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by the Chamber were not made under the direction of its board of directors.

We find no error in the district court's determination that the expenditure of funds by the City to the Chamber, which funds were subsequently transferred from the Chamber to the Foundation, were appropriate and for a public purpose, according to § 13-315.

CONCLUSION

The district court did not err in finding that Kalkowski's claim was not barred by the statute of limitations or in finding that the expenditure of funds by the City was for a public purpose and in conformity with the statutes.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DEAN L. OSBORNE, APPELLANT.

826 N.W.2d 892

Filed February 19, 2013. No. A-12-112.

1. **Courts: Jurisdiction: Appeal and Error.** A district court sitting as an intermediate appellate court may timely modify its opinions, a notion consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction.
2. **Courts: Appeal and Error.** Judicial efficiency is served when any court, including an appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or to correct its own mistakes.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. 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.
4. **Sexual Assault: Convictions: Proof.** According to Neb. Rev. Stat. § 28-320(1) (Reissue 2008), a conviction for third degree sexual assault requires proof that the defendant subjected another person to sexual contact without the consent of the victim or where the defendant knew or should have known that the victim

was physically or mentally incapable of resisting or appraising the nature of the conduct.

5. **Sexual Assault: Words and Phrases.** Neb. Rev. Stat. § 28-318(5) (Reissue 2008) defines sexual contact as meaning intentional touching of the victim's sexual or intimate parts or intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact includes only such conduct which can reasonably be construed as being for the purpose of sexual arousal or gratification.
6. ____: ____. Neb. Rev. Stat. § 28-318(2) (Reissue 2008) defines intimate parts to mean the genital area, groin, inner thigh, buttocks, or breast.
7. **Sexual Assault: Proof.** In proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose.
8. **Obscenity: Minors: Convictions: Proof.** According to Neb. Rev. Stat. § 28-809 (Reissue 2008), a conviction for admitting a minor to an obscene motion picture, show, or presentation requires proof that the defendant knowingly exhibited to a minor or knowingly provided to a minor an admission ticket or pass or knowingly admitted a minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors.
9. **Obscenity: Minors: Words and Phrases.** Neb. Rev. Stat. § 28-807(6) (Reissue 2008) defines harmful to minors as meaning that the description or representation of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse predominantly appeals to the prurient, shameful, or morbid interest of minors; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and is lacking in serious literary, artistic, political, or scientific value for minors.
10. **Criminal Law: Obscenity: Minors: Statutes: Words and Phrases.** The offense defined in Neb. Rev. Stat. § 28-809 (Reissue 2008) is labeled in the statute as "Obscene motion picture, show, or presentation; admit minor; unlawful; penalty."
11. ____: ____: ____: ____: ____. The definition of the offense in Neb. Rev. Stat. § 28-809 (Reissue 2008), along with the relevant definitions of key terms in Neb. Rev. Stat. § 28-807 (Reissue 2008), generally mirrors the specific definition of obscene in § 28-807(10), which requires a finding that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity or sex, depicts or describes in a patently offensive way certain sexual conduct, and, taken as a whole, lacks serious literary, artistic, political, or scientific value.
12. ____: ____: ____: ____: ____. The definition of the offense in Neb. Rev. Stat. § 28-809 (Reissue 2008) and the relevant definitions of key terms in Neb. Rev. Stat. § 28-807 (Reissue 2008) specifically focus on whether the material predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct; is patently offensive to prevailing community standards; and lacks serious literary, artistic, political, or scientific value, just as the specific definition of obscenity does.

13. **Judgments: Obscenity.** A determination of obscenity requires the trier of fact to look at the work as a whole and determine whether its dominant theme is one which goes beyond customary limits of candor in appealing to a shameful or morbid interest in sex. Even though a matter depicts hardcore sexual conduct appealing to the prurient interest, it is not obscene unless, taken as a whole, it depicts or describes sexual conduct in a patently offensive way.
14. **Obscenity.** Even if material appeals to the prurient interest and is patently offensive, it is not obscene unless the work taken as a whole lacks serious literary, artistic, political, or scientific value.
15. **Obscenity: Minors: Convictions: Proof.** The State bears the burden of proving the necessary elements to establish that a work satisfies the requirements for a finding of obscenity. So, too, the State bears the burden of proving beyond a reasonable doubt all necessary elements to sustain a conviction under Neb. Rev. Stat. § 28-809 (Reissue 2008).
16. **Criminal Law: Obscenity: Minors.** Neb. Rev. Stat. § 28-809(1) (Reissue 2008) indicates that the prohibition is on exhibiting to a minor a work which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct. However, the statute also requires that the work, taken as a whole, is harmful to minors.
17. **Criminal Law: Obscenity: Minors: Statutes: Words and Phrases.** A finding that a work is harmful to minors requires consideration not only of whether the work predominantly appeals to the prurient, shameful, or morbid interest of minors, but also whether it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors and whether it is lacking in serious literary, artistic, political, or scientific value for minors. Thus, despite the "in whole or in part" language in Neb. Rev. Stat. § 28-809(1) (Reissue 2008), the general guidance of the Nebraska Supreme Court concerning obscenity is relevant to determining what is prohibited under Neb. Rev. Stat. § 28-807 (Reissue 2008).
18. **Criminal Law: Obscenity: Minors: Proof.** What is necessary to demonstrate a violation of Neb. Rev. Stat. § 28-809 (Reissue 2008) is something less than the standards for establishing obscenity in a free speech context.
19. **Double Jeopardy: Convictions: Evidence.** Where there has been insufficient evidence presented to convict a defendant in a first trial, the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.
20. **Double Jeopardy: Convictions: Appeal and Error.** Not all appellate reversals of criminal convictions prohibit retrial. Rather, if a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy to bar his retrial.

Appeal from the District Court for Saunders County, MARY C. GILBRIDE, Judge, on appeal thereto from the County Court for Saunders County, MARVIN V. MILLER, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions to dismiss.

Cynthia R. Lamm, of Law Office of Cynthia R. Lamm, for appellant.

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

IRWIN, PIRTLE, and RIEDMANN, Judges.

PER CURIAM.

I. INTRODUCTION

Dean L. Osborne appeals his convictions on charges of third degree sexual assault and admitting a minor to an obscene motion picture, show, or presentation. On appeal, Osborne challenges the sufficiency of the evidence to sustain his convictions, challenges various rulings made by the county and district courts, and asserts that he was denied effective assistance of counsel. We find the evidence adduced was sufficient to sustain the third degree sexual assault conviction, but legally insufficient to sustain the obscenity conviction. We affirm in part, and in part reverse and remand.

II. BACKGROUND

The events giving rise to this case occurred during the second half of 2009. At that time, Osborne was 47 years of age and the complainant, A.H., was 15 or 16 years of age. A.H. boarded a horse at a commercial stable in Ashland, Nebraska, where Osborne was employed. A.H. was a riding student of Osborne's girlfriend, Anne W.

A.H. testified that Osborne touched her inappropriately on a number of occasions during a 2-week period in August 2009, while Anne was out of town. A.H. testified that Osborne "touched [her] breasts and [her] sides and [her] butt." When asked how often Osborne touched her inappropriately, she indicated "[n]ot too often" and indicated the incidents happened only during a 2-week period; she also testified that it happened, during that 2-week period, "around 20 times, 15, 20 times," and she acknowledged that she had previously testified in a deposition that it happened 10 to 20 times.

On direct examination, A.H. was not asked to describe the circumstances of any instances of inappropriate touching.

She was asked if Osborne had ever touched her in a way that she considered inappropriate and was asked general questions about how often it happened and how she reacted to it. She testified that when Osborne touched her in a way she considered inappropriate, she "would just kind of leave the area," but testified that she did not try to avoid Osborne after it happened. She testified that she told her father about the touching "a month later" and that she also told Anne and "asked her to say something to [him] when [Anne] got back [from being out of town]."

Anne testified that A.H. never said anything to her about Osborne's allegedly engaging in inappropriate touching. Anne testified that she received a minimum of 10 text messages per day and a minimum of 3 telephone calls per day from A.H. while she was out of town, but that A.H. never said anything about Osborne's touching her inappropriately. Anne also testified that she and Osborne spent several hours with A.H. playing keno and pool on the day Anne returned to town, but that A.H. did not say anything about inappropriate conduct on Osborne's part.

Osborne testified that he could recall two occasions on which he had touched A.H.'s buttocks, over her clothing. He testified that there were a number of other people present at the time and that the contact was not in any way sexual or for sexual arousal or gratification. He described the contact as a "twang" of A.H. on the buttocks, and he testified that A.H. laughed about the incidents. He testified that A.H. never asked him to stop such conduct and never indicated that she was disturbed or had a negative reaction to the incidents. He further testified that he believed A.H. "was sweet on" him and had a crush on him, and he described it as "puppy dog love."

Osborne testified that he did not believe he had ever touched A.H. on the breast, but acknowledged that he may have accidentally touched her in an area that she considered to be her breast. He described that a common practice around the stables during the summer of 2009 was for one person to "scare" or "startle" another person by approaching from behind and grabbing his or her sides. Osborne testified that A.H. "started doing it to the kids and then everybody started doing it to everybody"

and that "she would do it to [him]," "[he] would do it to her," and "[t]he kids would do it to her, and we would do it to Ann[e]." He testified that the contact was not a sexual act and was not intended for any sexual purpose. He also testified that A.H. did this to him "about the same amount" of times as he did it to her. He testified that A.H. never asked him to stop this conduct or indicated that it was an unwanted gesture.

Anne testified that there was "a lot of horseplay, a lot of joking around, a lot of genuine affection between everyone in [the] group" at the stables during the summer of 2009. She testified that she observed Osborne "on several occasions return the same type of joking pinch to her waist area that everyone in the group was exchanging" and that A.H. did this to Osborne, to Anne, and to the younger children around the stables. Anne further testified that she observed two occasions when Osborne "snapped [A.H.'s] bottom" and that during one of those occasions, Osborne commented to A.H., "'You're not wearing any underwear today, are you?'" Anne testified that she never observed Osborne touch A.H.'s breast. Despite Anne's characterization of the touching as "horseplay," she testified that after seeing Osborne "snap" A.H.'s buttocks, she told him not to do that anymore because it was inappropriate, as he was a grown man, A.H. was a teenage girl, and Anne and he were in a relationship. There was no testimony from Anne that she asked Osborne to refrain from similar touching of anyone else in the group.

In December 2009, Anne was again out of town. On Christmas Day, A.H. contacted Osborne to request a ride to the stables. Osborne drove A.H. to the stables in the morning, and the two worked cleaning stalls. They eventually got cold and returned to Osborne's home "to warm up a little bit and get something to eat." Osborne testified that his home was also where they "kept the grain."

Osborne testified that the two watched "the Weather Channel" for some time and that they then decided to watch a video. Osborne testified that he went through the available videos, reading their names to A.H. According to Osborne, A.H. said "no" to "King Kong" and said "no" to "how to take care of your horse." Osborne testified that he then suggested a

video labeled "Florida girls," which Osborne testified was not his video and which he believed belonged to a neighbor who had watched Osborne's home when he was not there; Osborne testified that he had not seen the video before, that it was not in any box or packaging, and that there was nothing to indicate its content. A.H. testified that Osborne suggested the two watch a video titled "Florida Girls Sunny Side Up."

When Osborne put the "Florida girls" video into the video player, it did not work properly and it froze on still images. A.H. testified that the video froze on "pornographic images." She testified that Osborne attempted to get the video to play, but that it kept freezing on still images. She testified that she observed only still pictures on the video and that she observed three different images. She testified that of the three images she observed, she could only recall that one image included "[a] girl [who] was giving [a] man a blow job." She testified that she did not recall the other images and that she was exchanging text messages with her mother at the time, although she did not mention the video to her mother.

Osborne testified that when he put the video into the player, it froze immediately and that "all there was was a blond bimbo sitting there." Osborne testified that he could tell the woman on the video was shirtless, but that he "could barely see her top half" and that "[i]t was blurred out" so that her nipples were not visible. He testified that he attempted to get the video to play, but that no other image appeared on the screen. He testified that he did not observe anyone on the video performing any sexual act. When the investigating police officer asked Osborne about the video's being pornographic, Osborne indicated that it was, and he testified that he believed it to be a pornographic video because he observed "the lady with her shirt off."

Osborne testified that A.H.'s reaction to the video was that she indicated that she "watch[ed] them all the time with [her] boyfriend." He also testified that A.H. was exchanging text messages at the time and did not seem shocked at all by the video. Osborne testified that the two watched more of "the Weather Channel," "grabbed" some grain, and returned to the stables.

A.H. testified that she told Anne about the video "a few days later." Anne testified that A.H. told her the video "was put in [in] jest" and that "[s]he was not uncomfortable by it, bothered by it." Anne testified A.H. told her that the video malfunctioned, that "[t]he only thing she was able to see was part of a woman's breast," and that "she saw more of Janet Jackson in the Super Bowl halftime show than she did of the video."

The investigating police officer testified that "[a]s far as [he knew, the video was] still at . . . Osborne's apartment" at the time of the trial. He testified that he had not seen the video and did not know where it was. He testified that he had no personal knowledge about the content of the video. The State did not produce or offer the video or any still images from the video during the trial.

A.H. testified that in late January or early February 2010, Anne asked her to stop boarding her horse at the stable. Anne testified that she "expelled [A.H.] from [her] riding group." A.H. testified that the request for her to leave the stables had nothing to do with Osborne. A.H. testified that she contacted law enforcement about Osborne's alleged inappropriate touching and the video incident after being asked to remove her horse from the stables.

Osborne testified that he was not aware that A.H. felt he had made inappropriate contact with her until he was contacted by law enforcement. He was surprised at the allegations and had not previously been given any reason to believe that A.H. had considered his conduct inappropriate.

On March 22, 2010, Osborne was charged in county court by complaint with third degree sexual assault and with admitting a minor to an obscene motion picture, show, or presentation. Both charges were Class I misdemeanor offenses. In February 2011, the county court found Osborne guilty on both charges and sentenced him to concurrent sentences of 6 months' imprisonment in jail for each conviction. In addition, Osborne was required to register as a sex offender.

Osborne appealed to the district court. On August 29, 2011, the district court entered an order reversing Osborne's convictions based upon a finding that the record presented to the

district court did not demonstrate that Osborne had properly waived his right to a jury trial. The State filed a motion for rehearing, along with a request to file a supplemental bill of exceptions containing the hearing at which Osborne had waived his right to a jury trial. Osborne sought to quash the attempt to file a supplemental bill of exceptions, but the trial court allowed its filing and granted rehearing. The district court ultimately found no merit to Osborne's assignments of error and affirmed his convictions. This appeal followed.

III. ASSIGNMENTS OF ERROR

On appeal, Osborne has assigned a variety of errors challenging the sufficiency of the evidence to sustain his convictions, challenging various rulings of the county and district courts, and challenging the effectiveness of his trial counsel. We specifically address Osborne's assertions that the district court erred in overruling his motion to quash the State's presentation of a supplemental bill of exceptions in the appeal of the county court's judgment and that there was insufficient evidence to sustain the convictions. Our resolution of these two issues makes it unnecessary for us to address the remaining assignments of error. See *State v. Rouse*, 13 Neb. App. 90, 688 N.W.2d 889 (2004) (appellate court is not obligated to engage in analysis not needed to adjudicate controversy before it).

IV. ANALYSIS

1. Record on Appeal to District Court

Osborne first asserts that the district court erred in overruling his motion to quash. In Osborne's appeal to the district court, the district court initially found that the record did not demonstrate that Osborne had properly waived his right to a trial by jury and, accordingly, reversed the decision and remanded the cause to the county court. The State sought rehearing and offered a supplemental bill of exceptions containing a transcription of the hearing wherein Osborne did waive his right to a trial by jury. It was this supplemental bill of exceptions that Osborne sought to quash. We find no error in the district court's overruling of the motion to

quash and acceptance of the supplemental bill of exceptions on rehearing.

[1,2] In *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009), the Nebraska Supreme Court clarified the law in Nebraska concerning the authority of a district court, sitting as an intermediate appellate court, to reconsider and modify its own rulings. The court noted that the notion that a district court sitting as an intermediate appellate court may timely modify its opinions is consistent with the generally recognized common-law rule that an appellate court has the inherent power to reconsider an order or ruling until divested of jurisdiction. *Id*. Judicial efficiency is served when any court, including an appellate court, is given the opportunity to reconsider its own rulings, either to supplement its reasoning or to correct its own mistakes. *Id*.

In the present case, the district court initially reached a conclusion that the record presented to it, as an intermediate appellate court, did not demonstrate that Osborne had properly waived his right to a trial by jury. As such, the district court initially reversed the convictions and remanded.

The district court's initial ruling, however, was clearly an erroneous one, as Osborne did waive his right to a jury trial and simply did so in a hearing that had not been presented in the record prepared for the district court. In allowing the State's motion for rehearing and accepting the supplemental bill of exceptions, the district court concluded that both parties had contributed to the error concerning the record. In fact, we conclude that there really was no error concerning the preparation of the record by either of the parties.

Instead, it is clear that the question of whether there was a proper waiver of the right to a trial by jury was simply not raised by Osborne in his appeal to the district court. His statement of errors to the district court and his amended statement of errors do not include an assertion that he never waived his right to a jury trial. Indeed, he assigned as error to the district court that his counsel had provided ineffective assistance in advising him to waive his right to a trial by jury, which necessarily suggests that he did, in fact, waive that right. As a result, because he was not alleging that he had not waived his right

to a trial by jury, he did not commit an error in the preparation of the record by not including that hearing. Similarly, the State did not commit an error by failing to supplement the record more quickly; there was no reason for the State to supplement the record to provide hearings unrelated to the assertions of error on appeal.

Because the district court clearly erred in finding error where none was asserted and based on the lack of a record that was understandably not provided because there was no error presented in relation to it, it was not reversible error for the district court to exercise its inherent power to reconsider its ruling and correct itself. We find no merit to Osborne's assertions that he should have been allowed to reap the benefit of the district court's error and that the error should not have been correctable by the district court.

2. Sufficiency of Evidence on Sexual Assault Conviction

Osborne asserts that the evidence adduced at trial was insufficient to support his conviction of third degree sexual assault. He asserts that there was insufficient evidence to establish that there was "sexual contact" under Neb. Rev. Stat. § 28-320(1) (Reissue 2008). We conclude that the State adduced sufficient evidence to demonstrate that the contact between Osborne and A.H. could reasonably be construed as for sexual arousal or gratification, and we therefore conclude that there was sufficient evidence to support this conviction.

[3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). 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. *Id.*

[4,5] According to § 28-320(1), a conviction for third degree sexual assault requires proof that the defendant subjected

another person to sexual contact without the consent of the victim or where the defendant knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of the conduct. Neb. Rev. Stat. § 28-318(5) (Reissue 2008) defines sexual contact as meaning intentional touching of the victim's sexual or intimate parts or intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact includes only such conduct which can reasonably be construed as being for the purpose of sexual arousal or gratification.

[6] In the present case, there is no issue presented concerning whether Osborne intentionally touched A.H.'s sexual or intimate parts as those terms are defined in the statutes. Section 28-318(2) defines intimate parts to mean the genital area, groin, inner thigh, buttocks, or breast. Osborne does not dispute that he intentionally touched A.H.'s buttocks on at least two occasions. A.H. testified that he also touched her breast on one occasion, while Osborne denied intentionally doing so. Regardless, there was sufficient evidence to demonstrate that Osborne intentionally touched A.H.'s intimate parts.

Nonetheless, Osborne's touching of A.H.'s buttocks or breast in this case can be classified as sexual contact only if there was sufficient evidence adduced to support a finding that it could reasonably be construed as having been for the purpose of sexual arousal or gratification.

The allegations in this case must be analyzed in the context in which they occurred. First, Osborne is a 47-year-old male; A.H. was 15 or 16 at the time of the incidents. Osborne testified that he thought A.H. probably had a crush on him, but despite this, he spent time alone with her and engaged in "horseplay" that involved physical touching of her intimate or sexual parts over her clothing. He made suggestive remarks such as "'No panties, today, huh?'" and, according to Anne, he ran his finger up the back side of A.H.'s thigh and buttocks, an act Anne later denied having said happened. Together Osborne and A.H. viewed portions of a video, "Florida Girls Sunny Side Up," which Osborne himself described as pornographic. After seeing what Osborne described as a shirtless "blond bimbo" on

the screen, he kept trying to get the video to play. Osborne's conviction of third degree sexual assault must be analyzed against this backdrop.

[7] The Nebraska Supreme Court has held that in proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. See *State v. Berkman*, 230 Neb. 163, 430 N.W.2d 310 (1988). Even sexual contact done for the defendant's amusement can be reasonably construed as being for the purpose of sexual arousal or gratification. See *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987).

In *Charron*, the defendant approached a woman in a parking lot and grabbed her vaginal area. Affirming a conviction of third degree sexual assault, the Nebraska Supreme Court stated:

> The act[s] of the defendant in grabbing a woman from behind, pressing forcefully in the vaginal area, and then walking away, laughing and bobbing his head, were circumstances from which the trial court could find that the conduct of the defendant was for the purpose of his sexual arousal or gratification.

Id. at 873, 415 N.W.2d at 476.

In the present action, we are not dealing with two strangers; rather, the defendant and the complainant were very familiar with each other, and Osborne believed A.H. "was sweet on" him. In such a situation, when an adult male makes a suggestive comment to an adolescent female, coupled with physical contact of her intimate parts, a rational juror could have reasonably construed such acts as having been for the purpose of sexual arousal or gratification, especially when the adult suspects the minor has a crush on him. Even Anne, Osborne's adult girlfriend, believed the contact was inappropriate and asked him to stop.

It is important to note that the statutory definition of sexual contact includes sexual arousal or gratification of *either* party. § 28-318(5). Therefore, if the acts can be reasonably construed as having been for the purpose of arousing either Osborne or A.H., then Osborne's touching comes within the purview of

prohibited contact. See, also, *In re Interest of Kyle O.*, 14 Neb. App. 61, 703 N.W.2d 909 (2005).

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. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012). We conclude, based on the evidence presented, that a rational trier of fact could have found beyond a reasonable doubt that Osborne's acts were for the purpose of sexual arousal or gratification, either of himself or A.H. Accordingly, we find no merit to his assertion on appeal, and we affirm the sexual assault conviction.

3. Sufficiency of Evidence on Obscenity Conviction

Osborne asserts that the evidence adduced at trial was insufficient to support his conviction of admitting a minor to an obscene motion picture, show, or presentation. He asserts that the State failed to adduce sufficient evidence to support a finding that the video displayed was obscene within the definition of the applicable statutes. Because the State failed to adduce any evidence concerning the content of the video as a whole, we find the evidence was insufficient.

In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: 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. *State v. Freemont, supra*. 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. *Id*.

[8,9] According to Neb. Rev. Stat. § 28-809 (Reissue 2008), a conviction for admitting a minor to an obscene motion picture, show, or presentation requires proof that the defendant knowingly exhibited to a minor or knowingly provided to a minor an admission ticket or pass or knowingly admitted a

minor to premises whereon there is exhibited a motion picture, show, or other presentation which, in whole or in part, predominantly pruriently, shamefully, or morbidly depicts nudity, sexual conduct, or sadomasochistic abuse and which, taken as a whole, is harmful to minors. Neb. Rev. Stat. § 28-807(6) (Reissue 2008) defines harmful to minors as meaning that the description or representation of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse predominantly appeals to the prurient, shameful, or morbid interest of minors; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and is lacking in serious literary, artistic, political, or scientific value for minors.

[10-12] The offense defined in § 28-809 is labeled in the statute as "Obscene motion picture, show, or presentation; admit minor; unlawful; penalty." The definition of the offense in § 28-809, along with the relevant definitions of key terms in § 28-807, generally mirrors the specific definition of obscene in § 28-807(10), which requires a finding that an average person applying contemporary community standards would find that the work, material, conduct, or live performance taken as a whole predominantly appeals to the prurient interest or a shameful or morbid interest in nudity or sex, depicts or describes in a patently offensive way certain sexual conduct, and, taken as a whole, lacks serious literary, artistic, political, or scientific value. Indeed, the definition of the offense in § 28-809 and the relevant definitions of key terms in § 28-807 specifically focus on whether the material predominantly pruriently, shamefully, or morbidly depicts nudity or sexual conduct; is patently offensive to prevailing community standards; and lacks serious literary, artistic, political, or scientific value, just as the specific definition of obscenity does.

[13,14] In *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), the Nebraska Supreme Court provided a lengthy discussion of obscenity under Nebraska law. Although the discussion in that case was in the context of whether purported speech was obscene, such that it was not entitled to constitutional protections afforded free speech, the court's discussion of what constitutes obscene material under Nebraska law is

pertinent to our consideration in the present case. In *Harrold*, the court recognized that a determination of obscenity requires the trier of fact to look at the work as a whole and determine whether its dominant theme is one which goes beyond customary limits of candor in appealing to a shameful or morbid interest in sex. The court also noted that even though a matter depicts hardcore sexual conduct appealing to the prurient interest, it is not obscene unless, taken as a whole, it depicts or describes sexual conduct in a patently offensive way. Moreover, the court also noted that even if material appeals to the prurient interest and is patently offensive, it is not obscene unless the work taken as a whole lacks serious literary, artistic, political, or scientific value.

[15] In *Harrold*, the court recognized that the State bears the burden of proving the necessary elements to establish that a work satisfies the requirements for a finding of obscenity. So, too, the State bears the burden of proving beyond a reasonable doubt all necessary elements to sustain a conviction under § 28-809.

[16,17] We recognize that § 28-809(1) indicates that the prohibition is on exhibiting to a minor a work which, "*in whole or in part*, predominantly pruriently, shamefully, or morbidly depicts nudity [or] sexual conduct." (Emphasis supplied.) However, § 28-809(1) also requires that the work, "*taken as a whole*, is harmful to minors." (Emphasis supplied.) Moreover, the accompanying definitions of key terms make clear that a finding that the work is harmful to minors requires consideration not only of whether the work predominantly appeals to the prurient, shameful, or morbid interest of minors, but also whether it is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors and whether it is lacking in serious literary, artistic, political, or scientific value for minors. Thus, despite the "in whole or in part" language in § 28-809(1), the general guidance of the Nebraska Supreme Court concerning obscenity is relevant to determining what is prohibited under § 28-807.

In the present case, A.H. testified that the video Osborne attempted to display did not work properly and that the images

froze on the screen. She testified that she observed only still pictures with no movement and that she observed three images, although she could recall only one of them because she was exchanging text messages with her mother at the time. With respect to the one image she recalled seeing frozen on the screen, she testified that it depicted people "doing sexual things" and that "[t]he girl was giving the man a blow job." She also testified that "the people were naked and touching each other." A.H. was not asked, and did not testify, whether she was able to observe the sexual or intimate parts of the people on the image. She was not asked and did not testify in any detail about what she saw, beyond the above general descriptions. There are any number of nonobscene depictions that she might have observed that would be consistent with her testimony, including, for example, having observed the man in the video from behind and having observed the girl in front of the man and on her knees; there was no evidence adduced to indicate that she observed either depicted party's intimate parts.

Osborne testified that the only image he recalled seeing depicted a woman who was obviously shirtless, but that the image was blurry when it froze and that no actual nudity was visible. In addition, although A.H. testified that it was a "pornographic" image, she was never asked and did not testify about what that term meant to her.

The State did not present the video or any still images from the video to the court; nor did the State present any still images for Osborne or A.H. to identify as having been seen by A.H. When the investigating police officer was asked about the video, he testified that he had not seen it, did not know what was on it, and assumed it was still in Osborne's possession.

We conclude that this limited testimony is legally insufficient to sustain a conviction under § 28-809. Without impermissible speculation, there is no way for a finder of fact to determine whether the image or images displayed to A.H. depicted nudity or sexual conduct in a predominantly prurient, shameful, or morbid fashion. Without impermissible speculation, there is no way for a finder of fact to determine

whether the image or images displayed to A.H. were patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors. Without improper speculation, there is no way for a finder of fact to determine whether the image or images displayed to A.H. were lacking in serious literary, artistic, political, or scientific value for minors. In short, the evidence adduced by the State in this case simply does not allow any meaningful determination of whether the image or images displayed to A.H. were obscene.

To conclude that A.H.'s testimony about what she recalled seeing, recounted above, is legally sufficient to sustain a conviction under § 28-809 would be tantamount to allowing a conviction anytime a minor is shown an image that the minor describes as "pornographic" and that the minor testifies depicted sex. Section 28-809 and the definitions of key terms in that statute clearly require more to allow a meaningful determination by the finder of fact and to allow a meaningful review by the appellate courts.

[18] Even recognizing that what is necessary to demonstrate a violation of § 28-809 is something less than the standards for establishing obscenity in a free speech context, as in *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999), the evidence adduced in this case was legally insufficient to support a conclusion that the State proved, beyond a reasonable doubt, the necessary prerequisites for a conviction. As such, we reverse the obscenity conviction.

4. Resolution

[19] In this case, we have concluded that the State adduced insufficient evidence to sustain a conviction on the obscenity charge. In *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), the U.S. Supreme Court held that where there has been insufficient evidence presented to convict a defendant in a first trial, the Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Because we necessarily afford absolute finality to a finder of fact's verdict of acquittal, no

matter how erroneous its decision, it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the finder of fact could not properly have returned a verdict of guilty. See *Burks v. United States, supra*.

[20] The Court in *Burks* noted that not all appellate reversals of criminal convictions prohibit retrial. Rather, if a defendant appeals a conviction and obtains a reversal based on a trial error, as distinguished from insufficiency of the evidence, he cannot assert double jeopardy to bar his retrial. *Id*. See, also, *State v. Noll*, 3 Neb. App. 410, 527 N.W.2d 644 (1995).

V. CONCLUSION

We find that the State adduced sufficient evidence to sustain the sexual assault conviction, but insufficient evidence to sustain the obscenity conviction. Accordingly, we affirm in part, and in part reverse and remand with directions to dismiss.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IRWIN, Judge, dissenting.

I concur with the majority in all respects except with regard to Osborne's conviction on the charge of third degree sexual assault. Because I find the evidence was legally insufficient to sustain a conviction for third degree sexual assault, I respectfully dissent from that portion of the per curiam opinion which affirms the sexual assault conviction.

I agree with the majority's recitation of the relevant standards of review and propositions of law that govern review of the sexual assault conviction in this case. I disagree, however, with the majority's characterization of the record in this case and its conclusion that the State adduced sufficient evidence to support a reasonable conclusion that Osborne's actions could be construed as having been for sexual arousal or gratification. I find the evidence adduced by the State and the examination of witnesses by the State to be devoid of evidence to support such a conclusion.

In this case, the State's evidence concerning the touching established only that Osborne actually made contact with A.H.'s buttocks and breast. A.H. was never asked a single

question by the State about the circumstances or surrounding context of the touching, and she did not provide any testimony or explanation of how any of the incidents happened. Osborne, while acknowledging the touching, testified that it was solely playful "twang[ing]" of her buttocks and grabbing her sides from behind to startle her, always over her clothing. Similarly, Anne testified that the touching she observed was consistent with touching that happened between A.H. and the children at the stables and consistent with touching of Osborne by A.H. There was no testimony or explanation of how the touching could reasonably be construed as having been for sexual arousal or gratification, and no testimony by anyone to even suggest that the touching could be construed as having been for sexual arousal or gratification.

While the majority provides a persuasive backdrop concerning the factual context in the present case, I believe it also leaves out other important factual context. First, the majority does not acknowledge that the complained-of conduct in this case was something which the victim regularly did herself to others and which the testimony indicated was done with frequency by the employees at the stables — it was essentially just slapping someone on the buttocks. The majority's rationale would suggest that everyone in the stable who engaged in this conduct could be guilty of sexual assault. In addition, the factual context presented by the majority leaves the impression that the touching and the facts surrounding the alleged obscenity incident (which we all agree was not supported by legally sufficient evidence) all occurred somewhat concurrently. In fact, these incidents were separated by several months and bore no relation to one another. The touching, the "'[n]o panties'" comment, and the viewing of the video were not in any way related to one another, according to my review of the record.

While I agree that the underlying rationale of the Supreme Court in *State v. Charron*, 226 Neb. 871, 415 N.W.2d 474 (1987), was that if a rational trier of fact could construe the facts as demonstrating something done for sexual arousal or gratification then an appellate court should not second-guess that conclusion, I do not believe the record presented in the

instant case is remotely similar to the factual situation in *Charron*. In that case, the facts that the defendant and the victim were complete strangers, that there was no other surrounding context to the touching, and that the defendant had no contact—at all—with the victim, beyond approaching her from behind and forcefully grabbing at her buttocks and vaginal area, left no rational explanation for the defendant's conduct other than that he was committing a sexual assault. The fact that he purported to have been acting solely for amusement certainly left ample evidence to allow a rational trier of fact to conclude that the acts were, in fact, done for sexual arousal or gratification.

In the present case, on the other hand, the longstanding relationship between Osborne and A.H., along with the evidence of this touching's having been commonplace by numerous people at the stables, including A.H. herself, and the lack of any evidence to suggest that Osborne's actions might have been for sexual arousal or gratification when nobody else's were present what I believe is a very different situation and merit a different result.

To conclude that the evidence adduced by the State in this case is sufficient to allow a finder of fact to conclude that Osborne's touching could reasonably be construed as having been for sexual arousal or gratification would be tautological, tantamount to a conclusion that every instance of contact made with a person's buttocks or breast could, without more, be construed as being sexual contact simply because it was contact with the buttocks or breast. I do not believe such a void of evidence in this case should support a conviction that will result in Osborne's being a registered sex offender, and I would reverse the sexual assault conviction.

I agree with the majority in all other respects.