Case No. A-23-801

IN THE NEBRASKA COURT OF APPEALS

IN THE INTEREST OF STEVEN V.,

STATE OF NEBRASKA, Appellee
STEVEN VIVAR-AMAYA, Appellant

APPEAL FROM THE SEPARATE JUVENILE COURT
FOR DOUGLAS COUNTY, NEBRASKA

Honorable Candice J. Novak
Juvenile Court Judge

BRIEF OF APPELLEE

Prepared and Submitted by:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND COURT RULES CITED

CASES CITED

CONSTITUTIONAL PROVISIONS CITED

TREATISES CITED

STATEMENT OF THE BASIS OF APPELLATE COURT JURISDICTION

The Appellant has provided a statement as to the basis of the jurisdiction of the appellate court as required by certain Nebraska statutes. The State of Nebraska would add that the jurisdiction of this Court is invoked per statutes, which provide in relevant part:

> Any final order or judgment entered by a juvenile court may be appealed to the Court of Appeals in the same manner as an appeal from the district court to the Court of Appeals. The appellate court shall conduct its review in an expedited manner and shall render the judgment and write its opinion, if any, as speedily as possible.

Neb. Rev. Stat. § 43-2,106.01.

> Actions before the juvenile court are determined to be: A 'special proceeding' for appellate purposes . . . To be appealable, the order in the special proceeding must affect a substantial right . . . .

In re Interest of Tabatha R., 255 Neb. 818, 827, 587 N.W.2d 109, 116 (1998).

The judgment of the Separate Juvenile Court of Douglas County, Nebraska is a final order as defined above. The order dated September 27th, 2023, effected Appellant's liberty, a substantial right. (T37–39). This appeal was properly filed herein thus conferring jurisdiction upon this Court.

STATEMENT OF THE CASE

Nature of the Case:

This appeal concerns Appellant, a juvenile born on August 27th, 2009. (E1, p. 1). The State of Nebraska filed a petition on July 12th, 2022, alleging Appellant came within Neb. Rev. Stat. § 43-247(2) by reason of being a juvenile having committed an act which would constitute a felony under the laws of Nebraska. (T1). Count I of the petition specifically alleged that Appellant, purported to be nineteen years of age, did subject A.C.G., a juvenile under the age of twelve, to sexual penetration in violation of Neb. Rev. Stat. § 28-319.01(1)(a), a Class IB Felony. (T1).

Prior to adjudication, Appellant filed a motion to dismiss the petition pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief could be granted. (T31). The motion to dismiss was argued before the juvenile court on the date of adjudication. (T34). During argument, the State orally motioned the juvenile court for leave to amend the petition to reflect the elements of Neb. Rev. Stat. § 28-319, or, in the alternative, to amend the petition to conform with the evidence to be adduced at the adjudication pursuant to Neb. Ct. R. Pldg. § 6-1115(b). (6:11–15). The juvenile court took all motions under advisement and proceeded to the adjudicative phase of the hearing. (T34). At the close of evidence, the State renewed its motion to amend the petition to conform to the elements of Neb. Rev. Stat. § 28-319 or, alternatively, Neb. Rev. Stat. § 29-320. (211:5–13).

The Issues Tried to the Court:

(1) Whether Appellant could be adjudicated under Neb. Rev. Stat. § 28-319.01(1)(a) as alleged in the original petition.

(2) Whether Appellant's motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) should be granted.

(3) Whether the State's motion for leave to amend the petition to reflect the elements of Neb. Rev. Stat. § 28-319 should be granted.

(4) Whether the State's motion to amend the petition to conform to the evidence adduced at adjudication pursuant to Neb. Ct. R. Pldg. § 6-1115(b) should be granted.

(5) Whether Appellant violated Neb. Rev. Stat. § 28-319(1)(b) beyond a reasonable doubt and, therefore, came within the meaning of Neb. Rev. Stat. § 43-247(2).

How Issues Were Decided:

The juvenile court took the State's oral motion for leave to amend the petition and Appellant's motion to dismiss under advisement. (6:16–18). In an order dated September 27th, 2023, the court overruled Appellant's motion to dismiss. (T37). The court further granted the State's motion to amend the petition to conform to the evidence presented at the adjudication pursuant to Neb. Ct. R. Pldg. § 6-1115(b). (T37). The court found that Appellant, a juvenile, subjected A.C.G. to sexual penetration and that Appellant knew or should have known that A.C.G. was mentally or physically incapable of resisting or appraising the nature of Appellant's conduct. (T38). The court concluded this violation of Neb. Rev. Stat. § 28-319(1)(b) was proven beyond a reasonable doubt, and the petition was amended to reflect the offense. (T38).

Scope of Review:

While an appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court's findings, when the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest Gunner B.*, 312 Neb. 697, 700, 980 N.W.2d 863, 866 (2022).

Subject matter jurisdiction is a question of law, and an appellate court reviews questions of law independently of the lower court's

conclusion. *Bleich v. Bleich*, 312 Neb. 962, 967, 981 N.W.2d 801, 806 (2022).

Whether procedures comport with due process presents a question of law that an appellate court reviews independently of a lower court. *In re Interest of Jordan B.*, 300 Neb. 355, 362, 913 N.W.2d 477, 483 (2018).

PROPOSITIONS OF LAW

I.

While an appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court's findings, when evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest Gunner B.*, 312 Neb. 697, 700, 980 N.W.2d 863, 866 (2022).

II.

Subject matter jurisdiction is the power of a court to determine a case and to deal with the general subjects involved. *Sanders v. Frakes*, 295 Neb. 374, 381, 888 N.W.2d 514, 521 (2016).

III.

A court always has the inherent ability to determine whether it has subject matter jurisdiction over a particular case. *Carlson v. Allianz Versicherungs-Aktiengesellschaft*, 287 Neb. 628, 638, 844 N.W.2d 264, 272 (2014).

IV.

A court may conform the pleadings to the facts proved when such amendment does not change substantially the claim or defense. A decision to amend the pleadings to conform to evidence is left to the

discretion of the trial court and will not be disturbed on appeal absent prejudicial error. *In re Interest Joshua M.*, 251 Neb. 614, 634, 558 N.W.2d 548, 562 (1997); Neb. Ct. R. Pldg. § 6-1115(b).

V.

The key inquiry for determining whether an issue was tried by implied consent is whether the parties recognized that an issue not presented by the pleadings entered the case at trial. Consent may be implied if during the trial a party acquiesces or fails to object to the introduction of evidence that relates only to an unpled issue. *Schmid v. Simmons*, 311 Neb. 48, 66, 970 N.W.2d 735, 749 (2022).

VI.

Prejudicial error occurs when a pleading is allowed to be amended and the amendment changes the issues and affects the quantum of proof as to any material fact. *In re Interest Joshua M.*, 251 Neb. 614, 634, 558 N.W.2d 548, 562 (1997).

VII.

Individuals have a constitutional guarantee against deprivations of liberty without due process of law. U.S. Const. amend. XIV; Neb. Const. art. I, § 3.

VIII.

Gross violations of an individual's due process rights constitute plain error and, although not specifically asserted, may be raised by an appellate court *sua sponte*. *In re Interest of Jordan B.*, 300 Neb. 355, 362–63, 913 N.W.2d 477, 483 (2018).

IX.

A juvenile court plainly errs by adjudicating a juvenile on a law violation that was not pled and was not a lesser-included offense of the crime pled. *In re Interest of Jordan B.*, 300 Neb. 355, 636, 913 N.W.2d 477, 483 (2018).

X.

Sexual penetration encompasses any intrusion of an offender's body part into the anal openings of a victim's body which is not for medical or law enforcement purposes. Sexual penetration does not require penile emission. Neb. Rev. Stat. § 28-318(6).

XI.

To prove lack-of-capacity sexual assault on the basis of mental impairment, the State must prove that the victim's impairment was so severe that he or she was mentally incapable of resisting or mentally incapable of appraising the nature of the sexual conduct. *In re Gunner B.*, 312 Neb. 697, 701, 980 N.W.2d 863, 866 (2022).

XII.

A sexual assault victim's young age combined with an offender's knowledge of that age is sufficient evidence to prove impairment so severe that the victim was incapable of resisting or appraising the nature of sexual conduct beyond a reasonable doubt. *In re Gunner B.*, 312 Neb. 697, 702, 980 N.W.2d 863, 867 (2022).

STATEMENT OF FACTS

Procedural History:

The State of Nebraska filed a petition on July 12th, 2022, alleging that Appellant came within the meaning of Neb. Rev. Stat. § 43-247(2) by reason of being a juvenile having committed an act which would constitute a felony under the laws of Nebraska. (T1). The State

alleged in Count I of the petition that Appellant, purported to be nineteen years of age, did subject A.C.G., a juvenile under the age of twelve, to sexual penetration in violation of Neb. Rev. Stat. § 28-319.01(1)(a), a Class IB Felony. (T1). On or about August 23, 2022, the Appellant entered a written denial as to the allegations in the petition. (T6–7).

The matter was set for adjudication to occur on June 12th, 2023. (T29). Four days prior to the adjudication hearing, Appellant filed a motion pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) contending the July 12th, 2022, petition failed to state a claim upon which relief could be granted. (T31). The motion, in pertinent part, argued Appellant could not be found to be within the meaning of Neb. Rev. Stat. § 43-247(2) based on a violation of Neb. Rev. Stat. § 28-319.01(1)(a) since a material element of said offense is that the accused be at least nineteen years of age. (T31).

Arguments regarding Appellant's motion to dismiss were heard before the adjudication on June 12th, 2023. (T34). The State orally motioned the juvenile court for leave to amend the petition to conform to Neb. Rev. Stat. § 28-319 contending no prejudice would befall the Appellant. (5:20–25). Alternatively, the State motioned the juvenile court to amend the petition to conform with the evidence to be adduced at the adjudication. (6:11–15). The juvenile court took all motions under advisement and proceeded to the adjudicative phase of the hearing. (6:16–18; T34).

Adjudication began on June 12th, 2023, but, due to time constraints, the juvenile court continued the matter and set the next hearing for June 23rd, 2023. (T34–35). During closing arguments on June 23rd, 2023, the State renewed its motion to amend the petition to conform with the evidence presented at the adjudication. (211:5–7). The State argued that evidence adduced at the adjudication proved, beyond a reasonable doubt, that Appellant had committed sexual assault in the first degree pursuant to Neb. Rev. Stat. § 28-319 or, in

the alterative, sexual assault in the third degree under Neb. Rev. Stat. § 28-320. (211:8-13).

On September 27th, 2023, the juvenile court entered an order overruling Appellant's motion to dismiss and granting the State's motion for the petition to conform to the evidence. (T37). In light of the evidence presented at the adjudication, the juvenile court concluded that the State had proven beyond a reasonable doubt that Appellant violated Neb. Rev. Stat. § 28-319(1)(b). (T38). Appellant was adjudged to be within the meaning of Neb. Rev. Stat. § 43-247(2). (T38). Appellant appeals from this decision.

Factual History:

Prior to the adjudication hearing, the juvenile court heard arguments relating to Appellant's motion to dismiss. (4:24–25). The juvenile court was asked to take judicial notice of a file which purportedly contained evidence to confirm Appellant's age. (5:5–8). The State objected to the court taking judicial notice of the file as no certified copies of the documents had been provided. (5:11–16). The State also asked the court for leave to amend the petition to conform with Neb. Rev. Stat. § 28-319. (5:20–22). Alternatively, the State requested that the court amend the petition to conform with the evidence that would be adduced at adjudication. (6:11–15). Appellant objected to both of the State's motions arguing amendment of the pleadings would inject new issues into the case. (7:4–6). However, Appellant's counsel made clear that he was prepared to move forward to adjudication. (7:23–24). The State responded by indicating it was able to proceed and believed hearing evidence would rectify the situation. (8:7–8, 15–17). The court took Appellant's motion to dismiss under advisement and proceeded to adjudication. (8:18–22).

Prior to calling its first witness, the State offered Exhibit 1 which was a certified copy of Appellant's birth certificate, and it was received by the court without objection. (9:1–5, 17). Exhibit 1 lists

Appellant's date of birth as August 27th, 2009, making him thirteen years old at the time of adjudication. (E1, p. 1).

The State then called the victim, A.C.G., as its first witness. (12:7). A.C.G. was eight years of age at the time of his testimony but was seven at the time of the incident. (13:7; 32:21). A.C.G. stated that he had lived in Omaha for around five years. (14:25). A.C.G. testified he was familiar with Appellant who had frequently come to his house in the past. (15:3, 17). A.C.G. indicated that on one particular day, he and Appellant were alone together in his mother's room. (16:12–16). During this time together, A.C.G. stated that Appellant showed him images of naked boys and girls on a phone. (16:18–23). A.C.G. reiterated that the individuals pictured on the phone were nude and had no clothes. (16:24–25; 17:1).

A.C.G. then testified that Appellant "tried to have sex" with him. (17:10). A.C.G. explained that Appellant touched him with his arms. (17:15–20). Further, A.C.G. testified that Appellant's "huevos" or "privacy" touched the "inside" of his buttocks. (19:2–4, 16–18). A.C.G. identified his "privacy" and "huevos" as the part of the body that is used to urinate. (17:24–25; 18:1–6). A.C.G. stated that he had pants on prior to the encounter, but Appellant pulled them down. (19:7). A.C.G. recounted that he was in pain and felt "scared" during the encounter. (20:3, 8). A.C.G. next testified that he attempted to leave the room, but he got "nervous" and tripped. (20:17–24). A.C.G. also testified that Appellant tried to stop him from leaving the room. (21:4–6).

A.C.G. then testified that his mother entered the room, and Appellant stopped "doing the things that he was doing." (23:12, 19). A.C.G. explained that Appellant left the room, went to a nearby bathroom, and deleted the videos depicting nude individuals. (24:1–2). A.C.G. also testified that Appellant was struck by his own mother. (24:2–3). Shortly thereafter, Appellant left the home. (24:11). A.C.G. stated that his mother took him to the hospital. (24:11–12). A.C.G. reiterated that he attempted to leave the room but tripped. (24:25; 25:3–5).

On cross-examination, A.C.G. stated that Appellant and his family had come over to the house on multiple occasions. (27:3–5, 14–16). A.C.G. also indicated that he and Appellant used to be friends before "it all snapped." (27:19–20). A.C.G. explained that he had a mother, two sisters, and a brother that lived at home with him. (28:4–7, 16). On the day of the incident, only A.C.G.'s mother and two sisters were home. (28:25). A.C.G. also testified that Appellant had a mother and three siblings who were all present on the date in question. (29:1–14).

A.C.G. continued his testimony on cross-examination by stating he, Appellant, and the rest of the children were playing hide-and-seek and tag outside prior to the incident. (30:2–5). However, A.C.G. stopped playing after he was tripped by one of Appellant's brothers. (30:11–14). A.C.G. testified that it was beginning to get dark out when he entered his home. (31:19). At some point, A.C.G. entered his mother's room and began to watch cartoons on his tablet while lying on the bed. (33:1–3; 34:15). A.C.G. indicated there was brief moment where he was alone in the room. (33:4–7). However, A.C.G. testified that Appellant eventually entered the room, put a movie on the television, and sat on the corner of the bed. (33:10–13; 34:17–18). A.C.G. went on to describe how Appellant showed him a short, two second video on his phone. (35:3–6, 15). A.C.G. stated that, after viewing the video, he "felt like something was going to happen" and believed Appellant was trying to "prank" him. (35:24–25; 36:1). A.C.G. stated that the door to the room was shut but not locked. (36:22; 37:1–2). A.C.G. did not recall saying anything to Appellant while the two were in the room. (39:21–24).

A.C.G. then recounted the events of the sexual assault. (36:11–13). A.C.G. testified that Appellant tried to touch him and eventually grabbed his arm. (38:1; 40:7–9). A.C.G. wanted to move away from Appellant, but he was afraid of jumping off the bed for fear of being bitten by a dog located under the bed. (38:7–10; 58:19–22). A.C.G. testified that Appellant forcibly pulled down his pants and "put his

balls in [A.C.G.'s] butt." (42:7; 43:12). A.C.G. also indicated that Appellant's "privacy" was "soft first," but it got "harder and hard" upon entering his buttocks. (60:23–25; 61:1). A.C.G. further stated he wanted to stop Appellant by kicking him but was afraid he may get in trouble. (43:10–22; 59:13–14). A.C.G. testified the assault lasted anywhere from one to two minutes. (44:16–17). A.C.G. said that Appellant stopped touching him before A.C.G.'s mother entered the room, but the two were on the bed when she opened the door. (41:1–4, 24–25; 42:1). A.C.G. stated when his mother entered the room, he pulled up his pants, and Appellant left the room "running" and went to the bathroom to delete videos off his phone. (42:15–16, 20–22). A.C.G. then informed his mother that Appellant was touching him. (45:19).

The State then called the victim's mother, Veronica Gochez. (63:19). Gochez testified that around April 20th, 2022, an incident involving Appellant occurred at her home. (66:2–8). On the date in question, Appellant's mother had called Gochez to gift a piece of cheese from Salvador. (67:1–2). Appellant, his mother, and his siblings came over to the house. (66:19–20). Gochez described her relationship with Appellant's family at that time as cordial. (67:13–14).

Gochez stated that, prior to finding A.C.G. and Appellant alone in her bedroom, she sat at the dining room table with Appellant's mother. (68:2–5). Gochez explained that she saw A.C.G. and Appellant enter the home after playing outside. (70:13–17). Gochez instructed A.C.G. to go to her room with his tablet after an argument broke out among the children while they were playing outside. (70:19–25). Gochez stated that Appellant briefly sat on the couch in the living room. (90:4–6). Gochez indicated that she eventually saw Appellant enter her bedroom behind A.C.G. (71:5). After seeing the pair enter her room, Gochez testified that she sat at the dining room table for approximately fifteen minutes. (71:16). After that time, Gochez thought it was odd the boys had not gone back outside, so she got up from the dining room table, walked to her room, opened the door, and saw A.C.G. on the bed with his pants down. (73:21–22; 91:12–13).

Gochez stated she screamed after opening the door to her room. (92:23). Gochez further testified that Appellant stood up when she opened the door and passed her as he left the room. (74:1, 8–9; 76:6–9). Gochez indicated that Appellant had a cell phone in his hands as he ran past her. (76:25; 95:16–17). Gochez stated that she saw Appellant's mother "slap" Appellant after leaving the room. (83:1).

Gochez stated that A.C.G. looked "scared" and was crying after she entered the room. (77:17; 78:25). As Gochez pulled up A.C.G.'s pants, A.C.G. said that Appellant told him the two of them "were going to have sex." (114:6). Gochez heard Appellant's mother scream at Appellant, and Gochez subsequently asked everyone to leave the home. (97:14–15, 19). Gochez then took A.C.G. to Children's Hospital. (80:1). On the way to the hospital, Gochez testified that she asked A.C.G. if Appellant did "something wrong to him," and A.C.G. responded by saying Appellant "put his private thing on his butt." (101:3–4; 102:6–8). Gochez also testified that A.C.G. told her that Appellant was showing him inappropriate videos and that Appellant prevented him from leaving the room. (102:23–24; 103:1–2). Gochez elaborated by stating A.C.G. told her that the videos Appellant showed him contained several people engaging in sex. (103:7–8). The day after the initial hospital visit, Gochez testified that she took A.C.G. to Project Harmony. (105:10–16).

The State's final witness was Project Harmony forensic interviewer Amanda Kuszak. (118:1–2, 25; 119:9). Kuszak testified that she conducted a forensic interview of A.C.G. on April 20th, 2022, which was a day after the incident with Appellant. (124:17; 130:7–8). Kuszak stated that A.C.G. was seven years old at the time of the forensic interview. (125:2). Kuszak explained that forensic interviews are not employed to substantiate allegations of abuse. (120:18). Instead, forensic interviews are used to gather information in a non-leading manner to assist investigators and medical professionals. (120:20–23).

The State offered a recording of A.C.G.'s forensic interview marked as Exhibit 2 into evidence. (129:1–6). Exhibit 2 was received by the court without objection. (129:4–6). Exhibit 2 begins with Kuszak building rapport with A.C.G. (E2, 129; Vol.2, 04:05:20–04:11:45). A.C.G. then stated he had gone to the doctor the day before. (E2, 129; Vol.2, 04:12:04). When asked about this visit by Kuszak, A.C.G. indicated that his mother's friend came over, and he began to act "weird." (E2, 129; Vol.2, 04:19:39–04:20:14). A.C.G. went on to describe how Appellant entered Gochez's bedroom while A.C.G. was in there playing on his tablet. (E2, 129; Vol.2, 04:21:28–04:21:55). When A.C.G. was asked about what happened after Appellant entered the room, he stated he could not remember. (E2, 129; Vol.2, 04:22:08–04:22:22). A.C.G. clarified that he did, in fact, remember, but he did not want to discuss the matter because he thought it was best to "let it go." (E2, 129; Vol.2, 04:22:08–04:22:40). A.C.G. then told Kuszak that Appellant showed him a video of girls and boys "making out." (E2, 129; Vol.2, 04:24:26–04:24:38). After showing this video, A.C.G. explained that Appellant continued to act "weird" which scared A.C.G. (E2, 129; Vol.2, 04:24:45–04:24:56). A.C.G. described how Appellant put his penis in A.C.G.'s buttocks. (E2, 129; Vol.2, 04:25:00–04:25:10). A.C.G. indicated that Appellant also "made out" with him, but A.C.G. described Appellant's act of "making out" as putting his penis inside A.C.G.'s buttocks. (E2, 129; Vol.2, 04:26:15–04:26:25). A.C.G. also told Kuszak that Appellant locked the door and touched A.C.G.'s penis with his hands. (E2, 129; Vol.2, 04:28:20–04:29:41). A.C.G. explained that he did not notice anything about Appellant's penis, nor did he remember any sort of penile discharge. (E2, 129; Vol.2, 04:48:58–04:49:30).

Kuszak stated on cross-examination that A.C.G. did not disclose the sexual assault until more "focused" questions were asked. (134:22–23). However, she testified that such questions do not invalidate a disclosure. (137:10–14). At the conclusion of Kuszak's testimony, the State rested its case. (137:20).

The Appellant's first witness was his mother, Evelyn Amaya. (138:5). Amaya stated that she has known Gochez for nine years and met her through Gochez's mother. (140:3–7). Amaya testified that prior to the incident, she and Gochez were good friends and visited each other twice a week. (140:12–15). Prior the April 19th ordeal, Amaya indicated there had been no concerns about A.C.G. and Appellant's interactions. (143:17–20).

Amaya testified that she arrived at Gochez's home at 3:40 P.M. on April 19th, 2022. (143:21–23; 144:14–15). Amaya explained that she sat at the dining room table with Gochez while the children played outside. (146:8–15). At a certain point, Amaya testified that A.C.G. and Appellant entered the home and walked into Gochez's bedroom at the same time. (151:22–25; 152:16–19, 24–25; 153:1). Amaya stated that about three minutes after A.C.G. and Appellant entered the bedroom, Gochez got up from the dining room table and went to check on them. (153:8–16). After Gochez entered the bedroom, Amaya testified that she heard Gochez say A.C.G.'s pant zipper was down. (154:11–14). Amaya explained that she could see into the bedroom and neither Appellant nor A.C.G. appeared to be undressed. (155:2–18).

Amaya then called Appellant out of the bedroom and questioned him about the situation. (156:23). Appellant told Amaya that all he had done was show A.C.G. a TikTok video. (157:1–3). Amaya testified that she chastised Appellant, reminding him that he was not allowed to enter bedrooms while visiting other people's homes. (157:8–11). Amaya admitted that she hit Appellant in the mouth so hard that his nose began to bleed. (157:14–17). Amaya indicated that she struck Appellant because he was not allowed in other people's bedrooms. (157:18–20). Amaya and her family left Gochez's home shortly thereafter, and Amaya did not learn of the sexual assault allegations until after leaving. (176:10–25; 177:1–4).

On cross-examination, Amaya testified that she was protective of her children and would take actions to keep them from harm. (169:12–18). Further, Amaya stated that Appellant is not allowed into

other people's bedrooms because he "already had problems like that." (171:23–24). Amaya explained that all of her children are barred from entering bedrooms but later admitted that on the day in question, she permitted some of Appellant's siblings to enter a bedroom to look at a cat. (174:4–9).

Appellant was called as the last witness at the adjudication. (181:11–14). Appellant began his testimony by stating he had not had any problems with A.C.G. prior to April 19th, 2022, and described A.C.G. as a friend. (182:25; 183:1–7). On the day in question, Appellant explained that he was playing basketball outside with A.C.G. before the pair went to Gochez's room to watch the movie Happy Feet 2. (184:22–25; 185:9–10; 187:16–18; 188:2–3). Appellant stated that both he and A.C.G. were on the bed together. (188:9–13). Appellant explained that, at a certain point, he began to watch TikTok videos on his phone. (189:16–24). Appellant testified that he showed A.C.G. a video of a girl in a bikini exiting a swimming pool. (191:14–25; 192:1). After showing A.C.G. the video, Appellant asserted that A.C.G. pulled down his zipper and began "humping" a pillow. (192:16–19).

Appellant then stated that Gochez entered the bedroom shortly thereafter. (194:4–6). Appellant testified that Amaya, his mother, called him out of the bedroom and hit him in the mouth so hard that his nose began to bleed. (195:7–10; 196:21; 197:1–11). Appellant indicated Amaya struck him because he was not allowed to go into other people's rooms. (197:3–4). Appellant concluded direct examination by denying any sexual contact with or penetration of A.C.G. (200:1–17). On cross-examination, Appellant admitted that the video he showed A.C.G. was not appropriate because A.C.G. was "little" and, therefore, "not supposed to know that." (206:16–22). Appellant could not recall why he showed A.C.G. the sexual TikTok video. (206:23–24).

After Appellant's testimony, closing arguments were heard by the juvenile court. The State renewed its motion to amend the petition to conform the evidence presented and asked the juvenile court to find

the elements of either Neb. Rev. Stat. § 28-319 or § 28-320 to have been proven by evidence beyond a reasonable doubt. (211:5–13). Appellant reasserted his motion to dismiss. (213:18–25). The matter was taken under advisement, and the adjudication hearing concluded.

SUMMARY OF THE ARGUMENT

The juvenile court did not err in taking Appellant's motion to dismiss under advisement. Courts have the inherent authority to determine whether they have subject matter jurisdiction over a particular matter. Proceeding to adjudication gave the juvenile court an opportunity to hear evidence and determine whether it had jurisdiction over Appellant. The juvenile court's amendment of the petition to conform to the elements of Neb. Rev. Stat. § 28-319(1)(b) brought Appellant within the jurisdiction of the court pursuant to Neb. Rev. Stat. § 43-247(2). The juvenile court did not abuse its discretion in granting the State's motion to amend the petition to conform to the evidence adduced at adjudication. The allowance of such an amendment is left to the sole discretion of a trial court, and its decision should not be reversed on appeal absent prejudicial error. No prejudicial error resulted in this case since Neb. Rev. Stat. § 28-319(1)(b) and § 28-319.01(1)(a) are substantially similar and relate to the same subject matter. Appellant also fully participated in the adjudication hearing and had a chance to rebut any evidence the State presented. Appellant's constitutional right to due process was not violated because he had notice the State was seeking to amend the petition prior to the adjudication. Lastly, the State proved the elements of Neb. Rev. Stat. § 28-319(1)(b) with evidence beyond a reasonable doubt.

ARGUMENT

I. THE JUVENILE COURT HAD SUBJECT MATTER JURISDICTION TO ADJUDICATE APPELLANT.

Subject matter jurisdiction is the power of a court to determine a case and to deal with the general subjects involved. *Sanders v. Frakes*, 295 Neb. 374, 381, 888 N.W.2d 514, 521 (2016). As courts of limited jurisdiction, a juvenile court only has such authority as conferred on it by statute. *In re Interest of Jorge O.*, 280 Neb. 411, 414, 786 N.W.2d 343, 346 (2010). It is axiomatic that no court has the power to render judgment where it lacks subject matter jurisdiction. *See Sanders*, 295 Neb. at 382–83, 888 N.W.2d at 522. Any judgment rendered by a court lacking subject matter jurisdiction is void. *Id.* at 382–83, 888 N.W.2d at 522.

Appellant contends the juvenile court erred in denying his motion to dismiss for failure to state a claim. Appellant argues that his motion should have been granted since the State's original petition alleged a violation of Neb. Rev. Stat. § 28-319.01(1)(a) which, as a material element, requires proof the offender was at least nineteen years of age at the time of the offense. Due to this age requirement, Appellant believes the juvenile court did not have subject matter jurisdiction to adjudicate him because Neb. Rev. Stat. § 43-246.01(1)(d) only extends jurisdiction to juveniles who are under fourteen years of age at the time of an offense and when the offense constitutes a felony under the laws of Nebraska.

However, Appellant's argument overlooks two important legal principles. First, in Nebraska, a court always has the inherent ability to determine whether it has subject matter jurisdiction over a particular case. *Carlson v. Allianz Versicherungs-Aktiengesellschaft*, 287 Neb. 628, 638, 844 N.W.2d 264, 272 (2014). It was proper for the juvenile court to take Appellant's motion to dismiss under advisement and proceed to adjudication. Proceeding to adjudication ensured that the court had the opportunity to hear evidence and determine whether

it had subject matter jurisdiction over the case, especially since the State had orally motioned the court to amend the petition to conform to the evidence produced. (6:11–15). This was well within the juvenile court's discretion. *See Carlson*, 287 Neb. at 638, 844 N.W.2d at 272; Neb. Ct. R. Pldg. § 6-1115(b).

Second, Neb. Ct. R. Pldg. § 6-1115(b) empowers courts to amend the pleadings to conform to the evidence adduced at trial. The State orally motioned the juvenile court to amend the petition to conform with the evidence prior to adjudication and during closing arguments. (6:11–15; 211:5–7). Specifically, the State asked for the petition to be amended to reflect the elements of either Neb. Rev. Stat. § 28-319 or § 28-320. (211:5–7). Pursuant to the Nebraska Supreme Court Rules, this motion can be made by "any party at any time" and should be granted "when the presentation of the merits of the action will be subserved." Neb. Ct. R. Pldg. § 6-1115(b). Here, the State made such a motion, and the juvenile court—within the discretion afforded under Neb. Ct. R. Pldg. § 6-1115(b)—determined that the evidence adduced at trial showed Appellant violated Neb. Rev. Stat. § 28-319(1)(b) beyond a reasonable doubt. (T38).

Since Appellant was adjudicated under Neb. Rev. Stat. § 28-319(1)(b), he is within the meaning of Neb. Rev. Stat. 43-247(2). Thus, the juvenile court had proper subject-matter jurisdiction over the matter. The State's motion to amend the pleadings to conform to the evidence cured any jurisdictional defect. Appellant appears to admit as such in his brief. *See* Brief for Appellant, 20.

For these reasons, the juvenile court did not lack subject matter jurisdiction over Appellant. In Nebraska, courts always have the inherent power to determine their jurisdiction over a matter. It was not error for the juvenile court to take Appellant's motion to dismiss under advisement and to proceed to adjudication. Further, pursuant to Neb. Ct. R. Pldg. § 6-1115(b), courts are empowered to amend the pleadings to conform to the evidence adduced at trial. The court amended the petition to reflect the elements of Neb. Rev. Stat. § 28-

319(1)(b). This amendment brought Appellant within the meaning of Neb. Rev. Stat. § 43-247(2). Thus, the juvenile court had proper subject matter jurisdiction over Appellant, and the juvenile court's order should be affirmed.

II. THE JUVENILE COURT DID NOT ERR IN GRANTING THE STATE'S MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE.

The State argues that the issue of Appellant's knowledge of A.C.G.'s mental or physical incapability of appraising or resisting Appellant's sexual conduct was tried by the implied consent of the parties. Even if the issue was not tried by Appellant's implied consent, the trial court's amendment of the pleadings to conform to the elements of Neb. Rev. Stat. § 28-319(1)(b) was not prejudicial error. Lastly, the State asserts the juvenile court's amendment of the petition did not violate Appellant's due process rights.

Pursuant to Neb. Ct. R. Pldg. § 6-1115(b), a court may conform a petition to the evidence adduced at adjudication when such amendment does not substantially change the claim or defense. *In re Interest Joshua M.*, 251 Neb. 614, 634, 558 N.W.2d 548, 562 (1997). This decision is entrusted to a trial court and will not be disturbed on appeal absent prejudicial error. *Id.* at 634, 558 N.W.2d at 562. Prejudicial error occurs when the amendment changes the issues and affects the amount of proof as to any material fact. *Id.* at 634, 558 N.W.2d at 562. The Nebraska Supreme Court Rules state, in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment . . . may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the results of the trial of these issues.

Neb. Ct. R. Pldg. § 6-1115(b). Even if a party objects to evidence at trial on the grounds that it is not within the issues framed by the pleadings, the Nebraska Supreme Court Rules still empower a court to amend the pleadings when "the presentation of the merits of the action will be subserved" and the objecting party fails to demonstrate that the admission of such evidence is prejudicial to their defense. Neb. Ct. R. Pldg. § 6-1115(b). The rule is designed to promote decisions on the merits and amendments should be liberally granted. *See* 61B Am. Jur. 2d *Pleading* § 698 (2024).

A. The issue of Appellant's knowledge of A.C.G.'s mental or physical incapability of appraising or resisting Appellant's sexual conduct was tried by the implied consent of the parties.

Under Neb. Ct. R. Pldg. § 6-1115(b), the key question in determining whether an issue was tried by implied consent is whether the parties recognized that an issue not contained in the pleadings was injected at trial. *Schmid v. Simmons*, 311 Neb. 48, 66, 970 N.W.2d 735, 749 (2022). A party's failure to object to the introduction of evidence that only tends to prove an unpled issue constitutes implied consent. *Id.* at 66, 970 N.W.2d at 749.

The record clearly indicates both parties knew that issues not pled in the original petition had entered the adjudication. After all, Appellant objected to the State's initial motion to have the petition amended to the reflect the evidence adduced at adjudication. (7:4–22). Shortly after this disapproval, Appellant's counsel stated on the record that he was willing to proceed to adjudication notwithstanding objection. (7:23–24). It is important to note that this general objection occurred prior to the adjudicative portion of the hearing, so the objection did not take place during trial as required under the Nebraska Supreme Court Rules. *See* Neb. Ct. R. Pldg. § 6-1115(b);

(4:11–14; 8:18–22). There is nothing in the record that shows Appellant made a continuing objection as to the issue of his knowledge of A.C.G.'s mental or physical incapability. *See Hudson v. Hudson*, 31 Neb. App. 630, 648–49, 988 N.W.2d 179, 193 (2023).

The record does not contain any instances where Appellant specifically objected to the introduction of evidence that only tended to prove the issue outside the original petition. For example, Appellant testified on direct that he thought the video shown to A.C.G. was inappropriate. (197:19–21). Likewise, no objection was made when the State cross-examined Appellant on whether it was inappropriate to show A.C.G. the same sexually explicit video. (206:16–24). Both lines of questioning would only tend to prove Appellant's knowledge of A.C.G.'s inability to comprehend or appraise the nature of sexual conduct. Failure to specifically object in this situation or to ask the juvenile court for a continuing objection during the adjudication demonstrates there was implied consent to try the issue. While it is true that Appellant reasserted his motion to dismiss during closing arguments, he did not object to any of the evidence introduced during the adjudication that tended to prove the issue of Appellant's state of mind. Thus, this Court should find that the issue of Appellant's knowledge of A.C.G.'s mental or physical incapability of appraising or resisting Appellant's sexual conduct was tried by the implied consent of the parties and affirm the juvenile court's order.

B. Granting the State's motion to amend the petition to conform to the evidence did not prejudice Appellant.

The juvenile court's amendment of the petition did not prejudice Appellant. Pursuant to Neb. Ct. R. Pldg. § 6-1115(b), so long as no prejudice befalls the opposing party, a court is free to amend the pleadings to conform to the evidence adduced at trial upon a motion by one of the parties. The language found in the Nebraska Supreme Court Rules expressly states that a court "shall do so freely when the

presentation of the merits of the action will be subserved." Neb. Ct. R. Pldg. § 6-1115(b). This phrasing empowers courts to ensure cases are decided on their merits, not upon rigid pleadings. *See* Neb. Ct. R. Pldg. § 6-1115(b).

It is clear the merits of the case were subserved by the juvenile court's amendment of the petition to conform to the evidence. Absent the amendment, the case would have been dismissed due to a deficiency in the original petition. (218:9–15). Thus, Appellant has the burden of demonstrating the amendment prejudiced his defense on the merits. Neb. Ct. R. Pldg. § 6-1115(b). If the amendment did not prejudice Appellant, there was no error, and this Court should affirm the juvenile court. *See In re Interest Joshua M.*, 251 Neb. at 634, 558 N.W.2d at 562.

No prejudice befell Appellant in this case. As Appellant points out in his brief, prejudicial error occurs when a pleading is allowed to be amended and the amendment changes the issues and affects the quantum of proof as to any material fact. *Id.* at 634, 558 N.W.2d at 562. The juvenile court's act of amending the petition to reflect the elements of Neb. Rev. Stat. § 28-319(1)(b) did not affect the quantum of proof. Both Neb. Rev. Stat. § 28-319(1)(b) and § 28-319.01(1)(a), being found in Nebraska's criminal code, must be proven by evidence beyond a reasonable doubt.

Further, the amendment did not change the issues in a way that prejudiced Appellant. The law violation alleged in the original petition—Neb. Rev. Stat. § 28-319.01(1)(a)—is Nebraska's version of a statutory rape provision and only requires that the State prove sexual penetration, that the victim was under twelve years of age, and that the offender was at least nineteen years old. No *mens rea* need be proven. *See* Neb. Rev. Stat. § 28-319.01(1)(a). However, the State asked the juvenile court to amend the petition to conform to the elements of either Neb. Rev. Stat. § 28-319 or § 28-320. (211:5–13). Each of these provisions have subsections that require the State to prove *mens rea* on part of the offender. *See* Neb. Rev. Stat. § 28-319; Neb. Rev. Stat. § 28-

320. Thus, the State made its case more difficult to prove by asking the juvenile court to amend the petition to conform to the evidence. In a real sense, the State was the party that was prejudiced by the amendment, not Appellant.

Appellant seems to argue that just because an issue was injected at the adjudication, he was prejudiced *per se*. Brief for Appellant, 20. To support this assertion, Appellant cites to the case *In re Interest of Joshua M.* where the Nebraska Supreme Court noted that prejudicial error occurs where an amendment changes the issues and affects the amount of proof. 251 Neb. at 634, 558 N.W.2d at 562. However, a closer look at the opinion provides important context and elaboration. The case of *In re Interest of Joshua M.* concerned proceedings relating to the termination of parental rights pursuant to Neb. Rev. Stat. § 43-292(6). *Id.* at 633, 558 N.W.2d at 561. Importantly, after each party had rested, the State motioned the court to amend the petition under Neb. Ct. R. Pldg. § 6-1115(b) alleging that the evidence adduced at the hearing demonstrated that the juveniles also came within the meaning of Neb. Rev. Stat. § 43-292(7). *Id.* at 633, 558 N.W.2d at 561–62. This is an entirely separate condition for termination under Nebraska law. *Id.* at 633, 558 N.W.2d at 561–62. On appeal, Lona, the parent defending the termination action, argued that such an amendment was prejudicial since she was not given notice that Neb. Rev. Stat. § 43-292(7) would be at issue during the hearing. *Id.* at 634, 558 N.W.2d at 562. The Nebraska Supreme Court disagreed explaining that the amendment did not "substantially change the subject matter or issues" that would be addressed at the hearing. Further, the court noted that Lona "participated in the hearing and had ample opportunity to address and rebut all the evidence presented." *Id.* at 634, 558 N.W.2d at 562.

Thus, the case of *In re Interest of Joshua M.* suggests that just because issues are injected at an adjudication, it does not necessarily mean that an amendment to conform to evidence is automatically prejudicial, as Appellant asserts. Appellant concedes that the

amendment of the petition from Neb. Rev. Stat. § 28-319.01(1)(a) to § 28-319(1)(b) only added one element. Brief for Appellant, 21. However, as discussed previously, the element exclusively concerned the *mens rea* of Appellant. This amendment made the State's case objectively harder to prove. *Compare* Neb. Rev. Stat. § 28-319.01(1)(a), *with* Neb. Rev. Stat. § 29-319(1)(b). Further, both charges are substantially similar insofar as they both concern allegations of sexual assault via sexual penetration, the only difference being the *mens rea* element. Moreover, Appellant was present at the adjudication and had ample opportunity to address and rebut the State's evidence. Appellant vigorously cross-examined all of the State's witnesses and offered evidence of his own. Appellant's robust defense also shows implied consent to try the *mens rea* element. For these reasons, Appellant was not prejudiced by the juvenile court's grant of the State's motion to amend the petition to conform to the evidence.

C. Granting the State's motion to amend the pleadings to conform to the evidence did not violate Appellant's constitutional right to due process.

The Constitution and Nebraska Constitution guarantee against deprivations of liberty without due process of law. U.S. Const. amend. XIV; Neb. Const. art. I, § 3. While Appellant did not explicitly raise a due process violation in his brief, the record shows that Appellant made such assertions prior to adjudication. (7:4–11). Gross violations of an individual's due process rights constitute plain error and, although not specifically asserted, may be raised by an appellate court *sua sponte*. *In re Interest of Jordan B.*, 300 Neb. 355, 362–63, 913 N.W.2d 477, 483 (2018). Thus, a due process discussion is warranted in this case.

The United States Supreme Court has held that juvenile proceedings, while not criminal prosecutions, must comport with certain procedural due process requirements. *In re Gault*, 387 U.S. 1, 30 (1967). The Court has stated that juveniles must be given sufficient

notice of the charges against them. *Id.* at 33. The State has an obligation to ensure that justice is done and to bring legal authority to the attention of this Court that may be controlling, even if said authority has not been imparted by Appellant. Neb. Ct. R. of Prof. Cond. § 3-503.3(a)(2). The State believes that the case *In re Interest of Jordan B.* 300 Neb. 355, 913 N.W.2d 477 (2018) merits attention from this Court but earnestly contends it is distinguishable from the present matter.

The Nebraska Supreme Court in *In re Interest of Jordan B.* held that a juvenile court plainly errs by adjudicating a juvenile on a law violation that was not pled and was not a lesser-included offense of the crime pled. 300 Neb. at 363, 913 N.W.2d at 483. In that case, the State filed a petition asking the juvenile court to adjudicate a juvenile under Neb. Rev. Stat. § 28-319, sexual assault in the first degree. *Id.* at 357, 913 N.W.2d at 480. However, before closing arguments, the State motioned the court to amend the petition to conform to the evidence and requested the petition be amended to reflect attempted sexual assault in the first degree claiming it would be a more appropriate charge. *Id.* at 361, 913 N.W.2d at 482. Over the objection of the juvenile, the court adjudged him to have violated Neb. Rev. Stat. § 28-320(1) and (3), neither of which were pled or requested by the State. *Id.* at 361, 913 N.W.2d at 483. The Nebraska Supreme Court found this to be a violation of the juvenile's due process rights since the juvenile court curtailed his freedom by adjudicating him for an offense for which he was not specifically charged. *Id.* at 366, 913 N.W.2d at 485–86.

The present case is distinguishable. First, in *In re Interest Jordan B.,* a due process violation occurred because the juvenile was adjudicated under a law violation that was not pled. Instead, the juvenile court in that case acted *sua sponte* and concluded the juvenile committed an independent violation that was neither pled in the State's original petition or recommended by the State it its motion to amend. This is unlike the current matter. Here, the State orally

motioned the juvenile court to amend the petition pursuant to Neb. Ct. R. Pldg. § 6-1115(b) to reflect the elements of Neb. Rev. Stat. § 28-319. (211:5–13). The juvenile court granted this motion, and the petition was amended to reflect Neb. Rev. Stat. § 28-319(1)(b). (T38). Thus, the Appellant was adjudicated under a law violation that was pled. Under Nebraska law, an amended pleading relates back to the date of the original pleading so long as it does not change the party, the name of a party against whom a claim is asserted, and the claim arises out of the same transaction or occurrence as set forth in the original pleading. Neb. Rev. Stat. § 25-201.02(1). Likewise, this Court has held that an amended criminal complaint or information supersedes or supplants the original complaint or information. *State v. French*, 9 Neb. App. 866, 871, 621 N.W.2d 548, 553 (2001). It is also important to note that Appellant had notice that the State was planning to proceed under a legal theory outlined in Neb. Rev. Stat. § 28-319 prior to the commencement of adjudication. (5:21–22). Appellant was present at the adjudication, had the opportunity to rebut the State's evidence and cross-examine its witnesses. For these reasons, the State did not violate Appellant's constitutional right to due process, and this Court should affirm the juvenile court's order.

III. THE JUVENILE COURT DID NOT ERR IN CONCLUDING THE STATE PROVED SEXUAL PENETRATION BEYOND A REASONABLE DOUBT.

The juvenile court correctly found that the evidence produced at the adjudication proved Appellant subjected A.C.G. to sexual penetration beyond a reasonable doubt as required under Neb. Rev. Stat. § 28-319(1)(b). Pursuant to the Nebraska criminal code, sexual penetration is defined as the following:

> [S]exual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of a part of the actor's or victim's body or any object

> manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical, nonhealth, or nonlaw enforcement purposes. Sexual penetration shall not require emission of semen[.]

Neb. Rev. Stat. § 28-318(6).

The Honorable Candice J. Novak was the trier of fact in this case and made a finding in the adjudication order dated September 27th, 2023, that "the testimony of the victim A.C.G. and Veronica Gochez-Rodriguez was probative, credible, and entitled to weight." (T38). The Appellant argues in his brief that the testimony of A.C.G. was inconsistent and conflicting. However, A.C.G. provided clear testimony that Appellant subjected him to sexual penetration while the two were alone in Gochez's bedroom. (19:2–4, 16–18). Specifically, A.C.G. testified that Appellant forcibly pulled down his pants and that he felt Appellant's "balls" and "privacy" touch the "inside" of his buttocks. (19:7, 16–23). A.C.G. identified a "privacy" as the part of the body that is used to urinate. (17:24–25; 18:1). Further, A.C.G. explained that Appellant's "privacy" was "soft" when it first entered his buttocks but turned "hard." (60:23–25; 61:1). This description by A.C.G. is consistent with penile erection. Gochez also provided testimony that A.C.G.'s pants were down when she entered the room providing further circumstantial evidence that A.C.G.'s testimony was truthful. (96:16–20). Gochez testified that she asked A.C.G. if Appellant did "something wrong to him" while driving A.C.G. to the hospital, and A.C.G. responded by saying Appellant "put his private thing on his butt." (101:3–4; 102:6–8). The acts described in A.C.G.'s testimony—namely statements about Appellant's "privacy" going "inside" A.C.G.'s buttocks—clearly come within the statutory meaning of sexual penetration. *See* Neb. Rev. Stat. § 28-318(6); (19:7, 16–23).

A.C.G.'s in-court testimony was also corroborated by his statements made to Kuszak at Project Harmony. This interview was identified as Exhibit 2 during the adjudication and was received by the

juvenile court without objection. (129:1–6). During the interview, A.C.G. explained that Appellant forcibly pulled down A.C.G.'s pants and put his penis in A.C.G.'s buttocks. (E2, 129; Vol.2, 04:25:00–04:25:10). A.C.G. also explained how he felt pain when Appellant inserted his penis. (E2, 129; Vol.2, 04:27:40–04:27:55). The forensic interview took place on April 20th, 2022, which was over a year before A.C.G.'s in-court testimony at the June, 2023, adjudication. (4:1; 124:16–17). Despite the gap in time between the forensic interview and A.C.G.'s testimony, the narrative regarding sexual penetration remained the same. (E2, 129; Vol.2, 04:27:40–04:27:55; 19:7, 16–23).

Appellant argues that A.C.G.'s testimony was inconsistent and contradicted by other witnesses. However, any alleged inconsistences have no substantive bearing on testimony relating to sexual penetration. The purported variations in A.C.G.'s testimony only go to A.C.G.'s credibility as a witness. As discussed above, A.C.G.'s testimony regarding sexual penetration at the adjudication was the same as what was revealed during his forensic interview over a year prior. (E2, 129; Vol.2, 04:27:40–04:27:55). Appellant further argues that the question Gochez asked A.C.G. while on the way to the hospital was of the type that Kuszak warned would taint memory of the event. However, Appellant overlooks the fact that Kuszak testified that "focused" questions do not invalidate disclosures. (134:22–23; 137:10–14).

While an appellate court reviews juvenile cases *de novo* on the record and reaches its conclusions independently of the juvenile court's findings, when the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest Gunner B.*, 312 Neb. 697, 700, 980 N.W.2d 863, 866 (2022). Here, the juvenile court found A.C.G.'s Gochez's testimony to be credible and probative. (T38). This Court should give weight to the juvenile court's observations and assessments of the witnesses. Thus, this Court

should affirm the juvenile court's finding that the State proved sexual penetration by evidence beyond a reasonable doubt.

IV. THE JUVENILE COURT DID NOT ERR IN CONCLUDING THE STATE PROVED APPELLANT KNEW OR SHOULD HAVE KNOWN THAT A.C.G. WAS MENTALLY OR PHYSICALLY INCAPABLE OF RESISTING OR APPRAISING THE NATURE OF APPELLANT'S CONDUCT BEYOND A REASONABLE DOUBT.

The juvenile court correctly found that the evidence adduced at the adjudication proved Appellant knew or should have known that A.C.G. was mentally incapable of resisting or appraising the nature of Appellant's conduct beyond a reasonable doubt as required under Neb. Rev. Stat. § 28-319(1)(b). (T38). As Appellant notes in his brief, to prove a lack-of-capacity sexual assault on the basis of mental impairment, the State must prove that the victim's impairment was so severe that he or she was "mentally . . . incapable of resisting" or "mentally . . . incapable of . . . appraising the nature of" the sexual conduct. *In re Interest K.M.*, 299 Neb. 636, 646, 910 N.W.2d 82, 89 (2018).

Appellant relies on *In re Interest K.M.* to assert the State did not carry its burden. Brief for Appellant, 24. In *In re Interest K.M.*, the Nebraska Supreme Court concluded that a victim's mere diagnosis with Asperger syndrome was not sufficient evidence to prove the victim was unable to appraise the nature of the alleged perpetrator's conduct. *Id.* at 91, 910 N.W.2d at 648–49. However, this Court should look to *In re Gunner B.*, where the Nebraska Supreme Court added context to this general rule. 312 Neb. 697, 980 N.W.2d 863 (2022). The court in *In re Gunner B.* held that young age alone can be sufficient evidence to establish mental incapacity. *Id.* at 702, 980 N.W.2d at 867. Relying on persuasive authority from Pennsylvania, the Nebraska Supreme Court found that a child of five or six years of age was "indisputably" under an age where children are capable of appraising the nature of sexual

conduct. *Id.* at 702, 980 N.W.2d at 867. Importantly, the Nebraska Supreme Court noted it did not intend to establish any particular age under which a child is incapable of appraising the nature of sexual conduct. *Id.* at 702, 980 N.W.2d at 867. Instead, courts are to engage in a "common sense" analysis. *See id.* at 702, 980 N.W.2d at 867.

The holding from *In re Gunner B.* is instructive in this matter. In *In re Gunner B.*, it was determined that an eleven-year-old offender should have known that a five-year-old was mentally incapable of resisting or appraising the nature of sexual conduct on account of age. *Id.* at 703, 980 N.W.2d at 868. The Nebraska Supreme Court reached this conclusion because there was testimony from the offender that he was personally familiar with the victim and his young age. *Id.* at 703, 980 N.W.2d at 867–68. Further, when asked if the allegations of sexual assault were true, the offender denied them. *Id.* at 703, 980 N.W.2d at 867–68. The court noted this denial suggested that the offender was aware that such behavior was unacceptable. *Id.* at 703, 980 N.W.2d at 867–68.

These facts are analogous to the case before this Court. The State adduced evidence that A.C.G. was seven years of age at the time Appellant subjected him to sexual penetration. (32:17–21; 125:2). This is only one year older than the six-year-old the Nebraska Supreme Court stated would be mentally incapable of appraising the nature of sexual conduct. *See id.* at 702, 980 N.W.2d at 867. Common sense alone establishes that a seven-year-old child is not mentally capable of appraising sexual conduct. For example, in his forensic interview, A.C.G. indicated that Appellant began to "make out with him." (E2, 129; Vol.2, 04:25:03–04:26:15). However, when asked about what "making out" means, A.C.G. stated that it was the same thing as sexual penetration. (E2, 129; Vol.2, 04:26:15–04:26:25). A.C.G.'s conflation of "making out" and sexual penetration demonstrates that he is mentally incapable of appraising sexual conduct on account of his age. A.C.G. also testified that he had no idea what the word "sex" meant during adjudication. (62:9–10). This is further evidence that

A.C.G. was mentally incapable of comprehending the nature of sexual conduct due to his age.

The record indicates that Appellant knew of A.C.G.'s youth and his inability to appraise sexual conduct. During both direct and cross-examination, Appellant testified that he regretted showing A.C.G. a sexually explicit video. (197:19–21; 206:20–22). Appellant testified this was because A.C.G. is "little, [and] he's not supposed to know that." (206:20–22). Appellant also stated that he was familiar with A.C.G. and denied the allegations made against him, suggesting he knew that such conduct was unacceptable. (182:7–8; 183:8–10; 201:1–25). This is sufficient evidence of Appellant's knowledge of A.C.G.'s mental incapability of appraising sexual conduct on account of his age. *See In re Gunner B.*, 312 Neb. at 703, 980 N.W.2d at 867–68.

Thus, this Court should affirm the juvenile courts conclusion that Neb. Rev. Stat. § 28-319(1)(b) was proven by evidence beyond a reasonable doubt.

CONCLUSION

For the aforementioned reasons, the juvenile court had subject matter jurisdiction over Appellant. Further, the juvenile court did not err in granting the State's motion to amend the petition to conform to the evidence adduced at adjudication. Such amendment did not prejudice Appellant, nor did it violate Appellant's constitutional right to due process. Likewise, the State carried its burden of proving Appellant violated Neb. Rev. Stat. § 28-319(1)(b) beyond a reasonable doubt. Thus, Appellant is within the meaning of Neb. Rev. Stat. § 43-247(2). The State respectfully requests this Court to affirm the decision of the Separate Juvenile Court for Douglas County, Nebraska.

Respectfully Submitted,
STATE OF NEBRASKA

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CERTIFICATE OF WORD COUNT

I certify that the accompanying brief complies with Neb. Ct. R. § 2-103(c), in that it was prepared using Century Schoolbook 12-point typeface and contains 10,472 words, excluding this certificate. This certificate was prepared in reliance on the word count function of Microsoft Word, specifically, Microsoft Word for Mac Version 16.56. DATED this 4th day of March, 2024.

/s/ Jackson Stokes

JACKSON STOKES #27102
Deputy Douglas County Attorney

Certificate of Service

I hereby certify that on Monday, March 04, 2024 I provided a true and correct copy of this *Brief of Appellee State of NE* to the following:

Steven E Vivar-Amaya represented by Nicholas Edmund Wurth (23711) service method: Electronic Service to **nick@nickwurthlaw.com**

Evelyn Yamilette-Amaya (Self Represented Litigant) service method: **No Service**

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