UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING AGENDA

WebEx Meeting
June 3, 2020 – 12:00 p.m. to 1:30 p.m.

12:00	Welcome and Approval of Minutes	Action	Tab 1	Judge Blanch
	CR1607 Object Rape and *State v. Heath*, 2019 UT App 186	Action	Tab 2	Judge Blanch
	CR1616A Conduct Sufficient to Constitute Sexual Intercourse for Unlawful Sexual Activity with a Minor, Unlawful Sexual Conduct with a 16 or 17 year old, or Rape.	Action	Tab 3	Judge Blanch
	CR1615 Consent - *Revisions based on HB0213*	Action	Tab 4	Michael Drechsel
	Jury Unanimity and *State v. Alires*, 2019 UT App 206 - *Supreme Court denied cert on May 8, 2020… discussion of next steps*	Discussion	Tab 5	Judge Blanch Karen Klucznik Debra Nelson
1:30	Adjourn			

COMMITTEE WEB PAGE: https://www.utcourts.gov/utc/muji-criminal/

UPCOMING MEETING SCHEDULE:
Meetings are held at the Matheson Courthouse in the Judicial Council Room (N301), on the first Wednesday of each month from 12:00 noon to 1:30 p.m. (unless otherwise specifically noted):

September 2, 2020	November 4, 2020	
October 7, 2020	December 2, 2020	

UPCOMING ASSIGNMENTS:
1. Judge McCullagh = DUI; Traffic
2. Sandi Johnson = Burglary; Robbery
3. Karen Klucznik & Mark Fields = Murder
4. Stephen Nelson = Use of Force; Prisoner Offenses
5. Judge Jones = Wildlife Offenses

TAB 1

Minutes – May 6, 2020 Meeting

NOTES:

UTAH JUDICIAL COUNCIL
STANDING COMMITTEE ON MODEL UTAH CRIMINAL JURY INSTRUCTIONS
MEETING MINUTES

WebEx Meeting
May 6, 2020 – 12:00 p.m. to 1:30 p.m.

DRAFT

MEMBERS:	**PRESENT**	**EXCUSED**
Judge James Blanch, *Chair*	•	
Jennifer Andrus	•	
Melinda Bowen	•	
Mark Field	•	
Sandi Johnson	•	
Judge Linda Jones, *Emeritus*	•	
Karen Klucznik	•	
Elise Lockwood	•	
Judge Brendan McCullagh	•	
Debra Nelson	•	
Stephen Nelson	•	
Nathan Phelps	•	
Judge Michael Westfall	•	
Scott Young		•

GUESTS:

None

STAFF:

Michael Drechsel

(1) WELCOME AND APPROVAL OF MINUTES:

Judge Blanch welcomed the committee to the meeting, which was held via WebEx. The committee considered the minutes from the February 5, 2020 meeting. Ms. Klucznik moved to approve the draft minutes. Mr. Field seconded the motion. The motion passed unanimously.

(2) LEGISLATIVE UPDATE:

Mr. Drechsel provided the committee members with an update on legislative changes from the 2020 session that might require, or benefit from, a committee response.

HB0139 – DUI LIABILITY AMENDMENTS

Mr. Drechsel described to the committee that this bill: 1) explicitly states that DUI is a strict liability offense; 2) defines what is NOT "actual physical control"; 3) makes a new criminal offense to refuse a blood draw after a

warrant issues; and 4) adds a new method for MA DUI (driving the wrong way on a divided highway / crossing the median).

Mr. Drechsel discussed with the committee how these legislative changes impact the committee's ongoing work on DUI instructions. In particular, Mr. Drechsel noted that instructions CR1003 (MB DUI elements), CR1004 (MA DUI elements), and CR1005 (F3 DUI elements) all contain a mental state for operating or having actual physical control of a motor vehicle ("intentionally, knowingly, or recklessly"). He also noted that CR1004 would need to be amended to include the new way to arrive at an MA DUI (wrong way on divided highway), along with similar changes to SVF1001.

The committee determined it should engage in a discussion of revisions related to these three instructions and the special verdict form before hearing from Mr. Drechsel on the remaining legislative updates. Judge Blanch noted that this would jump the committee ahead to Item 4 on the agenda. [The meeting minutes for this section of the meeting are therefore contained under item (4) below.]

After finishing those revisions (see minutes for Agenda Item (4) below), the committee resumed its discussion of the remaining legislative updates related to HB0139. Mr. Drechsel reported that the draft "actual physical control" instruction (not yet approved by the committee) may need to attend to the HB0139 definition of what is NOT "actual physical control." In addition, the committee should consider whether to create an instruction for the refusal of a blood draw after a warrant issues (criminal refusal). Judge McCullagh explained that a criminal refusal instruction would be useful in certain scenarios. Judge Blanch asked Judge McCullagh to draft a proposed instruction for criminal refusal for a future meeting.

Ms. Johnson proposed that the NOT "actual physical control" instruction be separate from the "actual physical control" instruction. The committee engaged in a discussion about actual physical control instruction. Committee members were concerned if the instruction makes it seem like the defendant bears any burden of proof as it relates to NOT having actual physical control of the vehicle. The committee agreed that the prosecution bears the burden to prove actual physical control and also to prove that the circumstances that are outlined in the definition of what is NOT actual physical control are not satisfied (i.e., prove the negative). It was not clear to some of the committee members whether the NOT actual physical control definition is an affirmative defense. The committee agreed that even if the NOT actual physical control factors are not satisfied, a person may still not have actual physical control when considering the totality of the circumstances (a la *State v. Barnhart*). The committee explored some potential language, but ultimately determined that it would be wise to spend some time drafting language for the next meeting. Judge Blanch asked Judge McCullagh to draft up some proposed language and send it to Ms. Klucznik and Ms. Johnson for review. Judge McCullagh agreed to take on that assignment.

HB0213 – CONSENT LANGUAGE AMENDMENTS

Mr. Drechsel explained that there is currently a MUJI instruction on consent (CR1615). Changes in HB0213 require some modification to CR1615: 1) the bill expands current code so that a sexual act is "without the consent of the victim" if the actor knows the victim is participating because the victim erroneous believes that the actor is someone else (lines 62-63) (previously this was limited to an erroneous belief that the actor was the victim's spouse); and 2) the bill makes clear that prior consent does not necessarily mean consent has been given for any other sexual act and that consent can be withdrawn through words or conduct at any time before or during sexual activity (lines 79-81). Judge Blanch asked that Mr. Drechsel prepare an updated draft of CR1615 for the next meeting. Mr. Drechsel accepted the assignment for the next meeting.

SB0210 – BODY CAMERA AMENDMENTS

Mr. Drechsel provided an overview to the changes in this body-worn camera legislation, noting that for the committee the work is presently simply to consider whether an model adverse inference instruction should be prepared. Mr. Drechsel also suggested that the issue may arise in both criminal and civil cases and so the MUJI Civil committee may also decide to pay some attention to this. Mr. Drechsel noted that he had received one version of an existing adverse inference instruction from one of the committee members and that he could distribute it to the committee if this is addressed at a future meeting. After the introduction, the committee briefly discussed the issue and agreed that a model instruction would be helpful. Ms. Johnson will prepare a draft adverse inference instruction for a future meeting.

SB0238 – BATTERED PERSON MITIGATION

Mr. Drechsel explained the battered person mitigation legislation. Judge Blanch pointed out that there already exist other mitigation-type instruction(s) in the MUJI homicide instructions. The committee briefly discussed CR1450 (imperfect self-defense) and CR1404 (extreme emotional distress). Judge Blanch pointed out *State v. Smith*, 2019 UT App 141, and *State v. White*, 2011 UT 21, as possible relevant cases to inform the committee's preparation of a proposed SB0238 instruction. Ms. Klucznik agreed to prepare a draft mitigation instruction and special verdict form for a future meeting.

SB0121 – MEDICAL CANNABIS AMENDMENTS

Mr. Drechsel briefly mentioned one additional piece of legislation that was not explicitly included on the agenda, but was reflected on the draft instructions on pages 98 and 99 of the meeting materials. During the 2020 session, a change was made to Utah Code § 41-6a-517 (driving with any measurable controlled substance). The change was to specifically exclude "11-nor-9-carboxy-tetrahydrocannabinol" as a substance that can be used to sustain a prosecution under Utah Code § 41-6a-517. "11-nor-9-carboxy-tetrahydrocannabinol" is an inactive metabolite of THC. Mr. Drechsel explained that there are two versions of a proposed draft instruction for driving with a measurable controlled substance and that he had added to each of those some additional proposed language to incorporate the change from SB0121. The committee will address this language at a future when the relevant draft instructions are considered.

(3) JURY UNANIMITY:

Judge Blanch noted that it appears that a petition for certiorari is still pending in *State v. Alires*, 2019 UT App 206. The committee agreed to wait for that cert petition to be resolved prior to addressing the jury unanimity issue.

(4) DUI AND RELATED TRAFFIC INSTRUCTIONS:

CHANGES TO CR-1003, CR-1004, AND CR1005

The committee considered changes to instructions CR1003 (MB DUI elements), CR1004 (MA DUI elements), and CR1005 (F3 DUI elements), necessitated by the passage of HB0139. In particular, the committee discussed the mental state for operating or having actual physical control of a motor vehicle in light of the legislative pronouncement in HB0139 that DUI is a strict liability offense. The committee agreed that HB0139 makes clear that there is no mental state necessary for the DUI elements. The committee discussed whether there needed to be two separate instructions for each level of DUI elements—one for pre-July-1 DUIs and one for post-July-1 DUIs (July 1, 2020 being the effective date for HB0139). Ms. Johnson identified a new case issued in the last few weeks that again noted that DUI is a strict liability offense (*State v. Higley*, 2020 UT App 45). As a result of this,

she suggested to the committee that there be only one instruction that eliminates the mental states, and with an updated committee note that identifies there may be an issue on mental state for pre-July-1 DUIs.

Judge Blanch proposed some language for the updated committee note. The committee discussed and refined the proposed language. The committee also discussed other possible issues with the existing committee notes in regard to the paragraph that speaks to disfavoring instructions that comment on the sufficiency of the evidence (in particular as it relates to "actual physical control"). After discussion, the committee agreed that no further changes to the committee notes were necessary.

The committee next addressed possible changes to CR-1004 (MA DUI elements) to include the new method of MA DUI when operating a vehicle in the wrong direction on a divided highway or crossing the median. The meeting materials contained the new statutory language from HB0139 on this point. The committee discussed how to best articulate the statutory language in a plain-English jury instruction, including exploring use of "going the wrong way." Judge Westfall encouraged that the committee do what it can to use the statutory language as much as possible. The conversation explored a variety of options, including simplifying this general purpose instruction by omitting the option that encompasses the operator of a dispatched tow truck driver; the committee viewed this option as extremely unlikely to arise and that when it did apply, practitioners would need to be attentive to modifying the instruction accordingly. The committee also agreed that SVF1001 "DUI Offenses" should be amended to reflect the change to CR1004 regarding the MA of driving the wrong way on a divided highway or crossing the median.
At the conclusion of all of this discussion and revision, the committee voted unanimously to approve the following revisions to CR1003, CR1004, CR1005, and SVF1001.

For CR1003, the committee approved the following language:

CR1003 DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR COMBINATION.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME) ~~intentionally, knowingly, or recklessly~~
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME):
   a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
   b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]
   c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation or actual physical control].
3. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

REFERENCES

Utah Code § 41-6a-502
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Higley, 2020 UT App 45
State v. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

COMMITTEE NOTES

This instruction is intended to be used in prosecuting Class B Misdemeanor driving under the influence. For Class A Misdemeanor or Third Degree Felony driving under the influence instructions, use CR1004 or CR1005, respectively.

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f) ; and CR1001 "Preamble to Driving Under the Influence Instructions."

~~It is an open question whether a mens rea is required with respect to the operation or actual physical control element of DUI.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For CR1004, the committee approved the following language:

CR1004 DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR COMBINATION.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME) ~~intentionally, knowingly, or recklessly~~
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME):
   a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
   b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]

c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation or actual physical control][.][; and]

3. (DEFENDANT'S NAME):
   a. [operated the vehicle in a negligent manner which was the proximate cause of bodily injury upon [VICTIM'S NAME];]
   b. [had a passenger under 16 years of age in the vehicle at the time of the offense;]
   c. [was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense;]
   d. [operated a vehicle onto or from any controlled-access highway except at entrances and exits established by the appropriate highway authority; or]
   e. [on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer:
      i. operated a vehicle on a divided highway using the left-hand roadway; or
      ii. operated a vehicle over, across, or within any dividing space, median, or barrier of a divided highway.]
4. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

REFERENCES

Utah Code § 41-6a-502
Utah Code § 41-6a-712
Utah Code § 41-6a-714
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Higley, 2020 UT App 45
State v. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

COMMITTEE NOTES

This instruction is intended to be used in prosecuting Class A Misdemeanor driving under the influence. For Class B Misdemeanor or Third Degree Felony driving under the influence instructions, use CR1003 or CR1005, respectively. An alternative method to instruct the jury would be to use CR1003 (MB Instruction) in combination with SVF1001 ("Driving Under the Influence Offenses").

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f) ; and CR1001 "Preamble to Driving Under the Influence Instructions."

~~It is an open question whether a mens rea is required with respect to the operation or actual physical control element of DUI.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For CR1005, the committee approved the following language:

CR1005 DRIVING UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR COMBINATION.

(DEFENDANT'S NAME) is charged [in Count ____] with committing Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug] [on or about (DATE)]. You cannot convict [him] [her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME) ~~intentionally, knowingly, or recklessly~~
   a. operated a vehicle; or
   b. was in actual physical control of a vehicle; and
2. (DEFENDANT'S NAME):
   a. [had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of the test;]
   b. [was under the influence of [alcohol][any drug][the combined influence of alcohol and any drug] to a degree that rendered [him][her] incapable of safely operating a vehicle; or]
   c. [had a blood or breath alcohol concentration of [.05][.08] grams or greater at the time of operation or actual physical control][.][; and]
3. (DEFENDANT'S NAME) operated the vehicle in a negligent manner which was the proximate cause of serious bodily injury upon [VICTIM'S NAME].
4. [The defense of _____ does not apply.]

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

REFERENCES

Utah Code § 41-6a-502
Utah Code § 76-2-101(2)
State v. Bird, 2015 UT 7
State v. Higley, 2020 UT App 45
State v. Thompson, 2017 UT App 183
State v. Vialpando, 2004 UT App 95

COMMITTEE NOTES

This instruction is intended to be used in prosecuting Third Degree Felony driving under the influence. For Class B Misdemeanor or Class A Misdemeanor driving under the influence instructions, use CR1003 or CR1004, respectively. An alternative method to instruct the jury would be to use CR1003 (MB Instruction) in combination with SVF1001 ("Driving Under the Influence Offenses"). For Third Degree Felony driving under the influence offenses that result from a prior conviction or convictions, practitioners should request that the court address the prior convictions in a bifurcated proceeding and, if appropriate, use SVF1002 ("Driving Under the Influence – Prior Conviction").

In the realm of DUI, courts often give instructions at the request of the parties that comment on the sufficiency, or relative quality, of evidence. These instructions are disfavored and may run afoul of the Utah Supreme Court's admonition that trial courts should not comment upon the evidence. *See State v. Pappacostas*, 407 P.2d 576 (Utah 1965); Utah R. Crim. P. 19(f); and CR1001 "Preamble to Driving Under the Influence Instructions."

~~It is an open question whether a mens rea is required with respect to the operation or actual physical control element of DUI.~~ As of July 1, 2020, Utah Code was amended to explicitly state that driving under the influence is a strict liability offense (see HB0139-2020, line 164). For any offense committed prior to July 1, 2020, there is divergent legal authority on whether driving under the influence is a strict liability offense with respect to the operation or actual physical control of the vehicle. *See* Utah Code § 76-2-101(2) (no mental state generally required for traffic offenses), *State v. Higley*, 2020 UT App 45, and *State v. Thompson*, 2017 UT App 183; *but see State v. Vialpando*, 2004 UT App 95, ¶ 26.

Last Revised – ~~01/08/2020~~05/06/2020

For SVF1001 DUI Offenses, the committee approved the following language:

SVF 1000. Driving Under the Influence Offenses.

(LOCATION) JUDICIAL DISTRICT COURT, [_____ DEPARTMENT,]
IN AND FOR (COUNTY) COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. (DEFENDANT'S NAME), Defendant.	**SPECIAL VERDICT** **DRIVING UNDER THE INFLUENCE** Case No. (*********) Count (#)

We, the jury, have found the defendant, (DEFENDANT'S NAME), guilty of Driving Under the Influence of [Alcohol][Any Drug][the Combined Influence of Alcohol and Any Drug], as charged in Count [#]. We also unanimously find the State has proven the following beyond a reasonable doubt (check all that apply):

☐ [(DEFENDANT'S NAME) had a passenger under 16 years of age in the vehicle at the time of the offense;]

☐ [(DEFENDANT'S NAME) was 21 years of age or older and had a passenger under 18 years of age in the vehicle at the time of the offense;]

☐ [(DEFENDANT'S NAME) operated a vehicle onto or from any controlled-access highway except at entrances and exits established by the appropriate highway authority;]

☐ [(DEFENDANT'S NAME), on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer, operated a vehicle on a divided highway using the left-hand roadway;]

☐ [(DEFENDANT'S NAME), on or after July 1, 2020, without being directed or permitted by a traffic-control device or peace officer, operated a vehicle over, across, or within any dividing space, median, or barrier of a divided highway;]

☐ [(DEFENDANT'S NAME) operated the vehicle in a negligent manner which was the proximate cause of bodily injury upon [VICTIM'S NAME];]

☐ [(DEFENDANT'S NAME) operated the vehicle in a negligent manner which was the proximate cause of serious bodily injury upon [VICTIM'S NAME].]

☐ None of the above.

DATED this _____ day of (Month), 20(**).

_____
Foreperson

Committee Notes
Pursuant to Utah Code § 41-6a-502(3), if the case involves multiple victims that suffered bodily injury or serious bodily injury under Utah Code § 41-6a-502 or death under Utah Code § 76-5-207, a separate special verdict form should be used for each victim.

Last Revised – ~~01/08/2020~~05/06/2020

After approving revisions to CR1003, CR1004, CR1005, and SVF1001, the committee returned to its consideration of the remaining legislative update items under Agenda Item (2) above.

At the conclusion of the meeting, the committee had additional discussion about next steps for the remaining work under this agenda item. Judge McCullagh provided the following guidance: the committee should next consider the "driving with measurable controlled substance" instruction, followed by the automobile homicide instructions, the actual physical control instruction(s), and the new criminal refusal instruction. Judge Blanch indicated that these matters will be first on the agenda for the next meeting.

(5) ADJOURN

The meeting adjourned at approximately 1:30 p.m. The next meeting will be held on June 3, 2020, starting at 12:00 noon via WebEx.

TAB 2

CR1607 Object Rape and *State v. Heath*, 2019 UT App 186

NOTES:

CR1607 Object Rape.

(DEFENDANT'S NAME) is charged [in Count ___] with committing Object Rape [on or about DATE]. You cannot convict [him][her] of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. (DEFENDANT'S NAME)
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of [the outer folds of ([VICTIM'S NAME] [MINOR'S INITIALS])'s labia][([VICTIM'S NAME][MINOR'S INITIALS])'s genital or anal opening], by any object or substance other than the mouth or genitals;
3. The act was without ([VICTIM'S NAME] [MINOR'S INITIALS])'s consent;
4. (DEFENDANT'S NAME) acted with intent, knowledge, or recklessness that ([VICTIM'S NAME] [MINOR'S INITIALS]) did not consent; and
5. (DEFENDANT'S NAME) did the act with the intent to:
   a. cause substantial emotional or bodily pain to ([VICTIM'S NAME] [MINOR'S INITIALS]); or
   b. arouse or gratify the sexual desire of any person.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

References

Utah Code § 76-5-402.2
State v. Barela, 2015 UT 22
State v. Heath, 2019 UT App 186

Committee Notes

For a definition of vaginal "penetration" for purposes of this instruction, see *State v. Patterson*, 2017 UT App 194, ¶3 (citing *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988)).

This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

If there was a prior conviction or serious bodily injury, a special verdict form may be necessary. See SVF 1617, Sexual Offense Prior Conviction or SVF 1618, Serious Bodily Injury.

Last Revised – 09/2015; 12/05/2018 (committee notes amended)

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
DALE HARLAND HEATH,
Appellant.

Opinion
No. 20180076-CA
Filed November 21, 2019

Fourth District Court, Provo Department
The Honorable Derek P. Pullan
No. 151402675

Ann M. Taliaferro, Attorney for Appellant

Sean D. Reyes and Jeffrey S. Gray, Attorneys
for Appellee

JUDGE JILL M. POHLMAN authored this Opinion, in which JUDGES MICHELE M. CHRISTIANSEN FORSTER and DAVID N. MORTENSEN concurred.

POHLMAN, Judge:

¶1 A woman (Victim) suffered from back pain. She visited Dale Harland Heath's chiropractic offices, where Heath treated her over the course of nine visits. Based on his conduct during some of those visits, Heath was convicted of sexual battery (three counts), forcible sexual abuse, and object rape. Heath appeals and we affirm.

BACKGROUND[1]

¶2 When Victim could not find relief from chronic back pain, her mother recommended that Victim seek treatment from Heath, mother's chiropractor. From October 2012 to December 2012, Victim, then age 20, saw Heath nine times. The first four visits were mostly uneventful, though by the fourth visit she was starting to feel "a little uncomfortable." Heath's conduct at the next four visits forms the basis of Heath's criminal case.

Count 1—Sexual Battery

¶3 On November 3, 2012, Victim visited Heath for the fifth time. To prepare for treatment, she changed into a medical gown but kept her yoga pants on. Heath added "a new massage" on this visit, rubbing Victim's inner thigh with one hand and rubbing "right over [her] vaginal area with the other hand." His hand was "going up and down, back and forth, right over the seam of [Victim's] yoga pants, right on [her] vagina." Victim "opened [her] eyes for a moment," noticed that the lights were off, and asked Heath what he was doing. Heath said he was massaging a psoas attachment.[2] Victim, not knowing what

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1. "On appeal from a jury verdict, we view the evidence and all reasonable inferences in a light most favorable to that verdict and recite the facts accordingly." *State v. Pinder*, 2005 UT 15, ¶ 2, 114 P.3d 551 (cleaned up). In our recitation of the facts, we rely primarily on Victim's trial testimony.

2. The psoas muscles are in the lower back, originating at the spine and running down to the femur. William C. Shiel Jr., *Medical Definition of Muscle, Psoas*, MedicineNet.com, https://www.medicinenet.com/script/main/art.asp?articlekey=9654 [https://perma.cc/F8V6-35C9].

treatment was necessary to relieve her symptoms, "closed [her] eyes and just waited for it to be over."

¶4 The rubbing lasted a few minutes, and Victim had an orgasm. She gave no outward indication of it, and Heath acted like "nothing was wrong" and did not say anything. After paying for the visit, Victim "cr[ied] the whole way home" while trying to "explain it away" in her mind.

Count 2—Sexual Battery

¶5 On November 24, 2012, Victim returned for her sixth session with Heath. She decided to return because she "was in a lot of pain" and "didn't really want to believe that it had happened." She trusted Heath, and his treatment had been helping to reduce her back pain.

¶6 Heath again massaged Victim's "clitoral or vaginal area" over her clothes. Victim asked what he was doing, and Heath responded that he was working the gracilis muscle.[3] He did this for a few minutes, and Victim had another orgasm. When Victim's sister—who accompanied Victim to her appointment on this occasion—entered the room, Heath moved his hand away from Victim's vagina and massaged her thigh with two hands as he talked to her sister. Heath did not put his hand back on Victim's vagina while Victim's sister was in the room.

Count 3—Sexual Battery

¶7 On December 1, 2012, Victim had her seventh visit with Heath, again after "convincing [herself] that everything was

3. "The gracilis muscle is a long, strap-like muscle that passes from the pubic bone to the tibia in the lower leg." Tim Barclay, *Gracilis Muscle*, Innerbody.com, https://www.innerbody.com/image_musfov/musc67-new.html [https://perma.cc/CGZ2-298E].

fine" and that she must have "imagined it." Heath started with a stomach massage, which was routine by this point, but then he went "lower and lower than ever before," with his fingers going past her waist "into [her] underpants." Victim was frozen. She did not say anything but felt Heath's fingers "stopping right on the left side of [her] vagina . . . where [her] leg starts." His fingers went "in a circular motion, which would move [the] outer lip of [Victim's] vagina over." At trial, Victim further described this as a touching of her labia majora, which she described as "the starting of the vagina, but not the . . . inner, not the opening, not the clit[oris]."

Counts 4 & 5—Forcible Sexual Abuse and Object Rape

¶8 Victim returned again on December 8, 2012. This visit was the same as the last. Heath went under Victim's underpants and moved his fingers in a circular motion, touching the "outer lip of [Victim's] vagina, moving it around and around and around." Then, Victim clearly felt Heath move one finger over (likely the pinky finger of Heath's right hand), and touch her "right on [her] clitoris . . . in the middle of [her] vagina." Victim flinched, and Heath moved his finger away.

¶9 Victim described this touching at trial. The prosecutor asked if Heath had to "go beyond the labia majora to touch [her] clitoris." Victim responded affirmatively. She similarly testified that she "felt" his finger "actually go beyond [her] labia majora."[4]

¶10 Victim did not immediately tell anyone what had happened because "if [she] said it out loud then it meant it was

4. Victim visited Heath one last time on December 15, 2012. Nothing relevant to the criminal case against Heath happened at that visit.

real and it really happened, and [she] didn't want to believe it." But a little more than a month later, Victim reported the touching to her mother and then to the police.

Other Incidents with J.T. and E.B.

¶11 Before Victim began visiting Heath in 2012, Heath was treating J.T. in 2011. J.T., a licensed massage therapist, visited Heath for hip and leg pain. Heath worked along the top of J.T.'s pubic bone and then started "grinding back and forth in [J.T.'s] crotch," touching and rubbing her clitoris. J.T. opened her eyes and saw that Heath "looked very different," "like he was . . . enjoying what he was doing." J.T. ended the appointment and never returned.

¶12 As a massage therapist, J.T. knew "there's absolutely no reason to" touch that area because there are "no muscles that attach right there." J.T. reported the incident to the police and the Division of Professional Licensing (DOPL). Though DOPL had some concerns, it declined to "investigate the matter any further" or "seek formal action against [Heath's] license." Heath had promised to examine and adjust his practices, and DOPL encouraged him to do so.

¶13 Then, in 2015, Heath treated E.B., who visited Heath a total of four times. On the third and fourth visits, Heath touched E.B.'s genital area, including the clitoris, over her clothes. At first it seemed unintentional, but throughout the treatment it became apparent to E.B. that it "was completely intentional" and that "there was no excuse for it." She too filed a complaint with DOPL and reported the incident to the police.

Procedural History

¶14 In 2015, the State charged Heath with sexual crimes against Victim and E.B. The charges with respect to each victim were severed, and the State filed an amended information

relating to the five sexual offenses against Victim: three counts of sexual battery, *see* Utah Code Ann. § 76-9-702.1 (LexisNexis 2017); one count of forcible sexual abuse, *see id.* § 76-5-404 (2012); and one count of object rape, *see id.* § 76-5-402.2 (2017).

¶15 Heath filed a motion in limine to exclude certain other acts evidence at trial, including testimony from J.T. and E.B., primarily under rule 404(b) of the Utah Rules of Evidence. Under a doctrine of chances theory, the trial court allowed the State to use J.T.'s and E.B.'s testimonies to prove mens rea but not to prove actus reus. When it came to proving actus reus, the court concluded that the State had "failed to prove the foundational requirement of frequency," which it described for purposes of the actus reus as "the frequency with which chiropractors are falsely accused of inappropriate touching during treatment." There was no evidence on this statistic, and the court reasoned that any conclusion on this point "would be nothing more than conjecture."

¶16 But regarding mens rea, the court found that the relevant inquiry was "the frequency of [Heath's] involvement in a type of event—the accidental touching of his patients' genitals." Reasoning that "the mistaken touching of another's genitals would be a once in a lifetime event" for the general population and that chiropractors could take precautions to avoid accidental touching that would make chiropractors as a class "indistinct from people generally," the court allowed the other acts evidence to prove mens rea—that is, to prove that Heath touched Victim not by mistake or accident incidental to treatment, but rather with the intent to arouse or gratify sexual desire.

¶17 Heath was tried before a jury. Among other witnesses, the State called a doctor of chiropractic (Doctor) to testify about the standard of care practiced by chiropractors in Utah. Doctor opined that chiropractors should "avoid any accidental,

incidental or intentional touching of sensitive areas" through "draping techniques" or "physical blockage." He also testified that there would be no medical reason to touch Victim below the "top of the pubic bone."

¶18 Heath testified in his own defense. As relevant here, he testified that he did not intentionally touch Victim's vaginal area but that incidental, over-the-clothing touching during the treatment was possible. He also stated that he was unaware that Victim had been sexually stimulated and that she gave no indication that she was uncomfortable. He admitted that there is no reason to intentionally touch a patient's labia or clitoris when treating lower back pain, whether under or over the clothing.

¶19 The jury found Heath guilty of all charges. After reviewing this court's decision in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002, the trial court on its own motion requested briefing on whether judgment should be arrested on count 5 on the basis that penetration of the genital opening may not have been established. Heath then filed his own motion to arrest judgment, contending that the evidence was insufficient on counts 4 and 5 for forcible sexual abuse and object rape. Specifically, he argued that the State did not prove "penetration" of the "genital or anal opening," as required by the object rape statute. *See* Utah Code Ann. § 76-5-402.2(1). He additionally argued that, for purposes of forcible sexual abuse, the State did not prove his specific intent "to arouse or gratify the sexual desire of any individual." *See id.* § 76-5-404(1).

¶20 The trial court rejected both arguments. It first stated that penetration "means entry between the outer folds of the labia" and concluded that the evidence was sufficient to show penetration, "meaning [Heath's] fingers entered between the outer folds of [Victim's] labia." It then determined that a reasonable jury could find specific intent for forcible sexual abuse, reasoning that the "nature, duration and progression of

the touching described by [Victim] all give rise to a reasonable inference" about Heath's intent to arouse or gratify sexual desire. The court also noted that there was "no medical purpose" for the touching. So concluding, the court declined to arrest judgment.

¶21 The trial court sentenced Heath to concurrent prison terms of up to one year on each sexual battery count, one to fifteen years for forcible sexual abuse, and five years to life for object rape. Heath appeals.

ISSUES AND STANDARDS OF REVIEW

¶22 Heath raises challenges to the admission of other acts evidence at trial, the sufficiency of the evidence on all counts, and the jury instructions.

¶23 Trial courts "are afforded a great deal of discretion in determining whether to admit or exclude evidence." *State v. Martin*, 2017 UT 63, ¶ 18, 423 P.3d 1254 (cleaned up). Barring an "error of law," we will reverse a trial court's evidentiary decision under rule 404(b) of the Utah Rules of Evidence "only if that decision is beyond the limits of reasonability." *Id.* (cleaned up); *see also State v. Thornton*, 2017 UT 9, ¶ 56, 391 P.3d 1016 ("'[T]he question . . . is whether the [trial court] abused [its] broad discretion in [admitting rule 404(b) evidence].").

¶24 We review Heath's sufficiency challenges "under well-settled standards of review—yielding deference to the jury's determination of the sufficiency of the evidence but addressing the legal questions he raises de novo." *State v. Barela*, 2015 UT 22, ¶ 17, 349 P.3d 676 (cleaned up), *see also State v. Nielsen*, 2014 UT 10, ¶ 46, 326 P.3d 645 (stating that, in any sufficiency challenge, we "review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict" (cleaned up)).

Omitted pages 9-25 as being irrelevant to the committee's work

evidence, he has not done so here.[12] We therefore affirm his conviction for forcible sexual abuse.[13]

C. Object Rape—Count 5

¶60 Heath contends that the State failed to prove penetration of the genital opening for purposes of object rape. He asserts that Victim never used the word "penetration" and instead described Heath has having touched the "outer lip of [her] vagina"[14] and "on [her] clitoris." He argues that her clitoris is not the requisite "genital opening" contemplated by the object rape statute. In his view, the "genital opening" means the "vaginal opening," and he points to supposed contextual cues in the statute, particularly

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12. Heath also briefly argues that the State failed to prove that he acted with "the requisite mens rea as to any purported lack of consent" where the State did not present evidence showing that he was at least reckless with respect to Victim's nonconsent. However, the same evidence discussed above also supports a finding that Heath was at least reckless with respect to Victim's nonconsent.

13. Heath also makes an ineffective assistance of counsel claim with respect to his unpreserved arguments on count 4. Heath, however, has not shown that it was unreasonable under these circumstances for defense counsel to not object to the sufficiency of the evidence on the issues of nonconsent. *See Roberts*, 2019 UT App 9, ¶ 29. Accordingly we reject this argument.

14. Victim and counsel often referred to the "vagina" at trial when it is clear based on context that they intended to refer to the vulva—the external part of a female's genitalia. As Heath notes in his briefing on appeal, the term vagina is "quite often used colloquially to refer to the vulva" despite the fact that the vagina is part of a female's internal genitalia. (Cleaned up.)

the statute's use of the parallel term "anal opening," to support his interpretation.

¶61 Utah Code section 76-5-402.2 defines object rape as:

> A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person . . . by any foreign object, . . . including a part of the human body other than the mouth or genitals, . . . with the intent to arouse or gratify the sexual desire of any person, commits [object rape] . . . .

Utah Code Ann. § 76-5-402.2(1) (LexisNexis 2017).[15] "Penetration" was first defined by our case law in *State v. Simmons*, 759 P.2d 1152 (Utah 1988), in the context of rape of a child. *Id.* at 1153–54. The definition was then extended to object rape in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002. *Id.* ¶ 3. These cases hold that "penetration" in both the rape and object rape context means "entry between the outer folds of the labia."[16] *Id.* (cleaned up). In *Simmons*, our supreme court then

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15. Because there have been no material changes to this statute since the crime occurred, we cite the current version.

16. It appears that numerous courts agree, holding that "entry of the anterior of the female genital organ, known as the vulva or labia, is sufficient penetration to constitute rape." James L. Rigelhaupt Jr., Annotation, *What Constitutes Penetration in Prosecution for Rape or Statutory Rape*, 76 A.L.R.3d 163 (1977); *see, e.g.*, *State v. Toohey*, 2012 SD 51, ¶ 22, 816 N.W.2d 120 (interpreting statutory language similar to Utah's "to mean that evidence of vulvar or labial penetration, however slight, is sufficient to prove penetration"); *State v. Bowles*, 52 S.W.3d 69, 74 (Tenn. 2001) (defining penetration and stating that "it is not (continued…)

discerned insufficient evidence of penetration when the alleged victim testified only that the defendant "had placed his penis *on* her labial folds." 759 P.2d at 1154 n.1. *But see id.* at 1161 (Hall, C.J., concurring and dissenting) (stating that combined with other facts in the case this conclusion "insult[ed] common sense and the experience of all those sexually literate"). Conversely, in *Patterson*, we held that there was sufficient evidence of penetration when the victim testified that the defendant "tr[ied] to put his fingers up" her genitalia, that he "separated the labia" using two fingers, and that "[i]t really hurt." 2017 UT App 194, ¶¶ 8, 19.

¶62 Here, Victim testified that Heath's finger touched her "right on [her] clitoris . . . in the middle of [her] vagina." In response to questions, Victim clarified that Heath had to "go beyond [her] labia majora to touch [her] clitoris" and that she "felt" his finger "actually go beyond [her] labia majora." Elsewhere in her testimony, Victim described the labia majora as "the soft skin that's the starting of the vagina, but not the . . . inner, not the opening, not the clit[oris]."

¶63 Heath argues that this testimony was insufficient to prove that he penetrated Victim's genital opening. To do so, he contends that *Simmons* and *Patterson*'s "penetration" definition should not be credited. He points out that *Simmons* was a rape case, not an *object* rape case, and asserts that neither *Simmons* nor *Patterson* actually reviewed, interpreted, or "consider[ed] the specific requirement of the object rape statute to penetrate the

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(…continued)
necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient" (cleaned up)). Though this secondary source and the cases it cites discuss rape and not object rape, the definition of "penetration" of the female genitalia is consistent.

genital or anal opening." Rather, according to Heath, *Patterson* merely imported the definition of "penetration" announced in *Simmons* without dealing with the fact that the rape statute and object rape statute differ with respect to the "*specific body part* required to be penetrated."

¶64 To that end, Heath argues for a different interpretation of "penetration" in relation to the genital opening under section 76-5-402.2. He asserts that, properly construed, section 76-5-402.2's reference to "genital . . . opening" means "vaginal opening." He advances his conclusion by analogizing the reference in the statute of "genital opening" to that of the "anal opening," arguing that, when read in context, the "anal opening" means "the actual opening [where the gastrointestinal tract ends and exits the body] and not the surrounding skin and folds." Extending the analogy, Heath argues that "genital opening" must then mean the "vaginal opening" or, alternatively, the vaginal "hole." Thus, in his view, "an inappropriate touch of the clitoris or even an inappropriate touch of the protective skin and folds surrounding the clitoris and the vulva" may be sexual battery or forcible sexual abuse but it is not object rape, "because *no opening has been penetrated*." We first address Heath's statutory construction argument, and we then address the sufficiency of the evidence supporting his conviction of object rape.

¶65 It is true that the rape and object rape statutes use slightly different terminology with respect to "penetration." The rape statute refers to "sexual penetration," Utah Code Ann. § 76-5-407(2)(a)(iii) (LexisNexis Supp. 2019), while the object rape statute refers to "penetration . . . of the genital or anal opening," *id.* § 76-5-402.2(1) (2017). And as Heath points out, neither *Simmons* nor *Patterson* interpreted the meaning of "penetration" specifically with respect to a "genital opening." However, we conclude that the plain meaning of the phrase "penetration . . . of the genital . . . opening" in section

76-5-402.2(1) is consistent with the definition of "penetration" announced in *Simmons* and applied in *Patterson*. We thereby reject Heath's proffered interpretation.

¶66 The "primary goal" of statutory interpretation "is to evince the true intent and purpose of the Legislature," and the "best evidence of the legislature's intent is the plain language of the statute itself." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (cleaned up). It is well-settled that in interpreting statutes we presume that "the legislature used each term advisedly according to its ordinary and usually accepted meaning," and that "the expression of one term should be interpreted as the exclusion of another." *Id.* (cleaned up); *see also State v. Sanders*, 2019 UT 25, ¶ 17, 445 P.3d 453 ("As we examine the text, we presume that the legislature used each word advisedly." (cleaned up)). *See generally State v. Robertson*, 2017 UT 27, ¶ 40, 438 P.3d 491 (stating that the judiciary is tasked with "interpreting and applying legislation according to what appears to be the legislature's intent, neither inferring substantive terms into the text that are not already there nor taking away from the statutory text by ignoring it or rendering it superfluous" (cleaned up)).

¶67 Heath's argument turns in part on the meaning of "opening" in the object rape statute; he asserts that "opening" in this context means a "specified anatomical *hole*." (Emphasis added.) But the ordinary dictionary meaning of the term "opening" is not so limited, and common synonyms include, among other things, a "gap," "vent," "breach," "space," and "slot." *See Opening*, Dictionary.com, https://www.dictionary.com/browse/opening?s=t [https://perma.cc/ST8P-SQXP]; *Opening*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/opening [https://perma.cc/EJ3W-55DZ]; *Opening*, Thesaurus.com, https://www.thesaurus.com/browse/opening?s=t [https://perma.cc/7Y8Q-D3QL]; *see also State v. Lambdin*, 2017 UT 46, ¶ 22, 424 P.3d 117 ("When interpreting statutes, we look

to the ordinary meaning of the words, using the dictionary as our starting point.").

¶68 Further, in the context of the object rape statute, it is plain that the term "opening" is not limited to the vaginal opening. *See Lambdin*, 2017 UT 46, ¶ 22 ("After determining our starting point [from the dictionary definitions], we then must look to the context of the language in question." (cleaned up)). The legislature used the term "*genital* . . . opening" in the object rape statute, not "vaginal opening." Utah Code Ann. § 76-5-402.2(1) (emphasis added). The term "genital" is broadly defined as "of or relating to the sexual organs." *Genital*, Dictionary.com, https://www.dictionary.com/browse/genital?s=t [https://perma.cc/9VBP-GFKE]; *Genital*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/genital [https://perma.cc/J6TR-LMLT] (defining "genital" as "of, relating to, or being a sexual organ"). And indeed, as the State points out, accepted medical understanding establishes that female genitalia have more than one opening, including the vaginal opening and the opening between the labial folds. *See* Jennifer Knudtson & Jessica E. McLaughlin, *Female External Genital Organs*, Merck Manual, https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-external-genital organs [https://perma.cc/GD4X-P5LX] (identifying a female's external genital organs, including the various "openings," and explaining that the labia majora are "folds of tissue that enclose and protect the other external genital organs").

¶69 Given this, if the legislature intended to limit the meaning of "penetration" to only the *vaginal* opening, it could have done so. But it did not, and instead used the more inclusive term "genital opening"—a choice in terminology that we must presume was intentional. *See Marion Energy*, 2011 UT 50, ¶ 14. Because the plain meaning of the term "genital opening" necessarily includes more than simply the "vaginal opening,"

we disagree with Heath's assertion that, in context, the meaning of "genital opening" is strictly limited to the "vaginal opening." We also discern no other indication in the object rape statute that the legislature intended "genital opening" to be narrowly interpreted as "vaginal opening." Thus, we cannot read into the object rape statute the limitation that Heath urges. *See Robertson*, 2017 UT 27, ¶ 40. The statute's plain language simply does not support doing so.

¶70 The plain language reading of the term "genital opening" in the object rape statute is consistent with the interpretation of "penetration" decided in *Simmons* and applied in *Patterson*. The courts in both cases determined that the "penetration" element in the context of either rape or object rape is satisfied when the penetration occurs "between the outer folds of the labia." *Simmons*, 759 P.2d at 1154; *Patterson*, 2017 UT App 194, ¶ 3. Because the object rape statute uses the general and inclusive "genital opening" terminology, and because one of the medically acknowledged female genital openings is that between the labial folds, it follows that the penetration element is satisfied upon proof of entry "between the outer folds of the labia." *Simmons*, 759 P.2d at 1154; *Patterson*, 2017 UT App 194, ¶ 3. And Heath has not otherwise shown error in how the statute was interpreted in *Simmons* and *Patterson*.[17] Thus, we conclude that, in defining object rape, the legislature did not intend to limit the required penetration of the "genital opening" to the "vaginal opening" and that the interpretation of "penetration" set forth in *Simmons* and *Patterson* are in line with a plain language reading of the object rape statute.

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17. We reiterate that numerous courts define penetration of the female genitalia this way. *See supra* note 16. Though of course not necessary to rule for Heath on his statutory argument, Heath cites no case in which a court has interpreted statutory language similar to Utah's to require penetration of the vaginal opening.

¶71 Next, having interpreted the relevant terms, resolving Heath's sufficiency challenge is straightforward. Victim explicitly testified that Heath went "beyond [her] labia majora to touch [her] clitoris" "in the middle of [her] vagina." Unlike in *Patterson*, in which the victim did not explicitly state that the defendant penetrated her genital opening and the jury had to rely on competing inferences, no inferences were required here. Victim testified directly to the question of penetration and, though not using that exact word, described Heath touching her clitoris and confirmed that he had to "go beyond [her] labia majora" to do so. Thus, the jury reasonably found that Heath penetrated Victim's genital opening when he touched her clitoris. *See* Utah Code Ann. § 76-5-402.2(1); *see also State v. Lerman*, 2018 MT 5, ¶ 13, 408 P.3d 1008 (holding that there was sufficient evidence of penetration based on "common sense anatomy" because "[t]he outer portions of the vulva necessarily are penetrated, however slightly, when the clitoris is touched" (cleaned up)); *Jett v. Commonwealth*, 510 S.E.2d 747, 749 (Va. Ct. App. 1999) ("[T]he clitoris lies within the labia majora; therefore, evidence of penetration or stimulation of the clitoris is sufficient to establish penetration of the labia majora . . . ."). We accordingly affirm his conviction for object rape.[18]

~~III. Jury Instructions~~

~~¶72 Heath contends that he received ineffective assistance of counsel in regard to the jury instructions at his trial. We have no need to describe the challenges in detail. Heath paints with a~~

18. Heath challenges his conviction for object rape with the same argument he did with respect to his conviction for forcible sexual abuse—namely, that there was no evidence of his specific intent to arouse or gratify sexual desire. This argument fails for the same reasons discussed above. *See supra* ¶¶ 53–56.

broad and indiscriminate brush, and he has failed to meet his burden of demonstrating prejudice.

¶73 "To succeed on an ineffective assistance of counsel claim, [a defendant] must demonstrate that his trial counsel's performance was deficient and that he suffered prejudice as a result." *State v. Vallejo*, 2019 UT 38, ¶ 36, 449 P.3d 39 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). There is no need for us "to address both components of the inquiry," *id.* ¶ 40 (cleaned up), and courts often analyze prejudice without opining on any objective deficiency in the representation, *see Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."), *State v. Reid*, 2018 UT App 146, ¶ 20, 427 P.3d 1261.

¶74 The burden to prove prejudice is on the defendant. *State v. Garcia*, 2017 UT 53, ¶¶ 36–37, 424 P.3d 171. And it is no light undertaking. *Id.* ¶ 44. The defendant must show that "but for the error, there is a reasonable probability that the verdict would have been more favorable to him." *State v. Apodaca*, 2019 UT 54, ¶ 50, 448 P.3d 1255 (cleaned up). "[A] mere potential effect on the outcome is not enough." *Id.* Rather, the defendant must show a "substantial" likelihood of a different result as a "demonstrable reality and not [merely as] a speculative matter." *State v. Nelson*, 2015 UT 62, ¶¶ 10, 28, 355 P.3d 1031 (cleaned up); *see also Apodaca*, 2019 UT 54, ¶ 50 (stating that the prejudice requirement "is a relatively high hurdle to overcome" in that "the likelihood of a different result must be substantial" (cleaned up)).

¶75 Heath has not met his burden of demonstrating prejudice. He asserts that the instructions were prejudicial because they were "incomplete, legally inaccurate, and confusing." But this does not establish prejudice. Even if the instructions were problematic, Heath must still show a prejudicial effect on the outcome given the totality of the evidence at trial. Considering

the evidence in this case—Victim's testimony, the Other Acts Evidence, Doctor's testimony, and Heath's own admissions—it is difficult to say that it is reasonably likely the jury would have come to a different conclusion had the instructions been different. At least, Heath has not hoed that row. We therefore conclude on this basis that there was no demonstrable ineffective assistance of counsel in regard to the jury instructions.[19]

CONCLUSION

¶76 The trial court did not abuse its discretion in admitting the Other Acts Evidence. Based in part on that evidence, there was sufficient evidence for the jury to convict Heath of sexual battery, forcible sexual abuse, and object rape. Finally, Heath's counsel was not constitutionally ineffective in not objecting to jury instructions because Heath has not shown prejudice from the lack of an objection. We affirm Heath's convictions.

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19. Heath also argues that if we determine "that the errors set forth herein do not individually warrant reversal," we should "find the cumulative effect of all such errors do." But there are no errors to cumulate, and therefore cumulative error does not apply. *See State v. Squires*, 2019 UT App 113, ¶ 45 n.10, 446 P.3d 581.

759 P.2d 1152
Supreme Court of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Gene SIMMONS, Defendant and Appellant.

No. 860053.
|
July 5, 1988.

Synopsis

Defendant was convicted in the Third District Court, Salt Lake County, Leonard H. Russon, J., of one count of rape of a child and two counts of sodomy upon a child, and he appealed. The Supreme Court, Zimmerman, J., held that: (1) jury could not conclude beyond reasonable doubt that defendant's penis was between folds of child's labia so as to constitute penetration, and (2) evidence supported conviction for sodomy.

Rape conviction reversed; otherwise affirmed.

Howe, A.C.J., concurred and filed an opinion.

Stewart, J., concurred in affirming sodomy convictions, concurred in all but Part VI of Chief Justice Hall's concurring and dissenting opinion, and filed opinion.

Hall, C.J., concurred in affirming sodomy convictions, but dissented as to reversal of rape conviction and filed opinion in which Howe, A.C.J., concurred in all but Part VI.

Durham, J., concurred in result of Chief Justice Hall's concurring and dissenting opinion, and filed an opinion.

Attorneys and Law Firms

***1153** Joan Watt, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Sandra L. Sjogren, Salt Lake City, for plaintiff and appellee.

Opinion

ZIMMERMAN, Justice:

Defendant Gene Simmons appeals from convictions on one count of rape of a child and two counts of sodomy upon a child. Defendant was sentenced to three concurrent minimum mandatory terms of ten years to life. The two sodomy convictions are affirmed. However, the rape conviction is reversed.

Defendant lived with V. and her three children, A., a girl, and T. and G., boys, from approximately January of 1982 until May of 1985, when allegations of sexual abuse were made against him. He was later charged by information with raping A. “on or about May 5, 1985” and with sodomizing T. and G. On appeal, defendant attacks all convictions. We consider first the rape conviction.

Simmons contends that the evidence was insufficient to sustain the conviction because there was no showing of penetration, as required by ***1154** Utah Code Ann. § 76–5–407(2) (Supp.1985). That section provides in pertinent part:

> (2) In any prosecution for unlawful sexual intercourse, rape, or sodomy, any sexual penetration ... however slight, is sufficient to constitute the offense.

The first question is the definition of "penetration." If that term requires entry into the vaginal canal of the victim, there is no question that the evidence here is insufficient. This Court has never expressly addressed the question of whether "penetration" requires proof that the penis of the defendant or, in the case of object rape, the object being used to commit the rape, entered the vaginal canal of the victim or whether it is sufficient if it is merely inserted between the outer folds of the victim's labia. However, the generally accepted rule is that entry between the outer folds of the labia is sufficient to constitute "penetration" as that term is commonly used in defining the crime of rape. *See* 65 Am.Jur.2d *Rape* § 3 (1972). Our prior decisions are entirely consistent with this proposition. *See State v. Warner,* 79 Utah 500, 505–06, 291 P. 307, 309 (1930), *vacated on other grounds,* 79 Utah 510, 13 P.2d 317 (1932) (citing *Reg. v. Lines,* 1 Car. & K. 393 (O.S.C.1844)). We therefore declare it to be the definition of penetration under section 76–5–407.

In light of the foregoing, the question here is whether there was evidence sufficient to support the jury's finding beyond a reasonable doubt that defendant's penis was between the folds of A.'s labia during the incident on or about May 5, 1985, which is charged in the information. We conclude that there was not sufficient evidence. A. testified that defendant put the tip of his penis "on" her labia. At no time did she testify that defendant put his penis between the outer folds of her labia, much less in her vagina. There was no evidence of penetration on or about May 5, 1985, beyond the testimony of the victim. [1]

[1] The Chief Justice in dissent reads the record differently. He relies principally on the inconsistent and confusing description given by the prosecutor of what A. was demonstrating to the jury on an anatomically correct doll. However, we conclude that a fair reading of the testimony regarding the anatomical doll leads only to the conclusion that the victim was demonstrating that defendant had placed his penis *on* her labial folds.

The jury's implicit and necessary finding that penetration occurred despite the lack of adequate evidence may be explained. During trial, the jury heard evidence of a series of incidents between defendant and A. stretching over a period of almost three years. During some of those incidents, defendant did place his penis between A.'s outer labial folds. On at least one occasion, his penis penetrated the vaginal canal. On others, he apparently only touched his penis to the outside of the folds. However, the trial judge admitted this evidence of prior crimes for the limited purpose of showing intent, opportunity, or plan with respect to the May 5th incident. *See* Utah R.Evid. 404(b). In addition, the court instructed the jury that to find defendant guilty of rape, it had to find that he had sexual intercourse with A. "on or about the 5th day of May, 1985." No objection was received as to this instruction. In light of the limited purpose for which the evidence was admitted, the narrow specificity of the charge in the information, and the similar specificity in the jury instructions, the jury could not properly have taken into account the ample evidence of other incidents of rape committed upon the same victim in determining whether penetration had occurred on May 5, 1985. [2]

[2] It is worth noting that in *State v. Fulton,* 742 P.2d 1208 (Utah 1987), *cert. denied,* 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988), we made it clear that the precise date of the offense need not be charged and proven as an element of every crime. It is enough that the defendant is "sufficiently apprised of the particulars of the charge to be able to 'adequately prepare his defense.' " *Id.* at 1214 (quoting *State v. Burnett,* 712 P.2d 260, 262 (Utah 1985)). Had defendant been put on notice that he was being tried for all of the instances of rape to which the victim and other witnesses testified, the lack of proof of a precise date for each incident would not necessarily have been fatal to the State's case. *Id.* at 1213. However, here the State chose to proceed on a very narrow charge. This decision was its undoing.

***1155** For the foregoing reasons, we reverse the conviction of rape. [3]

[3] The likelihood of jury confusion was enhanced by the prosecutor's closing argument in which she repeatedly focused on the evidence of prior incidents of molestation, rather than on what occurred on May 5th. This argument clearly strayed from the charge in the information and from the jury instructions, both of which required a finding of penetration on or about May 5th.

In short, the case presented to the jury was built upon evidence of prior crimes that Simmons was never charged with committing.

Defendant also challenges his conviction on two counts of sodomy upon the two boys. No purpose would be served by setting defendant's arguments out here at length. We have considered them in detail and find that no harmful error occurred.

The conviction of rape is reversed. The two sodomy convictions are affirmed, as are the two minimum mandatory ten-year sentences on those charges.

HOWE, Associate Chief Justice: (concurring).
I concur in Justice Zimmerman's opinion and also in all but part VI of the opinion of Chief Justice Hall.

STEWART, Justice: (concurring).

I concur with Justice Zimmerman's opinion in affirming the two sodomy convictions and reversing the rape conviction and also with Chief Justice Hall's opinion in affirming the two sodomy convictions.

With respect to the rape charge, I submit that this is a case in which the trial court clearly should have given a lesser included offense instruction on the crime of child sexual abuse. Such an instruction was requested at trial and improperly refused by the trial court. Had the instruction been given, the problem that divides the Court today might well have not arisen since the jury could have convicted on a crime that clearly fit the facts set out in Chief Justice Hall's opinion. In my view, the law clearly required giving the instruction, most especially since it was based on defendant's theory of the case and the defendant therefore had a right to have it presented to the jury. *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. *State v. Baker,* 671 P.2d 152 (Utah 1983); *Hopper v. Evans,* 456 U.S. 605, 611, 102 S.Ct. 2049, 2052–2053, 72 L.Ed.2d 367 (1982). Beyond question, the evidence would have supported a conviction for child sexual abuse.

HALL, Chief Justice: (concurring and dissenting).
For the reasons enumerated below, I concur in affirming defendant's sodomy convictions and dissent as to the reversal of defendant's conviction for rape of a child. Further, inasmuch as defendant raises constitutional claims and issues of first impression, it is important to also address the efficacy of such points on appeal.

I

Under count three, defendant was convicted of sodomizing G. In this regard, G. testified at trial that when he was eleven years old, defendant initiated sexual contact with him. Apparently, on several occasions, defendant told G. to play a “trick” on his brother, T. When T. came into the room, G. was to place his mouth over defendant's penis. Sometimes G. would simply place his mouth over the penis, while other times, his mouth touched defendant's penis.

On appeal, defendant argues that the evidence was insufficient to sustain his conviction of sodomy upon a child as to G. Specifically, defendant claims that since he only intended to simulate the act of fellatio with G., any touching that occurred was

merely "accidental." In short, defendant urges this Court to believe that he "could not have been aware that his conduct was reasonably certain to cause the touching." Such contention is wholly without merit.

Utah Code Ann. § 76–5–403.1 (Supp.1987) provides in part:

> (1) A person commits sodomy upon a child if the actor engages in *any sexual* ***1156** *act* upon or with a child who is under the age of 14, *involving* the genitals of the actor or the child and the mouth or anus of either person....

(Emphasis added.)

Since no mens rea is explicitly stated for this crime, Utah Code Ann. § 76–2–102 (Supp.1987) would normally apply. That section provides in part:

> [W]hen the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility.

Utah Code Ann. § 76–2–103 (1978) states that a person engages in conduct:

> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is *aware of the nature of his conduct or the existing circumstances.* A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that *his conduct is reasonably certain to cause the result.*

(Emphasis added.) In response to questioning concerning the contact that occurred, G. testified at trial:

Q: [By the prosecutor] What occurred in that room? Can you speak slowly?

A: At first, it was just that I backed off when my brother walked in and then it was just barely the tip of my mouth. I mean, *his penis in my mouth* and later on it became the whole thing, but I wasn't really actually sucking.

....

Q: Now, was there any contact from your mouth to his penis?

A: Yes, my lips touched.

Q: And how many times did that happen?

A: *Four.*

....

Q: So, when [defendant] would call [your brother], is that when he—is that when he came in?

A: Yeah.

Q: And how many times did this happen?

A: [Defendant's] calling him in?

Q: Uh-huh.

A: *About ten.*

(Emphasis added.) Due to the numerous occurrences involved and in view of defendant's conduct and the circumstances surrounding the same, the jury could determine beyond a reasonable doubt that defendant not only engaged in sexual activity involving his genitals and the mouth of his victim, but that he was also aware of the nature of his conduct, the existing circumstances, and that his conduct was reasonably certain to cause the result. Therefore, defendant's conviction on this count is appropriately affirmed. [1]

1 *See State v. Gehring,* 694 P.2d 599, 600 (Utah 1984); *State v. McCardell,* 652 P.2d 942, 945 (Utah 1982).

II

Under count two, defendant was convicted of sodomizing T. On appeal, defendant argues that the trial court violated his right of confrontation by not allowing him to present evidence regarding T.'s prior sexual experiences. [2] Specifically, it was defendant's contention at trial that such testimony would have provided an alternative explanation of the victim's knowledge of certain sexual acts and diminished the victim's credibility by suggesting that he could have fabricated the charges against defendant.

2 Although in his brief defendant states that the trial court refused evidence regarding prior sexual experience of the children generally, the record indicates that defendant actually attempted to present evidence regarding T.'s prior conduct.

Recently, this Court addressed this issue in *State v. Moton* [3] and concluded that the defendant was not prejudiced by the exclusion of further cross-examination. [4] Likewise in this case, although the trial court ***1157** did not permit all of the questions defendant wished to ask T., the court did allow argument and testimony relevant to the victim's credibility, sexual knowledge, and possible motives for lying. Indeed, after the court ruled as to the issue at hand, defense counsel nevertheless elicited from the victim that his friends taught him the meaning of sexual phrases defendant had used. Moreover, the victim had already testified as to the lack of prior sexual activity with his sister. Finally, while other testimony at trial discussed the sexual knowledge the victims obtained from the family's babysitter, defense counsel chose not to pursue this information as to T. upon cross-examination. The evidence sought by further cross-examination having thus been already brought out either directly or by implication from T. or from the testimony of other witnesses, defendant was not prejudiced by the exclusion of further cross-examination. [5]

3 749 P.2d 639 (Utah 1988).

4 *Id.* at 644; *id.* at 644 (Zimmerman, J., concurring) (sufficient evidence regarding the victim's sexual activities was admitted so as to make the court's error harmless under the federal constitutional standard).

5 Prejudice does not arise from the exclusion of evidence where information that may be brought out by further questioning was already before the jury from the testimony of others or by implication from the witness's own testimony. *See State v. Rammel,* 721 P.2d 498, 500 (Utah 1986), and cases cited therein.

III

Defendant also claims on appeal that he was denied his right to trial by a jury chosen from a fair cross-section of the community. A review of the record reveals that on the first day of trial, defendant asked for and was denied a hearing on his motion to quash the jury panel and challenge the jury selection act. Defendant, however, was allowed to present extensive argument on this issue, including specific and detailed facts to support his contention. Defendant was also permitted to present ample proffer as to other evidence supporting his claims. Yet, even if we accept defendant's contentions raised upon argument and proffer, we have previously addressed this issue in *State v. Tillman,* [6] and our decision therein is dispositive here.

6 750 P.2d 546, 573–77 (Utah 1987); *see also id.* at 574 n. 115 ("Constitutional challenges to panels should be brought outside the framework of the Act."); *State v. Bishop,* 753 P.2d 439, 457 (Utah 1988).

IV

Defendant further claims that the minimum mandatory system under which he was sentenced was unconstitutionally vague. This argument was previously addressed in *State v. Egbert* [7] and *State v. Gerrish.* [8] Application of the principles in those cases supports the holding that the statute under which defendant was sentenced is not unconstitutionally vague.

7 748 P.2d 558, 559–60 (Utah 1987).

8 746 P.2d 762, 762 (Utah 1987); *see also State v. Larson,* 758 P.2d 901 (Utah 1988).

V

Defendant likewise contends on appeal that he should have been regarded as a stepfather to the victims for purposes of probation consideration at time of sentencing. Utah Code Ann. § 76–5–406.5 (Supp.1984) (amended 1986) provides in part:

> (1) In a case involving rape of a child, attempted rape of a child, sodomy upon a child ... where the defendant is the victim's father, stepfather, or adoptive father or a male who is the child's legal guardian who has been living in the household in the role of a father to the victim for a continuous period of time of at least one year prior to the earliest offense, ... execution of sentence may be suspended and probation may be considered only if all of the following circumstances are found by the court to be present and the court in its discretion, considering the circumstances of the offense, including the nature, frequency, and duration of the conduct[,] finds probation or suspension of sentence to be proper....
>
> ....
>
> (3) The defendant has the burden to establish by a preponderance of evidence eligibility under all of the criteria of this section.

***1158** Even though defendant was not married to the victims' mother, he contends that because he lived with the children in a "parent/child relationship" for a continuous period of over three years, he should have been given the opportunity at the time of sentencing to establish that he met the criteria for probation under the above statute.

Regardless of the "role" defendant claims he assumed after moving in with the victims and their mother, the language of the statute is clear and defendant has not shown that he met the requirements thereunder. [9] Therefore, the trial court did not err in refusing to consider defendant for probation under the statute.

9 *See Larson,* 758 P.2d at 904.

VI

Finally, I do not join the Court in reversing defendant's conviction for rape of a child. Our standard of review in this case is narrow and clear:

> [W]e review the evidence and *all inferences which may reasonably be drawn from it* in the light most favorable to the verdict of the jury. We reverse a jury conviction for insufficient evidence only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted. [10]

10 *State v. Petree,* 659 P.2d 443, 444 (Utah 1983) (emphasis added; citations omitted); *see also State v. Cantu,* 750 P.2d 591, 593 (Utah 1988).

In reiterating this standard, we have stated:

> In reviewing the conviction, we do not substitute our judgment for that of the jury. "It is the exclusive function of the jury to weigh the evidence and to determine the credibility of the witnesses...." So long as there is *some evidence, including reasonable inferences,* from which findings of all the requisite elements of the crime can *reasonably be made,* our inquiry stops. [11]

11 *State v. Booker,* 709 P.2d 342, 345 (Utah 1985) (emphasis added; citations omitted). "Inference" has been defined in part as "the act of passing from one judgment to another, or from a belief or cognition to a judgment"; "a conclusion; a deduction." Similarly, "infer" has been defined in part as "to accept or derive as a consequence, conclusion, or probability"; "to surmise; guess." Webster's New International Dictionary (2d ed. unabridged 1934).

Regarding such, defendant claims and the majority concludes that there was no evidence upon which a reasonable jury could find the element of penetration. I disagree.

Utah Code Ann. § 76–5–407 (Supp.1987) provides in pertinent part:

> (2) In any prosecution for unlawful sexual intercourse, rape, or sodomy, *any sexual penetration* or, in the case of sodomy, any touching, *however slight,* is sufficient to constitute the offense.

(Emphasis added.) As early as 1930, this Court adopted a definition of sexual penetration for purposes of the crime of rape. In *State v. Warner,* [12] we approved a jury instruction that "any penetration however slight is sufficient to complete the offense" of rape. In doing so, we adopted the rule stated by the English court in *Regina v. Joseph Lines.* [13] Therein, the court held that the appropriate rule of law only required the jury to determine "whether, at any time, any part of the virile member of the [defendant] was within the labia of the pudendum of the prosecutrix; for if ever it was, (no matter how little), that will be sufficient to constitute a penetration." [14] In accepting this standard, the *Warner* Court noted:

12 79 Utah 500, 291 P. 307 (Utah 1930), *vacated on other grounds,* 79 Utah 510, 515, 13 P.2d 317, 320 (1932).

13 79 Utah at 506, 291 P. at 309 (citing 1 Car. & K. 393 (O.S.C.1844)).

14 1 Car. & K. at 393.

> To constitute the offense there of course must be an actual contact of the sexual organs and a penetration into the body of the female, [that is] the insertion of the male organ to some extent into the female organ. It need be no particular ***1159** depth, and the hymen need not be broken. [15]

15 79 Utah at 506, 291 P. at 309 (citations omitted). The jury in this case was given an instruction in accordance with this standard.

This standard has been interpreted and is in keeping with the rule that even the slightest penile "penetration" of the labia is sufficient to constitute the offense of rape although the vagina was not entered and an act of intercourse was never completed. [16] The issue then is whether the jury could have reasonably concluded from the evidence and *the reasonable inferences* which may be drawn therefrom that defendant's penis "penetrated" A.'s sexual organ even *slightly.* [17] The record clearly supports such a finding.

16 *See, e.g., Sherbert v. State,* 531 S.W.2d 636, 637 (Tex.Crim.App.1976); *Rhodes v. State,* 462 P.2d 722, 726 (Wyo.1969); *see also Rhoades v. State,* 504 S.W.2d 291 (Mo.App.1973); *State v. Atkinson,* 190 Neb. 473, 209 N.W.2d 154 (1973); *State v. Murry,* 277 N.C. 197, 176 S.E.2d 738 (1970); *State v. Kirk,* 211 N.W.2d 757 (N.D.1973). "Slight" has been defined in part as "superficial." Websters', *supra* note 11.

17 *See Gehring,* 694 P.2d at 600.

Indeed, in describing the circumstances surrounding the offense on the specific date charged, A. testified:

"Q [By the prosecutor] What happened as you were watching cartoons?

"A [Defendant] called me into his room.

"Q What happened when you got into his room?

"A He told me to come in the room. Then he told me to take off my—(Girl crying)

....

"Q ... So, you went into the bedroom and he told you to do something. What did he tell you to do?

"A To take off my clothes.

"Q What did you say?

"A No.

"Q What happened next?

"A (No response.)

"Q Did he do anything?

"A Yes, he took off my pants and then he took off his pants.

"Q What happened next? What happened next?

"A Then he put me on his bed and then he got on me and put the tip of his private on my private.

"Q Can you take a deep breath?

"A (Girl crying)

"Q I don't know if people can understand quite what you are saying. Can you repeat what you just said?

"A He put his private on my *private.*

"Q [A.], do you have another word that you use when you refer to [defendant's] private?

"A Penis.

"Q Do you have another word that you use when you refer to your private?

"A *Vagina.*

"Q What happened at that time? Can you describe what [defendant] did?

"A *He was moving around.* He was breathing hard.

"Q He did what?

"A (No response.)

....

"Q ... Can you show with this doll, assuming this is [defendant], how he was in relation to you.

"A (Girl places male doll on top of female doll.)

....

"Q ... You want to show on your lap, show with this doll what happened?

"A (Girl demonstrated.)

"Q Okay. Were [defendant's] clothes off or on?

"A Off.

"A [A.], what part of his body touched yours?

"A What do you mean?

"Q Can you describe for the jury where his private was touching you?

***1160** "A Show?

"Q Uh-huh. Why don't you take the dolls' clothes off since that is how it occurred.

"[The prosecutor]: In the interest of time, I will take this doll's clothes off. Let the record reflect these are anatomically correct dolls.

"[Defense counsel]: Sure.

"Q [By the prosecutor] Now, show how [defendant] was with this doll?

"A (Girl places male on top of female doll.)

"Q [A.], can you show this jury, without this doll being on top, can you point with your finger where his private touched you?

"A (Girl pointing.)

"[Defense counsel]: May the record reflect that the finger appears to be between the legs, on the closest to the front side of the doll.

....

"Q [By the prosecutor] [A.], was it between your legs, or was it touching your genital area?

"A *Genital area.*

"Q You indicated that you know what your vagina is?

"A (Nods head affirmatively.)

"Q Did his penis go inside of your vagina?

"[Defense counsel]: I would object without some foundation as to what her definition is.

"THE COURT: Let's go a little further on foundation. Sustained for foundational reasons.

"Q [By the prosecutor] [A.], where is your vagina? Can you describe where that is?

"A (No response.)

"Q Can you show on the doll where the doll's vagina would be?

"A Right here (indicating).

"[The prosecutor]: Your Honor, may the record reflect that the witnes [sic] has identified *between the folds of the doll's genital area.*

"THE COURT: [Defense counsel.]

"[Defense counsel]: I am not sure that that is where that was. Maybe she can just do that again.

"THE COURT: Go ahead.

"Q [By the prosecutor] [A.], is your vagina the hole that is near your genital area, or right at your genital area?

"A Right at.

"Q I didn't hear you.

"A Right at your genital area.

"A Now, what part of your genital area did his penis touch?

"A (No response.)

....

"Q Can you describe where on your body his penis touched on this occasion, on the weekend before Mother's Day, that Saturday before?

"A (Girl indicating.)

"[The prosecutor]: Okay. Your Honor, I would ask the record reflect that the witness has domonstrated [sic] or pointed to the *labial area* on the doll.

"[Defense counsel]: I will stipulate that that is where she touched, *the labial folds.*

"THE COURT: The record will so show.

"Q [By the prosecutor]: [A.], did any part of his penis touch the outside of your vagina?

"[Defense counsel]: Object as to the form of the specificity of what "outside of the vagina" means.

"THE COURT: Restate your question.

"Q [By the prosecutor] [A.], did his penis go into your hole at that time?

"[Defense counsel]: We'll object again to the leading nature of the question. She responded without leading earlier.

"[The prosecutor]: Your Honor, I don't think that is an inappropriate question.

"THE COURT: I am going to allow it. Objection overruled. She may answer.

"THE WITNESS: No.

***1161** "Q [By the prosecutor] Did his penis touch just outside of your hole, or your vagina?

"A On that occasion.

"Q It did?

"A (Nods head affirmatively.)

"[The prosecutor]: I have no further use for the dolls at this point.

"Q ... [A.], do you remember approximately how long this lasted?

"A *About five minutes.*

....

"Q Can you describe when [defendant] put his private on yours, any kind of movements that he made?

"A *He was moving all over, up and down.*

"Q Can you describe how your legs were at that time?

"A *They were spread apart.*

"Q And was it—What part of his private touched you?

"A The tip."

(Emphasis added.)
Importantly, A. did not merely testify that defendant put the tip of his penis " 'on' her labia" or "outside" of her vagina. Rather, she testified that while "[h]e was *moving* all over, up and down" for "[a]bout *five minutes* " on top of her, with her legs "spread apart," defendant "put his private on [her] private" (or in her explanatory words) his "penis" on her "vagina"—her "genital area." (Emphasis added.) Then with the doll, A. demonstrated for the members of the jury and they observed and also heard for themselves the repeated statements on the record that A. identified "between the folds of the doll's genital area," "the labial area on the doll," and "the labial folds." Certainly the jury, in applying its individual and collective experience to this case, could conclude that defendant did not merely place his penis *on* the victim's labia but that, while moving for five minutes "all over, up and down" on top of her, with her legs spread apart, his penis entered her labial folds. The very fact of defendant's weight on top of the child, together with his erratic movements and the force and time involved, supports the jury's view. Concluding otherwise insults common sense and the experience of all those sexually literate.

Given the above-noted evidence alone, [18] and the reasonable inferences which the jury with its knowledge, awareness, and understanding could reasonably draw therefrom, it is incredulous to conclude that there was insufficient evidence from which the jury could appropriately find that defendant even slightly entered A.'s labial folds and was guilty of the crime charged. Such conclusion subverts the judgment of the jury, in total disregard of our established standard of review. [19]

18 A plain and fair reading of the evidence itself indicates that A.'s testimony and demonstration with the doll, together with the reasonable inferences drawn therefrom, do not lead "only to the conclusion that the victim was demonstrating that defendant had placed his penis *on* her labial folds." Majority opinion at note 1 (emphasis in original). Also, this Court should not presume "jury confusion" or that in order to implicitly find that penetration occurred, the jury must have disregarded the trial court's express instruction which prohibited the jury from considering evidence of defendant's prior acts against A. in determining defendant's guilt of the offense with which he was charged. *See* *Leigh Furniture & Carpet Co. v. Isom,* 657 P.2d 293, 313 (Utah 1982) (Howe, J., concurring).

19 *See supra* notes 10–11.

Furthermore, the conclusion reached today ignores the very essence of the crime of rape the statute itself seeks to protect. In this regard, Justice Straup more than sixty years ago stated, "The essential of the crime of rape 'is not the fact of the intercourse, but the injury and outrage to the modesty and feelings of the [victim], by means of the carnal knowledge effected by force.' " [20] Applying this concept to the evidence at hand certainly emphasizes and supports both the reasonableness and the appropriateness of the jury's verdict in this case.

20 *State v. Anderton,* 69 Utah 53, 69, 252 P. 280, 286 (1926) (Straup, J., dissenting) (citation omitted).

***1162** Finally, the conclusion reached by the majority produces an irrational and unworkable standard disadvantaging child rape victims who at the time they are violated (and possibly at the time of trial as well) are sexually uneducated, unaware, or lacking understanding regarding the term "slight" in reference to their genitalia and penetration. Indeed, in view of today's decision, only those children who are sexually aware or concentrating during such victimization will be able, in some instances, to provide sufficiently detailed testimony regarding the extent of the defendant's activity to support the majority's determination of slight penetration. Many child victims will need to become sensitive and sexually educated before trial as to their anatomy, the meaning of slight penetration, and the difference between the terms "on" and slightly "within," "between," or "into"—all in order to adequately describe such activity and terror. Also, the result today will seriously affect those child rape victims whose labial areas, because of anatomical immaturity, injury, defect, or otherwise, are incapable of being entered sufficiently to meet the majority's implicit standard regarding the element of slight penetration. And lastly, juries will no longer be able to look past the victim's use (or nonuse) of a particular preposition or choice of words and conclude that given the evidence offered by the victim, the reasonable inferences arising therefrom, and the possible immaturity or limited understanding of the child, the crime occurred.

Clearly, society does not favor such results, and the law should not encourage such effect. Accordingly, I dissent.

DURHAM, Justice: (concurring in the result of the Chief Justice's concurring and dissenting opinion)

I join in parts I through V and in the factual analysis of part VI of the Chief Justice's concurring and dissenting opinion, although I do not share his concern that the majority has established an "irrational and unworkable standard disadvantaging child rape victims." I think the legal standard employed by both the majority and the dissent is the same. This is merely a close case on the evidence, in which considerable deference is due to the inferences and conclusions made by the jury.

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2017 UT App 194

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
CORY R. PATTERSON,
Appellant.

Opinion
No. 20150791-CA
Filed October 19, 2017

Fourth District Court, Provo Department
The Honorable Derek P. Pullan
No. 141403037

Dustin M. Parmley, Attorney for Appellant

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JUDGE MICHELE M. CHRISTIANSEN authored this Opinion, in which JUDGES GREGORY K. ORME and JILL M. POHLMAN concurred.

CHRISTIANSEN, Judge:

¶1 Defendant Cory R. Patterson challenges his conviction on one count of object rape, arguing that the evidence was insufficient to support the jury's verdict. He does not challenge his convictions on two counts of forcible sexual abuse, stemming from the same incident. We conclude that the evidence adduced at trial was sufficient for the jury to find every element of object rape, and we therefore affirm.

¶2 When we review a challenge to the sufficiency of the evidence, we review the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict. *State v. Pullman*, 2013 UT App 168, ¶ 4, 306 P.3d

827. We will vacate the conviction only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime. *Id.*; *see also State v. Hamilton*, 827 P.2d 232, 236 (Utah 1992). To conduct this analysis, we first review the elements of the relevant statute. We then consider the evidence presented to the jury to determine whether evidence of every element of the crime was adduced at trial.

¶3 Defendant was charged with object rape. A person is guilty of object rape when the person, "without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older,[1] by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person." Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). "Penetration" in this context means "entry between the outer folds of the labia." *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988). On appeal, Defendant's sole claim is that the State did not present evidence that he caused such penetration.

¶4 To determine whether sufficient evidence was presented, we must scrutinize the testimony elicited at trial. And because we review evidence in the light most favorable to the jury's verdict, *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346, we rely primarily on Victim's account of what happened to her, which the jury apparently credited.

¶5 Victim met Defendant at their workplace; Defendant was 23 and Victim was 17. While working together, Defendant regaled her with stories of his military training and his plans to

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1. A separate statute criminalizes object rape of a person younger than 14. *See* Utah Code Ann. § 76-5-402.3 (LexisNexis Supp. 2016).

get a concealed carry permit. Victim testified that, after their shifts, Defendant asked Victim if he could walk her to her car. When they got to her car, Defendant told Victim that he wanted to kiss her. He then kissed her for "about a couple minutes" before pushing her into the back seat of her car. Once inside the car, Defendant continued to talk to Victim, who was "start[ing] to get scared, frightened, and . . . was still unsure of what to do or how to act." Victim testified that she did not think about running away at that point, explaining, "[I]n the moment when it's so traumatic, you don't know what to do. You're not really in control of your body." She also testified that she was concerned about "what he said about the military [training] before and about his conceal[ed] carry permit." Defendant then resumed kissing Victim.

¶6 Victim testified that, after about five minutes, "[t]he kissing got more intimate, and then he undid my pants, and he put his hand down my pants and started touching my vagina and moving his hand around that area." Victim further testified, "[W]hen he started trying to put his fingers up my vagina I told him to stop, and he kept saying, 'No, no, it's okay. It's okay.'" Victim repeated her plea for Defendant to stop, and "he kind of moved his fingers back and just started touching around the area instead of putting his fingers up, instead of penetrating."

¶7 Defendant then opened his pants and "used [his] hand to grab my hand, and caress his penis and move it up and down." Victim testified that whenever she tried to let go, Defendant would "put[] my hand back onto his penis. After a while he noticed that I didn't want to do that; and after I told him to stop, he just noticed that. So he finished himself off. Then he had lifted up my shirt and moved my bra up and touched my breast."

¶8 At this point in Victim's testimony, the prosecutor asked Victim to provide more detail about the earlier touching. Specifically, the prosecutor asked Victim to "describe where on your vagina he touched." Victim testified, "He touched the general area. Then when he was trying to put his fingers up he

separated the labia" using "[j]ust one hand, his two fingers." Victim further testified, "It really hurt. I had never felt anything like that before."

¶9 The question before us is whether a reasonable jury, after hearing this testimony, could find beyond a reasonable doubt that Defendant caused "penetration, however slight, of [Victim's] genital . . . opening." *See* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016). We therefore review the evidence in detail, bearing in mind that the evidence presented to the jury must speak to every element of the offenses charged to ensure that the jury's verdict does not rest on speculation:

> [N]otwithstanding the presumptions in favor of the jury's decision[,] this Court still has the right to review the sufficiency of the evidence to support the verdict. The fabric of evidence against the defendant must cover the gap between the presumption of innocence and the proof of guilt. In fulfillment of its duty to review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict, the reviewing court will stretch the evidentiary fabric as far as it will go. But this does not mean that the court can take a speculative leap across a remaining gap in order to sustain a verdict.

State v. Shumway, 2002 UT 124, ¶ 15, 63 P.3d 94 (first alteration in original) (citation and internal quotation marks omitted). "Sex crimes are defined with great specificity and require concomitant specificity of proof." *State v. Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827; *accord People v. Paz*, No. B265251, 2017 WL 1374701, at *9 (Cal. Ct. App. Apr. 14, 2017) (certified for partial publication at 217 Cal. Rptr. 3d 212) ("In all sex-crime cases requiring penetration, prosecutors must elicit precise and specific testimony to prove the required penetration beyond a reasonable doubt." (citing *Pullman*, 2013 UT App 168, ¶ 14)).

¶10 The Utah Supreme Court's decision in *State v. Simmons* is instructive to our analysis. *See generally* 759 P.2d 1152 (Utah 1988). There, the supreme court considered the crime of unlawful sexual intercourse which, like object rape, has "penetration" as an element. *Id.* at 1154. The supreme court held that a victim's testimony that the defendant "put the tip of his penis 'on' her labia" was insufficient to support conviction when the victim failed to "testify that [the defendant] put his penis between the outer folds of her labia." *Id.* (noting that the jury may have been confused by testimony regarding prior incidents where the defendant *did* "place his penis between [the victim's] outer labial folds" and "penetrated the vaginal canal").

¶11 Similarly, in *State v. Pullman*, this court vacated a defendant's conviction for sodomy on a child because the victim's testimony "describ[ing] a sexual act involving Pullman's penis and her buttocks" did not satisfy the statutory element of "touching the anus." 2013 UT App 168, ¶ 16 (emphasis, citation, and internal quotation marks omitted). This court explained that the victim's testimony that "Pullman 'tried to take [her] panties off and stick his dick into [her] butt' and that 'it hurt'" was "'sufficiently inconclusive . . . that reasonable minds must have entertained a reasonable doubt' as to whether Pullman's act involved the touching of her anus." *Id.* (alterations in original) (citation omitted).

¶12 Here, the testimony does not explicitly describe the challenged element of the offense—"penetration, however slight." *See* Utah Code Ann. § 76-5-402.2(1). Victim testified that Defendant was "trying to put his fingers up" her vagina until she repeated her plea for him to stop. Victim further testified that, at that point, Defendant "started touching around the area instead of putting his fingers up, instead of penetrating." And when asked by the prosecutor to "describe where on your vagina he touched," Victim responded that Defendant had touched "the general area" and that he "separated the labia" using "[j]ust one hand, his two fingers." But the State did not

elicit Victim's testimony as to whether Defendant's fingers actually penetrated between her labia, however slightly.[2]

¶13 Because Victim's testimony did not explicitly establish that Defendant penetrated Victim, we consider next whether the jury could have reasonably inferred that Defendant penetrated Victim. The State asserts that the jury could have inferred from her testimony that "Defendant's fingers entered, however slight[ly], between the outer folds of [Victim's] labia." (First alteration in original) (citation and internal quotation marks omitted). Defendant argues that such a finding amounted to speculation and was therefore not a reasonable inference.

¶14 The resolution of this issue turns on the difference between a permissible inference and impermissible speculation. "This is a difficult distinction for which a bright-line methodology is elusive." *Salt Lake City v. Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067. "An inference is a conclusion reached by

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2. We recognize that testifying about a sexual assault is traumatic for the victim. But the State has the burden of "proving by evidence every essential element" of the charged crime. *See Carella v. California*, 491 U.S. 263, 266 (1989) (per curiam); *see also In re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). We urge prosecutors to adduce specific testimony regarding each and every element of such crimes to ensure that a jury's guilty verdict rests not on speculation but on clear evidence sufficient to find beyond a reasonable doubt that the defendant committed the crime charged. *Cf. People v. Paz*, No. B265251, 2017 WL 1374701, at *9 (Cal. Ct. App. Apr. 14, 2017) (certified for partial publication at 217 Cal. Rptr. 3d 212) ("We caution prosecutors not to use vague, euphemistic language and to ask follow-up questions where necessary.").

considering other facts and deducing a logical consequence from them" whereas "speculation is the act or practice of theorizing about matters over which there is no certain knowledge." *Id.* (citation and internal quotation marks omitted). Thus, a jury's inference is reasonable "if there is an evidentiary foundation to draw and support the conclusion" but is impermissible speculation when "there is no underlying evidence to support the conclusion." *Id.* Put another way, "an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof." *See United States v. Finnerty*, 470 F.2d 78, 81 (3d Cir. 1972) (emphasis, citation, and internal quotation marks omitted).

¶15 There is no question that penetration is an essential element of the crime of object rape; indeed, it is the critical element distinguishing object rape from forcible sexual abuse. *Compare* Utah Code Ann. § 76-5-402.2(1) (LexisNexis Supp. 2016), *with id.* § 76-5-404(1) (LexisNexis 2012). Therefore, we must consider whether the two scenarios Victim's testimony might have described—penetration or non-penetration—"may be drawn with equal consistency" from that testimony. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted).

¶16 Victim testified that Defendant attempted to penetrate her using two fingers to "separate[]" her labia. This might describe separation by insertion (penetration) or separation by stretching the skin adjacent to the labia (not penetration). Victim also testified that, after she repeatedly asked him to stop, Defendant "kind of moved his fingers back and just started touching around the area." Again, this might describe Defendant removing his fingers from Victim after penetrating her or Defendant pulling his hand away from her vagina and labia without having penetrated Victim. And Victim testified that, "[i]t really hurt. I had never felt anything like that before." Arguably, this testimony might describe physical pain from penetration or emotional trauma from Defendant's forcible

sexual abuse of Victim. Thus, each of these pieces of testimony may plausibly be interpreted as describing either a penetrative scenario or a non-penetrative scenario.

¶17 However, while Victim's testimony was susceptible to two interpretations, it was not *equally consistent* with both. *See Finnerty*, 470 F.2d at 81. When viewed as a whole, rather than examining each statement in artificial isolation, Victim's testimony more consistently described actual penetration than it did mere attempted penetration. For example, given their context, Victim's statements that "[i]t really hurt" and that she "had never felt anything like that before" seem more likely to relate to bodily pain than emotional injury. And such a description of pain suggests that Defendant's separation of Victim's labia was accomplished by digital penetration. This is especially true given Victim's testimony that it was when Defendant was "trying to put his fingers up," that he "separated the labia." Indeed, Defendant himself described penetration as a goal he was unable to accomplish rather than testifying that he had been trying to merely separate Victim's labia, as an objective in its own right:

> Q: Did you ever penetrate her vagina?
>
> A: I did not.
>
> Q: Was that because of the—what you've described as the tight quarters, or was there another reason?
>
> A: It was the tight quarters.

Thus Defendant's concession that he had been attempting to penetrate Victim casts doubt on the possible inference that he spread Victim's labia by stretching the skin around it rather than by penetrating it with his fingers. In other words, Defendant's admission as to his intent largely dispels the alternative possibility that he was, for some reason, merely trying to

separate Victim's labia, one from the other, by stretching the skin and without penetrating between them.

¶18 Victim's testimony that, after putting his hand into her pants and trying to penetrate her vagina, Defendant "kind of moved his fingers back and just started touching around the area" could mean that his fingers had been on Victim's labia or that his fingers had been between Victim's labia. But these interpretations are not equally consistent with the evidence adduced. Specifically, because Victim testified about the pain she suffered, the total evidentiary picture is more consistent with the interpretation that Defendant had penetrated Victim before "mov[ing] his fingers back."

¶19 Considering these pieces of testimony together, we cannot conclude that an inference of non-penetration "may be drawn with equal consistency" as an inference of penetration from the evidence adduced at trial. *See Finnerty*, 470 F.2d at 81 (emphasis, citation, and internal quotation marks omitted). Therefore, there was an evidentiary basis for the jury's adoption of one inference over the other. *See Carrera*, 2015 UT 73, ¶ 12. And because the jury's adoption rested on an evidentiary basis, we conclude that the jury made a reasonable inference rather than an impermissible speculation.

¶20 Affirmed.

TAB 3

CR1616A Conduct Sufficient to Constitute Sexual Intercourse for Unlawful Sexual Activity with a Minor, Unlawful Sexual Conduct with a 16 or 17 year old, or Rape.

NOTES:

CR1616A Conduct Sufficient to Constitute Sexual Intercourse for Unlawful Sexual Activity with a Minor, Unlawful Sexual Conduct with a 16 or 17 year old, or Rape.

~~For purposes of [Unlawful Sexual Activity with a Minor][Unlawful Sexual Conduct with a 16 or 17 year old][Rape], any sexual penetration, however slight, is sufficient to constitute sexual intercourse.~~
You are instructed that any sexual penetration of the penis between the outer folds of the labia, however, slight, is sufficient to constitute "sexual intercourse" for purposes of the offense of [Unlawful Sexual Activity with a Minor] [Unlawful Sexual Conduct with a 16 or 17 Year Old] [Rape].

References
Utah Code § 76-5-401
Utah Code § 76-5-401.2
Utah Code § 76-5-402
Utah Code § 76-5-407
State v. Martinez, 2002 UT 80
State v. Martinez, 2000 UT App 320

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Last Revised - 09/2015

TAB 4

CR1615 Revisions in light of HB0213

NOTES: At the May 6, 2020 meeting, the committee instructed staff to prepare a draft instruction incorporating the changes to the consent statute (Utah Code § 76-5-406) outlined in HB0213. The draft instruction and a copy of the legislation are included for your consideration.

CR1615 Consent.

(DEFENDANT'S NAME) has been charged with (name of offense). The prosecution must prove beyond a reasonable doubt that [(VICTIM'S NAME)][(MINOR'S INITIALS)] did not consent to the alleged sexual conduct.

Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any time before or during sexual activity.

Commented [MCD1]: Utah Code § 76-5-406(3) uses the words "prior to" instead of "before"

The alleged sexual conduct is without consent of [(VICTIM'S NAME)] [(MINOR'S INITIALS)] under any, all, or a combination of the following circumstances:

[(VICTIM'S NAME)][(MINOR'S INITIALS)] expressed lack of consent through words or conduct;]

[(DEFENDANT'S NAME) overcame the victim through the application of physical force or violence;]

[(DEFENDANT'S NAME) overcame [(VICTIM'S NAME)][(MINOR'S INITIALS)] through concealment or by the element of surprise;]

[(DEFENDANT'S NAME) coerced [(VICTIM'S NAME)][(MINOR'S INITIALS)] to submit by threatening immediate or future retaliation against [(VICTIM'S NAME)][(MINOR'S INITIALS)] or any person, and [(VICTIM'S NAME)][(MINOR'S INITIALS)] thought at the time that (DEFENDANT'S NAME) had the ability to carry out the threat;]

[(DEFENDANT'S NAME) knew [(VICTIM'S NAME)][(MINOR'S INITIALS)] was unconscious, unaware that the act was occurring, or was physically unable to resist;]

[(DEFENDANT'S NAME) knew that as a result of mental illness or defect, or for any other reason [(VICTIM'S NAME)][(MINOR'S INITIALS)] was incapable at the time of the act of either understanding the nature of the act or of resisting it;]

[(DEFENDANT'S NAME) knew that [(VICTIM'S NAME)][(MINOR'S INITIALS)] ~~submitted or~~ participated because [(VICTIM'S NAME)][(MINOR'S INITIALS)] erroneously believed that (DEFENDANT'S NAME) was ~~[(VICTIM'S NAME)][(MINOR'S INITIALS)]'s spouse~~someone else;]

[(DEFENDANT'S NAME) intentionally impaired [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s power to understand or control [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s conduct by giving [(VICTIM'S NAME)][(MINOR'S INITIALS)] a substance without [(VICTIM'S NAME)][(MINOR'S INITIALS)]'s knowledge;]

[(MINOR'S INITIALS) was younger than 14 years old at the time of the act;]

[At the time of the act, (MINOR'S INITIALS) was younger than 18 years old and (DEFENDANT'S NAME) was (MINOR'S INITIALS)'s parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to (MINOR'S INITIALS);]

[(MINOR'S INITIALS) was 14 years old or older, but younger than 18 years old, and (DEFENDANT'S NAME) was more than three years older than (MINOR'S INITIALS) and enticed or coerced (MINOR'S INITIALS) to submit or participate, under circumstances not amounting to physical force or violence or the threat of retaliation;]

[(DEFENDANT'S NAME) was a health professional or religious counselor who committed the act under the guise of providing professional diagnosis, counseling or treatment, and at the time of the act [(VICTIM'S

NAME)][(MINOR'S INITIALS)] reasonably believed the act was for professionally appropriate reasons, so that [(VICTIM'S NAME)][(MINOR'S INITIALS)] could not reasonably be expected to have expressed resistance.]

In deciding lack of consent, you are not limited to the circumstances listed above. You may also apply the common, ordinary meaning of consent to all of the facts and circumstances of this case.

References
Utah Code § 76-5-406
Utah Code § 76-5-407
State v. Barela, 2015 UT 22
State v. Thompson, 2014 UT App 14

Committee Notes
This instruction contains bracketed language which suggests optional language. Please review and edit before finalizing the instruction.

Last Revised – 09/04/2019

CONSENT LANGUAGE AMENDMENTS

2020 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Angela Romero

Senate Sponsor: Todd Weiler

LONG TITLE

General Description:

This bill clarifies when consent may be given or withdrawn for sexual activity.

Highlighted Provisions:

This bill:

- makes clarifying changes regarding consent to sexual activity.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

76-5-406, as last amended by Laws of Utah 2019, Chapters 146, 189, and 349

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **76-5-406** is amended to read:

76-5-406. Sexual offenses against the victim without consent of victim -- Circumstances.

(1) As used in this section:

(a) "Health professional" means an individual who is licensed or who holds the individual out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling, including an athletic trainer, physician,

osteopathic physician, physician assistant, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor.

(b) "Religious counselor" means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

(c) "To retaliate" includes threats of physical force, kidnapping, or extortion.

(2) An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

(a) the victim expresses lack of consent through words or conduct;

(b) the actor overcomes the victim through the actual application of physical force or violence;

(c) the actor is able to overcome the victim through concealment or by the element of surprise;

(d) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or

(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;

(e) the actor knows the victim is unconscious, unaware that the act is occurring, or <u>is</u> physically unable to resist;

(f) the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to:

(i) appraise the nature of the act;

(ii) resist the act;

(iii) understand the possible consequences to the victim's health or safety; or

(iv) appraise the nature of the relationship between the actor and the victim;

(g) the actor knows that the victim [~~submits or~~] participates because the victim erroneously believes that the actor is [~~the victim's spouse~~] someone else;

(h) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim's knowledge;

(i) the victim is younger than 14 years of age;

(j) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Section 76-5-404.1;

(k) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2)(b) or (d); or

(l) the actor is a health professional or religious counselor, the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.

(3) Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any time prior to or during sexual activity.

TAB 5

Jury Unanimity and *State v. Alires*, 2019 UT App 206

NOTES: At the May 6, 2020 meeting, the committee determined it should wait until the Utah Supreme Court decided the then-pending petition for certiorari. That petition was denied by the Court on May 8, 2020. The committee should determine how to proceed on this matter. The materials that follow were previously discussed by the committee at the February 5, 2020 meeting, and were again included in the May 6, 2020 meeting materials. There are no new materials to review at this time.

Unanimity when multiple acts are offered to support one offense and each of those acts could have been charged separately:

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. You must not find (Defendant) guilty unless you unanimously find beyond a reasonable doubt that the State has proved that (Defendant) committed at least one of these acts and you all agree on which act or acts he/she committed.

OR

- (Defendant) is charged [in Count _____] with [crime] [on or about _____] . The State has presented evidence of more than one act to prove that (Defendant) committed this offense. To find (Defendant) guilty, you must unanimously find beyond a reasonable doubt that (Defendant) committed at least one of these acts under the circumstances and with the mental state required for the crime and you all agree on which act or acts he/she committed.

QUESTION - What do we do if Defendant is charged with a sex crime based on specific touching but the prosecutor wants to include the "indecent liberties" alternative of guilt?

Unanimity when multiple acts are offered to support multiple offenses:

- (Defendant) is charged with multiple counts of _____. Each count addresses a distinct occurrence of a distinct act. To find (Defendant) guilty on any count, you must all agree on the distinct act that applies to that count. You must further unanimously find beyond a reasonable doubt that (Defendant) committed that act under the circumstances and with the mental state required for the crime.

QUESTION - What do we do if Defendant is charged with sex crimes based on specific touchings but the prosecutor wants to include a single "indecent liberties" alternative of guilt?

Unanimity when multiple acts or mental states (theories) support one offense and the acts/mental states could not have been charged separately (this is the murder by strangulation or poison example):

- (Defendant) is charged with [crime]. The elements of [crime] are defined in Instruction [Number]. To convict (Defendant) of [crime], you must all agree beyond a reasonable doubt that the State has proved each and every element of the crime. However, [crime] can be committed in alternative ways, and you do not have to unanimously agree on the way (Defendant) committed the crime. Similarly, although you must unanimously find beyond a reasonable doubt that (Defendant) acted with one of the mental states defined in the elements instruction, you do not have to all agree on the mental state (Defendant) acted with.

QUESTION - What do we do if Defendant is charged with an attempted crime that falls under this category (like murder, where each attempt arguably could be charged separately)?

2019 UT App 206

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
PHILBERT EUGENE ALIRES,
Appellant.

Opinion
No. 20181033-CA
Filed December 19, 2019

Third District Court, Salt Lake Department
The Honorable Adam T. Mow
No. 171908080

Ann M. Taliaferro and Staci Visser, Attorneys
for Appellant

Sean D. Reyes and William M. Hains, Attorneys
for Appellee

JUDGE DIANA HAGEN authored this Opinion, in which
JUDGES MICHELE M. CHRISTIANSEN FORSTER and JILL M. POHLMAN
concurred.

HAGEN, Judge:

¶1 Philbert Eugene Alires was charged with six counts of aggravated sexual abuse of a child—two counts for conduct toward his youngest daughter and four counts for conduct toward one of his daughter's friends (the friend). A jury convicted Alires on two counts, one for each alleged victim, and acquitted him of the remaining four counts. We agree with Alires that his trial counsel was constitutionally ineffective in failing to request an instruction requiring the jury to reach a unanimous verdict with respect to each act for which he was convicted. Accordingly, we vacate his convictions and remand for further proceedings.

BACKGROUND[1]

¶2 One afternoon, Alires and his wife (the mother) hosted a party for their youngest daughter's eleventh birthday. The daughter invited two of her guests—the friend and another friend (the other friend)—to a sleepover that night. As the evening progressed, the daughter, the friend, and the other friend joined others in the living room to play a video game called "Just Dance."

¶3 Later that night, after everyone else had left, Alires and the mother got into a loud argument that the daughter, the friend, and the other friend overheard. The daughter appeared visibly upset and "started tearing up because her parents were fighting." Both Alires and the mother could tell that the girls overheard and were affected by the argument.

¶4 Alires and the mother went to their bedroom and discussed how they could "try and make [the daughter] happy." They decided that Alires would join the girls in the living room and "try to lighten the mood." Alires testified that he can generally make the daughter happy by "wrestling" with her and her friends or other family members because it "usually ends up being a dog pile" on Alires and it "usually brings the kids together and usually changes the mood." While Alires went to the living room, the mother stayed behind to change into her pajamas.

¶5 According to the friend, Alires went into the living room after the argument and "started trying to dance with [them]"

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1. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. We present conflicting evidence only as necessary to understand issues raised on appeal." *State v. Reigelsperger*, 2017 UT App 101, ¶ 2 n.1, 400 P.3d 1127 (cleaned up).

and "lighten the mood" because "the fight wasn't very fun for anybody." While they were dancing, Alires "put his hand on [the friend's] waist and kind of like slid it down, so [she] just sat down because [she] felt really uncomfortable." Alires then "tried dancing with [her] again and he . . . touched around [her] butt," though he "was kind of sneaky about it" as if he was "trying to make it look like it wasn't happening." On direct examination, the State asked the friend, "[H]ow does that get accomplished?" She responded, "I'm not sure. He just did it."

¶6 Feeling uncomfortable, the friend sat down on the couch next to the daughter. Alires sat down between the two and "started tickling [the daughter]." The friend testified that, while Alires tickled the daughter, "it looked like he was touching like in her inner thigh, and like moved up to her crotch area." According to the friend, "it was really not tickling, it was more like grabbing and grosping [sic]." This lasted "probably 15 to 30 seconds." Then, Alires turned to the friend and said, "I'm going to tickle you now." The friend told Alires she did not feel well and said, "[P]lease don't." But Alires started tickling near her "ribcage and then touched [her] breast area" and then he "started tickling [her] inner thighs and did the same thing that he did to [the daughter]." The friend testified, "[H]e slid his hand up to my vagina and started like grabbing, and like grosping [sic], I guess" for "[p]robably about seven to 10 seconds."

¶7 According to the friend, when Alires got up from the couch, the daughter asked, "[D]id he touch you?" The friend said, "[Y]eah. And he touched you, because I kind of saw it." The daughter "was like, yeah, can we just go to my room?"

¶8 According to the mother, she entered the living room about sixty seconds after Alires and told everyone that it was time to go to bed. The friend testified that it had been "probably about three minutes," during which time Alires touched her buttocks "twice," her breasts "twice," and her vagina "[a]bout

four times," in addition to touching the daughter's thigh and vagina.

¶9 Both the daughter and the other friend testified at trial that Alires did not touch anyone inappropriately and that they were only wrestling and tickling.

¶10 A few days after the birthday party, the daughter decided to report the friend's claim to a school counselor. The daughter went to the counselor's office in tears and when the counselor asked her if "something happen[ed] over the weekend" she "nodded her head yes." The daughter "wouldn't speak to [the counselor]" but told him that she was "going to go get a friend." The daughter then left and returned to the counselor's office with the friend. According to the counselor, the friend told him that Alires had touched both the daughter and the friend on "[t]he lower area and the breasts," although "they first described it as tickling . . . whatever that means." He also testified that the daughter "agreed to where the touching happened." At trial, the daughter testified that she told the counselor only what the friend had told her.

¶11 The State charged Alires with six counts of aggravated sexual abuse of a child without distinguishing the counts. At trial, the jury was instructed that four of those counts were for conduct perpetrated against the friend and two of those counts were for conduct perpetrated against the daughter. During closing argument, the prosecutor explained that, based on the friend's testimony, the jury could "ascertain six counts of touching of [the friend]" and that the State was "charging four" of those touches. The prosecutor also cited the friend's testimony that she saw Alires touch the daughter on her "inner thigh" and "on her vagina." The prosecutor further explained that "any one of those touchings qualifies for each of the counts. One for one. One touch for one count. And . . . it has to be just on the vagina, just on the butt, or just on the breast. It can be any combination."

¶12 Although both parties submitted proposed jury instructions, neither side asked the court to instruct the jury that it must be unanimous as to the specific act underlying each count of conviction. During its deliberations, the jury sent a question to the court asking, "Can we please have a clarification on how the counts work? We don't understand how to weigh each count when they are all the same. Not sure what they mean." Alires's trial counsel still did not request a specific unanimity instruction. Instead, with consent from both parties, the court referred the jury to instructions it had already received. The jury convicted Alires on one count of aggravated sexual abuse of a child involving the friend and one count involving the daughter.

¶13 After the jury returned its verdict and prior to sentencing, Alires filed a motion to arrest judgment and for a new trial due to, among other things, "fatal errors in the jury instructions and verdict forms." Trial counsel argued that the jury instructions were "fatally erroneous in failing to require the jury to find a unanimous verdict." The district court denied the motion and imposed two indeterminate terms of six-years-to-life in prison to run concurrently.

¶14 Alires appeals.

ISSUE AND STANDARD OF REVIEW

¶15 Alires argues that his trial counsel was constitutionally ineffective for failing to request a jury instruction that required the jurors to unanimously agree to the specific act at issue for each count of aggravated sexual abuse of a child.[2] Alires further

2. Alires did not preserve the underlying jury instruction issue for appeal, because he raised it for the first time in a post-trial motion. *State v. Fullerton*, 2018 UT 49, ¶ 49 n.15, 428 P.3d 1052 (reaffirming that "an objection that could have been raised at (continued…)

argues that, due to the lack of such an instruction, we "cannot be assured the jury was unanimous" as to which specific acts formed the basis for his conviction. "When a claim of ineffective assistance of counsel is raised for the first time on appeal, there is no lower court ruling to review and we must decide whether the defendant was deprived of the effective assistance of counsel as a matter of law." *State v. Bonds*, 2019 UT App 156, ¶ 20, 450 P.3d 120 (cleaned up).[3]

(…continued)
trial cannot be preserved in a post-trial motion"). Therefore, he must establish one of the three exceptions to the preservation requirement: plain error, ineffective assistance of counsel, or exceptional circumstances. *See State v. Johnson*, 2017 UT 76, ¶ 19, 416 P.3d 443. In addition to arguing ineffective assistance of counsel, Alires also asks us to review this issue under plain error. But because Alires's trial counsel proposed jury instructions that contained the same alleged infirmity, trial counsel invited the error and we are precluded from reviewing it under the plain error exception to the preservation requirement. *State v. Moa*, 2012 UT 28, ¶¶ 23–27, 282 P.3d 985 (explaining that the invited error doctrine precludes plain error review).

3. Alires also raises issues concerning the sufficiency of the evidence of sexual intent and the absence of a jury instruction defining "indecent liberties." Because we vacate Alires's convictions on other grounds and it is uncertain whether these issues will arise again on remand, *see infra* note 7, we do not "exercise our discretion to address those issues for purposes of providing guidance on remand." *State v. Low*, 2008 UT 58, ¶ 61, 192 P.3d 867; *see also State v. Barela*, 2015 UT 22, ¶ 35, 349 P.3d 676 (concluding that "[w]e need not and do not reach the factual question of the sufficiency of the evidence" when reversing on the basis of ineffective assistance of counsel relating to the jury instructions).

ANALYSIS

¶16 Alires argues that his trial counsel was ineffective for failing to request an instruction requiring the jury to unanimously agree on the specific act committed for each count of conviction. "To demonstrate ineffective assistance of counsel, [a defendant] must show that his counsel's performance was deficient and that the deficient performance prejudiced the defense." *State v. Squires*, 2019 UT App 113, ¶ 25, 446 P.3d 581 (cleaned up); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). We agree with Alires that his trial counsel performed deficiently and that counsel's deficient performance prejudiced his defense.

A. Deficient Performance

¶17 To overcome the high level of deference we give to trial counsel's performance, Alires "must show that counsel's representation fell below an objective standard of reasonableness when measured against prevailing professional norms." *See State v. Popp*, 2019 UT App 173, ¶ 26 (cleaned up); *see also Strickland*, 466 U.S. at 687–88. Under the circumstances of this case, it was objectively unreasonable for trial counsel to propose instructions that did not require the jury to be unanimous as to the specific acts supporting each count of conviction.

¶18 The right to a unanimous verdict in criminal cases is guaranteed by Article 1, Section 10 of the Utah Constitution (the Unanimous Verdict Clause). "The Article I, section 10 requirement that a jury be unanimous is not met if a jury unanimously finds only that a defendant is guilty of a crime." *State v. Saunders*, 1999 UT 59, ¶ 60, 992 P.2d 951. Instead, "[t]he Unanimous Verdict Clause requires unanimity as to each count of *each distinct crime charged* by the prosecution and submitted to the jury for decision." *State v. Hummel*, 2017 UT 19, ¶ 26, 393 P.3d 314 (emphasis in original). For example, a verdict would not be valid "if some jurors found a defendant guilty of a robbery

committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found him guilty of the elements of the crime of robbery and all the jurors together agreed that he was guilty of some robbery." *Saunders*, 1999 UT 59, ¶ 60. "These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such." *Hummel*, 2017 UT 19, ¶ 26.

¶19 The constitutional requirement that a jury must be unanimous as to distinct counts or separate instances of a particular crime "is well-established in our law." *Id.* ¶ 30. Indeed, this requirement was applied in the closely analogous *Saunders* case in 1999. In *Saunders*, the Utah Supreme Court considered whether jurors must be unanimous as to the particular act or acts that form the basis for a sexual abuse conviction. 1999 UT 59, ¶¶ 9–11. The jury had been instructed that there was "no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred." *Id.* ¶ 58 (cleaned up). The court held that, "notwithstanding a clear constitutional command and applicable case law, the instruction does not set out any unanimity requirement at all." *Id.* ¶ 62. The alleged child victim had testified that at least fifteen different acts of touching occurred—some in which the defendant had been applying Desitin ointment to her buttocks and vaginal area and some in which he had not. *Id.* ¶ 5. Without a proper unanimity instruction, "some jurors could have found touchings without the use of Desitin to have been criminal; others could have found the touchings with Desitin to have been criminal; and the jurors could have completely disagreed on when the acts occurred that they found to have been illegal."[4] *Id.* ¶ 65. Because the

4. "[B]ecause time itself is not an element of an offense, it is not necessary that the jurors unanimously agree as to just when the criminal act occurred." *State v. Saunders*, 1999 UT 59, ¶ 60, 992 (continued…)

"jury could have returned a guilty verdict with each juror deciding guilt on the basis of a different act by [the] defendant," the court held that "it was manifest error under Article I, section 10 of the Utah Constitution not to give a unanimity instruction." *Id.* ¶ 62.

¶20 Our supreme court recently reinforced these principles in *Hummel*. In that case, the court distinguished between *alternative factual theories* (or methods or modes) of committing a crime for which a jury need not be unanimous and *alternative elements* of a crime for which unanimity is required. *Hummel*, 2017 UT 19, ¶ 53. Hummel was charged with the crime of theft. *Id.* ¶ 1. Under Utah law, a person commits theft if he "obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof." Utah Code Ann. § 76-6-404 (LexisNexis 2017). Subsequent sections of the Utah Code explain that a person is guilty of theft if he obtains or exercises control over the property "by deception," *id.* § 76-6-405, or "by extortion," *id.* § 76-6-406. But the Utah Supreme Court explained that "[t]heft by deception and theft by extortion are not and cannot logically be separate offenses." *Hummel*, 2017 UT 19, ¶ 21. "If they were, Hummel could be charged in separate counts and be convicted on both." *Id.* Because the method of obtaining or exercising control over the property is not an alternative *actus reus* element of the crime, jury unanimity at that level is not required. *Id.* ¶ 61.

(…continued)
P.2d 951. "Thus, a jury can unanimously agree that a defendant was guilty of a particular act or acts that constituted a crime even though some jurors believed the crime occurred on one day while the other jurors believed it occurred on another day." *Id.* In other words, if all jurors agree that a defendant committed a particular act, it is immaterial if some jurors think that the act occurred on a Saturday and others believe it occurred on a Monday.

¶21 In contrast to *Hummel*, where deception and extortion are merely "exemplary means" of satisfying the obtaining or exercising control element of the single crime of theft, *id.*, each unlawful touch of an enumerated body part (or each unlawful taking of indecent liberties) constitutes a separate offense of sexual abuse of a child under Utah Code section 76-5-404.1(2). This is illustrated by the fact that a defendant can be charged in separate counts and be convicted for each act that violates the statute. *See State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987) (holding that the defendant's acts of placing his mouth on the victim's breasts and then placing his hand on her vagina were "separate acts requiring proof of different elements and constitute separate offenses"). Unlike the theft statute in *Hummel*, the sexual abuse of a child statute "contains alternative *actus reus* elements by which a person could be found" guilty of sexual abuse. *See Hummel*, 2017 UT 19, ¶ 61. Those alternative elements are touching "the anus, buttocks, pubic area, or genitalia of any child, the breast of a female child, or otherwise tak[ing] indecent liberties with a child," Utah Code Ann. § 76-5-404.1(2), each of which constitutes a distinct criminal offense.

¶22 Here, Alires was charged with six counts of aggravated sexual abuse of a child based on distinct touches prohibited by the statute. The information charged Alires with six identically-worded counts of aggravated sexual abuse of a child without distinguishing the counts by act or alleged victim. At trial, the friend testified that Alires unlawfully touched her at least six times and unlawfully touched the daughter twice. In closing, the State argued that the jury could convict Alires on four counts based on any of the six alleged touches of the friend in "any combination." Similarly, the State did not identify which alleged touch of the daughter related to which count. Once the State failed to elect which act supported each charge, the jury should have been instructed to agree on a specific criminal act for each charge in order to convict. *See State v. Santos-Vega*, 321 P.3d 1, 18 (Kan. 2014) (holding that "either the State

must have informed the jury which act to rely upon for each charge during its deliberations or the district court must have instructed the jury to agree on the specific criminal act for each charge in order to convict"); *see also State v. Vander Houwen*, 177 P.3d 93, 99 (Wash. 2008) (en banc) (noting that "[t]o ensure jury unanimity in multiple acts cases, we require that either the State elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt" (cleaned up)).

¶23 Despite the State's failure to elect which acts it relied upon for each charge, trial counsel failed to request a proper instruction. As a result, the jury was never instructed that it must unanimously agree that Alires committed the same unlawful act to convict on any given count. Without such an instruction, some jurors might have found that Alires touched the friend's buttocks when dancing, while others might have found that he touched the friend's breast while tickling. Or the jury might have unanimously agreed that all of the touches occurred, but some might have found that Alires had the required intent to gratify or arouse sexual desires only while trying to dance with the friend, while others might have found that he only had sexual intent when he tickled the friend. In other words, the jurors could have completely disagreed on which acts occurred or which acts were illegal. *See Saunders*, 1999 UT 59, ¶ 65. Where neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime.[5]

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5. The instructions informed the jury that, "[b]ecause this is a criminal case, every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" This instruction is plainly insufficient. The constitutional requirement (continued…)

¶24 It was objectively unreasonable for Alires's trial counsel to propose jury instructions that did not require unanimity as to the specific act that formed the basis of each count resulting in conviction. Although no prior Utah appellate decisions have applied the Unanimous Verdict Clause to a case where a defendant is charged with multiple counts of the same crime, trial counsel is not "categorically excused from failure to raise an argument not supported by existing legal precedent." *State v. Silva*, 2019 UT 36, ¶ 19. In any event, it should have been readily apparent that, although *Saunders* involved a prosecution in which the defendant was charged with and convicted of a single count of sexual abuse that could have been based on any one of a number of separate acts, its holding applies with equal force to a case such as this where a defendant is charged with multiple counts of sexual abuse, each of which could have been based on any one of a number of separate acts.

¶25 The State suggests that a reasonable trial counsel may have had strategic reasons for not requesting a proper unanimity instruction. While it is true that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), here trial counsel candidly admitted that the failure to request a proper unanimity instruction was "not due to tactical reasons, but mistaken oversight." Had trial counsel properly investigated the governing law, it would have been apparent that *Saunders* required the court to instruct the jury that it must agree on the specific criminal act for each charge in order to convict. Moreover, we disagree with the State's theory that a reasonable defense attorney could have concluded that "further clarification would have increased the likelihood of conviction." By failing to require juror unanimity as to each

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of unanimity "is not met if a jury unanimously finds only that the defendant is guilty of a crime." *Saunders*, 1999 UT 59, ¶ 60.

underlying act, the instructions—coupled with the prosecutor's closing argument—effectively lowered the State's burden of proof. *See State v. Grunwald*, 2018 UT App 46, ¶ 42, 424 P.3d 990, (holding that "no reasonable trial strategy would justify trial counsel's failure to object to instructions misstating the elements of accomplice liability in a way that reduced the State's burden of proof"), *cert. granted*, 429 P.3d 460 (Utah 2018). Under these circumstances, failure to request such an instruction fell below an objective standard of reasonableness.

B. Prejudice

¶26 Having established that trial counsel performed deficiently by failing to request a proper unanimity instruction, Alires must show that he was prejudiced by that deficient performance. *Strickland*, 466 U.S. at 687. To establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Therefore, we consider whether Alires has shown a reasonable likelihood that a juror unanimity instruction would have led to a more favorable result.[6] *See State v. Evans*,

6. Citing *State v. Hummel*, 2017 UT 19, 393 P.3d 314, the State argues that "defendants challenging a verdict under the Unanimous Verdict Clause must affirmatively prove that the jury was not unanimous." In *Hummel*, the court stated that "a lack of certainty in the record does not lead to a reversal and new trial; it leads to an affirmance on the ground that the appellant cannot carry his burden of proof." *Id.* ¶ 82. But the *Hummel* court was addressing how to assess the prejudicial effect of "a superfluous jury instruction," that is, a jury instruction that includes an alternative theory that was not supported by sufficient evidence at trial. *Id.* ¶¶ 81–84. It does not speak to the (continued…)

2001 UT 22, ¶ 16, 20 P.3d 888 (reviewing for plain error a defendant's challenge to the trial court's failure to provide a juror unanimity instruction and explaining that a "defendant must demonstrate . . . that the error should have been obvious to the trial court, and that the error was of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant"); *State v. Saunders*, 1999 UT 59, ¶¶ 57, 65, 992 P.2d 951 (same); *see also State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699 (explaining that "the prejudice test is the same whether under the claim of ineffective assistance or plain error").

¶27 To determine whether the defendant has shown a reasonable probability of a more favorable outcome, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. 668, 695. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.*; *see also Saunders*, 1999 UT 59, ¶¶ 5, 13, 57, 65 (holding that "factual issues in the case"—including the "conflicting, confused," and "obviously . . . coached" testimony of the alleged victim and the absence of other witnesses—created a reasonable likelihood that a proper unanimity instruction would have resulted in "a more favorable outcome for the defendant").

¶28 Here, the evidence supporting Alires's guilt was not overwhelming. The evidence was conflicting both as to which acts occurred and as to Alires's intent. The friend testified to eight separate touchings that allegedly occurred during a sixty-second to three-minute period in full view of all three girls in the room. The friend was the only person to testify that Alires unlawfully touched her and the daughter. Both the daughter and

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standard for showing prejudice where the jury is not properly instructed on the unanimity requirement.

the other friend testified that no inappropriate touching occurred. Given the conflicting evidence, there is a reasonable probability that the jury did not unanimously agree that the same two acts occurred.

¶29 In addition, even if the jury fully accepted the friend's testimony that all eight touches occurred, the surrounding circumstances were sufficiently ambiguous that members of the jury could have easily reached different conclusions as to which acts were done with the required sexual intent. Although direct evidence of the intent to gratify or arouse a sexual desire is not required, *see In re G.D.B.*, 2019 UT App 29, ¶ 21, 440 P.3d 706, Alires, the mother, and even the friend testified that Alires went to the living room to "tickle" and "wrestle" with the girls with the intent to "lighten the mood." Given this evidence, some jurors may have found that the touches while tickling were innocent or inadvertent and that Alires had the intent to gratify or arouse sexual desires only when he slid his hand down to the friend's buttocks in a "sneaky" way while dancing. Others may have concluded touching one particular body part while tickling the friend or the daughter evidenced sexual intent, although they may have disagreed as to which body part that was. Where the evidence is so readily subject to different interpretations, "we are not persuaded that the jury would have unanimously convicted had the error not existed." *See Saunders*, 1999 UT 59, ¶ 65.

¶30 This is particularly true given the prosecutor's statements in closing argument and the jury's note expressing confusion over how to treat the various counts. The State told the jury in closing argument that any of the alleged acts against a particular victim could support any of the charges relating to that victim. Further, the elements instructions were identical for each of the six counts, with the exception of substituting the friend's initials for counts one through four and the daughter's initials for counts five and six. And during its deliberations, the jury expressed confusion over how to deal with the various counts,

asking the court, "Can we please have a clarification on how the counts work? We don't understand how to weigh each count when they are all the same. Not sure what they mean." The jury's question shows that the absence of a proper unanimity instruction had a palpable impact on the jury deliberations and undermines our confidence in the jury's verdict. *McNeil*, 2016 UT 3, ¶ 30. We therefore conclude that Alires was prejudiced by trial counsel's failure to request a juror unanimity instruction.

CONCLUSION

¶31 We conclude that trial counsel performed deficiently when he did not request an instruction regarding juror unanimity and that this deficient performance was prejudicial to Alires's defense. Accordingly, we vacate Alires's convictions and remand for further proceedings.[7]

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7. Ordinarily, a defendant who prevails on an ineffective assistance of counsel claim is entitled to a new trial. *See State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321. But where the counts of conviction cannot be distinguished from the counts on which the defendant was acquitted, a retrial may be prohibited by the Double Jeopardy Clause. *See, e.g.*, *Dunn v. Maze*, 485 S.W.3d 735, 748–49 (Ky. 2016) (collecting state and federal cases holding that a mixed verdict on identically-worded counts forecloses a retrial). We express no opinion on the merits of the double-jeopardy issue, which will not be ripe unless and until the State seeks a retrial.