IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)

STATE V. ABNEY

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STATE OF NEBRASKA, APPELLEE,

V.

AARON D. ABNEY, APPELLANT.

Filed November 24, 2026. No. A-26-077.

Appeal from the District Court for Lancaster County, MATTHEW O. MELLOR, Judge, on appeal thereto from the County Court for Lancaster County, MATTHEW L. ACTON, Judge. Affirmed.

Kristi J. Egger, Lancaster County Public Defender, and Kelsey L. Helget for appellant.

Michael T. Hilgers, Attorney General, and P. Christian Adamski for appellee.

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

RIEDMANN, Chief Judge.

I. INTRODUCTION

Aaron D. Abney appeals from the order of the district court for Lancaster County, on appeal from the county court for Lancaster County, affirming his convictions and sentences. Following our review, we affirm the order of the district court.

II. BACKGROUND

1. COUNTY COURT TRIAL AND SENTENCING

Abney was charged with third degree sexual assault and attempted third degree sexual assault. He was convicted of both charges following a jury trial in county court. We summarize the evidence from trial that is relevant to resolving this appeal.

(a) P.S.

On September 5, 2024, Abney delivered groceries to P.S.'s home. After leaving some of her items at the door, Abney went to retrieve additional items from P.S.'s order. P.S. brought in her groceries and the door shut. She expected Abney to knock on her door with the remainder of her order, but he walked into her apartment without knocking. Abney commented that P.S. was "gorgeous" and "beautiful." As he said this, he stepped forward and tried to put his hand underneath her chin as though to kiss her. P.S. told Abney to leave. As Abney turned, he grabbed P.S.'s right butt cheek and squeezed. Abney walked toward the door and paused. P.S. recalled Abney saying, "'Do you mind if I just stay here and.'" But after Abney said this, P.S. went "blank" and "didn't understand what he said" but recalled that Abney "gestured his hand by his groin area." P.S. believed that Abney wanted to "pleasure himself" in her apartment.

Abney testified that he did not specifically recall making a delivery to P.S. on the day in question. He denied entering P.S.'s apartment without permission and denied making any advances.

(b) H.V.

H.V. was a leasing agent for a property management company, and on September 9, 2024, she met with Abney to show him an apartment. Abney made a comment about H.V.'s appearance. When the two were in the apartment unit, Abney "pulled out a string of condoms and said, 'Let's break it in.'" H.V. interpreted this as referring to sexual intercourse. H.V. told Abney that that was inappropriate and he could not act like that. Abney apologized and the two got in an elevator to continue the tour. As the elevator descended, H.V. tried to ignore Abney by looking at her tablet. Abney came over and "acted like he was trying to look at what [H.V.] was doing and kind of got a little bit too close." When H.V. told Abney to move away, he did. Abney never touched her. After moving away from her, Abney stood in the corner, rubbed his penis over his clothes, and told H.V. he knew she was "turned on" when he saw her.

At trial, H.V. was asked if Abney tried to touch her, and she stated that she "wouldn't say he tried to touch me. He just kind of got a little bit too close. I don't know exactly what he was trying to do." She was again asked if he tried to touch her, and H.V. stated that she "wouldn't say he really tried to touch me, no. He was just getting really close to me. I don't know how I would put that. He was just getting really close to me." H.V. confirmed that it appeared that Abney was going to get closer to her if she had not told him to move away.

Abney denied making comments, bringing condoms to the apartment, and rubbing himself in the elevator.

(c) Sentencing

The jury found Abney guilty, and the county court accepted the verdicts and ordered a presentence investigation report. For his conviction of third degree sexual assault, a Class I misdemeanor, Abney received a sentence of 150 days' jail. For his conviction of attempted third degree sexual assault, a Class II misdemeanor, Abney received a sentence of 30 days' jail. The sentences were ordered to be served consecutively.

2. District Court Appeal

Abney appealed to the district court and filed a statement of errors alleging that (1) the county court erred by sustaining the State's motion to amend the complaint; (2) the county court abused its discretion by overruling his motion to sever; (3) the county court abused its discretion by denying his motion for a mistrial; (4) the evidence was insufficient to sustain the verdict for count 1, sexual assault, third degree; (5) the evidence was insufficient to sustain the verdict for count 2, attempted sexual assault, third degree; and (6) the county court abused its discretion by imposing excessive sentences.

The district court affirmed the judgment of the county court. It found that the county court had not abused its discretion in sustaining the motion to amend, overruling the motion to sever, overruling the motion for mistrial, or in imposing sentence. It found the evidence was sufficient to support the jury verdicts.

Additional background will be discussed below as necessary.

III. ASSIGNMENTS OF ERROR

Four of Abney's assigned errors, combined, reordered, and restated, all assign that the district court erred in affirming the judgment of the county court. Specifically, he assigns that the county court erred by (1) sustaining the State's motion to amend the complaint, (2) abusing its discretion by overruling his motion to sever, (3) abusing its discretion by overruling his motion for mistrial, and (4) abusing its discretion by imposing excessive sentences. He also assigns that (5) the evidence was insufficient to sustain the convictions for third degree sexual assault and for attempted third degree sexual assault.

IV. STANDARD OF REVIEW

In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. Flodman*, 33 Neb. App. 504, 18 N.W.3d 599 (2025). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *Id*. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id*. An appellate court independently reviews questions of law in appeals from the county court. *Id*. When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that it applies to decide appeals from criminal convictions in district court. *Id*.

We set forth additional standards at appropriate points in our analysis.

V. ANALYSIS

1. Motion to Amend

(a) Additional Background

Abney was originally charged with third degree sexual assault, with P.S. being the victim. The State moved to file an amended complaint, seeking to add a charge of disturbing the peace, with H.V. being the victim. Abney objected, arguing that the charges arose from separate acts and

that joinder would be prejudicial. The county court sustained the motion. The State later amended the charge from disturbing the peace to attempted third degree sexual assault.

On appeal, the district court found that the county court had not abused its discretion, as Abney had ample time to prepare a defense and was not prejudiced by the joinder.

(b) Standard of Review

A ruling on whether to allow a criminal information to be amended is made by the trial court in its discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Ansell*, 322 Neb. 28, 38 N.W.3d 788 (2026). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*.

(c) Analysis

The State's original motion for leave to amend the complaint sought to add a charge of disturbing the peace of H.V. Abney asserts the county court erred in allowing this amendment; however, the State filed a subsequent motion for leave to file a second amended complaint charging Abney with attempted third degree sexual assault of H.V., rather than disturbing the peace of H.V. Because the amended complaint to which Abney assigns error did not contain the charge upon which he was tried and convicted, we need not address the county court's order allowing it.

If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information. The original charges have been abandoned or dismissed. *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001). Although all complaints charged Abney with third degree sexual assault of P.S., the charge as to H.V. was amended, and as to H.V., the second amended complaint supersedes the amended complaint. Therefore, we need not address whether the county court erred in allowing the State to amend the complaint to add a claim of disturbing the peace as that claim was abandoned when the State filed the second amended complaint charging Abney with attempted sexual assault. See *Bojanski v. Foley*, 18 Neb. App. 929, 798 N.W.2d 134 (2011) (recognizing in civil context that court need not address error assigned to pleading that is not operative pleading). See, also, *State v. Soto*, No. A-14-1017, 2015 WL 3379687 (Neb. App. May 26, 2015) (declining to address error related to motion to quash direct at original information when amended information superseded original pleading).

2. Motion to Sever

(a) Additional Background

Abney moved to sever the charges. At a hearing on the motion, the State entered the probable cause affidavit into evidence. The affidavit included P.S.'s allegations that Abney squeezed her buttocks and it also stated that Abney made an apparent attempt to touch H.V. The county court overruled the motion, finding the offenses were close in time, occurred in a business context, included references to matters of a sexual or romantic nature to a person Abney was not in a relationship with, involved Abney asking to or actually "pleasuring himself," and included touching or an attempt to touch the women involved.

On appeal, the district court affirmed the county court's ruling, noting that each charge was simple and distinct and that the jury could easily separate the evidence during deliberations. It also found that there was not a sufficient showing that the charges were combined to overcome individual deficiencies, and that joining the cases did not further inflame the jury to rise to a level of prejudice.

(b) Standard of Review

A denial of a motion to sever will be reversed only if an abuse of discretion is shown that caused the defendant substantial prejudice amounting to a miscarriage of justice. *State v. White*, 321 Neb. 1, 32 N.W.3d 256 (2026).

(c) Analysis

Abney assigns that the county court erred in denying his motion to sever. We disagree. A clear presumption exists in favor of a joinder of offenses and against severance. *Id*. The joinder or severance of charges for trial is governed by Neb. Rev. Stat. § 29-2002 (Reissue 2016), which expresses a rule of liberal joinder of offenses to achieve judicial economy and is construed broadly in favor of joinder. *White, supra*.

Section 29-2002 provides in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
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> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses in an indictment, information, or complaint or by such joinder of offenses in separate indictments, informations, or complaints for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

Thus, whether offenses were properly joined involves a two-stage analysis: (1) whether the offenses were sufficiently related so as to be joinable and (2) whether the joinder was prejudicial to the defendant. *White, supra*.

(i) Sufficiently Related

Under our case law, to determine whether the charges joined for trial are of the same or similar character, we look at the underlying factual allegations. *State v. Corral*, 318 Neb. 940, 20 N.W.3d 372 (2025). Here, the county court found the charges were of a same or similar character, and we agree. The incidents occurred within days of each other, and both involved Abney being alone with a woman in a business context. He made a comment about each woman's appearance. In one case, Abney attempted to kiss the victim, and in the other, he displayed condoms and made comments of a sexual nature. Even after each woman rejected his advances, Abney grabbed one

woman's buttocks and stood close enough to the other woman to be "almost touching." The similarities are sufficient to conclude the allegations are of a similar character.

Abney argues that although each occurred within a business context, in one he was the vendor, and in the other, he was the customer. Abney is correct that there are differences between the two incidents, but the question is whether they are of the same or similar character. The differences Abney highlights are not sufficient to lead us to conclude that they are not.

(ii) Prejudice

If two or more offenses are properly joinable, courts must next determine whether joinder would be prejudicial to the defendant. *State v. White*, 321 Neb. 1, 32 N.W.3d 256 (2026). Under § 29-2002(3), even if prejudice is shown, the determination as to any remedy that may be necessary is left to the sound discretion of the district courts. *White, supra.* A defendant opposing joinder must meet a high burden of proving prejudice therefrom by showing compelling, specific, and actual prejudice from the court's refusal to grant the motion to sever. *Id*. This is not merely a better chance of acquittal in separate trials or spillover of evidence from one count to another, but an appreciable chance that the defendant would have had for an acquittal in a severed trial. *Id*.

Various factors are considered in determining prejudice under § 29-2002(3), including (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case, so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense, or the joinder of the charges converts the matter into a capital case. *State v. Corral, supra*.

While prejudice from joinder cannot be shown if the evidence of one charge would have been admissible in a separate trial of another charge, the converse is not true. *White, supra*. Cross-admissibility of evidence pertaining to joined charges is only one consideration in determining prejudice. *Id*. We also consider whether, to the extent not cross-admissible, the evidence for one charge is sufficiently distinct from the evidence of the other charge so the jury can keep the evidence pertaining to each separate, rather than combining evidence of both to find guilt it would not have found in a separate trial. *Id*.

As will be discussed more fully below, the evidence was sufficient to support each charge. Each charge also involved distinct facts, witnesses, and investigators, with little overlap. There was no danger of the jury conflating the evidence for one charge with the evidence for the other. The jury was instructed that Abney had been charged with two crimes and it needed to reach a separate decision for each crime. Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict. *White, supra*. Each charge involved allegations of a sexual nature, so there was no danger of inflaming the jury any more than it would have been had the charges been tried separately.

The charges were of a same or similar character, and Abney was not prejudiced by the joinder. The district court did not err in affirming the county court's denial of the motion to sever. This assignment of error fails.

3. Motion for Mistrial

(a) Additional Background

Following H.V.'s direct examination, Abney moved for mistrial, arguing that H.V.'s testimony had not amounted to an attempted sexual assault. He asserted that during the motion to sever, the indication was that the incident was an attempted sexual assault and would be admissible under evidentiary rules in the case where P.S. was the victim. Abney argued that H.V.'s testimony was harmful to him, and that if the crime had not been charged as an attempted sexual assault, that would have played a part in the county court's order on the motion to sever. The court overruled the motion for mistrial. On appeal, the district court found no abuse of discretion.

(b) Standard of Review

An appellate court will not disturb a trial court's decision whether to grant a motion for mistrial unless the trial court has abused its discretion. *State v. Vazquez*, 319 Neb. 192, 21 N.W.3d 615 (2025).

(c) Analysis

Abney assigns that the county court erred in denying his motion for mistrial. We disagree. Abney argues that although some factors may have weighed in favor of joinder, at the time he made his motion for mistrial, some of the factors the court relied upon when overruling his motion to sever were no longer applicable. As such, he argues that when he made his motion for mistrial, it was clear that joinder was highly prejudicial. Abney specifically references, among other issues, H.V.'s testimony that Abney never attempted to touch her.

The probable cause affidavit stated that Abney made an "apparent attempt" to touch H.V. At trial, H.V. testified that she "wouldn't say he really tried to touch me, no." Although the information in the probable cause affidavit differed in some respects from H.V.'s testimony at trial, as will be discussed more fully below, the evidence was still sufficient to support the conviction for attempted third degree assault. The differences in the probable cause affidavit and H.V.'s testimony were not sufficient to show that Abney was prejudiced by the joinder of the charges. As noted above, each charge involved distinct facts and witnesses, with little overlap. The facts of each case were simple and there was not a danger of the jury mixing the evidence for the two charges together. The jury was also instructed it needed to reach a separate decision for each charge. The county court did not abuse its discretion in denying Abney's motion for mistrial, and the district court did not err in affirming the county court's ruling. This assignment of error fails.

4. Excessive Sentences

(a) Standard of Review

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

(b) Analysis

Abney assigns that the county court abused its discretion in imposing an excessive sentence. We disagree. Abney was convicted of a Class I misdemeanor, which is punishable by a

maximum sentence of not more than 1 year imprisonment, or a $1,000 fine or both, with no minimum sentence required. Neb. Rev. Stat. § 28-106 (Reissue 2016). For his conviction of a Class I misdemeanor, Abney received a sentence of 150 days' jail. Abney was also convicted of a Class II misdemeanor, which is punishable by a maximum sentence of six months' imprisonment, or a $1,000 fine or both, with no minimum sentence required. *Id*. For his conviction of a Class II misdemeanor, Abney received a sentence of 30 days' jail. These sentences are within statutory limits and on appeal are reviewed for an abuse of discretion.

When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Jones, supra*. A sentencing court is not limited to any mathematically applied set of factors, but the appropriateness of the sentence is necessarily a subjective judgment that includes the sentencing judge's observations of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *Id*.

At the time of sentencing, Abney was 25 years old and a high school graduate. He had one prior criminal conviction, for which he received a fine. The level of service case management inventory assessed Abney as a medium high risk to reoffend. At sentencing, the county court noted it would consider the comments of counsel, as well as Abney's statement, the information contained in the presentence investigation report, character letters, and the statutory and case law factors. It highlighted Abney's lack of criminal history, young age, and family history.

In appeal to the district court and this court, Abney highlights specific factors he alleges the county court failed to consider. He is essentially asking this court to reweigh the sentencing factors. But it is not the proper function of an appellate court to conduct a de novo review or engage in a reweighing of the sentencing factors in the record. *State v. Lopez*, 321 Neb. 118, 32 N.W.3d 868 (2026). The county court considered the proper factors when fashioning the sentences and Abney has not shown it abused its discretion. The district court did not err in affirming the sentences. This assignment of error fails.

5. Sufficiency of Evidence

(a) Standard of Review

In reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Vazquez*, 319 Neb. 192, 21 N.W.3d 615 (2025).

(b) Analysis

(i) Third Degree Sexual Assault

Abney was charged with third degree sexual assault. The State was required to put forth sufficient evidence such that a rational trier of fact could conclude that he subjected P.S. to sexual contact without her consent. See Neb. Rev. Stat. § 28-320 (Reissue 2016). Sexual contact includes the intentional touching of the victim's intimate parts. See Neb. Rev. Stat. § 28-318 (Cum. Supp.

2024). However, it includes only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. See *id*. The buttocks are considered intimate parts. See *id*.

The evidence at trial, taken in the light most favorable to the State, showed that Abney entered P.S.'s home without knocking. He made comments about her appearance and attempted to kiss her. P.S. told Abney to leave, and he grabbed P.S.'s right butt cheek and squeezed. Abney then made a comment and a gesture that led P.S. to believe that he wanted to "pleasure himself" in her apartment. Based on this evidence, a rational trier of fact could conclude that, without P.S.'s consent, Abney touched her buttocks and did so for the purpose of sexual gratification. The district court did not err in finding that the evidence, viewed in the light most favorable to the State, was sufficient to support the conviction for third degree sexual assault.

(ii) Attempted Third Degree Sexual Assault

Abney was charged with attempted third degree sexual assault. The State had to put forth sufficient evidence that a rational trier of fact could conclude that Abney intentionally engaged in conduct that, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in subjecting H.V. to sexual contact without her consent. See Neb. Rev. Stat. § 28-201 (Reissue 2016); § 28-320. Conduct is not to be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent. *State v. Serrano*, 32 Neb. App. 697, 4 N.W.3d 517 (2024). Whether a defendant's conduct constitutes a substantial step toward the commission of a particular crime and is an attempt is generally a question of fact. *Id*.

The evidence, viewed in the light most favorable to the State, was sufficient for a rational trier of fact to conclude that Abney's actions were a substantial step in a course of conduct intended to culminate in sexual contact of H.V. without her consent. Abney made a comment about H.V.'s physical appearance, displayed condoms, and made a sexual remark. Even though H.V. told Abney that was not appropriate and he apologized, he then stood very close to her in an elevator. Although Abney moved away at H.V.'s request, he rubbed his penis and made a sexual comment. H.V. did testify that she would not say that Abney tried to touch her; however, she also confirmed that it appeared Abney was going to get closer to her if she had not told him to move away. At that point, they were "almost touching." A rational trier of fact could conclude, based on the sexual nature of Abney's comments and actions in the apartment and in the elevator, that he took substantial steps in a course of conduct intended to culminate in touching H.V.'s intimate part or parts, without her consent, for the purposes of sexual gratification.

Abney argues that when H.V. told him to stand farther away on the elevator, he obliged, and H.V. "unambiguously testified that [Abney] did not attempt to touch her at any point." Brief for appellant at 37-38. However, H.V. also confirmed that it appeared that Abney was going to get closer to her had she not told him to move away. And although Abney complied, he then began "rubbing his private area" and made a sexual comment. (301:16) Whether this conduct constituted a substantial step toward the commission of third degree sexual assault was a question for the jury. As it convicted Abney, we can assume it concluded that the conduct was a substantial step.

The district court did not err in its ultimate conclusion that the evidence, viewed in the light most favorable to the State, was sufficient to support the conviction for attempted third degree sexual assault.

VI. CONCLUSION

We find that the district court did not err in affirming the judgment of the county court. We affirm the order of the district court.

AFFIRMED.