A-23-801

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

STATE OF NEBRASKA, APPELLEE

v.

STEVEN VIVAR-AMAYA, APPELLANT

APPEAL FROM THE SEPARATE JUVENILE COURT OF DOUGLAS COUNTY, NEBRASKA

Honorable Candice Novak, Juvenile Court Judge

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This appeal by Appellant, Steven Vivar-Amaya, ("Appellant"), is from an Order dated September 29, 2023,(T37-41) in which the Juvenile Court for Douglas County, Nebraska found that the State proved beyond a reasonable doubt that Appellant violated *Neb. Rev. Stat.* §28-319 (1)(b) (reissue 2016) and as a result came within the meaning of *Neb. Rev. Stat.* §43-247(2) (Reissue 2016). Appellant's Notice of Appeal was filed on October 16, 2023. (T41) The Juvenile Court granted Appellant's Motion to Proceed in Forma Pauperis on October 16, 2023. (T52) This Court thus has jurisdiction over the present appeal pursuant to *Neb. Rev. Stat.* §43-2,106.01 and §25-1902(1)(b) (Reissue 2016)

STATEMENT OF THE CASE

A) Nature of the case

This is a juvenile court case in which Appellant was charged on July 12, 2022 with Sexual Assault on a Child in the First Degree pursuant to *Neb. Rev. Stat.* §28-319.01(1)(a). stemming from an incident date of May 9, 2022. (T1) Appellant entered a denial to the allegation, and an adjudication date was ultimately set for June 12, 2023. (T9, T29) Prior to the adjudication, Appellant filed a motion to dismiss the petition pursuant to *Neb. Ct. R. Pldg*. §6-1112(b)(6). (T31) The motion to dismiss was argued on the date of trial, prior to the

adjudication. During argument on the motion to dismiss, the State made an oral motion for leave to amend the petition to conform to the elements *Neb. Rev. Stat.* §28-319. (5:20-25) The Court took ruling on the motion to dismiss and motion for leave to amend under advisement, and the matter proceeded to a contested adjudication that concluded on June 23, 2023. (6:16-18; 218:21-15) At the close of evidence, the State made an oral motion to amend the petition to conform to the facts presented at trial to either *Neb. Rev. Stat*. §28-319 or in the alternative to *Neb. Rev. Stat*. §28-320. That motion was also taken under advisement. (211:5-13)

B) Issues presented to the Court below

(1) Whether Appellant violated *Neb. Rev. Stat.* §28-319.01(1)(a),

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

(3) Whether the State's motion for leave to amend the petition prior to the adjudication to allege a violation of §28-319, or in the alternative to allege a violation §28-320 should have been granted;

(4) Whether the State's motion to have the pleadings conform to the evidence following the trial should have been granted.

(5) Whether Appellant violated §28-319(1)(b), and therefore came within the meaning of §43-247(2).

C) How the issues were decided

The matter proceeded to a contested adjudication hearing without ruling on the State's oral motion for leave to amend the Petition prior to trial, which in essence was a denial of the State's motion to amend. On September 28, 2023, the Court issued an order overruling Appellant's motion to dismiss as untimely and unsupported by evidence. (T37) The same order granted the State's motion to amend the allegations of the Petition to conform to the evidence submitted, and amended Count 1 to allege that "on or about the 20th day [sic] of April, 2023 [sic], in Douglas County, Nebraska said juvenile, [Appellant], age 12 at the time of the offense, did then and there subject ACG., to sexual penetration without the consent of the victim

and who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, in violation of *Neb. Rev. Stat.* §28-319(1)(b)." (T38) The order further found that the State proved Count 1 as amended by proof beyond a reasonable doubt, and thus came within the meaning of *Neb. Rev. Stat.* §43-247(2). (T37-41)

D) Scope of review

An Appellate Court reviews juvenile cases de novo on the record and reaches a conclusion independently of the Juvenile Court's findings. *In re Interest of Enyce J. & Eternity M.*, 291 Neb. 965, 870 N.W.2d 413 (2015). When the evidence is in conflict, however, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Mateo L. et al.*, 309 Neb. 565, 961 N.W.2d 516 (2021).

A jurisdictional question that does not involve a factual dispute is a question of law. *Id.* The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law *Hudson v. Hudson*, 31 Neb. App. 630, 988 N.W.2d 179 (2023) When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court. *Id.*

ASSIGNMENTS OF ERROR

I. **The Trial Court erred in overruling Appellant's Motion to Dismiss as untimely.**

II. **The Trial Court erred in granting the State leave to amend the Petition after the case was submitted.**

III. **The Trial Court erred in finding that the State proved that sexual penetration occurred beyond a reasonable doubt.**

IV. **The Trial Court erred in finding that the State proved that Appellant knew or should have known that ACG was incapable of resisting or appraising the nature of his or her conduct.**

PROPOSITIONS OF LAW

I.

An Appellate Court reviews juvenile cases de novo on the record and reaches a conclusion independently of the Juvenile Court's findings. When the evidence is in conflict, however, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of Mateo L. et al.*, 309 Neb. 565, 961 N.W.2d 516 (2021).

II.

A rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *State v. Griel B.* (*In re Noah B.),* 295 Neb. 764, 891 N.W.2d 109 (2017); *Neb. Ct. R. Pldg*. § 6-1112(b)(6).

III.

The juvenile court has exclusive, original jurisdiction of any juvenile who was under fourteen years of age at the time the alleged offense was committed, and the offense falls under subdivision (2) of section §43-247. *Neb. Rev. Stat* §43-246.01(1)(d).

IV.

In an adjudication based on *Neb. Rev. Stat*. §43-247(2), the State must prove the allegations beyond a reasonable doubt. *State v. K.M. (In re K.M.),* 299 Neb. 636, 910 N.W.2d 82 (2018)

V.

A trial court may conform the pleadings to the facts proved when an amendment does not change substantially the claim or defense. The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice resulted. *State v. Lona F. (In re Joshua M.),* 251 Neb. 614, 558 N.W.2d 548(1997)

VI.

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

VII.

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 of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. *Neb. Ct. R. Pldg*. § 6-1115(b).

VIII.

Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any 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. *Neb. Rev. Stat*. §28-318(6),

IX.

A victim's lack of consent is not an element of the crime of sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct. *State v. K.M. (In re K.M.),* 299 Neb. 636, 910 N.W.2d 82 (2018)

X.

To prove a lack-of-capacity sexual assault on the basis of a mental impairment…the State must prove beyond a reasonable doubt 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 with the alleged perpetrator, and that the perpetrator knew or should have known the victim lacked the capacity to consent*. State v. K.M. (In re K.M.),* 299 Neb. 636, 910 N.W.2d 82 (2018)

XI.

To render an individual incapable of consent to sexual conduct a mental impairment must be severe; a person in this category is as equivalent to a severely intoxicated or an unconscious person. . *State v. K.M. (In re K.M.),* 299 Neb. 636, 910 N.W.2d 82 (2018) citing *State v. Rossbach*, 264 Neb 563 (2002).

STATEMENT OF THE FACTS

On July 12, 2022, a juvenile petition was filed alleging that Appellant came within the meaning of *Neb. Rev. Stat* §43-247(2). (T1). The sole count of the petition alleged that Appellant subjected "A.C.-G." who is under twelve years of age to sexual penetration and that Appellant was at least nineteen years of age or older in violation of *Neb. Rev. Stat* §28-319.01(1)(a). The Petition alleged the incident have occurred on May 9, 2022. (T1). Appellant was born on August 27, 2009, making him 12 years old at the time of the incident. (E1, 9; Vol. 2, 2) A written denial was entered on August 23, 2022. (T9) The matter

was ultimately scheduled for a contested adjudication set to begin on June 12, 2023.

On June 8, 2023, Appellant filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), because Appellant was being charged under 28-319.01(2), and a factual prerequisite for a prima face case under that statute is that the accused be at least 19 years of age or older. (T31). Both the motion to dismiss and the adjudication on the petition came on for hearing on June 12th. The Motion to Dismiss was argued first. Arguing against the Motion to Dismiss, the County Attorney made an oral motion for leave to amend the petition to conform to the Neb. Rev. Stat. §28-319. (5:20-25) In the alternative, the County Attorney made an oral motion for Court to amend the petition to conform with "the evidence the State will produce." (6:11-15) The Court took the motion to dismiss and the State's motions under advisement and the matter proceeded to adjudication hearing. (6:16-18)

Prior to calling its first witness, the State offered and the Court received Exhibit 1, the birth certificate of Appellant, establishing he was born on August 27, 2009. (E1, 9; Vol. 2, 2) The State's first witness was the complaining witness (hereinafter "ACG"). ACG testified on direct that he 8 years old at the time of his testimony, and 7 years old on the date of the incident, but he did not know his birthday. (13:6-10; 32:17-21) ACG stated that he knew Appellant, who had been to his house before, though he could not recall how long it had been since he last saw him at his home. (15:1-25) ACG stated that on one occasion Appellant and he were in his mother's room, and Appellant "put girls that were naked and boys that were naked" on his phone. (16:14-23) ACG stated that next, Appellant tried to have sex with him. (17:9-10) ACG stated that Appellant tried to touch ACG's butt with his arm. (17:11-20) When asked directly, ACG stated that Appellant's "huevos" or "privacy" touched the inside of his butt. (19:2-18) ACG previously identified 'huevos' or 'privacy' as the body part that he uses to go pee. (17:24-25; 18:1-13) When asked "what happened when something went inside", ACG responded: "his balls," which he stated he also refers to as

his "privacy." (19:16-23) Appellant didn't touch ACG with any other part of his body. (22:2-4; 23:1-9). Appellant didn't say anything to him, nor did ACG say anything to Appellant during the incident. (20:9-16) ACG stated that he thought Appellant tried to stop him from leaving, but he couldn't recall how he did so. (21:2-8) Eventually, ACG's mother came into the room, and Appellant stopped 'doing the things he was doing to me." (23:10-23) After ACG's mother entered the room, Appellant went into the bathroom where, according to ACG, Appellant then deleted the videos and his other hit him in the mouth. (24:1-4)

On cross-examination, ACG testified that Appellant and his family had been to his home on multiple prior occasions, and before the incident the two used to be friends. (27:10-20) ACG stated that he lives at home with his mother, 2 sisters and a brother. On the date of the incident, his mother and sisters were both home, but his brother was not. (28:11-25) Appellant was there that day with his mother and his two older brothers and a baby sibling. (29:1-11) ACG recalled playing hide and seek with the other children, then the game stopped because one of Appellant's brothers tripped ACG, and their mother was mad. (30:3-25) After that ACG stopped playing with the other boys, and went to his mother's bedroom to watch cartoons on a tablet. (29:22-25; 33:1-3) Eventually Appellant came into the room and put a movie about a penguin who talks on the TV in the bedroom. (33:9-19) ACG stated that he was sitting on one corner of his mom's bed, and Appellant was sitting on the other corner of the bed. (34:11-21) ACG was positioned closer to the bedroom door, which doesn't shut very well and was not locked. (36:18-25; 37:1-2) At some point Appellant pointed his phone towards ACG to show him a 2 second video, and ACG's first thought was that Appellant was going to prank him. (35:3-25; 36:1)

Regarding the alleged assault, ACG stated that he wanted to move away from Appellant when he tried to touch him, but he was already on the edge of the bed and didn't want to get off because he was scared his dog would bite him. (38;5-12) ACG also claimed that he tried to leave after the touching started and made it off the bed and almost out of the room before he tripped and hurt his leg. (53:15-25)

ACG stated he was off the bed with his clothes on, and Appellant was on the bed when he tripped and fell. (54:5-20) ACG got up and then tripped one more time, before he returned to the bed. (55:1-14)

ACG stated that Appellant stopped touching him before his mom came in the room, and that ACG pulled his pants up right when the touching stopped. (41:24-25; 42:1-22) ACG didn't' see Appellant with his clothes off and didn't believe he took his clothes off. (42:23-25; 43:1-4) ACG first stated no one took his clothes off, but then stated that Appellant did pull his pants down. (43:5-12) ACG remembered that he did not have underwear on that day because he forgot to put them on after his shower. (19:8-10)

ACG stated the touching happened for 1-2 minutes before his mom came in the room, and that his pants were down when she walked in the room. (44:15-25) Earlier in his testimony, ACG stated at the time his mom walked in, he was sitting on the edge of the bed with his feet dangling off the bed, and Appellant was on the other side of the bed. They were not under any blankets or covers. (41:1-24) ACG recalled his mother saying "what was [Appellant] doing to you?" after she walked in. (45:1-3) ACG stated he told his mom that Appellant was touching him, but it was unclear when he made that statement or where they were when that statement was made. (45:15-19). ACG stated that Appellant left the bedroom to go to the bathroom after ACG's mother walked in, but also stated his mother was on a couch – not in her bedroom – when Appellant walked out of the bedroom. (45:20-24; 46:6-22) ACG also stated that he knew Appellant deleted videos on his phone while he was in the bathroom, but that Appellant closed the door to the bathroom after he went in. (45:22-24; 49:3-17) Before ACG said anything to his mom about what happened, his mother asked him about Appellant touching him with his privacy. (52:9-14) Later, ACG recalled his mother taking him to the hospital and ACG told one doctor what happened. (51:1-20)

The State's second witness was Veronica Gochez (hereinafter "Gochez"), ACG's mother. Gochez testified about an incident that happened at her home sometime in April 2022 when Appellant and his

family were present. She stated they were at the home because Appellant's mother called her to give her a piece of cheese from Salvador. (66:20-25; 67:1-3) Gochez stated that she knew Appellant's family, who had been to the house on multiple occasions before, and she considered them "really good friends." (67:4-14; 86:25; 87:1-5) Both families had been to each other's houses, and the children had played together on those occasions. (87:14-21)

On the date of the incident, Gochez recalled sitting at the table in her dining room, talking to Appellant's mother. (68-3-5) The dining room is 6-7 steps from her bedroom door. (68:6-12) The boys were playing outside, and they began to argue so she told ACG to come inside and go into her room with his tablet. (70:19-23) Sometime later, Appellant came inside, sat in the living room for a bit, then went to her bedroom. (70:23-25) Gochez estimated that Appellant was in the bedroom with ACG for approximately 15 minutes, and he remained talking to Appellant's mother in the dining room during that time. (71:13-23) Eventually Gochez went to check on the boys because she hadn't seen or heard the boys. (72:1-3) Gochez stated that the door was shut but it doesn't lock, and it wasn't obstructed or blocked by anything on the inside. (92:15-18; 95:4-5) When she opened the door she first stated that she saw Appellant standing up and ACG with his pants and underwear down to his knees. (72:7-8; 73:17-22; 84:1-7) Gochez then clarified that she initially saw Appellant on the bed on his knees, but he got up when he heard the door open. (74:4-9) On cross-examination, Gochez admitted that she did not honestly remember seeing Appellant on the bed. (93:25; 94:1-3) Gochez described ACG as laying on the bed on his back, with his legs hanging off the side. (74:10-23) After she saw the boys on the bed she began screaming and asked them what they were doing. (92:24-24; 93:1-4) After she walked in Appellant passed her and left the room and went into the bathroom. (76:6-9) Gochez stated that she remembered pulling up ACG's pants and underwear after she saw ACG jumping on her bed "like crazy." (96:22-25; 97:1-3)

She stated that ACG told her that Appellant was "trying to do something to him." (78:5-9) Gochez stated that she then told Appellant's mother that they needed to leave and that she was taking ACG to the hospital. (79:1-14) Gochez couldn't recall how much time transpired after she walked into the room and before Appellant and his family left her home. (99:8:11) The first thing ACG told Gochez was that Appellant had shown him a video with a boy and girl having sex – a statement he made while still in the bedroom, and while she was pulling his pants up. (102:18-24; 103:5-10; 104:1-7) When asked what exact words ACG said, Gochez stated he said "I didn't want to do anything, but [Appellant] was watching the two girls – I'm sorry, two boys, and doing bad stuff, and then one boy and one girls doing bad stuff." (113:25; 114:1-3)

Gochez stated that it wasn't until she and ACG were in the car on the way to the hospital, that ACG told her for the first time that Appellant "put his private thing" on [ACG's] butt." He said this only after Gochez asked him directly if something like that happened. (101:2-4; 102:5-8) She recalled taking ACG to the hospital in the early afternoon, and staying there all night before she spoke to police around midnight.(99:14-25; 100:1-11) When asked why she decided to take him to the hospital prior to being told any sexual contact occurred, she couldn't say why other than it was for "so many reasons." (100:16:21) The day after the hospital visit, she took ACG to Project Harmony. (81:1-14)

The State's third witness was Amanda Kuszak (hereinafter "Kuszak"), a forensic interviewer at Project Harmony. (118:17-25; 119:1-9) Kuszak conducted the forensic interview of ACG at Project Harmony on April 20, 2022, the day after the alleged incident. (124:14-24) A copy of the recorded forensic interview was offered and received by the Court as Exhibit 2. (129:1-8) Kuszak agreed that ACG did not immediately reference allegations of sexual contact when he was asked about why he was at Project Harmony, stating that she had to "get more focused with him" before he made mention of sexual contact. (133: 20-25; 134:1-23) Kuszak stated that based on her training and

experience, best practice is to not ask leading questions regarding assault so that the answers are the child's own words. (132:11-19) Kuszak agreed that a child's recollection can be influenced if they are asked leading questions about abuse (136:1-15)

During the forensic interview, after some rapport building, ACG was asked what he came to talk about, and he stated it was to talk about what he did that day. (E2, 129; Vol.2, 04:18:12-04:18:20) Kuszak then asked him why he went to the doctor the day before. ACG then described the boys playing, then said Appellant put girls with their clothes [unintelligible] and was being a little weird, then he wasn't feeling good and "that's all". (E2, 129; Vol.2, 04:19:38-04:21:15) When asked what happened after Appellant came into his mom's room, ACG stated "I don't remember." ACG clarified that he didn't want to talk about it, and just wants to let it go. (E2, 129; Vol.2, 04:21:55-04:22:45) ACG then talked about Appellant being weird because he had a video on his phone of some girls making out with some boys. (E2, 129; Vol.2, 04:23:00-04:24:35) Asked to describe what other weird things Appellant was doing, ACG stated that Appellant pulled his pants down and put his penis in his butt. (E2, 129; Vol.2, 04:25:00-04:25:19) Later, ACG stated that after Appellant came into the room, Appellant started making out with him and he got scared. ACG described making out as him putting his penis in his butt. (E2, 129; Vol.2, 04:26:00-04:26:30) ACG claimed Appellant locked the door before doing anything to him, and also claimed that Appellant touched ACG's penis with his hands. (E2, 129; Vol.2, 04:28:29-04:29:44) ACG stated that he didn't notice anything about Appellant's penis, nothing changed about his penis, and he didn't remember anything coming out of his penis. (E2, 129; Vol.2, 04:48:58-04:49:30) Following the testimony of Kuszak, the State rested its case-in-chief. (137:15-20)

Appellant then called his first witness, his mother Evelyn Amaya (hereinafter "Amaya"). Amaya testified that she has known Gochez for approximately 9 years, and met her through Gochez's mother. (140:1-7) Prior to the incident that took place on April 19, 2022, Amaya stated that she would interact with Gochez two times a

week, where they would get together and drink some beer. (140:8-18) Their children would always interact and play with each other when the mother's got together. (143: 1-15) Prior to April 19th there had never been concerns about the children getting along with each other. (143:17-20)

On April 19th, Amaya recalled arriving around 3:40 p.m. for the purpose of hanging out with Gochez and drinking some beers. (144:1-16) Amaya stated that she and Gochez were in the dining room, and described the layout of the house such that from where they were seated, they could see the door to Gochez's bedroom. (146:2-10) Amaya was shown a Douglas County Property Record for Gochez's home, and testified that is the location where she and her family went on April 19, 2022. The record established the main floor of the home was 900 square feet. The document was offered and received as Exhibit 4. (141:25; 142:1-7) Amaya stated that after they arrived, all of the children except for Gochez's oldest daughter Kimberly, were playing outside. Eventually her two sons, Randy and Joel, began to fight with ACG, so she had to separate them. (147:1-25; 148:4-5) After that, ACG and Appellant kept playing together before they came inside and went into Gochez's bedroom at the same time. (151:22-25; 152:1-25; 153:1) Amaya stated that about 3 minutes after the boys went into the bedroom, Gochez got up to go check on them, at which point Amaya got up to lay her baby Armando down. (153:8-16) As she was laying the baby down, she heard Gochez yell to her that ACG's zipper was down. (154:11-19) Amaya stated that from where she was standing she could see into the bedroom, and saw Appellant on the edge of the bed and ACG standing. Neither boy appeared to have any of their clothes off. (155:2-18) Amaya then went and called Appellant out of the room to ask him what was going on. He told her that he was showing ACG a video on TikTok. (156:20-25; 157:1-3) Amaya stated after he told her what he did she hit him in the mouth. (157:12-17) She stated it was at least 5:00 p.m. when this all happened. (158:4-6) After the boys were out of the room, Amaya recalled ACG saying that Appellant was showing him "what the dog that he has does with a pillow." (161:8-13)

Amaya couldn't recall Gochez saying anything to anyone after the boys left the room. (162:12-16) After Amaya and her children left, they arrived home and she was notified of the allegations being made by ACG. Amaya stated she asked Appellant about it and he denied doing anything other than showing ACG a video. (176:10-25; 177:1-4) Sometime later, Amaya was asked to bring Appellant in for questions about the incident, and that she has never told him what to say or not say regarding the incident. (165:14-25)

Following the testimony of Amaya, Appellant testified. Appellant stated that he was friends with ACG, having spent time with him approximately 20 times prior to the incident on April 19, 2022. (182:17-19; 183:5-9) Appellant recalled the date in question, and that he was playing basketball with ACG outside before they went inside to Gochez's room to watch a movie, Happy Feet 2. (185:9-12; 187:1; 188:2-3) Once the room, ACG was laying on side of the bed that was up against a wall, and Appellant was sitting on the corner of the bed. (188:22-25; 189:1-5) Shortly after the movie began, Appellant started watching TikTok on his phone. (189:16-25; 190:1-11) Appellant then turned his body to show ACG a 15-20 second video of a girl in a bikini getting out of a pool. (191:9-25; 192:1-12) After that ACG pulled down his zipper and started humping a pillow and said this is what my dog does. (192:16-24) Shortly after, Gochez came in the room, ACG stood up and Appellant's mom called him out of the room. (194:3-25; 195:1-25; 196:1-5) Appellant stated his mother told him she always tells him not to go into other people's rooms, then slapped him on the mouth and he started bleeding. (197:1-11) Appellant stated he admitted showing ACG the video but didn't do anything else. (197:15-18) Appellant denied doing any of the things ACG testified that he did, including ever touching him, sexually assaulting him, trying to trip him or stop him from leaving, or showing videos of people with no clothes on. (200:1-25, 201:10-25) Appellant stated he didn't even know what 'sex' was at the time of the incident. (201:7-9) Appellant recalled his mother asking him after they got home that same evening if he did anything else to ACG, and he denied doing anything. (203:16-25)

Appellant testified that he was eventually interviewed by police, and while he could not recall everything he said to the police, he knows that he never admitted to assaulting ACG. (205:9-19)

Following Appellant's testimony, Appellant rested. The State then renewed its motion for leave to amend the petition to conform to the facts presented and find that the elements of *Neb. Rev. Stat*. §28-319 were proven beyond a reasonable doubt, or in the alternative that the elements of *Neb. Rev. Stat* §28-320 were proven beyond a reasonable doubt. (211:5-13) The State conceded that it had not met its burden in establishing the necessary elements of *Neb. Rev. Stat* §28-319.01 that Appellant was 19 years of age or older at the time of the incident. (218:9-15) At closing, Appellant reasserted his motion to dismiss and objected to the State's motions to amend the pleadings to conform to the evidence. (213:18-25) Arguments were heard and the Court took the matter under advisement and the adjudication was adjourned.

In an order filed on September 28, 2023, the Court ruled on the adjudication and pending motions. (T37-40) The order overruled Appellant's Motion to Dismiss as untimely and unsupported by evidence. The Court granted the State's motion for the pleadings to conform to the evidence, and found that the elements of *Neb. Rev. Stat*. §28-319(1)(b) were proven beyond a reasonable doubt. (T38) The Court found that Appellant subjected ACG to sexual penetration when he knew or should have known that the victim was mentally or physically incapable of resisting his conduct." (T38) The findings of fact cited by the Court were that "after showing [ACG] images of naked boys and girls on his phone, [Appellant] subjected [ACG] to anal penetration. According to [ACG] he wanted to kick [Appellant] during the assault but was unable to. [Gochez] testified the victim was crying when she entered the bedroom immediately following the assault." (T38) The court entered a finding that Appellant came within the meaning of §43-247(2), and this appeal timely followed.

SUMMARY OF THE ARGUMENT

The State proceeded to the adjudication hearing on a Petition alleging violation of a statute - *Neb. Rev. Stat* §28-319.01(1)(a) - that the Juvenile Court had no jurisdiction to adjudicate. Appellant moved to dismiss the petition for failure to state a claim upon which relief could be granted. Rather than amending the Petition prior to trial, the State sought leave to amend the petition to conform to the evidence it planned on offering at the trial. The Court took the matter under advisement, and ultimately denied Appellant's motion to dismiss, and adjudicated Appellant under *Neb. Rev. Stat* §28-319(1)(b). The Court abused its discretion overruling the motion to dismiss and in allowing the amendment to the pleadings to conform to the evidence, because the amendment substantially affected the issues being adjudicated – namely inclusion of the issue of whether ACG lacked the capacity to consent to any sexual contact, and whether Appellant knew or should have known of the lack of ability to consent. The Court further erred when it found the State met its burden to establish sexual penetration occurred, and when it found the State met its burden to establish the lack of ACG's ability to consent, and Appellant's knowledge of the same, beyond a reasonable doubt.

ARGUMENT

I. The Trial Court erred in overruling Appellant's Motion to Dismiss as untimely.

Prior to the adjudication, Appellant filed a motion to dismiss the petition for failure to state a claim upon which relief could be granted pursuant to *Neb. Ct. R. Pldg*. § 6-1112(b)(6). (T31) A rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there

is some insuperable bar to relief. *State v. Griel B.* (*In re Noah B.),* 295 Neb. 764, 891 N.W.2d 109 (2017)

Here, it is uncontroverted that the sole count in the Petition filed alleged Appellant violated Neb Rev. Stat. §28- 319.01(1)(a), which as a necessary element, requires the offender to be at least nineteen years of age or older. The Juvenile Court is a court created by statute and does not have jurisdiction over matters outside the scope of the juvenile code. Pursuant to Neb. Rev. Stat. §43-246.01, the juvenile court has exclusive, original jurisdiction of any juvenile who was under fourteen years of age at the time the alleged offense was committed, and the offense falls under subdivision (2) of section §43-247. *Neb. Rev. Stat* §43-246.01(1)(d). Thus, it is axiomatic that a juvenile court can never adjudicate a juvenile charged with violating §28-319.01(1)(a), because a necessary element of that criminal violation is that the accused be at least nineteen years. If an accused was nineteen years of age, the juvenile court has no jurisdiction to adjudicate that individual. The error is plain on the face of the petition, and this is one of the 'unusual' cases where there is an insuperable bar to relief. The Court provided no basis for its finding that the motion to dismiss was "untimely filed." Subject matter jurisdiction can be raised at any stage of a proceeding. The Court proceed to adjudication without any justifiable basis on a petition that all parties knew was inaccurate, and under which the Court had no jurisdiction to do so. Consequently, the order adjudicating Appellant should be vacated, and the matter remanded to the juvenile court with directions to dismiss the Petition for failure to state a claim upon which relief could be granted.

II. The Trial Court erred in granting the State leave to amend the Petition after the case was submitted.

A trial court may conform the pleadings to the facts proved when an amendment does not change substantially the claim or defense. The decision to allow such an amendment rests with the discretion of the trial court and will not be error unless prejudice

resulted. *State v. Lona F. (In re Joshua M.),* 251 Neb. 614, 558 N.W.2d 548(1997) Prejudicial error results when a pleading is allowed to be amended where the amendment changes the issues and affects the quantum of proof as to any material fact. *Id.* 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 of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. *Neb. Ct. R. Pldg*. § 6-1115(b).

As argued above, and what the State seemed to concede at the outset of the adjudication hearing, Appellant could not be adjudicated under the sole count in the petition on file at the beginning of the adjudication hearing. Prior to the adjudication beginning, Appellant explicitly objected to proceeding under the petition on file, and to any amendments to the pleadings to conform to either §28-319 or §28-320 as requested by the State prior to the beginning of the trial. There was no express or implied consent to adjudicate Appellant under these alternative theories. As argued, the objection was based on prejudice to Appellant due to the inclusion of additional elements that must be proven at the adjudication. The State's argument that substituting allegations under §28-319 cured the deficiencies on the petition caused by §28-319.01 is without merit. While the amendment removed the jurisdictional barrier by eliminating the requirement that the actor be 19 years of age or older, allegations under §28-319 add multiple, separate bases under which an offender could be convicted, under either subsection (a), (b), or (c) of that statute. In §28-319.01, the State must only prove that sexual penetration occurred, and then prove the requisite ages of the offender and victim. In §28-319, the State must prove that sexual penetration occurred and either, (a) the penetration occurred without the consent of the victim, or (b) the accused knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct.

While there is a third basis for conviction under §28-319(c), that once again includes the age of the offender being 19 years of age or older, and therefore is equally as unactionable in juvenile court as the sole count in the petition against Appellant. Thus, the change in statute from §28-319.01 to §28-319(1)(b)- the subsection the court ultimately found true - adds an entirely different element – whether or not Appellant knew or should have known the victim was mentally or physically incapable of consenting. Appellant explicitly objected on the basis of not knowing which subsection of §28-319 the State was proceeding on prior to the adjudication beginning. (7:4-22) Here, the amendment ultimately granted by the Court, added the element of proving, and defending, whether or not Appellant knew or should have known ACG was incapable of consenting to sexual penetration. Therefore, the amendment was prejudicial and an abuse of discretion. The order adjudicating Appellant under §28-319(1)(b) should be reversed and the matter remanded with directions to dismiss.

III. The Trial Court erred in finding that the State proved that sexual penetration occurred beyond a reasonable doubt.

Assuming without conceding that the Appellate Court finds the Juvenile Court did not err in overruling Appellant's motion to dismiss, or in granting the State's motion for the pleadings to conform to the evidence, there was insufficient evidence for the Court to find that the State met its burden to prove the elements of §28-319(1)(b) beyond a reasonable doubt. The first element to be established is that ACG was subjected to sexual penetration by Appellant. The state failed to prove this essential element.

Pursuant to *Neb. Rev. Stat.* §28-318(6), sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any 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. Here, the allegation from ACG was that Appellant anally penetrated him with Appellant's penis. Based on the varied accounts and statements made by ACG, and the outright denial of any penetration of any kind by Appellant, the State failed prove this essential element beyond a reasonable doubt.

At trial, ACG made various claims about what happened during the incident where the assault was alleged to have occurred, but he also notably contradicted the direct testimony of his mother. He stated, and Gochez agreed, that ACG was laying on his back with his feet dangling off the bed when his mom entered the room. ACG claimed that he pulled his own pants up after the alleged contact, but Gochez was clear that she pulled ACG's pants up after she saw him jumping around on the bed. ACG was clear that he wasn't wearing underwear because he forgot to put it on after a shower, whereas Gochez repeatedly stated ACG was wearing underwear and she remembered pulling it up.

Regarding sexual penetration, ACG's testimony and statements in his forensic interview make it unclear what happened. At trial ACG first claimed Appellant "tried" to have sex with him, which he described as Appellant touching ACG's butt with his arm. (17:11-20) ACG stated that someone's privacy means the part they go pee with, but later when asked how Appellant penetrated him, the term "privacy" meant "balls." (17:24-15; 18:1-13; 19:16-23) ACG gave other contradictory statements, claiming in his forensic interview that Appellant both locked the door and touched ACG's penis with his hands, claims he explicitly denied happened in his testimony on direct. (E2, 129; Vol.2, 04:28:29-04:29:44, 37:1-2) ACG also gave varied accounts of trying to leave the room, stating that he didn't get off the bed because he was scared his dog would bite him, and then later that he did get off the bed, but tripped on himself so he returned to the bed. (38:5-12; 53:15-25; 55:1-14) Most telling, and problematic, is that ACG first made mention of any sexual contact after Gochez directly asked him if his penis touched his butt, the type of leading question that Kuszak warned could taint the memory of the event.

While an Appellate Court may give weight to the fact the juvenile court observed the witnesses and accepted one version of facts over the other, that does not mean the record is insufficient to make an alternate finding. Here, the record established ACG contradicted himself, and his mother on material issues of fact. Because of these inconsistencies and contradictions, coupled with the lack of specificity on the elements of sexual penetration, this Court must reverse the order finding that the State proved the element of sexual penetration beyond a reasonable doubt, and direct that the matter be remanded and the petition dismissed.

IV. The Trial Court erred in finding that the State proved that Appellant knew or should have known that ACG was incapable of resisting or appraising the nature of his or her conduct.

The Court's adjudication order specifically found that it was granting the State leave to amend the petition to allege a violation of §28-319(1)(b), and that the State met its burden in proving a factual basis under that statute. Without conceding that any sexual penetration took place, the State also failed to prove that ACG lacked the capacity to consent to sexual conduct, and that Appellant knew or should have known of the lack of capacity to consent.

To prove a lack-of-capacity sexual assault on the basis of a mental impairment…the State must prove beyond a reasonable doubt 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 with the alleged perpetrator, and that the perpetrator knew or should have known the victim lacked the capacity to consent. *State v. K.M. (In re K.M.),* 299 Neb. 636, 910 N.W.2d 82 (2018) To render an individual incapable of consent to sexual conduct a mental impairment must be severe; a person in this category is as equivalent to a severely intoxicated or an unconscious person. *Id.* citing *State v. Rossbach*, 264 Neb 563 (2002).

In *State v. K.M.*, the Supreme Court affirmed the Court of Appeal's reversal of an adjudication under §28-319(1)(b). In that case, the accused was 13 years old, and the alleged victim was 12 years old. The accused admitted to sexual penetration in an interview with law enforcement, but contested the issue of lack of consent. *Id.* The Court of Appeals reversed the adjudication, finding there was no evidence of the alleged victim's inability to appraise the nature of his conduct, other than he had autism. *Id.* at 86. The Supreme Court affirmed, finding that even if the accused knew the alleged victim was autistic, that did not establish that the accused knew that he was unable to resist or understand the nature of the conduct. *Id.* at 91.

Here, Appellant was 12 years old and ACG was 7 years old at the time of the incident. Appellant testified that he was friends with ACG, despite the age difference. The State offered no testimony that established ACG was incapable of appreciating the nature of sexual conduct, nor did it offer any evidence indicating that Appellant knew or should have known about any incapacity to consent. The State's evidence appears to have been offered under the theory that if any sexual penetration occurred, then Appellant should be adjudicated. However, its request for leave to amend the allegations to a violation of §28-319(1)(b) led to the additional burden of proving that ACG lacked capacity to consent to sexual contact, and that Appellant knew or should have known. The juvenile court's adjudication order cited facts such as ACG wanting to kick Appellant during the assault, and his mother stating he was crying when she entered the room, however, neither of those facts establish that he was incapable of consenting, or that Appellant knew of such incapacity. The State failed to establish the elements of the specific subsection of §28-319 that the Court granted leave to have the pleadings amended to conform to. As a result, the court must reverse the adjudication order and remand this matter with directions to dismiss.

CONCLUSION

The State erred when it filed a Petition against the Appellant, alleging violation of a law that was not only incorrect as applied to Appellant, but that the juvenile court had no jurisdiction to adjudicate. The State was put on notice in advance of the adjudication when Appellant filed a motion to dismiss. The Court compounded the error when it took the matter of the motion to dismiss and the motion to amend the pleadings under advisement and proceeded to trial. At trial, the State failed to prove the elements of the charge it sought to have the pleadings amended to allege, and the Court erred when it found it met its burden of proof on each necessary element beyond a reasonable doubt. For all of these reasons, the adjudication must be reversed, and the matter remanded with directions to dismiss.

Respectfully Submitted,

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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 12-point typeface and contains 7951 words, excluding this certificate. This certificate was prepared in reliance on the word-count function of Microsoft Word for Mac, version 16.81.

DATED this 2nd day of February, 2024.

Certificate of Service

I hereby certify that on Friday, February 02, 2024 I provided a true and correct copy of this *Brief of Appellant Vivar-Amaya* to the following:

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