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STATE OF NEBRASKA, APPELLEE, V. KENNETH C. FLEMING, APPELLANT.

792 N.W.2d 147

Filed December 23, 2010. No. S-10-120.

1. **Trial: Witnesses: Testimony: Appeal and Error.** An appellate court reviews a trial court's allowance of leading questions for an abuse of discretion. It is usual and proper for the trial court to permit leading questions in conducting the examination of a witness who is immature; unaccustomed to court proceedings; inexperienced, agitated, terrified, or embarrassed while on the stand; and lacking in comprehension of the questions asked.
2. **Judges: Recusal.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
3. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias bears the heavy burden of overcoming the presumption of judicial impartiality.
4. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial court level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.
8. **Criminal Law: Indictments and Informations: Time.** A criminal information is not insufficient with respect to a time allegation so long as it alleges a distinct beginning and an equally clear end within which the crimes are alleged to have been committed.
9. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
10. ____. 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.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., and, on brief, D. Brandon Brinegar, of Ross, Schroeder & George, L.L.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Defendant, Kenneth C. Fleming, was convicted of two counts of first degree sexual assault of a child. He was sentenced to 20 to 40 years' imprisonment on each count, with the sentences to run consecutively. Fleming appeals. We affirm.

FACTUAL BACKGROUND

The convictions in this case arise from sexual assault allegations made against Fleming by his stepdaughter, F.K., and his stepniece, A.S. Fleming was married to T.F. in 2006. At the time of the marriage, T.F. had three children from previous relationships, including F.K. A fourth child was born to Fleming and T.F. during the marriage. In March 2006, the family moved from Holdrege, Nebraska, to Kearney, Nebraska, due to a job opportunity for Fleming. In Kearney, the family lived in several residences, including two trailer homes and a single-family home. For nearly all the time at issue, the family lived at this latter location.

At the time of the move to Kearney, T.F. did not work outside of the home. However, in 2008, T.F. did obtain employment outside of the home. Fleming worked during the day, and T.F. worked at night. While T.F. was at work, Fleming stayed home with the children.

The single-family home in Kearney was usually filled with people. Besides the Flemings and their children, two family friends spent some time living in the home, followed by the family of Fleming's cousin, which included two children. Beyond those persons living in the home, the children of T.F.'s brother would occasionally visit the family in Kearney, and T.F. had a second job babysitting her nieces and nephews from that family. Moreover, when the family had lived in a prior residence in Kearney, Fleming's sister had lived with them for a time.

In November 2008, T.F. and the children moved to North Platte, Nebraska. Fleming remained in Kearney. In January 2009, F.K. reported to T.F. that Fleming had sexually assaulted her on various occasions while the family lived in Kearney. F.K. also stated that Fleming had sexually assaulted A.S. T.F. then contacted A.S. and A.S.' mother and father and eventually confirmed that Fleming had also assaulted A.S.

T.F. contacted North Platte law enforcement. Eventually, it was determined that the alleged assaults took place when F.K. lived in Kearney. Kearney law enforcement then initiated an investigation, which ended with the charges filed in this case.

At trial, both F.K. and A.S. testified that Fleming penetrated their vaginal areas with his finger, his tongue, and his penis and that he forced them to perform oral sex on him. Fleming testified and denied the allegations. The theory of his defense was that F.K. and A.S. made up their stories at the instigation of T.F.

ASSIGNMENTS OF ERROR

On appeal, Fleming assigns that (1) trial counsel was ineffective in several particulars; (2) the State's information was insufficient, in violation of his due process rights; (3) the trial court erred in allowing the State's expert witness to testify regarding the credibility of the alleged victims and in overruling Fleming's motion for mistrial on this basis; (4) the trial court erred in allowing the State to use leading questions and photographs to elicit testimony regarding the alleged assaults; (5) the trial court erred in conducting competency examinations

of the two alleged victims in the presence of the jury; (6) the trial court erred in overruling Fleming's motion to recuse; (7) the trial court erred in failing to grant Fleming's motions for directed verdict; (8) there was insufficient evidence to support his conviction; and (9) his sentences were excessive.

STANDARD OF REVIEW

[1] We review a trial court's allowance of leading questions for an abuse of discretion.[1] It is usual and proper for the trial court to permit leading questions in conducting the examination of a witness who is immature; unaccustomed to court proceedings; inexperienced, agitated, terrified, or embarrassed while on the stand; and lacking in comprehension of the questions asked.[2]

[2,3] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[3] A defendant seeking to disqualify a judge on the basis of bias bears the heavy burden of overcoming the presumption of judicial impartiality.[4]

[4] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[5]

[5,6] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial

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[1] See *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985).

[2] *Id.*

[3] *State v. Harris*, 274 Neb. 40, 735 N.W.2d 774 (2007).

[4] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[5] *State v. France*, 279 Neb. 49, 776 N.W.2d 510 (2009).

court.[6] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[7]

ANALYSIS

Ineffective Assistance of Counsel.

In his first assignment of error, Fleming assigns that his trial counsel was ineffective in that he (1) did not make himself available to Fleming, nor did he sufficiently communicate with Fleming; (2) refused to "gather and/or use" evidence and witnesses as directed by Fleming; (3) was not adequately prepared to use witnesses' inconsistent statements to impeach their live testimony; (4) refused to adequately address the motive of F.K., A.S., T.F., and others; (5) failed to adequately cross-examine F.K. and A.S.; (6) failed to file a motion to quash information; and (7) failed to file a motion to withdraw as counsel after Fleming filed complaint against him with the Counsel for Discipline.

[7] A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question. If the matter has not been raised or ruled on at the trial court level and requires an evidentiary hearing, an appellate court will not address the matter on direct appeal.[8]

In this case, both Fleming and the State agree that Fleming's claims are not cognizable on direct appeal. And we agree, with one exception, that we lack a record to determine whether trial counsel's representation was ineffective. We do, however, conclude that we can and will review Fleming's assertions with regard to the sufficiency of the information filed against him. We otherwise decline to reach on direct appeal Fleming's arguments regarding the ineffectiveness of his trial counsel.

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[6] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[7] *Id.*

[8] See *State v. Moyer*, 271 Neb. 776, 715 N.W.2d 565 (2006).

Sufficiency of Information.

In his second assignment of error, Fleming argues that the information against him was insufficient as it alleged the acts occurred between June 1 and November 25, 2008. Fleming argues that this time period is so broad as to violate his due process rights.

Fleming concedes that this court has held in *State v. Martinez*[9] that "where an information provides a timeframe which has a distinct beginning and an equally clear end within which the crimes are alleged to have been committed, it is [constitutionally] sufficient." However, he argues that the "'blanket bar'" on subsequent prosecutions during that same time period does not meet the goal stated in *Martinez* of "balancing the profound tension between the constitutional rights of one accused of child molestation against the State's interest in protecting those victims who need the most protection."[10] Rather, Fleming argues that "[i]t must be little comfort to defendants accused of first degree sexual assault of a child to know the 'blanket bar' will shield them from future prosecutions, when the current law makes it easier for the State to win a conviction on the charge they currently face."[11] Fleming urges us to reject the rule set forth in *Martinez* and instead adopt a rule that requires a case-by-case examination of "whether an indictment is reasonably particular with respect to the time of the offense."[12]

As an initial matter, the State argues that Fleming failed to file a motion to quash or otherwise object to the information and thus has waived any objection that he might have. A review of the record supports this. However, Fleming also alleges that his trial counsel was ineffective in this particular. Thus, as was noted above, we will address this issue on direct appeal.

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[9] See *State v. Martinez*, 250 Neb. 597, 599, 550 N.W.2d 655, 657 (1996).

[10] See *id.* at 601, 550 N.W.2d at 658.

[11] Brief for appellant at 26-27.

[12] See *State v. Baldonado*, 124 N.M. 745, 751, 955 P.2d 214, 220 (N.M. App. 1998).

[8] This court, as recently as January of this year, reiterated the rule it set out in *Martinez*,[13] namely, that an information is not insufficient with respect to a time allegation so long as it alleges a "distinct beginning and an equally clear end within which the crimes are alleged to have been committed."[14] We noted that to hold otherwise "would impose an impossible burden on a child sexual assault victim where there are allegations of multiple assaults over a lengthy timeframe."[15]

Our reasoning in *Martinez* was sound, and we decline to revisit it. Fleming's second assignment of error is therefore without merit.

Testimony of Barbara Sturgis, Ph.D.

In his third assignment of error, Fleming argues that the district court erred in admitting the testimony of Barbara Sturgis, Ph.D., and in not granting his motion for mistrial as a result of Sturgis' testimony.

The purpose of Sturgis' testimony was to provide for the jury background concerning child victims and how they differ from adult victims. Fleming argues Sturgis' testimony that "kids can disclose with detail when they're disclosing what's happened to them" improperly bolstered the credibility of F.K. and A.S.

This court has previously approved of the use of the type of testimony given by Sturgis.[16] At that time, we noted that this type of evidence was helpful because "'[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship,' and 'the behavior exhibited by sexually abused children is often contrary to what most adults would expect.'"[17]

A reading of the entirety of Sturgis' testimony calls Fleming's argument into question. Sturgis was asked whether children could disclose with detail; she indicated they could, but that

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[13] *State v. Martinez, supra* note 9.

[14] *State v. Gibilisco*, 279 Neb. 308, 317, 778 N.W.2d 106, 113 (2010) (citing *State v. Martinez, supra* note 9).

[15] *Id.* at 318, 778 N.W.2d at 113-14.

[16] *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

[17] *Id.* at 39, 486 N.W.2d at 204.

it "depends on what's happened to them." When asked to give an example, Sturgis stated that "kids can disclose with detail when they're disclosing what's happened to them." She then went on to testify that while children can disclose with detail, a child is less likely to tell all of the details to one person and instead will "talk about some of the things at some time and other of the things at others." In addition, Sturgis testified that children are capable of lying and that all of her observations were dependent on the child and his or her capabilities.

This case is distinguishable from *State v. Doan*,[18] a Nebraska Court of Appeals case relied upon by Fleming. In that case, when asked whether it was unusual for a child to not report an incident immediately or to not be visibly upset by reporting sexual abuse, the witness testified to the history she had obtained from the victim, then indicated that she evaluated whether she believed the victim. The witness concluded that she had received "'validation'" of the child's account of abuse.[19]

Unlike *Doan*, in which the witness had interviewed the alleged victim and made a determination of whether she believed the victim, Sturgis acknowledged that she had never interviewed F.K. or A.S. and that she had not even viewed their interviews with law enforcement. Nothing in Sturgis' testimony was directed at these particular witnesses, but, rather, was a discussion of child witnesses in general. At no point did Sturgis opine on whether F.K. or A.S. had been sexually assaulted, nor did she opine on whether she believed the allegations made by F.K. and A.S.

The district court did not err in admitting Sturgis' testimony and denying Fleming's motion for mistrial. Fleming's third assignment of error is without merit.

Use of Leading Questions and Photographs.

In his fourth assignment of error, Fleming contends that the district court erred in allowing the use of leading questions and photographs during F.K.'s testimony.

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[18] *State v. Doan*, 1 Neb. App. 484, 498 N.W.2d 804 (1993).

[19] *Id.* at 488, 498 N.W.2d at 807.

While acknowledging the discretion afforded to the district court in this matter, Fleming argues that such discretion was abused in this case. In particular, Fleming argues that "[t]he trial court's decision to allow [F.K.] to describe and identify the rooms where the alleged assault may have occurred preemptively struck down one of [Fleming's] means for attacking her credibility."[20]

A review of the record, however, demonstrates that the district court did not abuse its discretion. F.K. was just 7 years old at the time of trial. Over the past few years, F.K. had lived in at least five residences. And over those years there was, as the State puts it, "a veritable legion of other relatives and/or friends living with them"[21] at various times. The leading questions asked, and the photographs shown, were designed to help F.K. focus on the homes where the alleged abuse took place. None of the leading questions related to the offenses themselves.

The district court did not abuse its discretion in allowing the use of leading questions and photographs during F.K.'s testimony. Fleming's fourth assignment of error is without merit.

Competence Hearing.

In his fifth assignment of error, Fleming asserts, without authority, that the district court erred in conducting F.K.'s and A.S.' competence examinations before the jury. The State argues that there was no error, as child witnesses are presumed competent,[22] and there is no requirement that such hearings be held out of the presence of the jury.[23]

This issue has been considered in several jurisdictions. For example, the Pennsylvania Supreme Court has adopted a per se rule that child witnesses are to be examined for competence outside the presence of the jury.[24] The court noted that

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[20] Brief for appellant at 34.

[21] Brief for appellee at 9.

[22] See Neb. Rev. Stat. § 27-601 (Reissue 2008).

[23] See Neb. Rev. Stat. § 27-104 (Reissue 2008).

[24] *Com. v. Washington*, 554 Pa. 559, 722 A.2d 643 (1998).

> [e]ven with a cautionary instruction . . . permitting the competency proceedings to take place in the presence of the jury inevitably permeates into the veracity determination assigned exclusively to the jury. Particularly in cases such as this where credibility is the central issue, the likely impact of conducting the competency proceedings in the presence of the jury cannot be diminished.[25]

The Colorado Supreme Court specifically rejected this per se rule in *People v. Wittrein*.[26] Instead, that court concluded that while it was

> the better approach [to examine outside the presence of the jury], any prejudice . . . does not rise to the level of reversible error. The prosecutor asked [the child victim] simple questions that directly related to her ability to be truthful and to relate facts to the jury. The jury was not told the purpose of the testimony and was excused before the judge ruled on . . . competency.[27]

Similarly, the New Mexico Court of Appeals noted in *State v. Manlove*[28] that it was not error for the trial court judge to inquire into the competence of a child witness in the presence of the jury. The *Manlove* court noted that such decisions were in the sound discretion of the trial court, though the court did "feel that generally the better practice would be to conduct this examination outside the presence of the jury."[29]

Still other jurisdictions have concluded that it was not error, or in some instances was even preferable, to have the competency proceedings take place in the presence of the jury. These jurisdictions argue that this type of questioning "assists the

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[25] *Id.* at 566, 722 A.2d at 647. But see *Com. v. Delbridge*, 771 A.2d 1 (Pa. Super. 2001) (concluding that per se rule was inapplicable where credibility and truthfulness not at issue).

[26] *People v. Wittrein*, 221 P.3d 1076 (Colo. 2009).

[27] *Id.* at 1081.

[28] *State v. Manlove*, 79 N.M. 189, 441 P.2d 229 (N.M. App. 1968) (superseded by state evidence rule on other grounds as stated in *State v. Heuglin*, 130 N.M. 54, 16 P.3d 1113 (N.M. App. 2000)).

[29] *Id.* at 193, 441 P.2d at 233. See, also, *State v. Tandy*, 401 S.W.2d 409 (Mo. 1966).

jurors in evaluating independently the child's qualifications as a witness."[30] The Wisconsin Supreme Court has also noted that where there was no objection and the jury was instructed that it was the sole judge of the credibility of the witnesses, as well as the weight and effect of the witnesses, it was not error to hold proceedings in the presence of the jury.[31]

We believe that the best practice is for any hearings on the competency of child witnesses to take place outside the presence of the jury. However, the failure of the trial court to do so is not necessarily reversible error. Instead, an appellate court must consider whether the defendant was prejudiced by the trial court's actions. And we decline to find reversible error in this case.

We note that Fleming objected to F.K.'s examination taking place in the presence of the jury, but did not make the same objection when A.S. was later examined in the same manner. In performing the examination, the district court judge asked a number of general questions of the witnesses. During F.K.'s examination, she was questioned in part as follows:

> [Court] How are you today?
>
> [F.K.] Good. How are you?
>
> Q Just fine. Can you tell me your name for the record?
>
> A [Witness provided first name for record.]
>
> Q What is your last name?
>
> A [Witness provided last name for record.]
>
> . . . .
>
> Q How old are you?
>
> A I'm seven.
>
> Q And what grade are you in in [sic] school?
>
> A Second.
>
> . . . .

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[30] *Brown v. United States*, 388 A.2d 451, 458 (D.C. 1978). See, also, *The State v. Orlando*, 115 Conn. 672, 163 A. 256 (1932); *Schamroth v. State*, 84 Ga. App. 580, 66 S.E.2d 413 (1951); *Ramer v. State*, 40 Wis. 2d 79, 161 N.W.2d 209 (1968). Cf. *State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958) (applying same reasoning for potentially insane witness).

[31] *Collier v. State*, 30 Wis. 2d 101, 140 N.W.2d 252 (1966).

Q You understand that you're here today to provide some testimony or tell us some things that happened; is that right?

A Uh-huh.

Q Do you know what a lie is?

A Yeah.

Q Can you tell me?

A When you say something happened but it really didn't.

Q And if people tell lies, do anybody — does anything happen to them?

A People don't believe them for a long time.

Q For a long time?

A Uh-huh.

. . . .

Q Now today you're here and we're going to — or the attorneys are going to ask you some questions, and can you promise to me that you will tell the truth?

A Uh-huh.

Q And do you understand that if you don't, that you can get into trouble?

A Uh-huh.

Similar questions were asked and answered during the court's examination of A.S. At the conclusion of each witness' examination, the district court made no affirmative, explicit finding of competence, but simply allowed counsel to begin direct examination. We note also that neither F.K. nor A.S. were otherwise placed under oath when testifying; thus, the examination by the court essentially substituted as their oaths.

In addition, the jury was instructed by the district court judge as follows: "I am not permitted to comment on the evidence, and I have not intentionally done so. If it appears to you that I have commented on the evidence, during either the trial or the giving of these instructions, you must disregard such comment entirely." The jury was also instructed that it was "the sole judge[] of the credibility of the witnesses and the weight to be given to their testimony."

For the reasons noted above, we conclude that the district court did not err in allowing the witnesses to be examined for

competency in the presence of the jury. As such, Fleming's fifth assignment of error is without merit.

Recusal of Trial Court Judge.

In his sixth assignment of error, Fleming contends that the district court judge should have recused himself. The basis for the recusal request is that the judge "conducted himself in a biased and prejudice[d] manner against [Fleming]."

From a review of the briefs and argument, it appears that Fleming requested recusal because certain rulings went against him at trial. After a complete reading of the record in this case, however, it is clear that while the district court judge ruled against Fleming, he also made several rulings in Fleming's favor. Other than essentially complaining that the district court judge did not like him, Fleming points to nothing that would require the district court judge to recuse himself. The district court judge therefore did not abuse its discretion by declining to do so. Fleming's sixth assignment of error is without merit.

Directed Verdicts and Sufficiency of Evidence.

In his seventh assignment of error, Fleming contends that the district court erred in denying his motion for directed verdict and his renewed motion for directed verdict. And in his eighth assignment of error, Fleming contends there was insufficient evidence to support his conviction. These two assignments of error will be considered together.

Fleming was charged with two counts of first degree sexual assault of a child.[32] "A person commits sexual assault of a child in the first degree if he or she subjects another person under twelve years of age to sexual penetration and the actor is at least nineteen years of age or older."[33] And Neb. Rev. Stat. § 28-318(6) (Reissue 2008) defines

> [s]exual penetration [as] 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

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[32] See Neb. Rev. Stat. § 28-319.01 (Reissue 2008).

[33] § 28-319.01(1).

> the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen.

As an initial matter, the record shows that both F.K. and A.S. were under 12 years of age at the time of the alleged sexual assault and that Fleming was over the age of 19. As to the alleged sexual assaults, F.K. testified that Fleming's "weiner and his hand and his mouth" touched her body and that "[m]y private and my hand and my mouth" touched Fleming's body. F.K. stated that Fleming "put his private in my private." F.K. indicated that "[h]e would have me on the floor, and he would put his private in my private and then start rubbing." F.K. also stated that she had to put her hand on his "private" and that "[i]f the white stuff didn't come out, he would want us to put our mouth on it." F.K. testified that she would do so. F.K. additionally testified that she witnessed Fleming "put his private . . . in [A.S.'] private."

In addition, A.S. testified that her "private touched [Fleming's] private" and also that her mouth touched Fleming's "private." A.S. also stated that Fleming "told [her] to sit on his face and he licked my private [with his tongue]" and that she did not have any clothes on over her "private" when that event occurred. In response to this testimony, A.S. stated that Fleming's tongue did not go "inside of [her] private." A.S. additionally testified that she witnessed F.K. "suck on it," referring to Fleming's "private."

The above evidence, when viewed in a light most favorable to the State, clearly supports the denial of Fleming's motions for directed verdict and also supports the guilty verdicts entered against Fleming for first degree sexual assault of a child. Fleming's seventh and eighth assignments of error are without merit.

Sentences.

In his ninth, and final, assignment of error, Fleming asserts that the sentences imposed upon him were excessive.

[9,10] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's

observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[34] 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.[35]

Fleming's primary argument seems to be centered on the following statement of the district court: "Although . . . Fleming — and I understand your disagreement with whether you did anything wrong, the system, the jury disagrees with you. And you need to be and will be sentenced pursuant to what the jury determined occurred as opposed to what you think occurred." Fleming argues that this statement shows the district court sentenced him because of Fleming's "audacity in maintaining his innocence."[36]

We do not read the district court's statement in that manner. Rather, we read the district court's statement as its recognition that while Fleming continued to assert his innocence, the jury disagreed and concluded that Fleming was guilty and that he would be sentenced accordingly.

Fleming was convicted of two counts of first degree sexual assault of a child, a Class IB felony,[37] punishable by a minimum of 20 years' and a maximum of life imprisonment.[38] Section 28-319.01(2) further provides a mandatory minimum sentence of 15 years' imprisonment. Fleming was sentenced to 20 to 40 years' imprisonment on each count, with sentences to be served consecutively. These sentences were within statutory limits.

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[34] *State v. Epp, supra* note 6.

[35] *Id.*

[36] Brief for appellant at 47.

[37] See § 28-319.01(2).

[38] See Neb. Rev. Stat. § 28-105 (Reissue 2008).

Moreover, as is noted by the State, Fleming's minimum sentence is just 5 years more than the mandatory minimum for the crimes for which he was convicted. Both F.K. and A.S. have nightmares because of the abuse perpetrated by Fleming, as well as continuing emotional problems. The sentences imposed on Fleming were not excessive; the district court did not abuse its discretion in so sentencing Fleming. Fleming's final assignment of error is without merit.

CONCLUSION

The judgment and sentences of the district court are affirmed.

AFFIRMED.

WRIGHT, J., not participating.