PUBLIC

No. 20160439-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL ALAN JORDAN,
Defendant/Appellant.

Appellant is incarcerated

BRIEF OF APPELLANT

Appeal from a judgment of conviction for four counts of aggravated sexual abuse of a child, all first-degree felonies; four counts of sodomy on a child, all first-degree felonies; three counts of forcible sodomy of a child, all first-degree felonies; sixteen counts of sexual exploitation of a minor, all second-degree felonies; one count of tampering with a witness, a third-degree felony; and four counts of dealing in materials harmful to minors, all third-degree felonies; in the Third District Court, Salt Lake County, Utah, the Honorable Ann Boyden presiding.

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INTRODUCTION

The Appellant Michael Jordan claimed from the beginning that his ex-wife (Ex-wife) had conspired with her children, T.M. and A.J., to bring false allegations of sexual abuse against him to gain an advantage in their impending divorce. [redacted] But trial counsel failed to properly investigate this defense or take timely steps to present this evidence to the jury pursuant to rule 412 of the Utah Rules of Evidence. As a result of this error, Mr. Jordan was never able to present his primary defense at trial. Trial counsel also failed to object to erroneous statements of law, failed to present evidence that Mr. Jordan did not have actual possession of allegedly obscene images, and failed to ensure that the jury was

properly instructed. Based on these errors, and others, this Court should reverse and remand for a new trial.

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this case based on Utah Code section 78A-4-103(2)(j). Pursuant to rule 42(a) of the Utah Rules of Appellate Procedure, the Utah Supreme Court transferred this case to the Utah Court of Appeals on June 2, 2016. R.688. The Utah Supreme Court had jurisdiction in this case based on Utah Code section 78A-3-102(3)(i). *See* Addendum A.

ISSUES AND STANDARDS OF REVIEW

Issue I: Whether Mr. Jordan received ineffective assistance of counsel when his trial counsel failed to investigate or take timely steps to present Mr. Jordan's primary defense, allowed the prosecution to argue an incorrect legal standard to the jury, and failed to present evidence that Mr. Jordan did not have actual possession of allegedly obscene images.

Standard of Review: "Whether Defendant's counsel was ineffective . . . presents a question of law" that is reviewed for correctness. *See State v. Doutre*, 2014 UT App 192, ¶9, 335 P.3d 366.

Preservation: A claim of ineffective assistance of counsel may be raised for the first time on appeal. *Id*. ¶ 8.

Issue II: Whether there was sufficient evidence to convict Mr. Jordan on child pornography charges when the trial court erroneously allowed the jurors to use their life experiences to speculate about the ages of unidentified persons; or,

alternatively, whether trial counsel was ineffective for failing to present expert testimony or request an affirmative-defense jury instruction on the child pornography charges.

Standards of Review: An appellate court will "reverse a jury conviction for insufficient evidence only when the evidence is sufficiently inconclusive . . . that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94. "[T]he trial court's interpretation of case law" is a "question of law that we review for correctness." *State v. Burkinshaw*, 2010 UT App 245, ¶10, 239 P.3d 1052. "Whether Defendant's counsel was ineffective . . . presents a question of law" that is reviewed for correctness. *Doutre*, 2014 UT App 192 at ¶9.

Preservation: This issue was preserved when trial counsel argued that *State v. Alinas*, 2007 UT 83, 171 P.3d 1046, did not apply and the jurors should not be allowed to use their own life experience to speculate about the ages of unidentified persons. R.1641–49. The trial court ruled on the issue. R.1649–51. Trial counsel renewed the argument that *Alinas* did not apply and that there was insufficient evidence to convict Mr. Jordan of the child pornography charges without an expert. R.1682–84. The trial court ruled on that as well. R.1684. In the event that this issue was not preserved, this Court may nevertheless address it under ineffective assistance of counsel. *See* Part II.a., *infra*. A claim of ineffective assistance of counsel may be raised for the first time on appeal. *See Doutre*, 2014 UT App 192, ¶ 9.

Issue III: Does the cumulative effect of all the errors require reversal?

Standard of Review: Under the cumulative error doctrine, an appellate court applies the standard of review applicable to each underlying claim of error. *State v. McNeil*, 2013 UT App 134, ¶16, 302 P.3d 844, *aff'd*, 2016 UT 3, 365 P.3d 699.

Preservation: The doctrine of cumulative error is correctly raised for the first time on appeal.

STATUTORY PROVISIONS

The following statutory provisions and rules are attached as addenda:

1. Utah Code section 76-5b-201. Attached as Addendum B.
2. Rule 412 of the Utah Rules of Evidence. Attached as Addendum C.

STATEMENT OF THE CASE

Mr. Jordan was charged and convicted of four counts of aggravated sexual abuse of a child, all first-degree felonies; four counts of sodomy on a child, all first-degree felonies; three counts of forcible sodomy of a child, all first-degree felonies; sixteen counts of sexual exploitation of a minor, all second-degree felonies; one count of tampering with a witness, a third-degree felony; and four counts of dealing in materials harmful to minors, all third-degree felonies. He now appeals.

STATEMENT OF THE FACTS

On September 23, 2014, after police had handcuffed Mr. Jordan and taken him to the police station, they asked him to guess why he had been arrested.

R.268. Mr. Jordan answered, "I assume it has something to do with my ex, or soon to be ex-wife." R.268. He told the police that they had been married for "[f]our and a half long and miserable years," but they were finally getting a divorce. R.268. He said he knew this was going to happen, R.270, because his ex-wife ("Ex-wife") had "thrown every allegation of abuse at [him] to see what sticks." R.271.

Mr. Jordan then explained that [redacted]

During this interview with the police, Mr. Jordan answered all the accusations by claiming that he was being framed by Ex-wife, A.J., and T.M. R.286–88. "Everything was a fake," he said. R.288. "She was gonna file for divorce. Her and A.J. were concocting a story and I realized later that [T.M.] was part of it as well." R.288. Eventually, Mr. Jordan asked for an attorney and the police ended the interview. R.345.

Based on the allegations from A.J. and T.M., the prosecution charged Mr. Jordan with thirty-three felony counts. R.234–45. Twelve counts were first-degree felonies. R.234–39. Sixteen counts were second-degree felonies. R.239–42. And five counts were third-degree felonies. R.242–44.

At a preliminary hearing on February 18, 2015, trial counsel attempted to impeach T.M. The prosecution acknowledged that

[redacted]

Later, at a pretrial conference, on August 10, 2015, the prosecution made an offer to dismiss most of the charges if Mr. Jordan would plead guilty. R.897. Mr. Jordan refused that offer but remained open to accepting a better offer. *See* R.1362.

At the same pretrial conference, trial counsel mentioned that she might be ready to make a "formal motion on the 412 if [she could] round up the witnesses." R.904. She did not mention any documentary evidence or Mr. Jordan's statement to the police. R.904. The prosecution, however, informed trial counsel that if she wanted to file a motion under rule 412, "it has to be filed today because . . . [i]t has to be done at least 14 days before trial." R.905. Later that afternoon, Mr. Jordan's trial counsel filed a request for a rule 412 hearing. R.173. A week later, Mr. Jordan's trial counsel withdrew the motion for a rule 412 hearing. R.197. Trial counsel said, [redacted]

[redacted]. Again, trial counsel made no mention of documentary evidence or of Mr. Jordan's statement to the police. R.2767.

Just a few days before the trial began, the trial court held a hearing to determine whether Mr. Jordan's statements to the police should be suppressed. Mr. Jordan's attorney attempted to have the interview excluded, arguing that Mr. Jordan had not knowingly and voluntarily waived his right to counsel and his right to remain silent. R.260–65. The trial court determined Mr. Jordan made the statements knowingly and voluntarily and they were admissible. R.1034. After the trial court denied the motion to suppress, the prosecution raised a concern about the content of the interview under rule 412. R.1036. The prosecutor said, [redacted]. The prosecutor also said she would object if trial counsel attempted to use [redacted], "especially if counsel knows that she could've filed a motion under Rule 412, and didn't." R.1037.

In response to this, trial counsel said:

> I've done a million 412 hearings. And so, if I don't raise—if I don't bring up a 412 hearing, it's because I think that we wouldn't be able to prevail on a 412 hearing. And that would be the only reason. And so, *I will look at that, and if I believe that we will prevail, I will*

> *talk to my client about that and discuss our options with regards to that.*

R.1037–38 (emphasis added). The prosecutor responded:

> Rule 412 specifically gives a timeline of when these motions must be filed to avoid scenarios like last minute continuances because this evidence, you know, all of a sudden wants to be presented. That timeline has passed already. And so, at this point, counsel had an opportunity to file a Rule 412 motion. We discussed it back in August, and it was not filed.

R.1038.

The trial court agreed with the prosecution that the deadline had undoubtedly passed to file a rule 412 motion. R.1038–39. But the trial court indicated that it could consider a late motion based on "what the circumstances are at the time." R.1040. With this, the trial court concluded that "[Trial counsel] needs to discuss all of this with her client . . . ." R.1040. Trial counsel never filed a rule 412 motion [redacted]

At trial, T.M. claimed Mr. Jordan got undressed and abused him "every day," R.1275, for five and a half years. R.1281. He said the abuse occurred in the family's living room and in his mother's room. R.1275. According to T.M., Mr. Jordan would get a blue dildo, cover it in lotion, and stick it in T.M.'s anus during these daily instances of abuse. R.1281, 1290. On cross-examination, T.M. acknowledged that he never told the police about the dildo. R.1299. A.J. testified

that Mr. Jordan abused him and that Mr. Jordan had shown him pornographic images and sexually explicit images of [redacted] on Mr. Jordan's laptop and phone. R.1341. A.J. claimed that only Mr. Jordan had the password for this phone and computer. R.1341.

During direct examination of Ex-wife, the prosecution asked if Ex-wife had ever used a dildo. R.1403. "Never," she said. R.1403. The prosecution never presented any physical evidence about the dildo or explained where it came from. Ex-wife testified extensively about her history with Mr. Jordan and claimed that images of their children found on Mr. Jordan's computer were of a sexual nature. R.1392-1415. These images were pictures of [redacted] naked in the shower. R.1392–1415. While trial counsel never addressed this during the trial, nearly all of the images that Ex-wife claimed were sexual were taken by [redacted] not Mr. Jordan. R.1898. On cross-examination, trial counsel asked Ex-wife only one question: "You don't know who took those pictures?" R.1415. Ex-wife said, "No." R.1415.

On day three of the trial, trial counsel objected to jury instructions that would have allowed the jurors to use their own experience and common sense to determine the ages of persons in photographs that the police said they found on Mr. Jordan's computer. Trial counsel argued that the persons depicted in State's Exhibits 33–36 could all be older than eighteen. R.1642. Because the ages of the persons were unknown, trial counsel argued that the prosecution "would need . . . an expert to identify that that person is clearly under the age of 18." R.1642. The

prosecution countered that Utah case law has allowed jurors in the past to use their experience and common sense to determine the ages of unidentified persons in photographs. R.1644. Trial counsel argued that the case law cited by the prosecutor "involved six-year-old children" and was "distinguishable on that point." R.1649. Trial counsel also argued that without an expert, there was insufficient evidence to convict Mr. Jordan on those charges. R.1643. The trial court overruled Mr. Jordan's objection, stating: "I think that the general principles of law are that the jury will be instructed that if there is not a specific definition, that . . . the jurors can . . . look to their own experience and judgment in making these kind of determinations." R.1649–50.

During closing argument, trial counsel argued that T.M.'s testimony that he was abused daily in a public area of the family home for five and half years was unbelievable. R.1797. She said, "[T]he sheer number of times that he said that this occurred just is not believable in light of human experience." R.1797. In response, the prosecutor argued that T.M.'s age and sexual naivety could explain the discrepancies in his testimony. R.1804. At the conclusion of the trial, the jury found Mr. Jordan guilty of all charges. R.496.

At sentencing, the prosecutor said, "[T]he only mitigating factor that we have here is that the defendant had a good employment history and has good familial support." R.1884. The prosecutor then made new assertions about the images of [redacted] in the shower. She claimed that they were "evidence . . . of the defendant's grooming behavior toward [redacted]

R.1881. Trial counsel did nothing to dispute the new accusations at sentencing or point out that R.1898.

Before trial counsel spoke on Mr. Jordan's behalf at sentencing, she asked to approach the bench. R.1890. She said:

> [B]ecause [Mr. Jordan is] blaming me for not getting on the stand and not taking the deal, and all these things, and so I want a question from the Court so it's on the record that he's voluntarily giving up a right to say anything at this sentencing hearing. . . . Because, you know, I told him that he could do what he wants.

R.1890.

Trial counsel then asked for concurrent sentencing, but stated that she would not speak long in Mr. Jordan's defense "because of the seriousness of these offenses." R.1891. She echoed the prosecution's claim that there were only two mitigating factors: family support and work history. R. 1891. After finishing her short remarks, Mr. Jordan's trial counsel said, "I guess he's decided he is going to speak, Your Honor." R.1892.

Mr. Jordan said,

Why it didn't come forward, I don't know." R.1895. He also explained that he was not grooming as the prosecutor had alleged. R.1898. In fact, he did not even take the pictures in question. R.1898. " took

those pictures and texted them to me," he said. R.1898. "And the metadata proves that they were sent to me as a message."[1] R.1898.

The trial court noted that there were only two asserted mitigating circumstances and found them both unconvincing. R.1902. Mr. Jordan was sentenced as follows:

- Four terms of fifteen years to life to run consecutively. R.667.
- Two terms of twenty-five years to life to run concurrently with each other but consecutively with the other terms. R.667-68.
- Two terms of twenty-five years to life to run concurrently with each other but consecutively with the other terms. R.667-68.
- Four terms of five years to life to run concurrently with each other but consecutively with the other terms. R.667–69.
- Sixteen terms of one to fifteen years to run concurrently with each other but consecutively with the other terms. R.667–69.
- One term of zero to five years to run consecutively. R.667–70.
- Fourteen terms of zero to five years to run concurrently with the other charges. R.667–70.

At a minimum, Mr. Jordan faces a total of 141 years in prison. *See* R.667–70. The trial court entered Mr. Jordan's Sentence, Judgment, and Commitment

[1] Metadata here refers to the information written into the digital file of an electronic image. *See* Metadata, WIKIPEDIA.ORG, *available at* https://en.wikipedia.org/wiki/Metadata#Photographs. It can show when and where images were taken or downloaded and other relevant information. *See id*; *see also* R.1601.

on May 4, 2016. R.665. Mr. Jordan filed a pro se notice of appeal on May 26, 2016, but the Utah Supreme Court informed Mr. Jordan and trial counsel that he was still represented by trial counsel and that she would need to file the notice of appeal. R.673. Trial counsel then filed a timely notice of appeal. R.673.

SUMMARY OF THE ARGUMENT

First, this Court should reverse and remand for a new trial due to ineffective assistance. Mr. Jordan's trial counsel was constitutionally ineffective for three main reasons: (1) trial counsel failed to adequately investigate or timely pursue a rule 412 motion that would have allowed Mr. Jordan to present his primary defense at trial; (2) trial counsel failed to object when the prosecution told the jury to apply the wrong legal standard to some charges; and (3) trial counsel failed to present evidence that Mr. Jordan had neither actual possession nor constructive possession of the images and searches found on his laptop computer.

Second, this Court should reverse on Counts 25–28 with an order to dismiss because there was insufficient evidence to convict Mr. Jordan where the trial court mistakenly allowed the jurors to speculate about the ages of unidentified persons in the prosecution's exhibits. In the alternative, this Court should reverse and remand for a new trial because trial counsel was ineffective for failing to call an expert to testify about the ages of the unidentified persons in the prosecution's exhibits or to demand an affirmative-defense jury instruction.

All these errors individually prejudiced Mr. Jordan, but the cumulative effect of all these errors was even more prejudicial. There can be no confidence in the verdict or the sentencing and this Court should reverse and remand.

ARGUMENT

I. Mr. Jordan's trial counsel was constitutionally ineffective for failing to investigate and timely pursue a rule 412 motion, for failing to object to misstatements of the law, and for failing to present evidence that Mr. Jordan did not have possession of the images found on the computer.

Trial counsel was constitutionally ineffective and this Court should reverse and remand.[2] A defendant receives ineffective assistance of counsel when trial counsel performs deficiently and that deficient performance prejudices the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Trial counsel performs deficiently if the "representation [falls] below an objective standard of reasonableness." *Id*. 688. If there is any tactical or strategic basis for trial counsel's failures, an appellate court will generally not consider it deficient performance. *See State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162. But "[f]ailing to investigate because counsel does not think it will help does not constitute a strategic decision, but rather an abdication of advocacy." *Menzies v. State*, 2014 UT 40, ¶183, 344 P.3d 581 (citation and internal quotation marks

[2] Pursuant to rule 23B of the Utah Rules of Appellate Procedure, Mr. Jordan has filed a motion and memorandum concurrently with the filing of this brief. This Court should reverse and remand based on this brief as supported by the record on appeal. In the event this Court decides not to reverse and remand based on this brief and the current record, Mr. Jordan requests that this Court grant his rule 23B motion to remand to the trial court for the supplementation of the record to support his claims of ineffective assistance of counsel.

omitted); *see also Gregg v. State*, 2012 UT 32, ¶25, 279 P.3d 396; *State v. Lenkart*, 2011 UT 27, ¶¶22–24, 262 P.3d 1; *State v. Moore*, 2009 UT App 386, ¶¶ 5, 8–10, 223 P.3d 1137; *State v. Templin*, 805 P.2d 182, 188 (Utah 1990); American Bar Association, Criminal Justice Standards for the Defense Function, 4-3.7, 4-4.1.

The defense is prejudiced when, absent the deficient performance, "there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, [the] confidence in the verdict is undermined." *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993).

In this case, trial counsel was ineffective for three main reasons that are apparent from the record. First, trial counsel failed to investigate and timely pursue a rule 412 motion and thereby precluded Mr. Jordan from presenting his primary defense at trial. Second, trial counsel failed to object when the prosecution told the jury to apply an incorrect legal standard about sexual exploitation of a minor. Third, trial counsel failed to present evidence that Mr. Jordan had neither actual possession nor constructive possession of the images and searches found on his laptop computer.

A. Mr. Jordan received ineffective assistance of counsel when his trial counsel failed to adequately investigate and timely pursue a rule 412 motion.

Mr. Jordan said from the beginning that the charges against him were made up by his Ex-wife to gain an advantage in their impending divorce

proceeding. R.288. Despite this being his primary defense, his trial counsel failed to take the basic steps needed to present this defense to the jury.

Rule 412 of the Utah Rules of Evidence generally prohibits introducing evidence about a victim's sexual behavior or sexual predisposition. *See* Utah R. Evid. 412(a)(1)–(2). Two exceptions to this general rule are at issue in this appeal. First, a defendant can introduce evidence that the [redacted]. Second, a defendant can introduce evidence of [redacted]

i. Trial counsel performed deficiently by failing to adequately pursue a rule 412 motion.

Trial counsel performed deficiently by failing to take the steps necessary to present Mr. Jordan's primary defense to the jury. Failure to properly investigate a critical defense issue is deficient performance. *See Gregg v. State*, 2012 UT 32, ¶25, 279 P.3d 396; *see also* American Bar Association, Criminal Justice Standards for the Defense Function, 4-4.1. Trial counsel should also act promptly and thoroughly to present the defense's theory of the case to the jury. *See State v. Lenkart*, 2011 UT 27, ¶¶22–24, 262 P.3d 1; *State v. Moore*, 2009 UT App 386, ¶¶ 5, 8–10, 223 P.3d 1137; *State v. Templin*, 805 P.2d 182, 188 (Utah 1990); *see also* American Bar Association, Criminal Justice Standards for the Defense Function, 4-3.7.

In *Gregg*, the record showed that the defendant's trial counsel never attempted to investigate or introduce some evidence that would have been helpful to the defense. *Gregg*, 2012 UT 32, ¶25. The Utah Supreme Court held that "it can never be a tactical decision to fail to investigate and introduce evidence that would undermine the credibility of the only witness who presented direct evidence of the defendant's guilt." *Id*. ¶ 34. In *Templin*, the Utah Supreme Court explained why a failure to investigate can never be a strategic or tactical decision. *Templin*, 805 P.2d at 188. The Court wrote, "It is only after an adequate inquiry has been made that counsel can make a reasonable decision . . . for tactical reasons." *Id*.

In this case, the record shows that trial counsel was aware of and attempted to use Mr. Jordan's primary defense at the preliminary hearing. R.763. At the preliminary hearing, trial counsel tried to impeach T.M. [redacted] Before T.M. could answer, the prosecution objected under rule 412. R.763. [redacted]. The prosecution acknowledged [redacted] but argued that trial counsel would still need to file a timely motion and have a hearing on the issue. R.763–64. The trial court agreed with the prosecution and instructed trial counsel to file a rule 412 motion. R.771.

Later, at a pretrial conference, trial counsel said she might be ready to make a "formal motion on the 412 if [she could] round up the witnesses." R.904. The prosecution, however, informed trial counsel that if she wanted to file a motion under rule 412, "it has to be filed today because . . . [i]t has to be done at least 14 days before trial." R.905. That afternoon, Mr. Jordan's trial counsel filed a motion for a hearing on the rule 412 issue. R.173. [redacted] R.1923. Mr. Jordan later explained that there was also evidence of [redacted]

A week later, and just a few days before trial, Mr. Jordan's trial counsel withdrew the motion for a rule 412 hearing. R.197. [redacted]

Although Mr. Jordan's statement to the police explained his primary defense and did not incriminate him, trial counsel moved to have it excluded. R.1035. After the trial court rejected the motion to suppress, the prosecution pointed out that parts of the statement could be used to support a rule 412

motion. R.1037. The prosecutor said she would object if trial counsel now attempted to use it as evidence of [redacted], "especially if counsel knows that she could've filed a motion under Rule 412, and didn't." R.1037.

In response to this, trial counsel said, "I will look at that, and if I believe that we will prevail [on a rule 412 motion], I will talk to my client about that and discuss our options with regards to that." R.1037–38. At this point, just a few days before the trial, trial counsel still needed to look at how Mr. Jordan's statement to the police would support a rule 412 motion. R.1038. The prosecutor said,

> Rule 412 specifically gives a timeline of when these motions must be filed to avoid scenarios like last minute continuances because this evidence, you know, all of a sudden wants to be presented. That timeline has passed already. And so, at this point, counsel had an opportunity to file a Rule 412 motion. We discussed it back in August, and it was not filed.

R.1038.

The trial court agreed that the deadline had passed, but said it would consider a late motion. R.1039–39. It stated that "[trial counsel] needs to discuss all of this with her client . . . ." R.1040. It is apparent from the record that trial counsel did not pursue the matter further. *See* R.1895. This is not a legitimate trial strategy. Trial counsel failed to adequately investigate the rule 412 issue, failed to recognize that Mr. Jordan's statement to the police could be used in a rule 412 hearing, and failed to take the steps necessary to use the [redacted]

[redacted]. *See Gregg*, 2012 UT 32, ¶ 34. This fell below an objective standard of reasonableness and was deficient performance. *See id*.; *Menzies*, 2014 UT 40, ¶183.

Based the record, if trial counsel had timely filed an appropriate motion under rule 412, as the trial court had directed her to do, the motion would have been well taken under either the [redacted].

ii. A rule 412 motion based on the available evidence would have been well taken under the [redacted]

Based on Mr. Jordan's statements to the police and trial counsel's withdrawn rule 412 motion, there was available evidence that [redacted]

[redacted]

To admit other acts evidence under rule 404(b), the proponent of the evidence must first show that the evidence is admissible for a proper non-character purpose. *See* Utah R. Evid. 404(b)(2); *State v. Lowther*, 2017 UT 34, ¶30. Second, a proponent must show that the evidence is relevant under rule 402. *See State v. Nelson-Waggoner*, 2000 UT 59, ¶26, 6 P.3d 1120, *abrogated by Lowther, 2017 UT 24, on other grounds*. Third, a proponent must show that the evidence is admissible under rule 403. *Id*. ¶28.

The evidence in this case passes the threshold test of demonstrating [redacted]

This evidence was also admissible under rule 404(b). *See* Utah R. Evid. 404(b); *Id*. R. 412 advisory notes; *Tarrats*, 2005 UT 50, ¶46. [redacted]

[redacted] This is a proper, non-character purpose.

The evidence of [redacted] was relevant to a material issue at trial. *See Nelson-Waggoner*, 2000 UT 59, ¶26; Utah R. Evid. 402. [redacted] The credibility of the witnesses was also at issue in this case, and evidence of [redacted] is highly relevant to their honesty. Utah Code § 78B-1-128(3); *see also Gregg v. State*, 2012 UT 32, ¶ 34, 279 P.3d 396; *LeGrand Johnson Corp. v. Peterson*, 420 P.2d 615, 617 (Utah 1966).

Because most of the charges against Mr. Jordan were based solely on the testimony of T.M., A.J., and Ex-wife, the case was a "contest of credibility." *See*

Nelson-Waggoner, 2000 UT 59, ¶30, 6 P.3d 1120. Confronting T.M., A.J., and Ex-wife with [redacted] was the most direct way for Mr. Jordan to support his primary defense at trial. The evidence of [redacted] was also probative of Ex-wife's dishonesty and the manipulability of T.M. and A.J. The similarity of the evidence also supports its probative value. *See id*. ¶29. [redacted] The timing and the similarity of the [redacted] are highly probative of Mr. Jordan's innocence.

On the other hand, there was little danger of unfair prejudice to the witnesses. Any negative inference that the jury might draw about Ex-wife's honesty and the manipulability of A.J. and T.M. would be fair based on the circumstances. *See id*. ¶30. Considering the great need for the evidence, the lack of alternative means of presenting Mr. Jordan's primary defense, [redacted] and this case, and low risk of unfair prejudice, the evidence of [redacted] was admissible under rule 403.

The evidence of [redacted] would have been offered for a non-character purpose, would have been relevant, and its probative

value would not have been outweighed by unfair prejudice. Therefore, the evidence would have been admitted under rule 404(b) and also under rule 412. Had trial counsel made a sufficient effort to introduce the rule 412 evidence, it would have admitted.

iii. The evidence of [redacted] would have been admissible to combat [redacted].

The evidence of [redacted] would have also been admissible to combat the inference that [redacted]

When an alleged child victim is particularly young, there is a "'stronger . . . likelihood of a jury inference that the child would be too sexually [naïve] to have fabricated the allegations against the defendant.'" *Marks*, 2011 UT App 262, ¶37 (quoting *State v. Molen*, 231 P.3d 1047, 1052 (Idaho Ct. App. 2010)). Often the age of the child alone will be sufficient for a court to determine that a jury would improperly infer sexual naivety. *See State v. Ashby*, 2015 UT App 169, ¶33, 357 P.3d 554. In *Ashby*, a trial court determined that a child's young age—"ten years old at the time of trial—would support the likelihood of the jury drawing a sexual [naivety] inference." *Id*. For good measure, the prosecutor in *Ashby* went a step further and "raised the sexual [naivety] inference in closing argument." *Id*. ¶34.

[redacted]

[redacted] is considered within the framework of rule 403. *Id*.

In this case, [redacted]. To rebut trial counsel's claims that T.M.'s testimony about being abused daily in a public area of the family home for five and a half years without detection was patently unbelievable, R.1797, the prosecutor said:

> Now, I want to address a few things that defense brought up. Now, she made a big deal about [T.M.] saying that the abuse happened all the time . . . and that, you know, it happened in different parts of the house . . . . Now, I'm sure to a kid who was 10 at the time, that being anally sodomized, orally sodomized, that's having to put the defendant's penis in his mouth, that's having a . . . what did he describe it as, a blue jelly dildo with lotion inserted in his anus, that that abuse must've seemed like it was happening every day.

R.1804. [redacted]

[redacted]

iv. Trial counsel's deficient performance in failing to properly investigate and pursue a timely rule 412 motion prejudiced the defense.

The deficient performance in this case barred Mr. Jordan from presenting his primary defense to the jury. To show prejudice, Mr. Jordan must show that "there is a reasonable likelihood of a more favorable outcome" absent the deficient performance. *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993).

The following is a list of all the charges against Mr. Jordan that were based on the uncorroborated testimony of T.M.: Two counts of aggravated sexual abuse of a child, both first-degree felonies; one count of tampering with a witness, a third-degree felony; and one count of dealing in material harmful to a minor, a third-degree felony. There was no physical evidence and no corroborating witnesses. R.1781–83.

The following is a list of all the charges based on A.J.'s uncorroborated testimony: Two counts of aggravated sexual abuse of a child, both first-degree felonies; two counts of sodomy upon a child, both first-degree felonies; four counts of forcible sodomy, all first-degree felonies; and three counts of dealing in

harmful material to a minor, all third-degree felonies. There was no physical evidence and no corroborating witnesses. R.1783–87; 1803–04.

In addition to this, nine counts of sexual exploitation of a minor (counts 15–23) were based on images that A.J. claimed were taken by Mr. Jordan. R921. As the prosecutor stated in a rule 404(b) hearing before trial, this evidence was weak without A.J.'s testimony. R.921. "[Y]ou don't see the defendant's face. That evidence is based on A.J.'s testimony. There's no physical evidence here, there's . . . no injuries." R.921–22.

Nearly all the charges in this case were built on the credibility of the witnesses. The rule 412 evidence of [redacted] would have significantly undermined the prosecution's case against Mr. Jordan. "[C]ourts are more likely to reverse a jury verdict if the pivotal issue at trial was credibility of the witnesses and the errors went to that central issue." *State v. Thompson*, 2014 UT App 14, ¶73, 318 P.3d 1221 (collecting cases). If the jury had been presented with the rule 412 evidence, the entire evidentiary picture would have been altered. *See Gregg v. State*, 2012 UT 32, ¶ 21, 279 P.3d 396. Had trial counsel not performed deficiently in investigating and pursuing the rule 412 issues before trial, there is a reasonable likelihood that a jury would have found reasonable doubt for all charges that were based solely or principally on the testimony of A.J. and T.M. and unsupported by any physical evidence or corroborating witnesses. Because this deficient performance prejudiced Mr. Jordan's defense, he received ineffective assistance of counsel.

B. Trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law about what constitutes sexual exploitation of a minor and for failing to request an accurate jury instruction.

Trial counsel performed deficiently by failing to object when the prosecution told the jury that images of [redacted]—which were not objectively sexual—were sexually exploitative merely because they were found on Mr. Jordan's computer. R.1790–91. Trial counsel was also deficient for failing to give the jury an accurate instruction on the law. *See State v. Liti*, 2015 UT App 186, ¶ 20, 355 P.3d 1078; *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164; *State v. Lewis*, 2014 UT App 241, ¶ 10, 337 P.3d 1053.

"When a picture does not constitute child pornography, . . . it does not become child pornography because it is placed in the hands of a pedophile." *United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J. 1988), *aff'd*, 885 F.2d 117 (3d Cir. 1989); *State v. Morrison*, 2001 UT 73, ¶10, 31 P.3d 547 (accord).

A person is guilty of sexual exploitation of a minor when the person "knowingly . . . possesses . . . or views child pornography." Utah Code § 76-5b-201(1). Child pornography is defined as "any visual depiction . . . of sexually explicit conduct" involving a minor. *See id*. § 76-5b-103(1). In *Morrison*, the Utah Supreme Court determined that an image of a minor that was not sexually explicit could be not considered sexually explicit simply based on the possessor's intent. *See Morrison*, 2001 UT 73, ¶8. If this were permitted, Utah's sexual exploitation statute would be unconstitutional. *Id*. ¶¶8–12. To avoid a constitutional problem, the Utah Supreme Court articulated a clear standard:

"[W]e look to the materials themselves, not the intent of the possessor, to determine whether they are proscribed as sexually exploitative." *Id*. ¶10.

Recognizing that what constitutes "sexually explicit" may vary based on the age of the subject, the Utah Supreme Court has adopted a factor test called the *Dost* test. *See State v. Bagnes*, 2014 UT 4, ¶42, 322 P.3d 719. The *Dost* factors are:

> (1) "whether the focal point of the visual depiction is on the child's genitalia or pubic area"; (2) "whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity"; (3) "whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of a child"; (4) "whether the child is fully or partially clothed, or nude"; (5) "whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity"; and (6) "whether the visual depiction is intended or designed to elicit a sexual response in the viewer."

Id. ¶42 (quoting *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986)). When applied to Utah's sexual exploitation statute, the sixth factor is treated as a summation of the other factors and not as a separate factor. *Id*. ¶42 n.8.

Applying the *Dost* test to the evidence in this case shows that the images of [redacted] were not sexually explicit. Exhibit 22 is a picture of [redacted] In closing the prosecutor admitted that the image was not objectively sexually explicit. She said,

> I think under normal circumstances, you could say hey, [redacted], not a big deal. But in this case, in light of all of the evidence that you've heard, there should be no doubt that the defendant took that picture because he wanted a picture of [redacted] Why? Because he's sexually attracted to boys.

R.1791. The prosecutor made the same argument about Exhibit 21. Exhibit 21 depicts a [redacted]. *See id*. The prosecutor said,

> Now, maybe you think, well, . . . sure, [redacted] Nothing wrong with that. Use your common sense. Use your experience. And review that photo in light of all the evidence that we've presented in this case. And when you do that, you know that [Mr. Jordan] wasn't taking a picture of his son because he's cute, because he wants a picture of his kid in the bathroom. He was doing it because it's child pornography.

R.1790–91.

In both instances, the prosecutor explicitly argued that what would not be child pornography under normal circumstances was child pornography in this case simply because Mr. Jordan, whom the prosecutor claimed was a pedophile, may have possessed the images. R.1790–91. This is contrary to Utah law and raises serious constitutional issues about the breadth and vagueness of the statute. *See Morrison*, 2001 UT 73, ¶¶8–12. To meet a minimum standard of competency, trial counsel should have objected to these assertions as misstatements of the law. There is no conceivable benefit to Mr. Jordan to allow the jury to apply an incorrect and harsher legal standard. *See State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989).

In addition to this, jury instructions for those two charges did nothing to correct the prosecutor's incorrect statements. *See* R.528–29; 544–56. Instead,

the instructions included statutory language, which by itself was susceptible to an unconstitutional interpretation. *See Morrison*, 2001 UT 73, ¶¶8–12. The instruction read: "[T]he material [need not] appeal to the prurient interest in sex of the average person nor that the prohibited conduct need be portrayed in a patently offensive manner." R.544; *compare* Utah Code § 76-5b-301(2). Read alone, this gives support to the prosecution's legally incorrect standard. *See Morrison*, 2001 UT 73, ¶8 n.4. To avoid reading the statute in an unconstitutionally broad manner, the *Morrison* court explained that "this section merely states that the material at issue need not be legally obscene" according to the test in *Miller v. California*, 413 U.S. 15 (1973). *Id*. Without this important explanation and without an objection to the prosecutor's misstatement of the law, there is a reasonable likelihood that the jury applied the wrong legal standard to Exhibits 21 and 22. This was not a reasonable trial strategy because there was no conceivable benefit to Mr. Jordan. This was deficient performance.

This deficient performance prejudiced the defense because there was a reasonable likelihood of a better outcome for Mr. Jordan had the *Dost* factors been applied. First, the focal point of both images is not

Second, the settings are not sexually suggestive. Third,

[redacted]

Fourth, [redacted]. As the Utah Supreme Court recently held, "[N]ot all nudity has sexual appeal." *Butt v. State*, 2017 UT 33, ¶ 24; *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975) (stating that a "baby's buttocks" is an example of non-sexually explicit nudity). Fifth, there is [redacted]

Considering the *Dost* factors, the images were not sexually explicit. Had trial counsel objected to the prosecution's misstatement of the legal standard or ensured the jury instructions illuminated the statutory language with the correct legal standard, there is a reasonable likelihood that the jury would have acquitted Mr. Jordan of these charges. *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). Therefore, Mr. Jordan received ineffective assistance of counsel.

C. Trial counsel was ineffective for failing to show that [redacted] had access to Mr. Jordan's laptop computer and for failing to require the prosecution to show constructive possession of the images found on the computer.

Trial counsel was ineffective for failing to investigate or present evidence that [redacted]. had access to Mr. Jordan's laptop computer and had independently

visited sexually explicit websites in the past. R.314–15. Absent trial counsel's deficient performance, it is reasonably likely that the prosecution would have been unable to prove that Mr. Jordan constructively possessed any of the images found on the laptop computer.

A person is guilty of sexual exploitation of a minor if that person "knowingly . . . possesses . . . child pornography." *See* Utah Code § 76-5b-201(1)(a)(i). Actual physical possession of contraband is not necessary to prove that a defendant knowingly possessed the contraband as long as the prosecution can prove that the defendant had constructive possession. *See State v. Fox*, 709 P.2d 316, 318 (Utah 1985) (dealing with a controlled substance). To establish constructive possession, the State must "'prove that there was a sufficient nexus between the accused and the [item] to permit an inference that the accused had both the power and the intent to exercise dominion and control over the [item].'" *State v. Gonzalez-Camargo*, 2012 UT App 366, ¶17, 293 P.3d 1121 (citation omitted).

"Whether a sufficient nexus exists" to link the defendant to the item ""depends upon the facts and circumstances of each case."" *Id.* (citation omitted). One factor alone will often be insufficient to establish a sufficient nexus. *See id.* For instance, it is not enough to show "mere occupancy" in the house or vehicle where a contraband item was found. *State v. Hansen*, 732 P.2d 127, 132 (Utah 1987). This is particularly true where occupancy or ownership is "not exclusive." *See State v. Salas*, 820 P.2d 1386, 1388 (Utah Ct. App. 1991).

"There must be some additional nexus between the accused and the [contraband item] to show that the accused had the power and intent to exercise dominion and control over it." *Hansen*, 732 P.2d at 132.

Dealing specifically with child pornography, the Fifth Circuit Court of Appeals in *United States v. Moreland*, 665 F.3d 137 (5th Cir. 2011), determined that when more than one person had access to the defendant's computer, the prosecution had the increased burden to show constructive possession. *See id*. at 151. In *Moreland*, the prosecution's forensic computer expert "acknowledged that he could not tell from the data in the computers who, i.e., whether [the defendant], [the defendant's father], [the defendant's wife], or another person, was using the computers when the computers received the 112 images [of child pornography]." *Id*. The Fifth Circuit determined that there was no constructive possession in that case because the prosecution "did not provide any testimony or evidence from which it could reasonably be inferred that [the defendant] had ever seen the 112 images; knew that they were in the computers; or that [the defendant] had the knowledge and ability to access those images or exercise dominion or control over them." *Id*.

In a similar case, the Virginia Court of Appeals concluded that there was no constructive possession when there was no evidence that the defendant had "knowledge, dominion, or control" over the images on an unallocated space on his computer's hard drive. *Kobman v. Com*., 777 S.E.2d 565, 567 (Va. Ct. App. 2015). The court wrote, "While the evidence may suggest [the defendant] at one

time possessed the photographs in the unallocated space, there was no evidence that he had dominion or control of them." *Id*.

Other courts have looked to whether the defendant subscribed to an obscene website or used his credit card to purchase obscene images, *People v. Flick*, 790 N.W.2d 295, 304 (Mich. 2010); whether the defendant downloaded and used file-sharing software to obtain the images, *State v. Schuller*, 843 N.W.2d 626, 635 (Neb. 2014); whether defendant used forensic software to clean the hard drive or access obscure parts of the hard drive, *see Barton v. State*, 648 S.E.2d 660, 662 (Ga. Ct. App. 2007); whether the access dates in the metadata of the images matched the defendant's work schedule, *Bussell v. State*, 66 So. 3d 1059, 1062 (Fla. Dist. Ct. App. 2011); whether the search history during the time the obscene images were downloaded showed the defendant logging into his online bank account, *United States v. Hao Sun*, 354 F. App'x 295, 305 (10th Cir. 2009); whether the location of the files on the computer indicated a specific user, *State v. Myrland*, 681 N.W.2d 415, 420 (Minn. Ct. App. 2004); and whether the defendant printed out or saved the images, *State v. Ritchie*, 248 P.3d 405, 410 (Or. 2011).

In this case, trial counsel performed deficiently by failing to investigate or present evidence that [redacted] had access to Mr. Jordan's laptop computer and had independently visited sexually explicit websites in the past. R.314–315. If trial counsel had diligently reviewed Mr. Jordan's statement to the police, she would have discovered that Mr. Jordan did not have actual possession of the images and

searches found on the laptop computer. Because Mr. Jordan did not exercise exclusive dominion or control over the laptop computer, the prosecution should have been required to present evidence to show that Mr. Jordan had constructive possession of the images and searches found on the computer. *See Fox*, 709 P.2d at 319; *see also Moreland*, 665 F.3d at 151. Despite Mr. Jordan's statement to the police that [redacted] had access to Mr. Jordan's laptop computer and had visited sexually explicit websites, trial counsel failed to dispute that Mr. Jordan had exclusive control of the computer at all relevant times. R.2773.

For example, during a rule 404(b) hearing before trial, the trial court was considering whether to allow images of child erotica—not pornography—and incriminating search histories to be presented to the jury. R.187; 2773. Trial counsel did not argue that [redacted]. could have been responsible for those searches and images. Instead, trial counsel argued only that it should be excluded under rule 403. R.2773. Where there was evidence to show that Mr. Jordan did not have exclusive control of the laptop computer at all times, there is no conceivable benefit to Mr. Jordan to allow the prosecution to present evidence of sexual exploitation of a minor and rule 404(b) evidence without challenging the actual possession of those exhibits. *See State v. Doutre*, 2014 UT App 192, ¶ 24, 335 P.3d 366 (holding that it is not a reasonable trial strategy to fail to object on nonfrivolous grounds to evidence that has no conceivable benefit to the defendant).

This deficient performance prejudiced Mr. Jordan's defense because it is

reasonably likely that the prosecution would not be able to prove constructive possession in this case. To begin with, counts 24–28 were based on Exhibits 32–36. R.1648. All these images had been deleted and contained no metadata. R.1610–12. Based on the record, the only thing known about the images was that they were found on a computer to which Mr. Jordan and [redacted]. both had access. *See* R.314–15; 1599–1600. There is no evidence that Mr. Jordan knew about the files. There is no evidence that Mr. Jordan ever accessed the files. There is no evidence that Mr. Jordan downloaded the files, paid for the files, or used file-sharing software to obtain the files. While testifying about these exhibits, the prosecution's computer expert admitted that he could not say "who was standing behind the computer" when the images were downloaded. R.1678. Had trial counsel presented the evidence that [redacted] had access to the laptop computer, there is a reasonable likelihood that the prosecution would have been unable to show that Mr. Jordan constructively possessed Exhibits 32–36 and he would have been acquitted of counts 24–28.

The same is true for Count 14, which was based on Exhibit 22. R.1791. The metadata shows that someone sent this image as a text to Mr. Jordan's phone and that the image automatically backed-up on his computer. R.1606. There is no evidence that Mr. Jordan ever saw this image on his phone and there was no other relevant metadata. R.1605–06. It is reasonably likely that this would not be enough to show constructive possession.

In addition, had trial counsel not performed deficiently, there is also a

reasonable likelihood that the large number of exhibits admitted under rule 404(b) would not have been admitted. Exhibits 37–66 either had no metadata or only irrelevant metadata, such as the size of the image. R.1613–23. File path information indicated that all of these images had been downloaded from the internet into a default cache folder on the computer. R.1643–23. The prosecution's expert testified that there was really only one user account on the computer, which was named "Michael." R.1600. Anyone with Mr. Jordan's password could have searched from his account. There is no information about the times when the images where downloaded or the temporally proximate search history.

There is a reasonable likelihood that Exhibits 101–104 would not have been admitted under rule 404(b) for the same reasons. R.1657–58. They had no relevant metadata and there was no evidence that Mr. Jordan would have known about the images or been able to access them. R.1657–58. The prosecution also introduced evidence that someone had been searching for child pornography on Mr. Jordan's laptop computer, *see* R.932, 1600, but the prosecution admitted that the evidence did not show that Mr. Jordan was the one who was searching for child pornography on the computer, R.933. Before trial, the prosecutor told the trial court:

> [The forensic expert] is not going to testify, and we wouldn't expect actually, any forensic computer expert to testify that it was a certain person that conducted the search, or that downloaded certain material onto the computer, because the only way that [expert] would be able to do that is if he was—if he actually observed the

> defendant doing these things. The only thing that he can say is that [the expert] looked . . . for these search terms, and found that someone had engaged in a search for . . . child pornography.

R.933. If trial counsel had not been deficient in investigating and presenting evidence that [redacted] had full access to Mr. Jordan's computer, then the prosecution would have been required to prove constructive possession of the images and search terms in question. The prosecution admitted that the forensic computer expert was unable to show constructive possession. R.933. Therefore, absent trial counsel's deficient performance, there is a reasonable likelihood that Mr. Jordan would have been acquitted on at least six counts of sexual exploitation of a minor and would have avoided the introduction of scores of 404(b) exhibits that were used against him. This would have been a better outcome for Mr. Jordan. *See State v. Dunn*, 850 P.2d 1201, 1208–09 (Utah 1993). Therefore, trial counsel was constitutionally ineffective for failing to show that Mr. Jordan did not have exclusive control of the laptop computer.

II. There was insufficient evidence to convict Mr. Jordan of charges relating to Exhibits 33–36, and the jury should not have been allowed to speculate about the ages of the unidentified persons in those exhibits.

The trial court erred by allowing the jurors to use their life experiences to speculate about the ages of the unidentified persons in Exhibits 33–36. As a result, there was insufficient evidence to convict Mr. Jordan on the charges associated with those exhibits. *See State v. Shumway*, 2002 UT 124, ¶ 15, 63 P.3d 94.

This Court will reverse a jury conviction for insufficient evidence when, viewing "the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict . . . the evidence is sufficiently inconclusive . . . that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *Id*. A verdict must be supported by reasonable inferences drawn from the evidence, not mere speculation. *See State v. Cristobal*, 2010 UT App 228, ¶ 17, 238 P.3d 1096; *see also Salt Lake City v. Carrera*, 2015 UT 73, ¶ 24, 358 P.3d 1067.

A person is guilty of sexual exploitation of a minor when the person "knowingly . . . possesses . . . or views child pornography." Utah Code § 76-5b-201(1). Child pornography is defined as "any visual depiction . . . of sexually explicit conduct, where . . . the visual depiction is of a minor engaging in sexually explicit conduct [or] . . . the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." *Id*. § 76-5b-103(1). In a case "in which the government must prove that a model, who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary to 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *United States v. Katz*, 178 F.3d 368, 372 (5th Cir. 1999). "The State bears the burden of proving each and every element of a criminal offense beyond a reasonable doubt." *State v. Whitaker*, 2016 UT App 104, ¶11, 374 P.3d 56.

In *State v. Alinas*, 2007 UT 83, 171 P.3d 1046, a defendant was convicted of possessing child pornography that the Utah Supreme Court described as "clearly of real children, *far below the age of majority*." *Id*. ¶18 (emphasis added). The defendant's trial counsel in that case even conceded that the images in question did "not appear to be either virtual or non-minor." *Id*. Nevertheless, the defendant argued on appeal that the prosecution failed to prove that he possessed child pornography because the prosecution did not introduce expert testimony about the age of the children in the images. *Id*. ¶30.

In rejecting the defendant's claims, the Utah Supreme Court relied on several federal cases holding that an expert witness will not *always* be required in child pornography cases. *See id*. ¶31 n.5. For example, in *United States v. Riccardi*, 258 F. Supp. 2d 1212 (D. Kan. 2003), *aff'd*, 405 F.3d 852 (10th Cir. 2005), the court held that "'[t]here is no requirement that expert testimony be presented in child pornography cases.'" *Id*. at 1218. However, the *Riccardi* court went on to say that "whether expert testimony is necessary depends upon the facts of any given case." *Id*. The court then quoted the Fifth Circuit Court of Appeals as follows:

> "The threshold question—whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert testimony—must be determined on a case by case basis. . . . A case by case analysis will encounter some images in which the models are prepubescent children who are so obviously less than 18 years old that expert testimony is not necessary or helpful to the fact finder. On the other hand, some cases will be based on images of models of sufficient maturity that there is no need for expert testimony. However, in this case, in which the

> government must prove that a model, who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary to assist the trier of fact to understand the evidence or to determine a fact in issue."

Id. at 1219 (quoting *United States v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999) (internal citations omitted)).

The other cases cited in *Alinas* have similar holdings. In *United States v. Villard*, 700 F. Supp. 803 (D.N.J. 1988), *aff'd,* 885 F.2d 117 (3d Cir. 1989), the court determined that lay testimony about the age of a child who appeared to be "14, 15 years old" was insufficient. *Id*. at 815 n.6. The court held, "When the individual depicted may well be in his late teens, proof of age becomes critical." *Id*. In *People v. Phillips*, 346 Ill. App. 3d 487, 497, 805 N.E.2d 667, 676 (Ill. App. Ct. 2004), *aff'd,* 215 Ill. 2d 554, 831 N.E.2d 574 (Ill. 2005), the court determined that expert testimony was not required when the victims were "'well under the age of 18'" and were obviously not computer-generated. *Id*.

In *Alinas*, there was no need to speculate because even the defense agreed that the images were "clearly of real children, far below the age of majority." *Alinas*, 2007 UT 83, ¶ 18. Therefore, the court in *Alinas,* which was "of the same view" as the cases it cited, held that there was no need for an expert witness in that case. *Id*. ¶ 32. While the *Alinas* court declined to categorically require expert testimony in all child pornography cases, it did not create a categorical rule that expert witnesses would never be necessary. *Alinas* should be read to follow the case-by-case determination reasoning set forth in *Riccardi*, *Villard*, and *Katz*.

This is consistent with the majority of courts that have addressed this issue. *See, e.g., United States v. Riccardi*, 405 F.3d 852, 870 (10th Cir. 2005) ("Both sides agree that in some cases involving depictions of post-pubescent teenagers, expert testimony may be required to establish that they were minors, and that this judgment must be made on a case-by-case basis."); *United States v. Sims*, 428 F.3d 945, 957 (10th Cir. 2005) (accord); *United States v. Kimler*, 335 F.3d 1132, 1144 (10th Cir. 2003) (accord); *United States v. Rodriguez-Pacheco*, 475 F.3d 434, 448 (1st Cir. 2007) (upholding a trial court's determination that it could not determine the ages of unidentified persons in photographs without the aid of expert testimony); *United States v. Katz*, 178 F.3d 368, 373 (5th Cir. 1999); *Abernathy v. State*, 278 Ga. App. 574, 578, 630 S.E.2d 421, 429 (2006) ("this determination must be made on a 'case by case basis'"); *Com. v. Robertson-Dewar*, 2003 PA Super 280, ¶8, 829 A.2d 1207, 1212–13 (Pa. Super. Ct. 2003) (expert testimony may well be necessary); *State v. May*, 362 N.J. Super. 572, 594, 829 A.2d 1106, 1119 (N.J. Super. Ct. App. Div. 2003) (accord).

In this case, it was error for the trial court to allow the jury to speculate about the ages of the persons in Exhibits 33–36 when those persons could all have been adults when the images were taken. Without expert testimony, there was insufficient evidence to convict Mr. Jordan of the charges associated with those exhibits. *See Shumway*, 2002 UT 124, ¶ 15.

The marshalled evidence on this issue is as follows: Police found Exhibits 33–36 on Mr. Jordan's laptop computer. R.1600; 1611–12. A.J. testified that only

Mr. Jordan had the password to the computer. R.1341. The State's expert testified that without "standing behind the computer" he could not determine who had downloaded the images. R.1678. There was no metadata associated with Exhibits 33–36. R.1611–12. Exhibits 33–36 did not depict persons who were obviously under the age of eighteen. R.1642; State's Exhibits 33–36.

The prosecution argued that the jury could "make a reasonable inference . . . that [the exhibits] depict[] images of persons under the age of 18." R.1682. Based on this, the prosecution claimed that *Alinas* categorically did not require expert testimony to prove that the unidentified persons in the exhibits were minors. The prosecutor said, "[I]n Alinas, the Court held that it's up to the jury to determine whether a child depicted in an image is under the age of 18." R.1644. Trial counsel countered, "The images possessed by *Alinas* . . . were clearly of real children far below the age of majority." R.1683. After hearing the arguments, the trial court rejected trial counsel's arguments. The trial court said,

> I have reviewed, a third time now, in a little bit more detail, the *Alinas* case, and it is clear that the rule of law is that this is exactly the type of decision that needs to be made by the trier of fact . . . . And I find that there is sufficient evidence for the trier of fact to review and deliberate on those counts as well.

R.1684.

The trial court erred in its reading and application of *Alinas* to the facts of this case. Trial counsel was correct that *Alinas* was limited to a situation in which the images are obviously of very young children. That is not the case here. Exhibits 33–36 were all of unidentified males who could have been adults.

Following the reasoning articulated in *Riccardi,* the prosecution needed to provide the jury with some proof beyond the images themselves that the persons in the images were minors. *See Riccardi,* 258 F. Supp. 2d at 1219. Because the jury was left to speculate about an element of the charges, the prosecution did not meet its burden. *See Whitaker*, 2016 UT App 104, ¶ 11. There was insufficient evidence to convict Mr. Jordan on Counts 25–28. *See Shumway*, 2002 UT 124, ¶ 15; R.1648.

A. In the alternative, Mr. Jordan's counsel was ineffective for failing to call an expert witness to determine the ages of the unidentified persons in the prosecution's exhibits and to request an affirmative-defense jury instruction.

Whether the prosecution called an expert witness about Exhibits 33–36 or not, trial counsel performed deficiently by failing to call an expert witness for the defense and request an affirmative-defense jury instruction. A defendant receives ineffective assistance of counsel when trial counsel performs deficiently and that deficient performance prejudices the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Trial counsel performs deficiently if the "representation [falls] below an objective standard of reasonableness." *Id.* 688. Performance is deficient when counsel fails to request a beneficial jury instruction. *See State v. Liti*, 2015 UT App 186, ¶ 20, 355 P.3d 1078; *State v. Lee*, 2014 UT App 4, ¶ 27, 318 P.3d 1164; *State v. Lewis*, 2014 UT App 241, ¶ 10, 337 P.3d 1053. Performance is also deficient when trial counsel fails to investigate or present at trial necessary expert

testimony for the defense. *See Taylor v. State*, 2007 UT 12, ¶28, 156 P.3d 739 (trial counsel was ineffective for failing to investigate or hire his own expert); *State v. Hales*, 2007 UT 14, ¶ 92, 152 P.3d 321; American Bar Association, Criminal Justice Standards for the Defense Function, 4-4.1(d). The defense is prejudiced when, absent the deficient performance, "there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, [the] confidence in the verdict is undermined." *See Dunn*, 850 P.2d at 1208–09.

In this case, counsel performed deficiently when she failed to request an affirmative-defense instruction and when she failed to present critical expert testimony. Under Utah law, it "is an affirmative defense to a charge of [sexual exploitation of a minor] that no person under 18 years of age was actually depicted . . . or used in producing or advertising the visual depiction." Utah Code § 76-5b-201(4). When affirmative defenses involve elements of the charged offense, as is the case here, the Utah Constitution "requires that the prosecution disprove the existence of affirmative defenses beyond a reasonable doubt once the defendant has produced some evidence of the defense." *State v. Drej*, 2010 UT 35, ¶15, 233 P.3d 476 (citation and internal quotation marks omitted). "'Each party is . . . entitled to have the jury instructed on the law applicable to its theory of the case if there is any reasonable basis in the evidence to justify it.'" *State v. Campos*, 2013 UT App 213, ¶29, 309 P.3d 1160 (quoting *State v. Torres*, 619 P.2d 694, 695 (Utah 1980)).

In preparing for trial, there is no indication from the record that trial counsel investigated or attempted to introduce expert testimony about the ages of the persons depicted in Exhibits 33–36. At the same time, trial counsel repeatedly stated that she believed the persons in those exhibits could be older than eighteen. R.1642. To meet the minimum standard of competence, trial counsel should have adequately investigated the issue and called an expert to support this affirmative defense. *See Gregg*, 2012 UT 32, ¶ 34.

But trial counsel failed to even request the affirmative-defense jury instruction. If the jury was properly allowed to guess the ages of the unidentified persons, then trial counsel was not precluded from using the exhibits themselves as evidence to support the affirmative defense. Trial counsel was free to argue that the jurors could use their life experience to determine that Exhibits 33–36 depicted persons over the age of eighteen, but she only argued that the prosecution had not met its burden. R.1801. As a result, the jurors were instructed that they could use their own experiences to guess the ages, R.544, and that it was not a defense if the "defendant did not know the age of the victim[s]," R.545.

There is no reasonable trial strategy for failing to raise and support an affirmative defense in this case. *See State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989). Trial counsel mentioned the issue one time in closing, R.1801, but failed to support it with expert testimony or an accurate jury instruction. This was deficient performance.

Mr. Jordan was prejudiced by this deficient performance because, absent these errors, there was "a reasonable likelihood of a more favorable outcome." *See State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993). In this case, the only extrinsic evidence presented on Exhibits 33–36 was that the images were found on Mr. Jordan's laptop computer. R.1600; 1611–12. Had the images in those exhibits been of obviously pre-pubescent children, then that may have been sufficient for the prosecution to prove its case as long as it could also show that Mr. Jordan exercised exclusive control over the laptop computer. But where none of these images were obviously of children it was prejudicial to fail to call an expert and fail to request an affirmative-defense jury instruction. In closing, the prosecutor even shied away from referring to the persons depicted in Exhibits 33–36 as children. R.1794; *see also* State's Exhibits 32–36. Instead, the prosecutor chose to refer to the persons in the images as "young male[s]." R.1794. This shows that this was not an obvious case of child pornography. Had trial counsel not performed deficiently there was a reasonable likelihood that Mr. Jordan would have been acquitted of counts 25–28.

III. Cumulative error.

Even if all the individual errors were not sufficiently prejudicial in isolation, this Court should still reverse because the cumulative effect of the errors was undoubtedly prejudicial. "Whether errors can be classified as cumulatively harmful turns on whether the errors undermine confidence in the jury verdict." *State v. Bradley*, 2002 UT App 348, ¶16, 57 P.3d 1139. In assessing

a claim of cumulative error, this Court will "consider all the identified errors, as well as any errors [the Court] assume[s] may have occurred." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

In this case, trial counsel's failure to investigate and timely file a rule 412 motion was prejudicial. *See* Part I.a., *supra*. Trial counsel's failure to object to the prosecution's misstatement of law was prejudicial. *See* Part I.b., *supra*. Trial counsel's failure to present evidence that Mr. Jordan did not have exclusive control of the laptop computer was prejudicial. *See* Part I.c., *supra*. The trial court's error in allowing the jurors to guess the ages of unidentified persons in the prosecution's exhibits was prejudicial. *See* Part II., *supra*. And, trial counsel's failure to call an expert or ask for an affirmative-defense instruction was prejudicial. *See* Part II.a., *supra*.

The cumulative effect of these errors was even more prejudicial. Absent the cumulative effect of these errors, Mr. Jordan would have been able to present his primary defense at trial, i.e., that Ex-wife, A.J., and T.M. were making false allegations of sexual abuse against him to gain an advantage in their upcoming divorce and custody proceeding. Mr. Jordan would have been able to effectively attack the credibility and honesty of all the witnesses who testified against him directly. And Mr. Jordan would have been able to challenge and likely exclude six exhibits of alleged sexual exploitation of a minor and scores of 404(b) exhibits. Instead, because of the cumulative effective of these errors, trial counsel was largely reduced to arguing in closing that the prosecution's "very high burden

ha[d] not been met." *See* R.1795. There can be no confidence in this verdict, and this Court should reverse and remand for a new trial.

CONCLUSION

For these reasons, Mr. Jordan respectfully asks this Court to reverse and remand for a new trial. He also asks this Court to reverse on Counts 25–28 with an order to dismiss.

SUBMITTED this 7th day of July, 2016.

MARSHALL M. THOMPSON
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,542 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted or redacted from the public version of the foregoing opening brief of defendant/appellant.

MARSHALL M. THOMPSON

CERTIFICATE OF DELIVERY

I, MARSHALL M. THOMPSON, hereby certify that I have caused to be hand-delivered an original and five copies of the private brief, and one copy of the public brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies of the private brief, and one copy of the public brief to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf of the private and public briefs to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 7th day of July, 2016.

Marshall M. Thompson

MARSHALL M. THOMPSON

DELIVERED this ____day of July, 2016.

ADDENDUM A

The Order of the Court is stated below:
Dated: May 04, 2016
07:04:01 AM

At the direction of:
/s/ ANN BOYDEN
District Court Judge

by
/s/ PATRICIA DEES
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES SENTENCE, JUDGMENT, COMMITMENT
vs. MICHAEL ALAN JORDAN, Defendant.	:	Case No: 141910848 FS Judge: ANN BOYDEN Date: May 2, 2016

PRESENT
Clerk: patd
Prosecutor: CORAL SANCHEZ
MICHAEL S COLBY
Defendant
Defendant's Attorney(s): GUSTIN, SUSANNE

DEFENDANT INFORMATION
Date of birth: June 17, 1980
Sheriff Office#: 379359
Audio
Tape Number: S45 Tape Count: 306-411

CHARGES
1. AGGRAVATED SEXUAL ABUSE OF A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
2. AGGRAVATED SEXUAL ABUSE OF A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
3. AGGRAVATED SEXUAL ABUSE OF A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
4. AGGRAVATED SEXUAL ABUSE OF A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
5. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
6. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
7. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty

8. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
9. FORCIBLE SODOMY - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
10. FORCIBLE SODOMY - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
11. FORCIBLE SODOMY - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
12. FORCIBLE SODOMY - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
13. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
14. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
15. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
16. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
17. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
18. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
19. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
20. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
21. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
22. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
23. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
24. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
25. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
26. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty

27. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
28. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
29. TAMPERING WITH A WITNESS - 3rd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
30. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
31. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
32. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty
33. DEALING IN MATERIALS HARMFUL TO MINOR - 3rd Degree Felony
Plea: Not Guilty - Disposition: 01/15/2016 Guilty

HEARING

PRISON CONCURRENT/CONSECTIVE NOTE:
Counts 1-4 to Run Consectively to Each Other, Count 5 & 6 to Run Concurrently With Each Other But Consectively With Counts 1-4, Count 7 & 8 to Run Concurrently With Each Other But Consectively With Counts 5 & 6, Counts 9-12 to Run Concurrently With Each Other But Consectively With Counts 1-4, Counts 13-28 to Run Concurrently With Each Other But Consectively With Counts 1-4, Count 29 to Run Consectively, Counts 30-33 to Run Concurrently.

SENTENCE PRISON
Based on the defendant's conviction of AGGRAVATED SEXUAL ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

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Case No: 141910848 Date: May 02, 2016

years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED SEXUAL ABUSE OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than fifteen years and which may be life in the Utah State Prison.

Based on the defendant's conviction of SODOMY ON A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than twenty five years and which may be life in the Utah State Prison.

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Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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Based on the defendant's conviction of TAMPERING WITH A WITNESS a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd

Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of DEALING IN MATERIALS HARMFUL TO MINOR a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

ALSO KNOWN AS (AKA) NOTE
MIKE JORDEN

SENTENCE TRUST NOTE
Defendant to Pay Full Restitution, State Has 180 Days to Provide Any Restitution Information

Spencer Banks Addressed Court for Victims. Victim's Mother Addressed Court, Coral Sanchez Addressed Court, Suzanne Gustin Addressed Court, Defendant Addressed Court

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

End Of Order - Signature at the Top of the First Page

ADDENDUM B

Utah Code § 76-5b-201

§ 76-5b-201. Sexual exploitation of a minor--Offenses

(1) A person is guilty of sexual exploitation of a minor:
(a) when the person:
(i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or
(ii) intentionally distributes or views child pornography; or
(b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

(2) Sexual exploitation of a minor is a second degree felony.

(3) It is a separate offense under this section:
(a) for each minor depicted in the child pornography; and
(b) for each time the same minor is depicted in different child pornography.

(4) It is an affirmative defense to a charge of violating this section that no person under 18 years of age was actually depicted in the visual depiction or used in producing or advertising the visual depiction.

(5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.

(6) This section may not be construed to impose criminal or civil liability on:
(a) any entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:
(i) reporting or data preservation duties required under any federal or state law; or
(ii) implementing a policy of attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;
(b) any law enforcement officer acting within the scope of a criminal investigation;
(c) any employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;
(d) any juror who may be required to view child pornography during the course of the person's service as a juror; or
(e) any attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment.

Credits

Laws 2011, c. 320, § 16, eff. May 10, 2011; Laws 2016, c. 116, § 1, eff. May 10, 2016.

ADDENDUM C

Utah Rules of Evidence, Rule 412

RULE 412. ADMISSIBILITY OF VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:
(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:
(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or
(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.
(1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:
(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and
(C) serve the motion on all parties.

(2) *Notice to the Victim*. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Credits

[Adopted effective July 1, 1994. Amended effective December 1, 2011; May 1, 2017.]