

3. Prejudice and Plain Error

But notwithstanding this conclusion, we cannot ignore the fact that our decision in *Smith* brought about a significant change in the law after this case was tried and while it was pending on appeal. At the time this case was tried, voluntary manslaughter was an unintentional crime and the crime of attempted voluntary manslaughter did not exist.[57] There was thus no reason for Smith to request an instruction on attempted voluntary manslaughter, even though there was evidence of a sudden quarrel. Given the intervening change in the law, we conclude that Smith is entitled to a new trial.

[10] In *Griffith v. Kentucky*,[58] the U.S. Supreme Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." The Court reasoned that after it decides a new rule in a particular case, the "integrity of judicial review requires" that the new rule be applied "to all similar cases pending on direct review."[59] The Court further reasoned that "selective application of new rules violates the principle of treating similarly situated defendants the same."[60] The Court noted that the ideal

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[56] *State v. Smith, supra* note 1, 19 Neb. App. at 728, 811 N.W.2d at 738.

[57] See *State v. Jones, supra* note 4.

[58] *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). See, also, *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

[59] *Griffith v. Kentucky, supra* note 58, 479 U.S. at 323.

[60] *Id.*

of even-handed administration of justice would not be served if only the defendant in the case announcing the new rule could receive its benefit and other similarly situated defendants could not.

We applied these principles in *State v. Mata*.[61] There, we held that the new constitutional rule requiring a jury to determine aggravating factors in a capital sentencing proceeding announced by the U.S. Supreme Court in *Ring v. Arizona*[62] required resentencing of a defendant whose death sentence was pending on appeal at the time that *Ring* was decided, notwithstanding the fact that he had not raised at his sentencing hearing the substantive issue which was decided in *Ring*. Invoking the doctrine of plain error, we reasoned that the error was plainly evident from the record, that it affected a substantial right of the defendant, and that to ignore the error would "result in damage to the integrity, reputation, and fairness of the judicial process."[63] We agreed with the U.S. Supreme Court that "'where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be "plain" at the time of appellate consideration.'"[64]

[11] Although our decision in *Smith* did not announce a new constitutional rule, we conclude that the reasoning of *Griffith* and *Mata* applies. Plain error exists where there is error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[65] Accordingly, although our reasoning differs in some respects from that of the Court of Appeals, we agree with its determination that Smith

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[61] *State v. Mata*, 266 Neb. 668, 668 N.W.2d 448 (2003), *abrogated in part on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[62] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[63] *State v. Mata, supra* note 61, 266 Neb. at 699, 668 N.W.2d at 477.

[64] *Id.*, quoting *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997).

[65] *State v. Mata, supra* note 61.

is entitled to a new trial at which the jury can be instructed on the distinction between second degree murder and voluntary manslaughter under our holding in *Smith*[66] for the purpose of determining whether Smith committed the charged offense of attempted second degree murder.

We emphasize, however, that the Court of Appeals misinterpreted our opinion in *Smith* to require a step instruction under which the jury would consider the "alternative possibility" of voluntary manslaughter only if it acquitted the defendant of second degree murder.[67] Although voluntary manslaughter is a lesser degree of homicide, it is not a lesser-included offense of second degree murder under the elements test, because it is possible to commit second degree murder without committing voluntary manslaughter; one who intentionally kills another without premeditation and without the provocation of a sudden quarrel commits second degree murder, but does not simultaneously commit manslaughter. Necessarily implicit in the Court of Appeals' reference to a "step" instruction is that if a jury concludes a defendant killed another intentionally and without premeditation, thereby determining his guilt of second degree murder, it could never consider voluntary manslaughter. That is incorrect because under our holding in *Smith*, both second degree murder and voluntary manslaughter involve intentional killing; they are differentiated only by the presence or absence of the sudden quarrel provocation. If the provocation exists, it lessens the degree of the homicide from murder to manslaughter. Thus, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a jury must be given the option of convicting of either second degree murder or voluntary manslaughter depending upon its resolution of the fact issue regarding provocation.

4. SELF-DEFENSE

[12] Because we are reversing Smith's conviction and remanding for a new trial, it is not necessary that we resolve

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[66] See *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

[67] *State v. Smith, supra* note 1, 19 Neb. App. at 722, 811 N.W.2d at 734.

his argument that the Court of Appeals erred in finding he was not entitled to a self-defense instruction in the first trial. However, an appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings.[68]

Obviously, we cannot predict whether Smith will assert self-defense at his second trial or what evidence there might be to support this defense. But we reject his argument that because the evidence at his first trial was sufficient to raise an inference of sudden quarrel, it was necessarily sufficient to support an inference of self-defense. Self-defense is a statutorily defined affirmative defense in Nebraska.[69] Section 28-1409 provides:

> [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> . . . .
>
> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take . . . .

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[68] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011); *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[69] Neb. Rev. Stat. § 28-1409 (Reissue 2008); *State v. Iromuanya*, 272 Neb. 178, 719 N.W.2d 263 (2006).

Deadly force is force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm.[70] Purposely firing a weapon in the direction of another person constitutes deadly force.[71] To successfully assert a claim of self-defense, one must have a reasonable and good faith belief in the necessity of using such force.[72] In addition, the force used in self-defense must be immediately necessary and must be justified under the circumstances.[73]

The Court of Appeals found there was "no evidence that Smith had a reasonable and good faith belief that he needed to protect himself against death or serious bodily harm, which would justify his use of deadly force."[74] It noted that after Helmstadter fired shots in the air, "the fight broke up," and Smith then "grabbed" the gun and fired at Marcus, "who was running away from him."[75] It also noted Smith had two opportunities to retreat because he could have chosen not to follow Marcus to Save-Mart and/or could have chosen to get in the vehicle and leave after the fight ended.

In his petition for further review, Smith contends that there was evidence that the fight did not end after Helmstadter fired the shots in the air. Specifically, he points to the testimony of a witness who said that after the shots, the fighting "wasn't as intense." Smith argues that on this evidence, the jury "could easily have found [that] he was attempting to protect himself from a severe and perhaps life-threatening beating, and met that threat with force that was immediately necessary for that self-protection."[76] He further argues that the fact that the Court of Appeals found sufficient evidence of a sudden quarrel at the

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[70] Neb. Rev. Stat. § 28-1406(3) (Reissue 2008).

[71] *State v. Iromuanya, supra* note 69.

[72] *Id.*

[73] *Id.*

[74] *State v. Smith, supra* note 1, 19 Neb. App. at 729, 811 N.W.2d at 738.

[75] *Id.*

[76] Memorandum brief for appellant in support of petition for further review at 8.

time of the shooting "undermines its finding that [Smith] could have retreated rather than fire the weapon."[77]

We disagree. Even if Smith was *provoked* by a sudden quarrel to fire the shot which hit Marcus, it does not necessarily follow that he was *justified* in using deadly force by a belief that it was necessary to protect himself against death or serious bodily harm. We agree with the Court of Appeals that on this record, there is no evidence that Smith had a reasonable and good faith belief that he needed to protect himself against death or serious bodily harm at the moment that he fired the shots. Whether he was provoked by a sudden quarrel to fire the shots is a separate and distinct inquiry which is not dependent upon a reasonable and good faith belief in the necessity of using deadly force for self-protection.

V. CONCLUSION

For the reasons discussed, we affirm the judgment of the Nebraska Court of Appeals which affirmed in part and in part reversed the judgment of the district court and remanded the cause for a new trial.

AFFIRMED.

CASSEL, J., not participating.

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[77] *Id.* at 9.

MIKE BLAKELY, APPELLANT, V. LANCASTER COUNTY, NEBRASKA, AND THE LANCASTER COUNTY PERSONNEL POLICY BOARD, APPELLEES.

___ N.W.2d ___

Filed November 16, 2012. No. S-11-686.

1. **Administrative Law: Words and Phrases.** An administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking.
2. **Civil Service: Administrative Law: Words and Phrases.** Under the County Civil Service Act, Neb. Rev. Stat. §§ 23-2517 to 23-2533 (Reissue 2012), a "personnel policy board" is an administrative agency performing quasi-judicial functions when it reviews a grievance of, or disciplinary action against, a classified service employee.