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STATE OF NEBRASKA, APPELLEE, V. LARRY WILLIAMS, APPELLANT.

802 N.W.2d 421

Filed September 2, 2011. No. S-10-929.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case.
3. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
4. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
5. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
6. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404(2) (Cum. Supp. 2010), and the trial court's decision will not be reversed absent an abuse of discretion.
7. **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.
8. **Trial: Evidence: Appeal and Error.** On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court.
9. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403.
10. **Rules of Evidence: Other Acts.** Evidence of other crimes which is relevant for a purpose other than to show the actor's propensity is admissible under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010).
11. **Rules of Evidence: Other Acts: Appeal and Error.** An appellate court's analysis under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Cum. Supp. 2010), considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested,

instructed the jury to consider the evidence only for the limited purpose for which it was admitted.

12. **Sentences.** 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 violence involved in the commission of the crime.
13. ____. In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors.
14. ____. 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.
15. ____. Both the nature of the offense for which a defendant is being sentenced and the defendant's past criminal record are appropriate considerations in sentencing.
16. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
17. **Sentences.** Under Neb. Rev. Stat. § 83-1,106 (Reissue 2008), an offender shall be given credit for time served as a result of the charges that led to the sentences; however, presentence credit is applied only once.

Appeal from the District Court for Buffalo County: WILLIAM T. WRIGHT, Judge. Affirmed as modified.

John H. Marsh, Deputy Buffalo County Public Defender, of Knapp, Fangmeyer, Aschwege, Besse & Marsh, P.C., for appellant.

Jon Bruning, Attorney General, and Erin E. Tangeman for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Larry Williams appeals his convictions and sentences in the district court for Buffalo County for five counts of first degree sexual assault and one count of sexual assault of a child. Williams claims that the court erred when it overruled his motion for new trial and that the court imposed excessive sentences. We affirm Williams' convictions, and because we

find plain error in connection with the application of credit, we affirm Williams' sentences as modified.

STATEMENT OF FACTS

The charges against Williams arose from a relationship that Williams, who was born in July 1956, had with S.A., who was born in February 1987. Williams described the relationship as a "mentoring" relationship. Brief for appellant at 6. In his defense at trial, Williams denied that the relationship was romantic or sexual. However, S.A. testified that the relationship became sexual before she reached 16 years of age. The incidents charged were alleged to have occurred between February 25, 2001, and February 24, 2003, when S.A. was 14 and 15 years old. The following facts are based on trial testimony of S.A. and other witnesses:

S.A. moved to Ravenna, Nebraska, in the summer of 1998, prior to her sixth grade year, to live with her mother and stepfather. S.A. had trouble adjusting to her mother's new marriage, and the stepfather would sometimes be physically violent. S.A. began acting out physically and verbally. When arguments and tension in the family reached a certain point, S.A.'s mother called the police to defuse the situation.

As a police officer for the city of Ravenna, Williams sometimes responded to calls to S.A.'s house. The first time that S.A. recalled Williams' coming to the house was when she was in the sixth grade. Williams or another officer responded to calls to the house, but S.A.'s mother eventually began to specifically call for Williams to help deal with situations in the home, whether or not he was on duty. From S.A.'s sixth through eighth grade years, S.A. continued to have contact with Williams and he would talk to her about her family and school problems. When she was upset about circumstances at home, S.A. would sometimes go out walking, and if Williams was on patrol, he might see her and stop to check on her. At one point, S.A. began going to the police station to visit Williams.

During her ninth grade year, from 2001 to 2002, S.A. went to live with her father in Omaha, Nebraska, and later, Gretna, Nebraska. She returned to Ravenna for visits with her mother every other weekend. S.A. recalled that during one of her

weekend visits, Williams saw her walking around town and told her he would come to visit her. Williams later pulled his police car into the alley behind S.A.'s mother's house, and S.A. went out to sit in the car with him. They talked until it became dark. S.A. told Williams she was tired, and she laid her head on his shoulder. Williams put his arm around her shoulders and began to slowly move his hand down her shirt. He stuck his hand inside her shirt and cupped his hand around her breast. S.A. was shocked by the touch, and she eventually went back into the house and went to bed. S.A. was 14 years old at the time of the incident.

S.A. continued to see Williams when she returned to Ravenna for weekend visits. The two did not talk about the incident when he had touched her breast, but interactions between the two began to change in that he would sometimes hold her hand, and he kissed her once. At the end of her ninth grade year, S.A. moved back to Ravenna to live with her mother. One night during the summer of 2002, before S.A.'s sophomore year in high school, S.A. rode with Williams in his police car to the police department office located in the city hall. There, they started to kiss and hug, and eventually they had sexual intercourse. Before penetration, Williams asked S.A. if it was "okay," and she said that it was. S.A. was 15 years old at the time of the incident.

After school started in the fall of 2002, S.A. continued to see Williams and sometimes they would have sexual intercourse. S.A. specifically recalled four additional times they had sexual intercourse from the fall of 2002 until she turned 16 in February 2003. The incidents took place at various locations in Ravenna, including the city council chambers, the public swimming pool area, the shooting range, and Williams' police car when it was parked in a garage attached to the city hall.

In November 2004, Williams told S.A. that he wanted to end his relationship with her. S.A. was upset and asked her mother to arrange for her to see a counselor she had seen when she lived with her father. After a few sessions, S.A. told the counselor that she had had a sexual relationship with an older man and that the relationship had started when she was 16. In late December, S.A. called Williams and learned that he had

gotten married. After learning this, S.A. told her mother she was upset, and for the first time, S.A. told her mother about the sexual relationship with Williams. S.A.'s mother feared S.A. would hurt herself, and she therefore called the police to have S.A. hospitalized. S.A.'s mother told hospital personnel about S.A.'s relationship with Williams. A law enforcement investigation was begun that eventually led to the charges in this case.

On March 5, 2007, the district court for Buffalo County sustained a motion filed by the Buffalo County Attorney and, pursuant to Neb. Rev. Stat. § 23-1204.01 (Reissue 2007), appointed "the Nebraska Attorney General and his designated Assistant Attorneys General to serve as Special Deputy County Attorneys in all matters relating to the prosecution." The information and subsequent amended informations filed in this case were signed by persons who under oath identified themselves as special deputy county attorneys. The State initially filed an information charging Williams with one count of first degree sexual assault. On June 14, the State filed an amended information charging Williams with six counts of first degree sexual assault, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995), and one count of sexual assault of a child, in violation of Neb. Rev. Stat. § 28-320.01 (Cum. Supp. 2004). The first degree sexual assaults were alleged to have occurred between February 25, 2002, and February 24, 2003, when S.A. was 15, and the sexual assault of a child was alleged to have occurred between February 25, 2001, and February 24, 2002, when S.A. was 14.

A jury trial was held October 1 through 4, 2007. At the conclusion of the trial, the jury announced that it was deadlocked and the court declared a mistrial. On November 16, Williams filed a plea in abatement asserting that the jury's announcement and the declaration of a mistrial occurred outside his presence and the presence of his counsel. On January 7, 2008, the court entered an order denying Williams' plea in abatement. Williams appealed the January 7 order, but, on August 4, 2008, in case No. A-08-067, the Nebraska Court of Appeals sustained the State's motion to dismiss the appeal for lack of jurisdiction.

Williams thereafter filed a plea in bar asserting that a retrial would violate his constitutional right not to be subjected to double jeopardy and specifically asserting that because the declaration of a mistrial was an abuse of discretion, a second prosecution was barred and the matter should be dismissed. The district court overruled the plea in bar and found that the declaration of a mistrial was supported by manifest necessity. Williams again appealed, and, on January 13, 2009, in case No. A-08-1220, the Court of Appeals summarily dismissed the appeal. We granted Williams' petition for further review of the dismissal. We concluded that the order overruling Williams' plea in bar was a final, appealable order that we had jurisdiction to review. We further concluded that although the district court erred when it did not have the parties and counsel present for the colloquy with the jury regarding the deadlock, the court did not abuse its discretion when it declared a mistrial. We finally concluded that because jeopardy did not terminate, retrial was not barred. See *State v. Williams*, 278 Neb. 841, 774 N.W.2d 384 (2009).

Prior to a second trial, the State filed a second amended information in which it removed one of the six counts of first degree sexual assault alleged under § 28-319(1)(c) but added two counts of first degree sexual assault under § 28-319(1)(b), which were alleged to have occurred after S.A. turned 16 but at a time when Williams knew or should have known that she was incapable of resisting or appraising the nature of her conduct. Williams filed a motion to quash the two additional counts, asserting that adding the two counts evidenced prosecutorial vindictiveness which violated his due process rights. The court noted that Williams' only evidence of vindictiveness was the timing of the second amended information, which timing followed the mistrial in the first trial and Williams' filing of a plea to dismiss the charges against him on double jeopardy grounds. The court concluded that the facts did not give rise to a presumption of vindictiveness, and the court found "little to suggest that the motivation for the filing of the two amended charges was likely the result of vindictiveness for [Williams'] seeking a dismissal of the original charges." The court therefore overruled the motion to quash.

A second jury trial was held January 25 through 29, 2010. At the close of the State's case, Williams made a motion to dismiss, for lack of sufficient evidence, the two charges of first degree sexual assault under § 28-319(1)(b) that had been added in the second amended information. The district court sustained this motion. The court overruled Williams' additional motion for a mistrial of the remaining counts made on the basis that certain evidence admitted at trial related only to the two dismissed counts. When the trial resumed, the court told the jury that the two counts had been dismissed and instructed the jury that it must disregard the evidence and testimony related to such charges and to the relationship between Williams and S.A. after her 16th birthday. Williams then presented his defense. The day after deliberations began, the jury informed the court that it was deadlocked. The court declared a mistrial when the jury was still deadlocked after two additional hours of deliberations.

A third trial was held July 19 through 21, 2010, on the remaining five counts of first degree sexual assault and one count of sexual assault of a child. The jury found Williams guilty of all counts. The third trial gives rise to the instant appeal.

In support of his motion for new trial, Williams argued that his rights to due process were violated and that the prosecutors were guilty of misconduct when the State subjected him to a third trial. Williams argued that without the evidence regarding two additional counts of first degree sexual assault that were ultimately dismissed, the second jury might not have been deadlocked and that instead, he might have been acquitted of the remaining charges in the second trial. Williams also argued that the operative information in this case was defective, because the person who signed the information as a special deputy county attorney was not named in the order in which the court appointed the Attorney General and his assistants as special deputy county attorneys and there was nothing in the information to indicate that the person was an assistant attorney general. Williams also argued that the court made erroneous evidentiary rulings when it admitted a note that Williams wrote to S.A. into evidence. In the note, Williams wrote that he had problems with "Internal Affairs State Patrol" because

of "a girl leaving my apt. late at nights" and that he had been charged with "'Conduct unbecoming of a Police Officer'" but that he would "keep [S.A.'s] name out of it." The State offered the note into evidence during its cross-examination of Williams, who testified in his own defense. The court admitted the note into evidence over Williams' objections based on Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), regarding relevance and unfair prejudice, and Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2010), regarding other crimes, wrongs, or acts. The court instructed the jury that the evidence was received solely for the purpose of impeaching Williams' testimony and was not to be considered for any other purpose. Williams argued that the relevance of the note was outweighed by unfair prejudice, because the note was written when S.A. was over 16 years of age and after the time of the incidents charged in this third trial. The court overruled Williams' motion for new trial on all grounds.

The district court sentenced Williams to consecutive terms of imprisonment for 6 to 12 years for each of the five convictions for first degree sexual assault and to a term of probation for 5 years for sexual assault of a child. The probation sentence was ordered to be served consecutively to the prison sentences. The court also stated that Williams was entitled to credit against the five prison sentences for first degree sexual assault "in the amount of 45 days each count."

Williams appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Williams claims, restated, that the district court erred when it overruled his motion for new trial and specifically when it rejected his arguments to the effect that (1) he was denied due process because the informations were signed by persons who were not properly identified as the prosecuting authority, (2) prosecutorial misconduct and due process violations occurred because of the inclusion of two additional counts of first degree sexual assault and evidence related thereto in the second trial, and (3) the court erroneously admitted the note Williams wrote when S.A. was over 16 years of age into evidence because such evidence was not proper impeachment in that it was unfairly

prejudicial and it was improper evidence of uncharged misconduct. Williams also claims that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

[2,3] Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010). An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *Id.*

[4-6] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *Chavez, supra*. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, we review the admissibility of evidence for an abuse of discretion. *Chavez, supra.* It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rules 403 and 404(2), and the trial court's decision will not be reversed absent an abuse of discretion. *Chavez, supra.*

[7] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

ANALYSIS

The Informations Properly Identified the Prosecuting Authorities.

Williams asserts, as the first basis for which the district court should have granted a new trial, that he was denied due process because the information and amended informations were signed by persons who were not properly identified as the prosecuting authorities. We conclude that the court did not abuse its discretion when it denied Williams' motion for new trial on such basis.

Williams argued in support of a new trial that the informations in this case were defective because the persons who signed them as special deputy county attorneys were not named in the order in which the court appointed the Attorney General and his assistants as special deputy county attorneys and were not identified in the information as assistant attorneys general. The district court, pursuant to § 23-1204.01, appointed "the Nebraska Attorney General and his designated Assistant Attorneys General to serve as Special Deputy County Attorneys in all matters relating to the prosecution." The first information and all three amended informations filed in this case were signed by persons who under oath identified themselves as special deputy county attorneys.

Williams relies on *Lower v. State*, 106 Neb. 666, 184 N.W. 174 (1921), in which this court concluded that an information was a nullity because it was signed by an assistant attorney general in his capacity as an assistant attorney general. This court reasoned that an assistant attorney general was not clothed with the power to act in his own name and instead was an agent of the Attorney General who must perform official acts in the name of the Attorney General.

Williams' reliance on *Lower* is misplaced. The import of *Lower* is that when an assistant attorney general performs official acts that are within the authority of the Attorney General, he or she must do so on behalf of and in the name of the Attorney General rather than in his or her own name. In the present case, the individuals who signed the informations did not do so as assistant attorneys general or on behalf of the Attorney General but instead did so pursuant to the district court's order appointing them as special deputy county attorneys. The appointment was made pursuant to § 23-1204.01, and the individuals identified themselves under oath as having been appointed as special deputy county attorneys. Such identification was sufficient to establish them as the proper prosecuting authorities.

Williams makes no argument that the persons who signed the informations were not assistant attorneys general who were appointed under the court's order. Instead, Williams asserts that they were not properly identified in the informations and that therefore, the informations were defective.

Williams' argument in this regard is without merit, and the district court did not abuse its discretion when it denied a new trial on this basis.

Additional Counts of First Degree Sexual Assault Were Dismissed Prior to the Third Trial in Which Williams Was Convicted, and No Evidence Related to Such Counts Was Admitted at That Trial.

Williams asserts, as the next basis for which the district court should have granted a new trial, that the inclusion of two additional counts of first degree sexual assault and evidence related thereto in his second trial amounted to prosecutorial misconduct and a due process violation. We conclude that the district court did not abuse its discretion when it denied a new trial on this basis.

After the first trial resulted in a deadlocked jury and a mistrial, the State filed a second amended information in which it added two counts of first degree sexual assault which were alleged to have occurred after S.A. turned 16 but at a time when Williams knew or should have known that she was incapable of resisting or appraising the nature of her conduct. The court denied Williams' motion to quash the two additional counts after rejecting his argument that adding the two counts evidenced prosecutorial vindictiveness and violated his due process rights. The court found "little to suggest that the motivation for the filing of the two amended charges was likely the result of vindictiveness for [Williams'] seeking a dismissal of the original charges." In the second trial, the State presented evidence relating to the two additional counts, but the court determined that the State had not presented sufficient evidence to support the counts and dismissed the two counts before the case was given to the jury. The second trial resulted in a deadlocked jury and a mistrial.

Williams' convictions and sentences resulted from a third trial. As noted, the two additional counts were dismissed before the third trial and the State did not present evidence which related to the dismissed counts. Nevertheless, Williams argues on appeal that the State should not have subjected him to a third trial, because the second trial included evidence regarding

the two additional counts. Williams did not raise this argument in the trial court. To the extent Williams argues that the district court erred when it overruled the motion to quash the two additional counts in the second trial, we note that Williams essentially got the remedy he sought in the motion to quash when the additional counts were dismissed in the second trial before they were submitted to the jury.

Williams also argues that he was harmed because he might have been acquitted in the second trial if there had not been evidence of the additional counts. We do not speculate as to the reasons the members of the deadlocked jury in the second trial came to their individual decisions or what decisions they might have reached if the evidence had not been presented. See *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009) (this court cannot speculate as to reason for jury's verdict). We do note, however, that the court in the second trial instructed the jury not to consider the evidence related to the additional counts. We further note that no evidence related to the additional counts was presented in the third trial at which the jury found Williams guilty.

We conclude that to the extent there was any error in the second trial with respect to the inclusion of the two additional counts, any such error was inapplicable to the third trial, because evidence related solely to the additional counts was not included in the third trial, from which Williams' convictions arose. We conclude that the district court did not abuse its discretion when it rejected this basis for a new trial.

The District Court Did Not Err When It Admitted the Note for Purposes of Impeaching Williams' Testimony.

Williams asserts, as the final basis for which the district court should have granted a new trial, that the court erroneously admitted the note he wrote when S.A. was over 16 years of age into evidence. He asserts that such evidence was not proper impeachment evidence because it was unfairly prejudicial and it was improper evidence of uncharged misconduct. We conclude that the district court did not abuse its discretion when it denied a new trial on this basis.

We note that the district court admitted the note only for purposes of impeachment of Williams' testimony in which he asserted that he never had a romantic or sexual relationship with S.A. The note contradicted such testimony. Prior to receipt of the note during the State's cross-examination of Williams, the court instructed the jury that the evidence was "offered solely for the purposes of attacking the credibility of the witness" and that the jury should not consider the evidence "as proof of the truth of anything."

[8] Williams' objections at trial to the admission of the note and the line of questioning regarding the note were based on rules 403 and 404(2). On appeal, a party may not assert a different ground for an objection to the admission of evidence than was offered to the trial court. *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). We therefore consider Williams' arguments on appeal that the note was improper impeachment as arguments based on rules 403 and 404(2).

[9] Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The fact that evidence is prejudicial is not enough to require exclusion under rule 403, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party; it is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403. *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009).

Rule 404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[10,11] Rule 404(2) prohibits the admission of other bad acts evidence for the purpose of demonstrating a person's propensity to act in a certain manner. But evidence of other crimes

which is relevant for a purpose other than to show the actor's propensity is admissible under rule 404(2). See *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011). Evidence that is offered for a proper purpose is often referred to as having a "special" or "independent" relevance, which means its relevance does not depend upon its tendency to show propensity. *Id*. An appellate court's analysis under rule 404(2) considers (1) whether the evidence was relevant for some purpose other than to prove the character of a person to show that he or she acted in conformity therewith; (2) whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice; and (3) whether the trial court, if requested, instructed the jury to consider the evidence only for the limited purpose for which it was admitted. *Chavez, supra.*

In the present case, the note was not admitted for the purpose of proving Williams' character or to show that he acted in conformity therewith. Instead, the note was offered to impeach his testimony that he did not have a sexual or romantic relationship with S.A. The court instructed the jury that the evidence was admitted for the sole purpose of attacking Williams' credibility and that it should not be considered for other purposes. The probative value of the evidence was not outweighed by its potential for unfair prejudice. The note had probative value because it appeared to be inconsistent with Williams' testimony at trial and was therefore relevant to the jury's assessment of his credibility. The potential prejudice to Williams was minimized by the fact that the note was admitted during Williams' testimony, giving him the opportunity to explain the meaning of the note and his reasons for writing the note and leaving it for S.A.

We conclude that the district court did not abuse its discretion when it admitted the note into evidence and when it rejected this basis for a new trial.

The Court Did Not Impose Excessive Sentences.

Williams finally asserts that the district court imposed excessive sentences. We conclude that the sentences were within statutory limits and that the court did not abuse its discretion in sentencing Williams.

Williams was convicted of five counts of first degree sexual assault under § 28-319(1)(c) and one count of sexual assault of a child under § 28-320.01. First degree sexual assault is a Class II felony, see § 28-319(2), and sexual assault of a child is a Class IIIA felony, see § 28-320.01. The statutory sentencing range for a Class II felony is 1 to 50 years' imprisonment and for a Class IIIA felony is 0 to 5 years' imprisonment, a $10,000 fine, or both. Williams was sentenced to consecutive terms of imprisonment for 6 to 12 years for each of the five convictions for first degree sexual assault and to a term of probation for 5 years for sexual assault of a child, with the probation sentence ordered to be served consecutively to the prison sentences. Therefore, Williams' sentences were within statutory limits.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011). Williams argues that his combined sentences of 30 to 60 years' imprisonment were an abuse of discretion because he "had almost no criminal record whatsoever" and because he "had spent almost his entire adult lifetime in public service." Brief for appellant at 21. He notes that he had "a long history of law abiding conduct" which included time in public service in the military and as a law enforcement officer. *Id.* at 22. He further notes that his convictions all pertain to one victim and did not involve physical violence.

[12-15] 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 violence involved in the commission of the crime. *Erickson, supra.* In imposing a sentence, the sentencing court is not limited to any mathematically applied set of factors. *Id*. 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. *Id*. Both the nature of the offense for which a defendant is being

sentenced and the defendant's past criminal record are appropriate considerations in sentencing. *Id.*

The record of the sentencing hearing indicates that the court considered the factors listed above, including Williams' past criminal history, which the court recognized as being "minimal," and his record of law-abiding conduct. The court specifically noted Williams' "multiple years of service, both as a law enforcement officer and as a United States Army National Guard officer." While the court noted that "[m]uch of that service has been honorable," it further noted that "obviously, a significant portion of it was not." The court stated that Williams took advantage of his position as a law enforcement officer "in order to engage in an ongoing sexual relationship with a child who was obviously vulnerable, not only by reason of her age, but by reason of her circumstances, upbringing, and very probably emotional and other disturbances." The court emphasized that Williams had taken advantage of his position not just once but multiple times, as represented by the six incidents that resulted in the convictions in this case and additional uncharged incidents.

The court stated that its sentencing must reflect the multiple breaches of trust that led to the offenses for which Williams was convicted. The court also noted that Williams was "in need of intensive sex offender treatment and therapy" under circumstances that were controlled and highly structured, which indicated that a sentence of imprisonment was appropriate.

Our review of the record related to the sentencing indicates that the court considered proper, relevant factors, that it did not consider improper factors, and that the court had proper reasons for the sentences it imposed. We therefore conclude that the court did not abuse its discretion and did not impose excessive sentences.

The Court Committed Plain Error When It Applied the Credit for Time Served Against the Sentence for Each Count.

In its brief, the State claims that the district court committed plain error when it granted Williams credit for time served of 45 days against each of the five prison sentences for first

degree sexual assault. The State asserts that the court should have applied the credit against only one sentence. The State requests this court to modify the sentence to apply the 45-day credit against only the first sentence imposed and to strike the credits granted against the remaining sentences. We agree that the court committed plain error.

At the sentencing hearing, the court stated that Williams should be entitled to 45 days' credit for time served and that "[t]hat credit will be given on each count." In the journal entry on sentencing, the court ordered that Williams was entitled to credit for time served against the sentences of imprisonment "in the amount of 45 days each count." The presentence investigation report indicates that Williams served a total of 45 days prior to his sentencing.

[16] Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. *State v. Simnick*, 279 Neb. 499, 779 N.W.2d 335 (2010).

[17] We note that Neb. Rev. Stat. § 83-1,106(1) (Reissue 2008) provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.

In *State v. Banes*, 268 Neb. 805, 811-12, 688 N.W.2d 594, 599 (2004), we stated that under § 83-1,106, "an offender shall be given credit for time served as a result of the charges that led to the sentences; however, presentence credit is applied only once." The Nebraska Court of Appeals has noted:

> Courts in other states, construing statutes similar to § 83-1,106, have uniformly held that "'when consecutive sentences are imposed for two or more offenses, periods of presentence incarceration may be credited only against the aggregate of all terms imposed: an offender who receives consecutive sentences is entitled to credit against only the first sentence imposed, while an offender sentenced to concurrent terms in effect receives credit against each sentence.'"

State v. Sanchez, 2 Neb. App. 1008, 1012-13, 520 N.W.2d 33, 37 (1994) (quoting *Endell v. Johnson*, 738 P.2d 769 (Alaska App. 1987) (citations omitted)). See, also, *State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010) (citing *Endell, supra*, and indicating that time served should be credited against aggregate of minimum as well as aggregate of maximum of consecutive sentences imposed).

Instead of crediting time served against each count as the court did, the court in this case should have credited the 45 days served against only the first count, thereby crediting 45 days against the aggregate of the minimum and the aggregate of the maximum sentences imposed. We therefore modify the sentencing order to state that Williams is entitled to a credit for time served in the amount of 45 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment.

CONCLUSION

We conclude that the district court did not abuse its discretion when it denied Williams' motion for new trial on each of the bases asserted herein. We further conclude that the court did not impose excessive sentences, but we modify the sentencing order to state that Williams is entitled to a credit for time served in the amount of 45 days against the aggregate of the minimum and the aggregate of the maximum sentences of imprisonment.

AFFIRMED AS MODIFIED.