Case No. 20170193-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ANTHONY CHARLES MURPHY,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for aggravated sexual assault and aggravated kidnapping, both first degree felonies; forcible sexual abuse, a second degree felony; and aggravated assault, a third degree felony, in the First Judicial District, Cache County, the Honorable Thomas Willmore presiding

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[1] Unless otherwise noted, the State cites to current versions of these statutes for the Court's convenience.

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INTRODUCTION

Over several hours, Defendant strangled, choked, and forced his erect penis inside the victim's mouth. At trial, the central disputed issue was the victim's credibility. The State presented the victim's testimony, photos and medical documentation of her injuries, police testimony, testimony from witnesses who saw the victim after the attack, and evidence of three prior sexual assaults.

On appeal, Defendant raises six claims—two preserved and four unpreserved. In his first preserved claim, Defendant argues that the trial court erroneously admitted the State's 404(b) evidence, asserting that the evidence was more prejudicial than probative. The trial court properly

admitted the evidence under the doctrine of chances, where Defendant's four unrelated acts of similar sexual abuse were highly relevant to rebut Defendant's fabrication defense.

In his other preserved claim, Defendant challenges the trial court's denial of his mistrial motion after the victim testified that one of the 404(b) witnesses shot Defendant. On this record, Defendant cannot show the trial court abused its discretion. The victim's statement was not elicited intentionally, was relatively innocuous, and was made in passing. Moreover, the trial court struck the testimony, gave curative instructions, and excluded the 404(b) witness's testimony altogether.

Defendant's four unpreserved claims also fail.

In three separate claims, Defendant argues that (1) three sentences of the prosecutor's closing rebuttal comprised misconduct; (2) his aggravated kidnapping and aggravated sexual assault convictions should have merged; and (3) the victim's testimony was inherently improbable. All three claims fail for the same reason—Defendant argues no exception to the preservation rule.

In the fourth unpreserved claim, Defendant argues that his trial counsel was ineffective for not calling expert witnesses to rebut the State's

case. But Defendant does not provide any prejudice analysis, thus, his ineffectiveness claim necessarily fails.

STATEMENT OF THE ISSUES

Issue 1. Did the trial court abuse its discretion under rule 404(b) by admitting evidence of Defendant's other bad acts to rebut Defendant's claims of self-defense and that the victim fabricated?

Standard of Review. A trial court's admission of other-acts evidence is reviewed for abuse of discretion. *State v. Thornton*, 2017 UT 9,¶56, 391 P.3d 1016.

Issue 2. The prosecutor argued in closing rebuttal that the jury can consider the 404(b) evidence to determine if the victim fabricated or if Defendant acted in self-defense. As part of that argument, the prosecutor asked "what are the odds" that four women would falsely accuse Defendant of similar violent assaults?

Does Defendant's unpreserved challenge to the prosecutor's argument fail where he does not assert any exception to the preservation rule?

Standard of Review. No standard of review applies to this issue.

Issue 3. Did the trial court abuse its discretion by denying Defendant's mistrial motion where the victim's volunteered statement—that Defendant's ex-wife shot him—was not intentionally solicited, made in passing, relatively

innocuous, and where the court struck the testimony and gave curative jury instructions?

Standard of Review. "A trial court's denial of a motion for mistrial will not be reversed absent an abuse of discretion." *State v. Wach*, 2001 UT 35,¶45, 24 P.3d 948.

Issue 4. Does Defendant's unpreserved merger claim fail, where Defendant does not assert any exception to the preservation rule?

Standard of Review. No standard of review applies.

Issue 5. Has Defendant proven that his trial counsel was ineffective for not calling two expert witnesses to rebut the State's case?

Standard of Review. An ineffective assistance of counsel claim raised for the first time on appeal is a question of law. *State v. Ott,* 2010 UT 1,¶16, 247 P.3d 344.

Issue 6. Does Defendant's unpreserved claim that the victim's testimony was inherently improbable fail where Defendant does not assert any exception to the preservation rule?

Standard of Review. No standard of review applies.

STATEMENT OF THE CASE [2]

A. Summary of relevant facts. [3]

After Defendant and T.W. married in August 2008, Defendant became increasingly abusive. R4247,4250.[4] Defendant was verbally, physically, and sexually abusive. R4249,4259. For example, Defendant pushed T.W. against walls and down the stairs. R4248,4250. And, in one instance, Defendant threw T.W. in the shower, pulled the shower curtain rod down, and "started coming at [her] with it." R4249,4255.

In May 2009, T.W. and Defendant moved to a new house. R4263;State's Exhibit [SE] 7,8. The new house had two floors: an upstairs and a main floor. R4263;SE7,8. The main entrance to the house opened into the upstairs, which led into the living room, and the kitchen behind that. SE7. North of the kitchen was the master bedroom, a bathroom, and a second bedroom.

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[2] Consistent with appellate standards, the facts are recited in the light most favorable to the verdict. *State v. Maestas*, 2012 UT 46,¶3, 299 P.3d 892.

[3] Although the record was Bates numbered and the pages are in numerical order, some parts of the record are not in chronological order.

Defendant cites to the record using his own formulation. Br.Aplt.2,n.1. For clarity, the State cites to the record using the Bates numbers.

[4] T.W. is also referred to as T.S. and T.M. in the record.

R4264;SE7.[5] A staircase at the back of the house led down to the main floor. SE7,8. Next to the staircase, a door led to the backyard with a patio and grassy area. R4264,272;SE8,13,14. The downstairs main floor had a family room, a bedroom, a storage area, and a laundry room, all connected by a long, carpeted hallway with an old furnace. R4265-65;SE8.

On May 31, 2009, Defendant and T.W. were in the backyard drinking beer and tequila. R4266. Defendant started drinking at 10 a.m., and T.W. starting drinking around noon. R4266-67. Throughout the day, T.W. drank six beers and a shot of tequila. R4269. Defendant drank more beer than T.W. and at least three shots of tequila. R4270. The day was "pretty good until the evening" when Defendant received a text message that upset T.W. R4267. T.W. became "very angry" over the message, but eventually went to bed. R4268-71. It was about 7:30 p.m. R4267.

Later, Defendant came into the bedroom and asked T.W. to "work this out." R4271. Defendant and T.W. returned to the backyard and started dancing. R4271-72. While dancing, Defendant spun T.W., and she fell to the ground. R4273. Defendant pulled T.W. off the ground and ripped off her t-

[5] State's Exhibit 7 refers to the master bedroom as bedroom 1. SE7. T.W. refers to bedroom 1 as the master bedroom throughout her testimony. *See e.g*, R4280,4289.

shirt, bra, and shorts. R4273-74. T.W. screamed for help. R4274. Defendant told her to "shut up," "[n]obody was coming to save [her]." *Id.*

Naked, T.W. ran into the house. *Id*. Defendant followed and pushed her down the stairs on to the main floor. *Id*. Defendant dragged T.W. into the family room, repeatedly telling her "you'll remember me." R4275. Defendant then straddled T.W., put both of his knees on her chest, and constrained her breathing. *Id*. Defendant repeatedly hit T.W. in the face with his erect penis, telling her to "suck it, bitch." *Id*. Defendant then tried to force his erect penis into T.W's mouth. R4277. At first, T.W. was able to resist, but eventually Defendant forced his penis into her mouth. R4277-78.

T.W. sucked Defendant's penis for approximately twenty minutes "on and off." R4278. Defendant then twisted T.W.'s nipples hard. R4275. T.W. tried to crawl away, but Defendant picked her up with one hand and put her against the wall in the hallway next to the old furnace, strangling her. R4276. T.W. lost consciousness and urinated on herself. *Id*.

When T.W awoke, Defendant dragged her to the stairs, forced her up them, threw her into the bathtub, and turned on the cold water. R4278-79. When Defendant left the bathroom, T.W. tried to escape, running to the backdoor. R4280. Defendant caught her, pushed her down the stairs, and dragged her down the hallway into the main floor bedroom. *Id*. Defendant

pinned T.W.'s shoulders down with his knees and forced her to suck his penis again. R4280-81. T.W. choked on Defendant's penis and lost consciousness. R4281. When T.W. awoke, Defendant was on top of her, but he fell over, passing out on the floor. R4282.[6]

T.W. crawled out of the room and drove over to Marty Spicer and Diane West's house. *Id*. Marty and Diane were friends with T.W. and Defendant, and Marty was Defendant's long-time employer. R4270,4299.

When T.W. arrived at Marty and Diane's, it was after midnight. R4284. T.W. burst through Marty and Diane's door, hysterical, terrified, and screaming, "help me, please." R4283-84. Marty and Diane consoled T.W. and gave her ice for her face. R4286. Eventually, T.W. fell asleep. R4286.

Later that night, Defendant left several threatening voicemails on T.W.'s phone. SE19; *see also* voicemail transcript.[7] He also called 911 and reported T.W. missing, telling the dispatcher that T.W. was "suicidal." SE21.

When Officer Salvador Toscano responded to Defendant's 911 call, he immediately noticed that Defendant was intoxicated. R4400. Defendant said that he and T.W. had a non-physical argument and that T.W. drove away

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[6] The testimony also refers to the main floor bedroom as the "pink bedroom." *See e.g*., R4280.

[7] Although part of the record, the voicemail transcript was not Bates numbered.

intoxicated. R4400. When Toscano asked Defendant about alcohol consumption, Defendant became "very aggressive," and threatened to fight him if he took Defendant to jail. R4401.

The next morning, T.W. was sore "everywhere" and felt like she "had been used for a punching bag." R4286. Her throat was sore, "like the worst case of strep throat [she] had ever had," her face and chest were bruised, and she had difficulty walking. R4290-92. Despite her injuries, T.W. wanted to go to work—she did not want to lose her job. R4287. Marty followed T.W. back to her house so that she could shower and dress. R4287-89. Marty went into the house first and saw that Defendant was passed out on the couch. R4289. While T.W. got ready for work, Marty watched Defendant. R4290-91.

When T.W. arrived at work, her co-workers immediately noticed her injuries. R4387. One co-worker thought T.W. had been in a car accident because her face "was definitely like red and swollen and bruised and didn't look right." *Id*. Another noticed that T.W. was not her usual "gregarious" self, she was "very unnaturally subdued," "not talkative," and "hiding her face." R4394. The second co-worker described T.W.'s face as "grotesquely swollen," and "heavily covered in make-up" and "didn't look like her." R4394-95. T.W. admitted to the second co-worker that she had been assaulted. R4395. Because T.W was "really upset," "really scared," and "really shaken," her co-

workers called the police, even though T.W. did not want the police involved. R4388.

Officer Adam Zitterkopf responded. R4405. When he met T.W., he noticed that her face "was very battered." R4446. T.W. had "swollen eye sockets, a cut lip, swollen cheeks, and redness around her neck." *Id*. T.W. was "one of the worst victims" Zitterkopf had seen. *Id.* He believed T.W.'s neck injuries were consistent with strangulation. R4410. Also, T.W.'s demeanor was "very down, depressed," and "emotional." R4446. Zitterkopf interviewed T.W. and took photographs of her injuries whose quality did not capture the extent of her injuries. R4408.

About a day and a half later, T.W. went to the doctor. R4476;SE42. The doctor found contusions on T.W.'s rib cage that were "very tender," and that she had pain and bruising in her jaw and trouble opening it. R4484. The doctor also observed that T.W. had a bruised and swollen lip, bruises on her chest, bruises on her right leg, and rib contusions. R4477;SE42.

The next day, Detective Sargent Travis Allen interviewed T.W. R4522. Allen photographed T.W.'s injuries, documenting injuries to her face, eyes, lips, arms, and legs. R4491;SE26,27,45,46. He also noticed that T.W. had difficulty opening her mouth when she spoke. R4497.

A few days later, Allen, Zitterkopf, and T.W. walked through her house to collect and document evidence. R4496. On the main floor hallway wall, next to the old furnace—where Defendant strangled T.W. and she urinated on herself—Detective Allen and Officer Zitterkopf found a handprint and noticed that the carpet was discolored from being cleaned. R4413-14,4498,4500-02;SE37,41. In the laundry room, the officers found what appeared to be a bloodstained mattress cover inside the washing machine. R4415,SE16,17. They also found the clothing T.W. was wearing when Defendant attacked her; all of it was torn. R4415-16.

During the investigation, Marty repeatedly tried—unsuccessfully—to contact Defendant. R4637.

B. Summary of proceedings and disposition of the court.

Defendant was charged with aggravated sexual assault (domestic violence) and aggravated kidnapping, both first degree felonies; forcible sexual assault, a second degree felony; and aggravated assault, a third degree felony. R3706-08.

Before trial, the State moved under rule 404(b) to admit evidence that in 1998, Defendant similarly abused his ex-wife. R134. The court denied the motion. R816-817.

A substantial delay in Defendant's trial then occurred.[8] The State then filed a new rule 404(b) motion, seeking to admit evidence that Defendant had previously abused three other women besides his ex-wife. R3201. The trial court granted the motion, ruling that the evidence was admissible under the doctrine of chances to rebut Defendant's claims of self-defense and that T.W. fabricated. R3402-17.

On the first day of the six-day trial, the State presented T.W.'s testimony. R4385. During T.W.'s testimony, Defendant moved for a mistrial because T.W. testified that one of the 404(b) witnesses, Defendant's ex-wife, shot Defendant. R4360. The court denied the motion, but struck the testimony, gave a curative instruction, and ruled that Defendant's ex-wife could not testify. R4384-85.

The State also presented testimony from T.W.'s co-workers, her doctor, Diane West, Marty Spicer, Toscano, Zitterkopf, Allen, a domestic violence expert, and a strangulation expert. R4179,4385,4392,4396,4404,4476,4489,4551,4609,4661. And it presented testimony that Defendant had previously assaulted three other women. R4719,4750,4782,4829,4875,4900.

[8] Although Defendant was charged in 2009, his trial was repeatedly delayed because of pretrial matters.

The domestic violence expert testified that during a traumatic event, like T.W.'s, the victim's brain "shuts down" and the victim's flight or fight response kicks in. R4191-92. He testified that memory function is "often impaired in people who are victims of trauma," that memory is "spotty at best," it is "never possible" for a trauma victim to put the traumatic events in chronological order, and victims may not remember specific aspects of the traumatic event. R4193-94,4197.

The strangulation expert testified that it was her expert opinion that T.W. was strangled and physically and sexually assaulted. R4580-90. She testified that symptoms of strangulation include loss of consciousness and bladder control. R4573-74,4576. She testified that when a person loses bladder control, like T.W., that person has been strangled for approximately thirty seconds and death is "pretty imminent." R4576. Finally, the strangulation expert agreed with the domestic violence expert that it is not uncommon for victims, like T.W., to suffer from memory loss and remember only "bits and pieces" of the abuse. R49579,4591.

The defense. Defendant claimed that T.W. was the aggressor and that he hit T.W. in self-defense. R4960,4964,5004. According to Defendant, T.W. went into a "jealous rage" about the text message and attacked him, leaping "two feet in the air," landing on top of him, and punching him eight to ten

times while holding a knife, resulting in scratches on his chest and arm. R4957,4960,5009;Defense Exhibit (DE) 4-14,20,21. Defendant claimed that only in response did he hit T.W. once in the face, and put his feet on her shoulders and pushed her backward. R4961,5010. Defendant claimed that T.W. made up the sexual and physical abuse allegations. R4960,4964-65. He denied strangling, choking, forcing his penis into T.W.'s mouth, or cleaning up the house after the attack. R5003-04.

On cross-examination, Defendant admitted lying to Tocano when asked if a physical altercation occurred. R4993-94. Defendant claimed that after the sexual assault he did not disappear, but stayed at home for his "hemorrhoid problems." R4998.

State's rebuttal. Dr. Todd Grey, the chief medical examiner in Utah, testified that scratches on Defendant's torso were not consistent with his testimony that T.W. cut him with a knife. R5094-96. Rather, Dr. Grey testified that Defendant's injuries appeared staged. R5095.

The jury found Defendant guilty on all counts. R3760-61. For aggravated sexual assault and aggravated kidnapping, the court sentenced Defendant to two consecutive fifteen-years-to-life sentences. R3885-86. For forcible sexual abuse, the court sentenced Defendant to one-to-fifteen years in prison. R3885. For aggravated assault, the court sentenced Defendant to

zero-to-five years in prison. *Id*. The court ordered that Defendant's forcible sexual abuse and aggravated assault sentences to run concurrently. R3886.

Defendant timely appealed. R5331.

SUMMARY OF ARGUMENT

Point 1. Defendant argues that the trial court abused its discretion under rule 404(b) when it granted the State's motion to admit evidence that Defendant sexually assaulted four other victims. Defendant argues that the trial court did not properly analyze the evidence under rule 403 and that the evidence was more prejudicial than probative.

Defendant's claim fails. The record shows that the trial court properly analyzed the evidence under the doctrine of chances and found that it met the four foundational requirements under that theory. The record further shows that the court properly ruled that the evidence's probative value was not substantially outweighed by the risk of unfair prejudice because the evidence rebutted Defendant's claim that the victim fabricated the assault and that he acted in self-defense.

Point 2. Defendant argues that three sentences of the prosecutor's closing rebuttal remarks amounted to misconduct. Defendant's unpreserved claim fails because he does not argue any exception to the preservation rule. Regardless, Defendant cannot show that the remarks, made in the middle of

a thirteen-page rebuttal argument, were so obviously impermissible that the trial court should have recognized and corrected them on its own.

Point 3. Defendant argues that the trial court abused its discretion when it denied his mistrial motion after T.W. volunteered during her testimony that Defendant's ex-wife—one of the proposed 404(b) witnesses—had shot him. A mistrial is not required where, as here, the prosecutor does not elicit the allegedly improper statement, it was an isolated, off-hand remark, and it was made in passing. The prosecutor did not intentionally elicit T.W.'s statement, and it was one sentence in over 1000 pages of trial transcript. Moreover, the court struck the testimony, gave curative instructions, and excluded the ex-wife's testimony altogether.

Point 4. Defendant argues that the trial court erred by not merging his aggravated kidnapping and aggravated sexual assault convictions under *State v. Finlayson*. Defendant's unpreserved claim fails because he argues no exception to the preservation rule. Regardless, Defendant cannot show that the charges so plainly merged that either the trial court or counsel was obligated to raise the issue.

Point 5. Defendant argues that his counsel was ineffective for not calling expert witnesses to rebut the State's expert witnesses. Defendant's claim necessarily fails because he does not provide any prejudice analysis.

Nor could Defendant show prejudice because (1) no record evidence shows what either hypothetical expert would have said or how that testimony would have rebutted the State's case, and (2) on this record, reasonable counsel could decide that cross-examining the State's witnesses was an effective trial strategy.

Point 6. Defendant argues that the evidence was insufficient to support his convictions because T.W.'s testimony was inherently improbable. His unpreserved claim fails because he argues no exception to the preservation rule. Regardless, he cannot show that the issue was so obvious that the trial court should have sua sponte taken the case from the jury. T.W. testified consistently, credibly, and her testimony was corroborated by, among other things, photos and medical documentation of her injuries, testimony of other witnesses, and the police investigation.

ARGUMENT

I.

The trial court properly ruled that Defendant's prior sexual assaults were admissible.

Defendant argues that the trial court abused its discretion by admitting evidence under Utah R. Evid. 404(b) that Defendant had sexually assaulted four other victims: A.K., A.M., M.M, and G.M. Br.Aplt.7-18. Defendant argues that the court's decision conflicts with its prior ruling to exclude rule 404(b)

evidence. Br.Aplt.12. He also argues that the trial court's fifteen-page decision inadequately analyzed whether Defendant's prior sexual assaults were admissible under Utah R. Evid. 403. *Id*. Defendant's argument is without merit.

A. Background.

Defendant was charged in 2009. R6. In 2010, the trial court denied the State's first 404(b) motion which sought to admit Defendant's prior bad acts towards his ex-wife, G.M. R816-817.[9]

Defendant's trial was delayed several years because of pretrial motions. *See e.g.*, R742-2139. In 2014, the State filed an amended rule 404(b) motion after finding that Defendant had sexually abused, in addition to G.M., three other women: A.K., A.M., and M.M. R3201-26.[10] The State argued that the evidence was admissible, under the doctrine of chances relevance theory recently recognized in *State v. Verde*, to rebut Defendant's anticipated fabrication and self-defense claims. 2012 UT 60,¶47, 770 P.2d 116 (*abrogated on other grounds by State v. Thornton,* 2017 UT 9, 391 P.3d 1016); R3229. The State argued that the evidence was admissible because the doctrine of

[9] G.M. is also referred to as G.O. in the record.

[10] A.M. is also referred to as A.R. in the record.

chances' four foundational requirements were met. R3239-47. Defendant opposed the motion. R3257-93.

The trial court held four days of hearings where it heard from T.W., four prior victims, and a statistician. R2529,2677,2696,3081. *Id*.

M.M. While out on bond after attacking T.W., Defendant was arrested and charged with patronizing a prostitute, kidnapping, and assault for attacking M.M. R2909.[11]

In 2013, M.M. met Defendant at his hotel—as she regularly did—to give him a sensual massage that ended with a "hand job." R2542-44,2549-50. When M.M. arrived, Defendant was drinking beer. R4758. M.M. gave Defendant a massage and then began giving him a "hand job." R2553. During the "hand job," Defendant repeatedly tried to pull down M.M.'s panties, and M.M. repeatedly told him "no." R2554. At one point, Defendant grabbed both of M.M.'s arms and wrestled her to the floor. *Id*. With M.M. on her back, Defendant put his thumbs in her mouth, and his hands around her throat, strangling her. R2555. M.M. saw "stars," her "vision went black," and she gasped for air. R2555-56. Eventually Defendant let M.M. go but did not let

[11] Before Defendant's trial assaulting T.W. but after the 404(b) hearing, Defendant was convicted of patronizing a prostitute and assault. R4899.

her get her cellphone or move far from him. R2558-59. The hotel manager then knocked on the door, responding to a noise complaint. R2561. Defendant told the manager "everything's fine." R2562. M.M. "yelled no," and ran out of the room. R2563.

A.K. In 2000, A.K. became friends with Defendant when he frequented a restaurant she worked at in Kentucky. R2941-42.

On July 4, 2003, Defendant picked A.K. up around 4 p.m. R2944,2946-47,2964. A.K. remembered drinking bourbon with Defendant, then waking up in his truck wearing only a shirt—her shorts and panties had been removed. R2947,2950. A.K. cried, screamed, and begged to go home, but Defendant refused. R2949.

A.K. tried to escape, but Defendant threw her down and burned her neck with a cigarette. R2951,2965-66. Defendant told A.K. that she had to keep her promise to suck his penis. R2950. When A.K. objected, he slapped her in the face with a folder, threatened to drown her in a nearby creek, and told her that he would make sure "nobody would ever see [her] again." R2950-52. Defendant then forced his penis inside of her mouth. R2952. After, Defendant forced A.K. to sign a letter stating that she agreed to have sex with him. R2953-54. Defendant then held A.K. down and raped her. R2955.

No charges resulted from this incident. R2967.

A.M.[12] Because the State was unable to locate A.M. for the hearing, the State presented a transcript of the trial testimony she gave against Defendant in Kentucky. R2655-2669,3108-3121,3123,3141-3143.[13]

In 2001, A.M. was fifteen-years-old and lived with Father in Kentucky. R4723. One day, Defendant and Father returned from a bar "pretty intoxicated." R4725;SE56,p.51.[14] After she went to bed, A.M. woke up with Defendant on top of her. He was covering her face with one hand, inhibiting her breathing, and rubbing her breast and touching her vagina over her clothes with his other hand. R4727-28,4729. Defendant kissed her and told her if she screamed, he would kill her. R4727-28,4729. A.M. bit Defendant's hand

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[12] In the 404(b) hearing, A.M. was referred to as A.R. *See* R2655-2669,3108-3121,3123,3141-3143. The State refers to this witness as A.M. for clarity and consistency. *See* R4743.

[13] A.M.'s Kentucky trial testimony transcript is not part of the record. To the extent that Defendant challenges the admission of A.M.'s testimony, then, the record is inadequate to support his claim. *See State v. Litherland*, 2000 UT 76, ¶12, 12 P.3d 92 (stating if appellant "fails to provide an adequate record on appeal, this Court must assume the regularity of the proceedings below"). For the purposes of this summary, the State relies on A.M.'s testimony at Defendant's trial here.

[14] At Defendant's trial here, pursuant to a stipulation with Defendant, the State played an audio recording of A.M.'s father's trial testimony from Defendant's Kentucky trial. R4743. State's Exhibit 56 is the transcript of that testimony that was played for the jury. R4744-45,4747. It is not Bates numbered. The State references it by the exhibit number, SE56, and page number.

and screamed for help. R4728;SE56,p.43. Father ran into the room and pulled Defendant off A.M. R4729;SE56,p.43. A.M. ran, Defendant caught her and touched her again, and Father threw Defendant off A.M. again. R4730; SE56,p.44. A.M. ran to a neighbor's house. R4731. Defendant followed, attacked the neighbor's husband, tried to break into the neighbor's house, and repeatedly told A.M. "[T]his didn't happen, this didn't happen, I didn't touch you." SE56,p.96,99,101-02.

Defendant was charged with sexual abuse of A.M. and assault of the neighbor. R4748. The jury found Defendant guilty of assaulting the neighbor, but hung on the sexual abuse charge. R4748.

G.M.[15] G.M. and Defendant lived in Florida and were separated pending divorce proceedings. R2683. On June 1, 1997, Defendant—who was under the influence of alcohol—broke into G.M.'s house, kidnapped her, raped her twice, and sat on her chest and forced his penis inside her mouth—choking her. R2685-2703. During the several hours long attack, Defendant repeatedly covered G.M.'s mouth and nose with his hands. R2688-87,2694. Two months later, while he was on bond for that attack, Defendant broke into

[15] G.M.'s testimony was excluded at trial as part of the court's mistrial order. *See* R4377.

G.M.'s house again, but G.M. shot him five times in self-defense. R2702. Defendant was convicted of second-degree burglary. R2703.

Statistician. The statistician testified that the chances that a person would be accused or arrested five times for rape or attempted rape is one in a billion. R2995. He testified that given Utah's adult population in 2012, there is a .0004% chance of a person being arrested for rape or attempted rape. R3007-08. He testified that the probability of being arrested five times for rape or attempted rape is one is 32 quadrillion. R3015. And he testified that the probability that a person would be accused twice of a rape or an attempted rape involving similar facts is one in sixteen million. R3019-20.

Order. In a fifteen-page decision, the trial court granted the State's motion to admit the other bad acts evidence. R3402-17. The court found that the evidence was offered for a proper, non-character purpose—to rebut Defendant's claims that T.W. fabricated and that he acted in self-defense. R3410.

The trial court analyzed the evidence under the doctrine of chances, examining materiality, similarity, independence, and frequency. R3411-14. The court found that the evidence was material because the *actus reus* element of the crime was genuinely disputed where Defendant challenged T.W.'s credibility. R3411. The court found the evidence was similar, explaining that

Defendant used physical dominance to control the victims, including grabbing and strangling them to the point of unconsciousness. R3412. It also explained that the occurrences were similar because Defendant inhibited the victims' breathing, verbally threatened to harm or kill them, physically forced them to perform oral sex or raped them, and detained them. R3412-13. The court then found the evidence was independent where the "events occurred over a span of fifteen years in three different states" and "there is no evidence linking one allegation with another." R3414. Finally, the court found the frequency requirement was satisfied because Defendant was accused of sexually assaulting five different women. *Id*.

Last, the court considered whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. R3415. Relying on *Verde*, the court found that the evidence's probative value outweighed the risk of unfair prejudice "when two or more persons tell similar stories, the chances are reduced that both are lying or one is telling the truth and the other is coincidentally telling a similar false story," and "the jury will be in a better position to evaluate a [witnesses's] credibility with this evidence." R3416.

At trial. Before the State presented the 404(b) evidence at trial, the court read a cautionary instruction to the jury, explaining that the jury would hear

evidence related to other victims and such evidence "may not" be used "as evidence of the Defendant's character in order to show that on a particular occasion he acted in conformity with that character." R4718; *see also* R3766. Thus, the jury "may not use this evidence to convict [Defendant] of the crimes he is charged with in this case merely because you believe he committed a similar crime against one or more of these witnesses." R4718-19. Rather, the jury could consider the evidence only to determine (1) whether T.W. "fabricated her accusation"; and (2) "whether the Defendant acted in self-defense." R4719.

At the close of all evidence, the court again instructed the jury that it could not use the 404(b) evidence for character purposes. R3796. Rather, it could use the evidence only to determine (1) whether T.W. fabricated her accusation; and (2) whether the Defendant acted in self-defense. *Id*. Last, the court explained that Defendant was on trial for the crimes involving T.W. and the jury could not convict him "simply because you believe he may have committed some other act at another time." *Id*.

Post-Trial Motions. After he was convicted on all counts, Defendant moved to arrest judgment and for new trial, arguing that the 404(b) evidence was improperly admitted. R3830;3897. The trial court denied both motions. R5322,5238.

B. The other bad acts evidence was admissible.

Rule 404(b) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid. 404(b)(1). However, such evidence "may be admissible for another purpose, including but not limited to proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Utah R. Evid. 404(b)(2).

Rule 404(b) is an "inclusionary rule," presumptively admitting evidence so long as it is genuinely offered for a proper, noncharacter purpose. *See State v. Lucero*, 2014 UT 15,¶14, 328 P.3d 841 (*abrogated on other grounds by Thornton,* 2017 UT 9); *accord Verde*, 2012 UT 60,¶15 (noting this "list is illustrative and not exclusive"). Rule 404(b) does not exclude other bad acts merely because the evidence may tend to show a bad character trait. Evidence of other bad acts "may be admitted despite its negative propensity inference," *Lucero*, 2014 UT 15,¶14, so long as it is admitted for a proper purpose at trial. *Id.*; *see also State v. Cuttler*, 2015 UT 95,¶¶28-31, 367 P.3d 981. Other bad acts evidence is inadmissible under rule 404(b) only if its relevance depends "on a verboten character inference." Edward J. Imwinkelried, *The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines*

Which Threaten to Engulf the Character Evidence Prohibition, 51 Ohio St. L.J. 575, 576 (1990).

To determine whether a defendant's other bad acts are admissible under rule 404(b), the trial court must determine whether the evidence is offered for a genuine, noncharacter purpose; whether the evidence is relevant under rule 402 to a contested issue; and whether the probative value of the evidence is substantially outweighed by the risk of unfair prejudice under rule 403. *See Lucero*, 2014 UT 15,¶¶14, 17; *State v. Nelson-Waggoner*, 2000 UT 59, ¶18, 6 P.3d 1120; *State v. Marchet*, 2009 UT App 262,¶29, 219 P.3d 75.

As an initial matter, Defendant argues that because the trial court denied the State's first rule 404(b) motion, it should have denied the second. Br.Aplt.12. The first motion only asked for the admission of G.M.'s prior bad acts evidence as relevant to Defendant's intent. R134-42. The court denied the motion because intent was at not issue, the evidence was not being admitted for a non-character purpose, the time interval, and the need for the evidence was not substantial. R814-18. The second motion asked for admission of a series of assaults from 1997 to 2013, not to show mental state, but to rebut Defendant's claims that T.W. fabricated and that he acted in self-defense. R3231-39. A trial court is not bound by a prior non-final ruling. *Anderson v. Thompson*, 2008 UT App 3, ¶24, 176 P.3d 464. Given the greater evidence

supporting the second motion and the new theory under which its admission was sought, the trial court was well within its discretion to reconsider its prior ruling.

Rules 404(b) and 402. The trial court properly determined that Defendant's sexual assaults of A.K., A.M., M.M., and G.M. were relevant under the doctrine of chances for the contested, noncharacter purpose of rebutting Defendant's claims of self-defense and that T.W. fabricated. *State v. Lowther*, 2017 UT 34,¶48, 398 P.3d 1032 (doctrine of chances not limited to rebutting fabrication claims).

As the trial court explained, R3411-14, the Utah Supreme Court identified four foundational requirements for the admission of other bad acts under the doctrine of chances. *Verde,* 2012 UT 60,¶¶57-61. First, the "issue for which the uncharged misconduct evidence is offered must be in bona fide dispute." *Id.* ¶57 (cleaned up).[16] Second, each "incident must be roughly similar to the charged crime." *Id.* ¶58 (cleaned up). Third, "each accusation must be independent of the others." *Id.* ¶60. And fourth, the "defendant must

[16] This brief uses "(cleaned up)" to indicate that internal quotation marks, alterations, and citations have been omitted. *See State v. Cady*, 2018 UT App 8, ¶9, n.2, ---P.3d ---.

have been accused of the crime" or conduct "more frequently than the typical person endures." *Id.* ¶61.

Four women in three different states over sixteen years independently accused Defendant of sexual assault like Defendant's assault on T.W. Alcohol was involved in each attack. R2551,2946-47,4724,4758,4845. Defendant exerted physical dominance over each victim by grabbing them, pinning them down, and inhibiting their breathing. R2555-56,2948-49,2951,2965-66,4727-29,4761-63,4849-50. And, in each instance, Defendant either attempted to sexually assault or sexually assaulted each victim, then detained them. R2555-56,2950,2952,2955,4727-29,4759-60,4846-47.

This "improbable repetition of a similar event" had "the tendency to make [the] consequential fact[s]"—whether T.W. fabricated Defendant's assault against her—"more probable or less probable" under the doctrine of chances. *State v. Labrum*, 2014 UT App 5,¶30, 318 P.3d 1151. The prior sexual assaults were thus relevant under the doctrine of chances for the proper, noncharacter purposes of rebutting Defendant's claims that T.W. fabricated his assault and that he acted in self-defense.

Rule 403. Rule 403 provides that although relevant, other bad acts evidence may be excluded "if its probative value is substantially outweighed by the danger of…unfair prejudice, confusing the issues, or misleading the

jury." Utah R. Evid. 403. The fact that evidence is particularly damaging to a defendant does not make it *unfairly* prejudicial: "all effective evidence is prejudicial in the sense of being damaging to the party against whom it is offered." *Woods v. Zeluff*, 2007 UT App 84,¶7, 158 P.3d 552 (cleaned up). For evidence to be inadmissible under rule 403, the danger of unfair prejudice must *substantially* outweigh the evidence's probative value. *Lucero*, 2014 UT 15,¶32. "Given this bar," reviewing courts "indulge a presumption in favor of admissibility." *Lucero*, 2014 UT 15,¶32 (cleaned up). Evidence is unfairly prejudicial only if it creates "an undue tendency to suggest decision on an improper basis." *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989). "The critical question is whether certain testimony is so prejudicial that the jury will be unable to fairly weigh the evidence." *State v. Guzman*, 2006 UT 12,¶27, 133 P.3d 363. This Court "presume[s] that the proffered evidence is admissible unless '[it] has an unusual propensity to unfairly prejudice, inflame, or mislead the jury.'" *State v. Jaeger*, 1999 UT 1,¶18, 973 P.2d 404 (cleaned up).

Finally, the rule 403 balancing test is derived from the text itself, *Cuttler,* 2015 UT 95,¶15. Courts evaluate the "probative value" of the evidence and determine whether that value is "substantially outweighed" by unfair prejudice or other rule 403 concerns. When making that determination, "courts are not bound to any particular set of factors or elements." *Lowther*,

2017 UT 34,¶¶18,21. Rather, courts should consider any relevant factors. *Verde*, 2012 UT 60,¶12.[17]

Applying that test here, evidence of Defendant's sexual assaults of A.K., A.M., M.M., and G.M. was not substantially outweighed by the danger of unfair prejudice.

Evidence of A.K., A.M., M.M., and G.M.'s sexual assaults was highly probative to rebut Defendant's claim that T.W. fabricated the charged assault. Defense counsel elicited testimony that T.W. had lied about Defendant physically assaulting her in the past, R4654,4673; that T.W. had a character for untruthfulness, R4666; and that T.W. gave inconsistent accounts of the assault, R4826-28. And in closing argument, counsel argued that T.W.'s testimony was inconsistent. R5153-55. Because fabrication was central to

[17] To the extent that Defendant argues that the trial court erred by not using the *Shickles* factors in its analysis, he is mistaken. Br.Aplt.12,17 (citing *State v. Shickles*, 760 P.2d 291 (Utah 1988)). As Defendant acknowledges, the *Shickles* factors are "no longer binding legal precedent." *Id*. Indeed, the Utah Supreme Court rejected a strict *Shickles* inquiry four years ago in *Lucero*, 2014 UT 15,¶32. Under *Lucero*, it is "unnecessary for courts to evaluate each and every [*Shickles*] factor and balance them together in making their assessment" under rule 403. *Id.* Some factors "may be helpful in assessing the probative value of the evidence in one context," but others "may not be" in a different context. *Id.*; *accord State v. Reece*, 2015 UT 45,¶69, 349 P.3d 712 (holding that courts must "focus [their] analysis on the text of rule 403 and analyze only those *Shickles* factors that are relevant to the circumstances").

Defendant's defense, evidence that Defendant had previously sexually assaulted other women was highly probative. As the supreme court explained, when "two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story." *Verde*, 2012 UT 60,¶48 (cleaned up).

The 404(b) evidence also rebutted Defendant's claim of self-defense. Defendant testified that T.W. that attacked him and he was only defending himself. R4960-61. A.K., A.M., M.M., and G.M.'s accounts that Defendant was the instigator and that he assaulted them in similar ways rebutted that defense. *See* R4727-29,4761-63,4849-50. Thus, the evidence of Defendant's other sexual assaults had a high probative value.

In contrast, the danger of unfair prejudice from the evidence was low. Before and after the evidence was presented, the trial court instructed the jury that the evidence could not be used for character purposes and could only be used to determine whether (1) T.W. "fabricated her accusation"; and (2) "the Defendant acted in self-defense." R4719,5128. *See State v. Menzies,* 889 P.2d 393, 401 (Utah 1994).

Moreover, when the doctrine of chances is the basis for evidence's admission, the risk for improper character inferences is low. "Propensity

inferences do not pollute this type of probability reasoning" because the question is not what type of person Defendant is, but whether it is objectively likely that so many victims had falsely accused Defendant of similar assaults. *Verde*, 2012 UT 60,¶50.

Nonetheless, Defendant contends that (1) the 404(b) evidence was misleading and confused the jury because of its similarity[18]; (2) it was difficult for the jury to limit how it used the evidence; and (3) the evidence was confusing because the jury heard "days and days" of it. Br.Aplt.13-14.

Defendant's claims that the 404(b) evidence was too similar ignores that the Utah Supreme Court has repeatedly held that the similarity of the evidence makes it more likely that the evidence is admissible. *Lowther*, 2017 UT 34,¶36; *Verde*, 2012 UT 60,¶58.

Defendant's claim that it was difficult for the jury to limit how it used the evidence ignores that the trial court gave two jury instructions on just that. *See* R3766,3796,4718. This Court presumes that the jury follows instructions. *Menzies*, 889 P.2d at 401.

And Defendant misstates the record when he says the jury heard "days and days" of 404(b) evidence. Br.Aplt.14. The jury did not hear "days and

[18] Defendant's similarity argument is the opposite of what he argued below, that the evidence was too dissimilar. R1982-84,2379-80,3835-36.

days" of 404(b) evidence. The trial lasted for six days. The 404(b) evidence was heard over a day and a half, on the fourth and fifth days of the trial. R4713-4933.

Thus, Defendant has not shown that the trial court abused its discretion by admitting the rule 404(b) evidence.

II.

The prosecutor's closing argument was proper.

For the first time on appeal, Defendant argues that three sentences of the prosecutor's closing rebuttal remarks amounted to misconduct. Br.Aplt.18-22. During closing rebuttal, the prosecutor argued that the 404(b) evidence was "extremely relevant" and that the jury could consider it to determine "(1) whether [T.W.] fabricated her account; and (2) whether the defendant acted in self-defense." R5476. The prosecutor then argued "[w]hat are the odds, folks? What are the odds that these four women would accuse the defendant of similar violent assaults involving a sexual component, alcohol, strangulation, suffocation, or an injury on a neck? What are the odds?" R5176-77. When the prosecutor began to argue the 404(b) evidence, defense counsel objected, arguing that the prosecutor's statements went beyond his closing argument. *Id.* The court overruled the objection, noting that rebuttal addresses what defense counsel raised and agreeing with the

prosecutor that he can rebut counsel's closing argument that cast doubt on the 404(b) evidence. *Id*.

Defendant now argues that the prosecutor's remarks were improper because (1) they "implied Defendant was acting in conformity with his character; and (2) they appealed to the juror's emotions. Br.Aplt.19-20. Defendant's unpreserved claim fails because he argues no exception to the preservation rule. In any event, his claim lacks merit.

A. Defendant's unpreserved claim fails because he argues no exception to the preservation rule.

A party generally cannot raise an issue on appeal that it did not properly preserve in the trial court. *Oseguera v. State*, 2014 UT 31,¶10, 332 P.3d 963. To preserve an issue for appeal, a party must present the issue in "'the district court in such a way that the court has an opportunity to rule on [it].'" *Id.* (cleaned up). In other words, a party's objection must be both timely and specific. *See id.* The specificity requirement prevents a party from raising an issue on one ground but arguing another ground on appeal. *See id.* (a party that objects "based on one ground does not preserve any alternative grounds for objection for appeal") (cleaned up).

Here, counsel's objection was not timely. *See id.* Counsel did not object to the prosecutor's "what are the odds" argument. *See* R5176. Instead, counsel

waited to object until the prosecutor began arguing the specific 404(b) evidence. *See* R5177.

Additionally, counsel's objection was made on a different ground than Defendant now raises on appeal. *State v. Low*, 2008 UT 58,¶17, 192 P.3d 867. Counsel objected below only that the prosecutor's comments exceeded the scope of his closing argument, not that they "improperly implied [Defendant] was acting in conformity with his character" and appealed to the juror's emotions. *Compare* R5177 *with* Br.Aplt.19-20. Thus, Defendant's arguments are unpreserved.

A party seeking review of an unpreserved issue must "articulate an appropriate justification for appellate review"—such as plain error—"in the party's opening brief." *Oseguera*, 2014 UT 31,¶15 (cleaned up). When a party does not, this Court will decline to consider the issue. *See id.*; *see also State v. Rhinehart*, 2007 UT 61,¶21, 167 P.3d 1046. Defendant does not justify appellate review of this issue, and this Court should decline to consider it.

B. In any event, Defendant has not shown that the prosecutor's comments were so obviously improper that the trial court had no choice but to recognize and remedy them.

Even if this Court overlooked Defendant's preservation failure, the claim nevertheless fails. On a preserved prosecutorial misconduct claim, this Court reverses when "the actions or remarks of [prosecuting] counsel call to

the attention of the jury a matter it would not be justified in considering in determining its verdict and, if so, under the circumstances of the particular case, whether the error is substantial and prejudicial such that there is a reasonable likelihood that, in its absence, there would have been a more favorable result." *State v. Jadama*, 2010 UT App 107,¶21, 232 P.3d 545 (cleaned up). In assessing prejudice, this Court considers "the comments both in context of the arguments advanced by both sides as well as in context of all the evidence." *State v. Bakalov*, 1999 UT 45,¶56, 979 P.2d 799.

But where, as here, Defendant's claim is unpreserved, the standard is much higher. *State v. Dunn,* 850 P.2d 1201, 1208 (Utah 1993). Defendant must prove plain error, that an error exists; the error should have been obvious to the trial court; and the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome. *Id.* 1209. Thus, this Court does not review the propriety of the prosecutor's comments. Instead, Defendant must show that the prosecutor's comments "were so egregious that it would be plain error *for the district court* to decline to intervene *sua sponte*." *State v. Hummel*, 2017 UT 19,¶¶107-112, 393 P.3d 314 (emphasis in original). On this record, he cannot.

The prosecutor's argument was one of probability, asking the jury to consider "what are the odds" that four different women would falsely accuse

Defendant of similar violent assaults. R5176-77. This argument is the essence of the doctrine of chances. The doctrine of chances is a "theory of logical relevance" that asks the jury to consider the probability that a defendant would be accused of a similar crime multiple times. *Verde*, 2012 UT 60,¶¶47-51. Because the doctrine of chances explicitly allows using 404(b) evidence in this manner, Defendant cannot show that the trial court plainly erred by allowing the argument. *Id.*

Defendant argues that the argument was improper because the prosecutor used the evidence to show Defendant acted in conformity with his character. Br.Aplt.19. But the prosecutor did not do that. The prosecutor explicitly told the jury that the evidence could only be used to determine "(1) whether [T.W.] fabricated her account, and (2) whether the defendant acted in self-defense." R5176. And only after explaining the purpose of the evidence did the prosecutor argue probability. Thus, the prosecutor used the 404(b) evidence to prove probability, not character conformity. *See Verde*, 2012 UT 60,¶51 (404(b) evidence "tends to prove a relevant fact without relying on inferences from the defendant's character").

Relying on *State v. Wright*, 2013 UT App 142, 304 P.3d 887, Defendant also claims that the prosecutor's remark appealed to the juror's emotions and "diverted their attention from their legal duty." Br.Aplt.20. In *Wright,* this

Court held that the prosecutor's final statement 'You have the power to make that the abuse stop'—is beyond the scope of fair play" because it charges the jury with assuming the responsibility of the victim's safety. 2013 UT App 142,¶41 (cleaned up). This Court found that while the prosecutor's comments were improper, they did not require reversal because they were isolated and brief—a single sentence during a fifteen-page closing and rebuttal argument. *Id.* ¶42.

Unlike *Wright*, the prosecutor's argument here did not appeal to the jury's emotions. When read in context, the prosecutor's argument asked the jury to consider only the legally proper probative import of the evidence presented during trial. Additionally, the prosecutor's argument responded to defense counsel, who argued in closing that T.W. had fabricated Defendant's assault. R5166-67. The prosecutor's argument, resting on the evidence and representing the State's viewpoint, merely responded to that argument. *See Hummel,* 2017 UT 19,¶110 (stating in closing, "counsel have 'considerable latitude' in the points they may raise," and "the law recognizes the prerogative of opposing counsel to swallow their tongue instead of making an objection").

Nothing in the prosecutor's argument so obviously extended beyond the his "considerable latitude" that the trial court had no reasonable option but to intervene, unbidden by the defense.

In any event, Defendant has not shown a reasonable likelihood of a more favorable result absent the prosecutor's comment. Over six-days, the jury heard from nineteen different witnesses, amounting to over 1000 pages of transcribed testimony. The jury heard closing argument amounting to 50 transcribed pages. R5133-5183. By comparison, the prosecutor's challenged comments were brief—four lines in the middle of a thirteen-page rebuttal argument. R5170-5183;*see* R5176. As in *Wright*, Defendant cannot show a reasonable likelihood of a more favorable result absent the prosecutor's brief and "isolated" remarks. *See Wright*, 2013 UT App 142,¶¶42-43.

III.

The trial court properly exercised its discretion to deny a mistrial, where it struck the offending testimony, gave curative instructions, and excluded evidence.

Defendant argues that the trial court erred when it denied his mistrial motion based on T.W.'s testimony that Defendant's ex-wife shot him. Br.Aplt.22-27. Defendant argues that a mistrial was warranted because T.W.'s statement was so inflammatory that the curative instruction could not remedy it. Br.Aplt.24-26. Defendant argues that he was prejudiced because

jurors would wonder why he was shot. Br.Aplt.26. Defendant's claim fails because the prosecutor did not intentionally elicit T.W.'s statement, it was relatively innocuous in light of the testimony presented, the statement was stricken, curative instructions were given, and the witness that T.W. referenced was excluded altogether from testifying.

A. Background.

On the second day of trial, at the end of T.W.'s direct examination, T.W. answered one of the prosecutor's questions by stating that she knew that Defendant's ex-wife shot him five times. R4358.

> [The State]: At the time you reported this assault to the Smithfield Police Department were you aware of any general allegations that [G.M.] made against this defendant?
>
> [T.W.]: That they filed for divorce
>
> [The State]: Well, I'm talking about like a criminal accusation. Were you aware that she had accused him of any crimes?
>
> [T.W.]: I understand she shot him five times.

Id.

Defense counsel moved for a mistrial. R4360. The trial court denied the motion. R4360-85. The court found that the prosecutor asked a proper question and that T.W.'s response was non-responsive. R4370. The court also

found that T.W.'s testimony prejudiced Defendant, but that the prejudice could be cured. R4376-77. [19]

The court struck all questions and answers between the prosecutor and T.W. about G.M. R4384. Also, the court instructed the jury to "disregard all questions" by the prosecutor and statements by T.W. concerning G.M. and Defendant. R4385. And the court excluded all future 404(b) evidence related to G.M., including G.M.'s testimony. R4377.

Before the trial court released the jury that day, one juror asked: "can we know [the ex-wife's] name?" R4442. When the court responded that it told the jury the name in the curative instruction, the juror stated, "we can remember her name. [W]e just can't remember anything else." *Id*. The court then clarified that the jury does not "even need to remember her name. You don't even need to consider anything about G.M." *Id*.

Defendant renewed his mistrial motion, arguing that the jury, despite the curative instruction, was still "considering that" testimony. R4443. The

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[19] Defendant states that the trial court excluded the evidence of G.M. shooting him. Br.Aplt.22. Defendant overstates the court's order. In its second amended 404(b) motion, the State informed the trial court that it would not present the shooting evidence. R2329. Thus, the trial court never ruled on its admissibility. R3404 n.2. At trial, the prosecutor mistakenly agreed with defense counsel that the court previously excluded the shooting evidence. R4364. The trial court clarified at the mistrial motion that it ordered that the shooting evidence was excluded *unless* Defendant opened the door. R4376.

court denied the motion, explaining that the juror's question really was "do we forget her name," and "did not go to anything else." *Id*.

Following trial, Defendant again challenged the court's ruling in a motion to arrest judgment and a motion for new trial. R3830,3897. The trial court denied the motions, ruling that a mistrial was unnecessary where any prejudice was cured. R5322-25,5243-46.

B. The trial court acted within its discretion by denying Defendant's mistrial motion.

"In view of the practical necessity of avoiding mistrials and getting litigation finished," a trial court "should not grant a mistrial except where the circumstances are such as to reasonably indicate" that "a fair trial cannot be had and that a mistrial is necessary to avoid injustice." *State v. Butterfield*, 2001 UT 59,¶46, 27 P.3d 1133 (cleaned up). Once a trial court "has exercised its discretion" to deny a mistrial, the appellate court's "prerogative" on appeal "is much more limited." *Id.* (cleaned up). This Court reviews a trial court's ruling for a "clear[]" abuse of discretion. *Id*. The trial court's decision is given deference because of its "advantaged position" in assessing "the impact of events" "on the total proceedings." *Id.* (cleaned up).

Mistrial is unnecessary "when an improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented." *State v. Allen*, 2005 UT 11,¶40, 108 P.3d 730.

In *State v. Wach*, the supreme court held that no mistrial was required where the alleged improper statement "was not elicited by the prosecutor" and was "an isolated, off-hand remark, buried in roughly 244 pages of testimony." 2001 UT 35,¶46, 24 P.3d 948. And in *State v. Griffiths*, the supreme court affirmed the denial of a mistrial where a witness's improper reference to the defendant's outstanding arrest warrant "was very brief," made only "in passing," and stated no details of the circumstances which caused the warrant to issue or of the offense to which it was related." 752 P.2d 879, 883 (Utah 1988).

In other words, a trial court does not abuse its discretion simply because the challenged comment *might* have resulted in "some prejudice." *Butterfield*, 2001 UT 59,¶47 (cleaned up). Rather, the defendant must show real harm: "that there is a substantial likelihood that the jury would have found him not guilty had the improper statement not been made." *Id.*; Utah R. Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.").

Here, Defendant cannot show a "substantial likelihood that the jury would have found him not guilty" had T.W. not made her statement. *Butterfield*, 2001 UT 59,¶47. First, T.W.'s volunteered statement was not intentionally elicited by the prosecutor. Indeed, the prosecutor did not ask

about the shooting but asked about general criminal accusations. R4358. Nothing about the prosecutor's question was designed to elicit T.W.'s response. *See Wach*, 2001 UT 35,¶46.

Second, T.W.'s unsolicited statement was made in passing and was relatively innocuous in light of all the testimony presented. The trial lasted for six days, encompassed nineteen witnesses, and resulted in over 1000 pages of transcript. R4145-5185. The only mention of the shooting was T.W.'s single sentence, made before lunch on the second day of trial. R4358. After T.W. made the statement, the jury then heard four and half more days of testimony and closing argument. Like in *Wach*, the testimony was an "isolated, off-hand remark" buried in roughly 1000 pages of testimony. 2001 UT 35,¶46.

Finally, T.W.'s unsolicited statement was unlikely to influence the jury. The jury was instructed to disregard the statement and not consider it in any deliberations. R4385. Utah courts have long accepted that curative instructions ordinarily ameliorate an improper statement's potential prejudicial effects. *See Griffiths*, 752 P.2d at 883 ("the prompt action of the trial court in admonishing the jury to disregard the testimony obviated any prejudice that might have resulted" from the improper comment); *State v. Cooper*, 2011 UT App 412,¶21 n.11, 275 P.3d 250 (recognizing "general

acceptance" of trial court's "use of a curative jury instruction to remedy errors during trial"). And this Court presumes that the jury followed the instruction. *State v. Harmon*, 956 P.2d 262, 271-73 (Utah 1998) (holding that juries are presumed to follow jury instructions to "disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant")(cleaned up).

Moreover, T.W.'s statement was not prejudicial in light of the other evidence the jury heard. *See Wach*, 2001 UT 35,¶46 (statement not inflammatory given the "violent nature" of crime; jury did not convict because of statement but because of totality of the evidence). The jury heard that Defendant—over several hours—strangled, choked, and forced his penis in T.W.'s mouth. R4271-4286. T.W.'s testimony was supported by photos, her medical record, her co-workers' testimony that described her bruised and battered face, Marty and Diane's testimony that T.W. was inconsolably upset, the two officers' testimony that described T.W's injuries and their investigation, the strangulation and domestic violence experts testimony, and the testimony of A.K., A.M., and M.M., each of whom testified that Defendant similarly attacked them. R4243-4352;4385-95,4404-4931;SE22-28,42. The jury

did not convict Defendant because they heard his ex-wife shot him; they convicted him because they heard, and believed, what he did to T.W.

Defendant contends that the curative instruction was inadequate because one juror asked the court to clarify its instruction and the entire jury was "immensely" affected by the statement. Br.Aplt.27. But Defendant's argument that the juror's question shows that the jury was "immensely" affected by T.W.'s statement is speculative. Br.Aplt.27. Nothing in the record supports his logical leap where the juror only asked for clarification, and that request had nothing to do with the shooting evidence or the instruction to disregard it.

In sum, Defendant has not shown that the trial court abused its discretion by denying Defendant's mistrial motion.

IV.

Defendant's aggravated kidnapping and aggravated sexual assault convictions did not so obviously merge that the trial court had to raise the issue sua sponte.

Defendant argues under *State v. Finlayson* that his aggravated kidnapping and aggravated sexual assault convictions should merge.[20] Br.Aplt.27-31 (citing 2000 UT 10, 994 P.2d 1243 (*Finlayson I*)). Defendant

[20] The continued viability of *Finlayson* merger is pending before the Utah Supreme Court in *State v. Wilder*, Case No. 20160952-SC.

acknowledges that his claim is unpreserved and this "Court should review this issue under plain error and ineffective assistance of counsel," but he does not actually argue plain error or ineffective of counsel. Br.Aplt.28-29. For this reason alone, Defendant's claim fails.

A. Background.

After trial, Defendant moved the trial court to (1) merge his aggravated sexual assault conviction with his forcible sexual abuse conviction under *Shondel*; and (2) merge his aggravated kidnapping conviction with his aggravated assault under the *Finlayson* merger test. *See generally Finlayson I*, 2000 UT 10; *see also* R3920-22.

The trial court denied Defendant's merger motion. R5327-29. First, the court ruled that Defendant's aggravated sexual abuse and forcible sexual abuse convictions did not merge because the statutes require different elements; thus, *Shondel* is inapplicable. R5327. Second, the court ruled that Defendant's aggravated kidnapping and aggravated assault convictions did not merge because the aggravated kidnapping was not incidental to or inherent in the aggravated assault, and was thus independent of the aggravated assault. R5327-29.

B. Defendant's unpreserved argument fails because he argues no exception to the preservation rule.

For the first time on appeal, Defendant argues that his aggravated kidnapping and aggravated sexual assault convictions should merge. Br.Aplt.27-31. Defendant argues that the merger issue was preserved "in part" when counsel moved to merge some of his convictions below. Br.Aplt.28. Defendant acknowledges that he never argued below, as he does on appeal, that his aggravated kidnapping and aggravated sexual assault convictions should merge. *See* R3920-22;5313-16;5325-29; Br.Aplt.27. Thus, nothing about Defendant's claim is preserved. *Oseguera*, 2014 UT 31,¶10 (to preserve an issue for appeal, a party must present the issue in "'the district court in such a way that the court has an opportunity to rule on'" it).

But while Defendant argues that this Court should analyze this issue under plain error and ineffective assistance of counsel, he fails to do so himself. Br.Aplt.27-31. *See State v. Green*, 2005 UT 9,¶11, 108 P.3d 710 ("A brief [that] does not fully identify, analyze, and cite its legal arguments may be 'disregarded or stricken' by the court[.]") (quoting Utah R. App. P. 24(j)); *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998) (explaining an issue is inadequately briefed "when the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court"). Because Defendant does not actually make an argument under any appropriate

exception to the preservation rule—even though he recognized the necessity of doing so when he acknowledged his preservation failure and identified the appropriate standard of review—he wholly fails to meet his appellate burden. Thus, this Court should not address his unpreserved and inadequately-briefed claim. *State v. Atkinson*, 2017 UT App 83,¶5, 397 P.3d 874.

C. In any event, Defendant has not proven either plain error or ineffective assistance of counsel.

To prevail on a preserved *Finlayson* merger claim, an appellant must show that the *Finlayson* merger test applies. The supreme court adopted the three-part *Finlayson* merger test for cases in which "'a taking or confinement is alleged to have been done to facilitate the commission of another crime.'" *Finlayson I*, 2000 UT 10, ¶23 (cleaned up); *see also State v. Lee*, 2006 UT 5,¶¶27-31, 128 P.3d 1179; *State v. Sanchez*, 2015 UT App 27,¶9, 344 P.3d 191. The *Finlayson* merger test applies only when a defendant has been convicted of both "'a violent crime, in which detention is inherent, and the crime of kidnapping based solely on the detention necessary to the commission of the companion crime.'" *Sanchez*, 2015 UT App 27,¶8 (cleaned up).

But where the claim is unpreserved, as here, the standard is even higher. *Dunn,* 850 P.2d at 1208. Defendant has the added burden of proving obvious and prejudicial error. *State v. Holgate*, 2000 UT 74,¶17, 10 P.3d 346.

To show that his counsel was ineffective, Defendant must establish that his counsel's performance was deficient, and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, Defendant must show that his counsel "made errors so serious" that he "was not functioning as the 'counsel' guaranteed…by the Sixth Amendment." *Id.* Plain error and ineffective assistance share a common prejudice standard: that but for the trial court's or counsel's alleged error there is a reasonable probability of a more favorable outcome for the defendant. *State v. Munguia*, 2011 UT 5,¶13, 253 P.3d 1082. If Defendant fails to meet "any one of these requirements," neither ineffective assistance nor "plain error is…established." *Dunn,* 850 P.2d at 1209; *Parsons v. Barnes*, 871 P.2d 516, 522 (Utah 1994).

1. Defendant has not shown plain error.

The trial court did not obviously err because merger is inappropriate. When a kidnapping "is alleged to have been done to facilitate the commission of another crime," a separate kidnapping conviction is appropriate only if "'the resulting movement or confinement" (1) was not "'slight, inconsequential, and merely incidental to the other crime,'"; (2) was not "'of the kind inherent in the nature of the other crime'"; and (3) had "'some significance independent of the other crime in that it [made] the other crime

substantially easier of commission or substantially lessen[ed] the risk of detection.'" *Finlayson I*, 2000 UT 10,¶23.

Finlayson's second appeal supports the conclusion that merger is inappropriate. *State v. Finlayson*, 2014 UT App 282, 362 P.3d 926 (*Finlayson II*). There, after Finlayson physically assaulted the victim, she briefly escaped by running to the front door of the house. *Id*. ¶2. Finlayson blocked the door, threw the victim down the stairs, strangled her, and sat on her for twenty minutes. *Id.* ¶¶4-5. This Court held that merger of Finlayson's aggravated kidnapping and aggravated assault charges was inappropriate because: (1) the acts of detention—blocking the victim's exit and sitting on top of her—were not inconsequential; (2) the period of restraint was not incidental to a prior assault; and (3) the detention was not inherent in the nature of an aggravated assault but was independently significant because Finlayson could have pushed the victim down the stairs without also detaining her. *Id*. ¶¶51-52.

Similarly, in *State v. Lee*, the supreme court held merger did not occur where Lee sexually assaulted a woman, recaptured her after she fled, dragged her across a highway, and physically assaulted her again. 2006 UT 5,¶¶3-4, 128 P.3d 1179. The court observed that dragging the victim "across a highway by her hair was not 'slight, inconsequential and merely incidental

to' the assault Lee had already commenced against her." *Id.*¶34. (cleaned up). Nor was the detention "inherent in the nature of" the sexual assault because "most assaults do not involve the relocation of the victim from one site to another." *Id.* The detention was also independently significant because it made the assault easier to continue and harder to detect. *Id.*

And in *State v. Sanchez*, this Court held that merger did not occur where, after Sanchez physically assaulted the victim, the victim escaped the apartment, ran down the hallway to a neighbor's apartment where Sanchez recaptured her, dragged her 58 feet down the hallway back to her apartment, shut the door, and then escalated his attack, nearly ripping off the victim's ear and biting her cheek. 2015 UT App 27,¶¶2-3, 7. This court explained that merger was inappropriate because the victim "interrupted the attack by breaking free from Sanchez, escaping the apartment, and then seeking refuge" with a neighbor. *Id.* "Sanchez's recapture" of the victim was therefore "not 'slight, inconsequential, and merely incidental' to the assault." *Id.* (cleaned up). Nor was the detention "'inherent in the nature' of the assault" because Sanchez detained the victim to prevent the neighbor from helping her. *Id.* The detention also "made it easier for Sanchez to commit the second assault" because he removed her from a source of help and returned her to her apartment. *Id.*

Like *Finlayson II*, *Lee*, and *Sanchez*, Defendant committed a separate kidnapping here. After T.W. ran to the backdoor, Defendant blocked her exit, threw her down the stairs, and dragged her through the house. R4280. Defendant's actions unlawfully detained T.W., hindering T.W.'s escape and the discovery or reporting of his initial aggravated sexual assault and aggravated assault, inflicting bodily injury on T.W., and terrorizing her. R3666; *see* Utah Code Ann. §76-5-302 (West 2017) (aggravating kidnapping).

Defendant's kidnapping also does not merge into either of his sexual assaults because it is temporally distinct from them. By the time Defendant committed the detention, he had already sexually assaulted T.W. once—hours before when he forced his erect penis in her mouth in the family room. R4277-78; *see Finlayson I*, 2000 UT 10,¶23 (kidnapping committed after a completed sexual assault cannot be done "to facilitate the commission of" the sexual assault, thus the merger test is inapplicable). Thus, Defendant's first sexual assault was complete before he detained T.W.

Defendant's second sexual assault—when he orally sodomized T.W. in the bedroom—also does not merge with the kidnapping. In *Finlayson II*, *Lee*, and *Sanchez*, the defendant, after the initial assault, stopped the victim's escape, detained her, then re-assaulted her. *Lee*, 2006 UT 5,¶4; *Sanchez*, 2015 UT App 27,¶12; *Finlayson II*, 2014 UT App 282,¶¶4-5.

So too here. After Defendant's initial assault, he stopped T.W.'s escape, then detained her. R4280. He initiated a new criminal act by impeding her movement—preventing her escape by throwing her down the stairs and dragging her. *Id*. He then sexually assaulted her again. R4280-81. Defendant's detention of T.W. was therefore not "slight, inconsequential, and merely incidental" to either aggravated sexual assault.

Moreover, Defendant committed three other detentions during the several-hours-long attack. Defendant detained T.W. when he (1) initially pushed her down the stairs and dragged her the family room, R4275; (2) straddled her in the family room, constraining her breathing, *id*.; and (3) dragged her down the hallway, forced her up the stairs to the bathroom and threw her into the bathtub. R4278-79. But he was only charged with one count of aggravated kidnapping. R3707. The jury could have found him guilty of aggravated kidnapping for any one of these detentions.

None of these detentions merge into either of Defendant's sexual assaults. Each detention was a separate act that made the physical and sexual assaults easier to continue and harder to detect, prevented T.W. from reporting the abuse or escaping, and impeded T.W.'s movements. *Finlayson I*, 2000 UT 10,¶23

Thus, the *Finlayson* merger test does not so obviously apply here that the trial court had to sua sponte recognize and apply it.

2. Defendant has not shown that his counsel's performance was deficient.

Defendant cannot show that his counsel performed deficiently. As explained, the *Finlayson* merger test does not apply. Just as the *Finlayson* merger test would not have been obvious to the trial court, reasonable counsel could overlook it or decide that making a merger motion had a low chance of success. *See, e.g., Archuleta v. Galetka,* 2011 UT 73,¶61, 267 P.3d 232 (counsel does "not provide ineffective assistance…for electing not to bring a claim that had little or no chance of gaining any traction").

3. Defendant has not shown prejudice.

Defendant cannot show prejudice. As explained, under the *Finlayson* merger test, Defendant's aggravated kidnapping and aggravated sexual assault convictions do not merge. Because merger is inapplicable, Defendant has not shown that he was prejudiced by either the trial court's or trial counsel's omissions.

V.

Defendant has not overcome the strong presumption that his counsel was effective.

Defendant argues that his counsel was ineffective for not calling an expert witness to explain his knife wounds and T.W.'s mental state and

another expert to replace Sue Bryner, a forensic nurse who died before trial. Br.Aplt.32-33; *see also* R1009. Defendant's arguments fail because he does not provide any reasoned analysis showing why there was a reasonable likelihood of a more favorable outcome. Nor can Defendant show that no reasonable attorney would have acted as his counsel did here.

To show that his counsel was ineffective, Defendant must prove that his counsel performed deficiently, and that Defendant was prejudiced as a result. *See Strickland*, 466 U.S. at 687-89, 694. Defendant must prove both elements. *See id.* at 697. "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

A court need not review the deficient performance element before examining the prejudice element. *Strickland*, 466 U.S. at 670. Where, as here, "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Id*.

A. Defendant has not even argued, let alone proven, prejudice.

Defendant does not meaningfully address prejudice. Br.Aplt.33. Rather, Defendant concludes in one sentence that "*If* there were additional witnesses to corroborate [Defendant's] side of the case, then there was a reasonable likelihood of a different outcome." Br.Aplt.33 (emphasis added). His "if" is fatal. It suggests no more than the unremarkable truism that if the

evidence were otherwise, then the result might have been otherwise. That is true of literally every case, but says nothing to advance his claim that counsel left something important undone here.

Instead, Defendant's argument merely begs the questions it should have answered: who were the additional witnesses, what would they have said, and how would that additional testimony have changed the evidentiary picture? Without such supporting evidence and analysis, Defendant has not proven prejudice. Indeed, "merely rephrasing that which must ultimately be shown to satisfy the second prong of the *Strickland* test" is "clearly insufficient to affirmatively demonstrate a reasonable probability that the trial result would have been different if counsel had not performed deficiently." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993).

This Court may thus dispose of Defendant's claim on this ground alone. *See Green*, 2005 UT 9,¶11 ("A brief [that] does not fully identify, analyze, and cite its legal arguments may be 'disregarded or stricken' by the court[.]") (cleaned up); Utah R. App. P. 24(a)(9).

To prove prejudice, Defendant had to prove "a reasonable probability" that but for counsel's performance, "the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However,

the "likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011). The defendant "has the difficult burden of showing…*actual prejudice*." *Tyler*, 850 P.2d at 1259 (cleaned up).

Under that standard, Defendant cannot show prejudice. Defendant contends that had his counsel called either an expert witness to explain his knife wounds and T.W.'s mental state and another expert to replace Sue Bryner, who died before trial, there was a reasonable likelihood of a different outcome. Br.Aplt.33.

In assessing whether Defendant has carried his burden, this Court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. At a minimum, Defendant must consider counsel's alleged deficiency in the context of the inculpatory evidence presented at trial and demonstrate how counsel's alleged deficiency would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *Id.* 695-96.

At trial, the State presented T.W.'s testimony, photos and medical documentation of her injuries. R4243-4352;SE22-28,42. Also, T.W.'s co-workers' testified about her bruised and battered face, and Marty and Diane testified that T.W. was inconsolably upset. R4385-95. Two officers testified about T.W's injuries, the discolored carpet inside the house, and finding

T.W.'s torn clothing. R4403-42,4489-4550 The strangulation and domestic violence experts testified that T.W.'s testimony was consistent with a person who had been assaulted. R4179-4203,4550-4608. Defendant lied to the police about the assault and threatened T.W. afterward. R4399;SE19; *see also* voicemail transcript. And A.K., A.M., and M.M.'s testified that Defendant similarly attacked them. R4719-82,4839-75.

Defendant has not even identified the experts he says counsel should have called, much less demonstrated what their testimony would have been. And without that proof, Defendant has not shown how any expert testimony would have rebutted any of the evidence against him, let alone "so altered the evidentiary landscape that a more favorable outcome would have been reasonably probable." *Strickland*, 466 U.S. at 695-96.

Regardless, Defendant speculates that a hypothetical expert witness would have supported his fabrication and self-defense claims. But Defendant ignores that the 404(b) testimony seriously undermined his fabrication and self-defense claims. Defendant fails to explain how an expert would have shown that four independent witnesses, who each testified that Defendant assaulted them in a similar way, all coincidentally fabricated the same or similar stories. Defendant, therefore, has not shown—and cannot show—that

but for counsel calling an expert witness, he would have received a more favorable outcome.

B. Defendant cannot show deficient performance.

Nor can Defendant show deficient performance because he presents no evidence to "rebut the strong presumption that under the circumstances," his counsel's decisions to not call expert witnesses "might be considered sound trial strategy." *State v. Taylor*, 2007 UT 12,¶73, 156 P.3d 739 (cleaned up). To show deficient performance under *Strickland*, Defendant must show that his counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. "[T]rial counsel's error must be so egregious that no reasonably competent attorney would have acted similarly." *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011). This Court's review of counsel's performance thus begins with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997) (cleaned up). This presumption recognizes that counsel faces a "variety of circumstances" and have a "range of legitimate decisions regarding how to best represent a criminal defendant." *State v. Tyler*, 850 P.2d 1250, 1254, (Utah 1993); *see also Strickland*, 466 U.S. at 689. Indeed, "[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the

record, and interacted with the client, with opposing counsel, and with the judge." *Richter*, 562 U.S. at 105.

An allegation that counsel did not call experts does not establish that counsel in fact did not consider or investigate whether an expert would be useful to the defense. This is because counsel's decision "not to call an expert witness is a matter of trial strategy, which will not be questioned and viewed as ineffectiveness unless there is no reasonable basis for that decision." *State v. Walker*, 2010 UT App 157,¶14, 235 P.3d 766; *accord Tyler*, 850 P.2d at 1256.

Defendant presents no evidence that his counsel did not fully consider and investigate calling expert witnesses. This Court must therefore presume that counsel did, and that the investigation proved the expert strategy either fruitless or harmful to the defense. *See Litherland*, 2000 UT 76,¶17 (holding that inadequacies in the record "will be construed in favor of a finding that counsel performed effectively").

Defendant's claim amounts to nothing more than speculation that his current counsel "'would have taken a different course.'" *Parsons*, 871 P.2d at 524 (cleaned up). But he cannot really say even that because he provides no evidence about what an expert investigation would have turned up. Such allegations and speculation do not prove deficient performance. *See id*.

This is especially so where counsel may have reasonably decided to rely on cross-examination of the State's experts to support the defense theory. *See Richter*, 562 U.S. at 107 (counsel was "entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Counsel may have decided cross-examining the State's experts to support the defense theory would be more persuasive than hiring a defense witness who was subject to cross-examination. Indeed, in "many instances, cross-examination will be sufficient to expose defects in an expert's presentation." *Id*. 111. And that is the case here. "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Id.* 110.

Counsel cross-examined the State's knife expert, Dr. Todd Grey, the chief medical examiner in Utah, eliciting concessions that the expert only examined the State's photos, did not examine Defendant, and did not know specifically how Defendant's wounds were inflicted. R5085,5097. Counsel then argued in closing that "the best expert you can hire in the state…doesn't say" Defendant's version of events "couldn't have happened." R5163.

Counsel also effectively cross-examined the State's strangulation expert, eliciting testimony that it was possible that Defendant acting in self-

defense caused T.W.'s injuries. R4595. On cross-examination, the strangulation expert also testified that she did not examine T.W., but relied on T.W's statements, police reports, and medical records in formulating her opinion. R4595,4597. In closing, counsel used the State's expert's testimony to argue that T.W. fabricated her accusations. R5159-60. On this record, Defendant cannot show deficient performance where counsel may have reasonably decided that eliciting concessions from both of the State's experts was an effective trial strategy. *See Richter*, 562 U.S. at 107. [21]

Defendant has not shown—and cannot show—that his counsel performed deficiently. Neither has Defendant shown prejudice. Thus, Defendant's claim fails.

VI.

The victim's testimony was not inherently improbable.

Defendant argues that T.W's testimony was inherently improbable under *State v. Robbins*. Br.Aplt.33-38 (citing 2009 UT 23, 210 P.3d 288). Defendant's claim fails because it is unpreserved and he argues no exception

[21] To the extent that Defendant suggests that Sue Bryner's report was a trial exhibit, he misreads the record. Br.Aplt.33. The report was never admitted as an exhibit. *See* Exhibit List. The State's strangulation expert was given a copy of the report in preparation of her trial testimony. R4602-03. However, the expert did not rely on the report in formulating her opinion. R4606-07.

to the preservation rule. And Defendant cannot show obvious prejudicial error. Under *Robbins*, an appellate court may disregard a witness's testimony only where a witness "presents *inherently contradictory* testimony" *and* "there is a complete lack of circumstantial evidence of guilt." 2009 UT 23,¶18 (cleaned up). Defendant has not made—and cannot make—either showing.

A. Defendant's unpreserved argument fails because he argues no exception to the preservation rule.

Defendant argues that his claim is preserved by the motion to arrest judgment. Br.Aplt.34. That is incorrect.

In his motion to arrest judgment, Defendant argued that the 404(b) evidence was improperly admitted at trial. R3830-44;5216-31;5237. He did not argue that T.W.'s testimony was inherently improbable. *See* R3830-44;5216-31;5237. Defendant did not present the issue to the trial court, and the trial court did not have the opportunity to rule on it. *See Oseguera*, 2014 UT 31,¶10. Defendant's claim is thus unpreserved. *See id.* And Defendant argues no exception to the preservation rule. *Atkinson*, 2017 UT App 83,¶6. This Court should decline to address his claim. *Id.*

B. Defendant has not shown—and cannot show—that the trial court should have taken the case from the jury on its own motion.

The law has long been settled that the jury "'serves as *the exclusive judge* of both the credibility of the witnesses and the weight to be given particular evidence.'" *State v. Prater*, 2017 UT 13,¶31, 392 P.3d 398 (cleaned up). This is so even when the evidence is "conflicting or disputed." *Id*. Simply put, an appellate court "is not normally in the business of reassessing or reweighing evidence." *Id*. ¶32. Accordingly, when reviewing the sufficiency of the evidence on appeal, this Court must generally resolve "conflicts in the evidence *in favor of* the jury verdict." *Id*. (cleaned up).

In one narrow exception, a reviewing court may reassess a witness's testimony: where it is "inherently improbable." *Robbins*, 2009 UT 23,¶16. But this standard is "stringent." *State v. Phillips*, 2012 UT App 286,¶22, 288 P.3d 310. Testimony is inherently improbable only if it is "incredibly dubious," thus "apparently false." *Robbins*, 2009 UT 23,¶18. Moreover, testimony is inherently improbable only when a "'witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt.'" *Id.* ¶18 (cleaned up). As the supreme court clarified in *Prater*, 2017 UT 13,¶38, however, trial testimony that differs from pretrial statements is not, without more,

inherently improbable. Rather, it takes something like "inconsistencies" "*plus*…patently false statements…*plus* the lack of any corroboration." In short, this course of action is "uncommon." *State v. Marks*, 2011 UT App 262,¶78, 262 P.3d 13. Defendant must show that T.W.'s testimony was materially inconsistent and entirely uncorroborated. *See Prater*, 2017 UT 13,¶¶33-34.

And because Defendant's claims are unpreserved, he has the added burden of showing that the evidence's "insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury." *Holgate*, 2000 UT 74,¶17. On this record, Defendant cannot meet his burden.

T.W.'s testimony was not obviously inherently improbable. T.W.'s testimony was corroborated by photos and medical records of her injuries, the police investigation, the domestic violence and strangulation experts' testimony, and the testimony of Marty, Diane, and T.W.'s co-workers. As explained in *Robbins*, the "existence of *any* additional evidence supporting the verdict prevents the judge from reconsidering the witness's credibility." 2009 UT 23,¶19 (emphasis added). Thus, the inherent-improbability exception does not apply since "other witness testimony and circumstantial evidence supported the conviction." *Id*. (cleaned up).

Defendant claims that T.W.'s testimony was inherently improbable because she testified inconsistently with her preliminary hearing testimony when she testified that she was strangled in the hallway and was choked to unconsciousness twice. Br.Aplt.36.[22]

Prater made clear that *Robbins* does not apply to such inconsistencies. *Prater*, 2017 UT 13,¶13. In *Prater,* three witnesses testified inconsistently with their pre-trial statements. The supreme court held that such inconsistencies did not render the witnesses' testimony "apparently false," because the question of which version to believe "is the type of question we routinely require juries to answer." *Id*.

Defendant also argues that T.W.'s testimony was inherently improbable because she was "highly intoxicated" at the time of the assault. Br.Aplt.38. Even if T.W. was intoxicated, intoxication does not render a witness "inherently unreliable." *Cf. State v. Christensen*, 2016 UT App 225,¶19, 387 P.3d 588 ("witness is not rendered incompetent merely because her

[22] Defendant misstates the record when he argues that T.W. admits that "she may have passed out because she was drunk." Br.Aplt.36. To support his assertion, Defendant cites to "R2 95:1-5," or Bates numbered page 4334. There, counsel asked T.W., "I believe on direct testimony your statement was 'I passed out maybe because I was drunk.'" R4334. T.W. answers, "I don't recall saying that." *Id*. Counsel asks," Why did you pass out then?", and T.W. responded, "because I couldn't breathe." R4334.

memory is less than complete, or because she was intoxicated or otherwise impaired during the events in question") (cleaned up); *see also State v. Villarreal*, 857 P.2d 949, 956 (Utah Ct. App. 1993) (concluding victim competent to testify even though she was intoxicated while sexually assaulted). Defendant cites no case stating otherwise. Indeed, whether Victim was intoxicated or not is a classic credibility question, not a *Robbins* claim. *See State v. Nay*, 2017 UT App 3,¶15 (witness's memory and quality of her perception relates to the weight and credibility of her testimony).

Defendant also argues that T.W.'s testimony was inherently improbable because (1) she returned to the house after the assault; (2) her hair was not wet, even though she testified that she was thrown in the bathtub; (3) she did not initially tell the police about the sexual assault; and (4) her doctor "found only superficial bruising and complaints of soreness, which can easily be explained by [Defendant's] version of event." Br.Aplt.37-38.

As an initial matter, Defendant misstates the record when he argues that T.W.'s doctor "found only superficial bruising and complaints of soreness." Br.Aplt.38. The medical report shows the doctor also found "decreased opening of [T.W.'s] jaw and recommended x-rays of T.W.'s ribs and jaw. SE42.

Defendant's claims are nothing more than run-of-the-mill challenges to T.W.'s credibility. But *Robbins* does not allow defendants to challenge testimony for "generalized concerns about a witness's credibility." 2009 UT 23, ¶19 (cleaned up). Such credibility disputes must be resolved by the jury. *See Prater,* 2017 UT 13,¶¶39,41*; State v. Mead*, 2001 UT 58,¶67, 27 P.3d 1115.

Yet that is precisely Defendant's quarrel—that the jury believed T.W. over his view of the evidence. Defendant's "personal view of events does not, however, render the State's evidence 'sufficiently inconclusive or inherently improbable' so as to warrant a reversal." *State v. Johnson*, 2015 UT App 312,¶12, 365 P.3d 730 (cleaned up). Thus, Defendant has not shown that the trial court overlooked such apparently false testimony that it no choice but to withhold the case from the jury. *See Holgate*, 2000 UT 74,¶17.

CONCLUSION

For the foregoing reasons, this Court should affirm Defendant's convictions.

Respectfully submitted on April 10, 2018.

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 14,655, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Lindsey Wheeler
LINDSEY WHEELER
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 10, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☑ mail ☐ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

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/s/ Melanie Kendrick

Addenda

Addendum A

Utah R. Evid. 401. Definition Of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Utah Rules of Evidence, Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissibl

Utah Rules of Evidence, Rule 403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah Rules of Evidence, Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(a)(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(a)(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(a)(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(c) Evidence of similar crimes in child molestation cases.

(c)(1) In a criminal case in which the accused is charged with child molestation, evidence of the commission of other acts of child molestation may be admissible to prove a propensity to commit the crime charged provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such **evidence** it intends to introduce at trial.

(c)(2) For purposes of this **rule** "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(3) **Rule** 404(c) does not limit the admissibility of **evidence** otherwise admissible under **Rule** 404(a), 404(b), or any other **rule** of **evidence**.

Utah Code Annotated § 76-5-302 (West Supp. 2017) Aggravated Kidnapping

(1) An actor commits aggravated kidnapping if the actor, in the course of committing unlawful detention or kidnapping:
(a) possesses, uses, or threatens to use a dangerous weapon as defined in Section 76-1-601; or
(b) acts with intent:
(i) to hold the victim for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct;
(ii) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony;
(iii) to hinder or delay the discovery of or reporting of a felony;
(iv) to inflict bodily injury on or to terrorize the victim or another;
(v) to interfere with the performance of any governmental or political function; or
(vi) to commit a sexual offense as described in Title 76, Chapter 5, Part 4, Sexual Offenses.
(2) As used in this section, "in the course of committing unlawful detention or kidnapping" means in the course of committing, attempting to commit, or in the immediate flight after the attempt or commission of a violation of:
(a) Section 76-5-301, kidnapping; or
(b) Section 76-5-304, unlawful detention.
(3) Aggravated kidnapping is a first degree felony punishable by a term of imprisonment of:
(a) except as provided in Subsection (3)(b), (3)(c), or (4), not less than 15 years and which may be for life;
(b) except as provided in Subsection (3)(c) or (4), life without parole, if the trier of fact finds that during the course of the commission of the aggravated kidnapping the defendant caused serious bodily injury to another; or
(c) life without parole, if the trier of fact finds that at the time of the commission of the aggravated kidnapping, the defendant was previously convicted of a grievous sexual offense.
(4) If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(a) for purposes of Subsection (3)(b), 15 years and which may be for life; or
(b) for purposes of Subsection (3)(a) or (b):
(i) 10 years and which may be for life; or
(ii) six years and which may be for life.
(5) The provisions of Subsection (4) do not apply when a person is sentenced under Subsection (3)(c).

(6) Subsections (3)(b) and (3)(c) do not apply if the defendant was younger than 18 years of age at the time of the offense.
(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Utah Code Annotated § 76-5-405 (West 2017)

(1) A person commits aggravated sexual assault if:
(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:
(i) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;
(ii) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or
(iii) is aided or abetted by one or more persons;
(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:
(i) causes serious bodily injury to any person;
(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;
(iii) attempts to compel the victim to submit to rape, object rape, or forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or
(iv) is aided or abetted by one or more persons; or
(c) in the course of an attempted forcible sexual abuse, the actor:
(i) causes serious bodily injury to any person;
(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;
(iii) attempts to compel the victim to submit to forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or
(iv) is aided or abetted by one or more persons.
(2) Aggravated sexual assault is a first degree felony, punishable by a term of imprisonment of:
(a) for an aggravated sexual assault described in Subsection (1)(a):
(i) except as provided in Subsection (2)(a)(ii) or (3)(a), not less than 15 years and which may be for life; or

(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous sexual offense;
(b) for an aggravated sexual assault described in Subsection (1)(b):
(i) except as provided in Subsection (2)(b)(ii) or (4)(a), not less than 10 years and which may be for life; or
(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous sexual offense; or
(c) for an aggravated sexual assault described in Subsection (1)(c):
(i) except as provided in Subsection (2)(c)(ii) or (5)(a), not less than six years and which may be for life; or
(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous sexual offense.
(3)(a) If, when imposing a sentence under Subsection (2)(a)(i), a court finds that a lesser term than the term described in Subsection (2)(a)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(i) 10 years and which may be for life; or
(ii) six years and which may be for life.
(b) The provisions of Subsection (3)(a) do not apply when a person is sentenced under Subsection (2)(a)(ii).
(4)(a) If, when imposing a sentence under Subsection (2)(b)(i), a court finds that a lesser term than the term described in Subsection (2)(b)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than six years and which may be for life.
(b) The provisions of Subsection (4)(a) do not apply when a person is sentenced under Subsection (2)(b)(ii).
(5)(a) If, when imposing a sentence under Subsection (2)(c)(i), a court finds that a lesser term than the term described in Subsection (2)(c)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than three years and which may be for life.
(b) The provisions of Subsection (5)(a) do not apply when a person is sentenced under Subsection (2)(c)(ii).

(6) Subsections (2)(a)(ii), (2)(b)(ii), and (2)(c)(ii) do not apply if the defendant was younger than 18 years of age at the time of the offense.
(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Addendum B

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ANTHONY CHARLES MURPHY, Defendant.	**MEMORANDUM DECISION** Case No. 091100683 Judge: Thomas L. Willmore

THE ABOVE MATTER is before the Court pursuant to the State's Second Amended Motion to Allow Evidence of Defendant's Uncharged Misconduct under the Doctrine of Chances. Evidentiary hearings were held on November 20, 2013, January 30, 2014, January 31, 2014, and March 19, 2014. Oral arguments were heard by the Court on January 7,2015. The Court has reviewed the moving papers, considered the evidence presented, and examined applicable legal authorities. Having considered the foregoing, the Court issues the following Memorandum Decision.

SUMMARY

Defendant Anthony Charles Murphy is charged with following crimes: aggravated sexual assault, aggravated kidnapping, forcible sexual abuse, aggravated assault, terroristic threat, and intoxication. *See* Amended Information. The State alleges the following factual allegations in support of the charges. On May 31, 2009, Defendant and T.S., the alleged victim in this case, got into an argument while in their back yard. During the argument, Defendant pushed T.S. to the ground, ripped her clothes off, and began to hit her. T.S. went into the house where Defendant pushed her down a set of stairs, grabbed her by the hair, dragged her into another

room, and continued to hit her. The Defendant then removed his clothes and, while holding T.S. down, forced her to perform oral sex. T.S. alleges she tried to leave, but that Defendant grabbed her by the throat and pinned her against a wall, which eventually caused her to lose consciousness. After regaining consciousness, the State asserts Defendant dragged T.S. to an upstairs bathroom. Again, Defendant grabbed T.S. by her throat causing her to lose consciousness. When T.S. regained consciousness, she alleges Defendant forced her to perform oral sex on him again. During the ordeal, T.S. contends Defendant made several verbal threats, including one to kill her. T.S. alleges the ordeal took place over two hours. State's Second Amended Motion at 2–3.

The State moves to admit evidence of prior sexual assaults alleged to have been committed against four other women pursuant to UTAH R. EVID. 404(b) under the "doctrine of chances." *See State v. Verde*, 2012 UT 60, 296 P.3d 673. Specifically, the State seeks to have the evidence admitted to prove *actus reus* by rebutting claims that T.S. fabricated the allegations, or that Defendant was acting in self-defense. As the State is seeking to admit evidence of prior bad acts, it is necessary to provide a brief factual background of the allegations.[1]

1. Alleged Victim G.M.

G.M. testified at the hearing on January 31, 2014. G.M. was previously married to Defendant, but the couple separated in early 1997. Around that time, G.M. had sought and obtained a protective order against Defendant for domestic violence. On June 1, 1997, Defendant went to G.M.'s house. She testified that at some point there was an argument and Defendant grabbed her by the arm and dragged her down a hallway to an empty bedroom. Defendant shut the door, turned out the lights, and started pulling G.M.'s clothes off. G.M.

[1] The underlying factual allegations presented at the evidentiary hearings are extensive. Defendant contests many of these allegations. These disputes will be addressed as the Court considers the admissibility of each incident.

alleges that Defendant then began raping her. She also testified that Defendant would put his hand over her mouth and nose if she talked or cried. She claims Defendant then tried to penetrate her anally and forced her to perform oral sex on him. During the encounter, G.M. also testified that Defendant picked up a butcher knife he had brought with him and told her he was trying to make her mad enough to kill him. She alleges that at some point Defendant stopped the rape because their three year old son woke up. Defendant locked the child in the room and dragged G.M. back to the empty bedroom where he raped her again. G.M. states she was able to get Defendant to eventually calm down enough where she was able to escape and call 911. Defendant was subsequently arrested.

G.M. also testified about another incident occurring on August 8, 1997. G.M. claims that Defendant broke into her house during the middle of the night, pinned her down by the shoulders on the mattress, and threatened to kill her. As Defendant began to pull G.M. off the bed, she reached for a gun underneath the pillow and shot Defendant in the chest. The two struggled over the gun and several shots were fired. G.M. was eventually able to leave the house and call law enforcement for help.[2] *See* Transcript of January 31, 2014, Evidentiary Hearing at 9–29.

Defendant was charged with three counts of sexual battery and one count of burglary based on the incidents. Defendant eventually pled no contest to the burglary charge in exchange for having the sexual battery charges dismissed. *Id.* at 30.

2. Alleged Victim A.R.[3]

[2] The State is seeking to only admit evidence of the incident on June 1, 1997. *See* State's Second Amended Motion at 9.

[3] The information about this incident stems from a trial held in Kentucky in November 2001. Defendant was charged with assault, burglary, and sexual abuse. State's Exhibit 41. A.R. could not be located to testify as to the allegations in person. The Court found that the State made reasonable efforts to locate her and admitted the transcript due to her unavailability. Transcript of March 19, 2014, Evidentiary Hearing at 64–65. At defense counsel's request, the entire trial transcript was admitted. *Id.* at 66–67; State's Exhibit 21. In addition, the Court admitted a three page handwritten statement by A.R. State's Exhibit 25.

On May 31, 2001, a complaint was received about a sexual assault in Harrison County, Kentucky. On that night, Defendant was at A.R.'s house drinking beer with her father. A.R's boyfriend, Chris Grimes, was also at the house. A.R. alleged that she was awoken by Defendant getting on top of her while she was in bed. He did this while holding his hand over A.R.'s mouth. A.R. alleges that Defendant threatened to kill her and began touching her breasts and genital area. A.R. screamed to get the attention of her father, who came in and pulled Defendant away. State's Exhibit 21 at 66–74. A.R. was then able to leave the house and go to a neighbor's house for help. A.R. told the neighbor that Defendant had tried to rape her. The neighbor also testified to seeing a handprint mark across A.R.'s face. *Id.* at 95–99

Defendant denied sexually assaulting A.R. and covering her mouth with his hand. He contended that he had only gone into A.R.'s room to find out if Mr. Grimes had abused her on a prior occasion. Defendant argued A.R. had fabricated the allegations. *Id.* at 146–145. He was eventually found guilty of assault, but was never convicted on the sexual abuse charge because of a hung jury. State's Exhibit 23.

3. Alleged Victim A.K.

A.K. testified at the evidentiary hearing on November 20, 2013. A.K. met Defendant while she was working as a waitress in Cynthiana, Kentucky. A.K. and Defendant became good friends during this time. On July 4, 2003, A.K. called Defendant and asked him to take her for a ride in his pickup truck. They went to a couple of local stores to get fireworks and alcohol. They parked the vehicle and began to talk. A.K. states she drank half of a fifth of Jim Beam whiskey and eventually fell asleep. When she woke up, she alleges her shorts and underwear had been removed. She contends Defendant would not let her go home because she had previously promised to perform oral sex on him. She denied making the promise and Defendant

began hitting her in the face with a red folder. A.K. also testified that Defendant verbally threatened to drown her. A.K. states that she tried to hit Defendant with an alcohol bottle, but that he grabbed her wrists. She also alleges that Defendant burnt her neck with a lit cigarette and forced her to perform oral sex on him. A.K. then testified that Defendant raped her vaginally as he held her down in the front seat of his vehicle. A.K. was eventually taken home and the allegations were reported to law enforcement by her mother. However, charges were never brought against Defendant. Transcript of November 20, 2014, Evidentiary Hearing at 149–187.

4. Alleged Victim M.M.

M.M. testified at the evidentiary hearing on January 30, 2014. M.M. met Defendant by placing an online advertisement for "body rubs." Defendant and M.M. would meet at the Crystal Inn in West Valley City, Utah. During these meetings, M.M. would give Defendant a body rub and then masturbate him. On one occasion, M.M. and Defendant were at the hotel where the two began to have sex. M.M. stopped Defendant because it was painful and she told him she no longer no wanted to continue. M.M. claims Defendant did not stop and held her down for approximately five to ten seconds. Defendant then relented and apologized.

M.M. and Defendant met again on October 28, 2013. When she arrived at the hotel, Defendant was there watching television and drinking beer. M.M. gave defendant the body rub and then masturbated him. At the time, M.M. was wearing only her underwear. She alleges Defendant tried to remove her underwear, but that she pushed him away and verbally told him "no." M.M. claims Defendant then grabbed her arms and knocked her off the bed. The two struggled on the floor and Defendant grabbed M.M. by the throat and began choking her. M.M. states she was crying and screaming during the struggle and that Defendant prevented her from reaching for her phone. Transcript of January 30, 2014, Evidentiary Hearing at 16–37.

During the hearing, the Court also heard from Ms. Rexene Boyd, an employee at the Crystal Inn. Ms. Boyd testified that she received a noise complaint from one of the other hotel guests and went to investigate. As she approached Defendant's room, Ms. Boyd testified that she could hear muffled screams. Ms. Boyd knocked on the door and Defendant answered. M.M. eventually was able to run out into the hallway. Ms. Boyd testified to observing several injuries on M.M.'s back.[4] Transcript of November 20, 2014, Evidentiary Hearing at 86–92. Law enforcement was called to the scene. Officer Amanda Zeller and Detective Justin Boardman testified as to M.M's injuries, which consisted of scratches and abrasions to M.M.'s chest, back, neck, and shoulders.[5] *Id.* at 99–100. Defendant has been charged with aggravated sexual assault and aggravated kidnapping as a result of this incident.

DISCUSSION/ANAYLSIS

Evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith pursuant to UTAH R. EVID. 404(b). However, such evidence may be admissible for other purposes, such as: proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Id.* In the past, courts have used a three-part test to determine admissibility under this rule: 1) the evidence must be offered for a proper, non-character purpose; 2) the evidence must meet the relevancy requirements of Rule 402; and 3) the evidence must satisfy a Rule 403 balancing test. *State v. Northcutt*, 2008 UT App 357 ¶ 5, 195 P.3d 499, 502. However, the

[4] The Court also heard from April Rouse, who was staying below Defendant's room. Ms. Rouse states she heard a scream and a loud thump come from the room. Ms. Rouse is the guest who reported the disturbance to hotel management. *Id.* at 81.

[5] On August 8, 2014, Defendant filed a Motion to Reopen Evidentiary Hearing to Receive Additional Evidence. Defendant has recently become aware of the fact that M.M. disclosed to prosecutors the fact that some bruising marks on her throat were not caused by Defendant; rather, they were the result of M.M. injecting herself with heroin. The State has conceded these marks were not caused by Defendant and relies on the exhibits it introduced at the hearing to support its arguments. State's Exhibits 2-9.

traditional analysis of prior bad acts evidence has recently undergone some significant changes pursuant to a number of decisions from the appellate courts. The traditional three-step process of analyzing the proffered evidence under Rules 404(b), 402, and 403 has been abridged to a two-part analysis where "the relevance of the other acts evidence" is addressed in conjunction with the analysis of the evidence under Rules 404(b) and 403 and not as "a separate step of the analytical framework." *State v. Labrum*, 2014 UT App 5, ¶ 19, 318 P.3d 1151, 1157.

In addition to this change, the Utah Supreme Court has held that evidence of prior misconduct can be admitted under the doctrine of chances. "This doctrine defines circumstances where prior bad acts can properly be used to rebut a charge of fabrication." *Verde*, 2012 UT 60, ¶ 47. "It is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Id.* (citation and quotation omitted). For example, "an innocent person may be falsely accused or suffer an unfortunate accident, but when several independent accusations arise or multiple similar accidents occur, the objective probability that the accused innocently suffered such unfortunate coincidences decreases." *Id.* at ¶ 49. Put more simply, eventually the "fortuitous coincidence[s] become too abnormal, bizarre, implausible, unusual or objectively improbable to be believed."[6] *Id.* (citation and quotation omitted). In addition to rebutting fabrication, the doctrine of chances has be recognized as being useful in other Rule 404(b) contexts, such as rebutting mistake, accident, and allegations of self-defense. *Labrum*, 2014 UT App 5, ¶ 29.

The doctrine of chances is an evolving legal theory that has yet to be fully developed. It will undoubtedly become more defined as trial courts apply legal principles that are handed

[6] Though not formally referred to as the doctrine of chances, Utah courts have used similar reasoning in allowing evidence of prior bad acts to rebut fabrication. *See e.g. State v. Nelson-Waggoner*, 2000 UT 59, 6 P.3d 1120; *State v. Bradley*, 2002 UT App 348, 57 P.3d 1139.

down by the appellate courts. But for now, courts use a simple test to determine its applicability in any given case.

> Whether the doctrine of chances applies depends on why the other acts are relevant. Other acts evidence is relevant if it has any tendency to make a consequential fact more probable or less probable. If that tendency lies in the improbable repetition of a similar event, the doctrine of chances applies.

Id. at 30.

The State contends evidence of prior sexual assaults involving this Defendant presents an appropriate doctrine of chances question. As such, the Court will consider the following: 1) whether the evidence is being offered for a proper, non-character purpose; 2) whether the specific requirements of the doctrine of chances have been met; and 3) whether Defendant will be unfairly prejudiced if the evidence is admitted.

1. Whether the Prior Act Evidence is Offered for a Legitimate Purpose

Courts are often called upon to resolve disputes regarding the admissibility of a defendant's prior bad acts. Evidence of a prior bad act may be admissible if the Court determines the evidence is being "introduced for a legitimate, non-character purpose." *State v. Lucero*, 2014 UT 15, ¶ 14, 328 P.3d 841, 850. On its face, the rule appears to be a relatively simple one. However, the difficulty in applying it comes from the fact that "evidence of prior bad acts often will yield dual inferences – and thus betray both a permissible purpose and an improper one." *Verde*, 2012 UT 60, ¶ 16. In order to distinguish between the two, "courts must make a threshold determination of the genuine underlying purpose for admission of the evidence." *Lucero*, 2014 UT 15, ¶ 14. Namely, the evidence must have real probative value, which means it must be "contested and material to the charged offense." *Labrum*, 2014 UT App 5, ¶ 21. However, if the evidence is "really aimed at establishing a defendant's propensity to

commit crime, it should be excluded despite a proffered (but unpersuasive) legitimate purpose. *Id.* (citation and quotation omitted).

The State contends the evidence is being offered to rebut allegations of fabrication and self-defense. These categories are not specifically listed under Rule 404(b). However, the list of non-character purposes is not exhaustive. *See State v. Allen*, 2005 UT 11, ¶ 17, 108 P.3d 730. As mentioned above, the Utah Supreme Court has recognized that rebutting a defense of fabrication and self-defense to prove *actus reus* are proper, non-character purposes.

The State contends that it expects Defendant "will argue that T.S. became jealous over the Defendant receiving text messages from another woman, that she attacked him with a kitchen knife, that in self-defense he fought her off, and that she fabricated an allegation of sexual assault to cover up her own bad conduct." State's Second Amended Motion at 31. As such, the State believes the prior bad act evidence is proper to demonstrate the improbability of Defendant being falsely accused. The Court agrees.

When a single individual alleges rape, "the unusual and abnormal element of lying by the complaining witness may be present for a number of reasons." *Verde*, 2012 UT 60, ¶ 48 (citation and quotation omitted). However, "when two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story." *Id.* This type of information can be helpful in eliciting truth because it "may tend to prove that the defendant more likely played a role in the events at issue than that the events occurred coincidentally." *Id.* at ¶ 51. "It is that objective unlikelihood that tends to prove human agency, causation, and design." *Id.* at ¶ 50. Accordingly, the Court finds that the State's proposed use of the evidence is being presented for a proper, non-character purpose.

2. The Doctrine of Chances under Rule 404(b)

Evidence of prior bad acts under the doctrine of chances to prove *actus reus* "must not be admitted absent satisfaction of four foundational requirements, which should be considered within the context of a Rule 403 balancing analysis." *Id.* at ¶ 57. These requirements consist of materiality, similarity, independence, and frequency.

a) Materiality

The State must demonstrate materiality, which means "[t]he issue for which the uncharged misconduct evidence is offered must be in *bona fide* dispute." *Id.* The State has satisfied this requirement because the *actus reus* element of the alleged crime is genuinely disputed. Defendant alleges numerous inconsistencies that question T.S.'s credibility. He does this to show that his actions did not constitute a criminal act. In response, the State intends to prove the opposite by rebutting any claim of fabrication and self-defense raised by Defendant during trial.

b) Similarity

"Each uncharged incident must be roughly similar to the charged crime." *Id.* at ¶ 58. The prior events do not need to be identical, but "there must be some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence. . . ." *Id.* There is no set threshold for admitting similar accusations because such a test would be imprecise. However, "[a]ll of the incidents must at least fall into the same general category." *Id.* at ¶ 59. Of course, greater similarity will increase the likelihood that the events "are not the result of independent imaginative invention." *Id.* at ¶ 58.

Defendant contends the various allegations, as described by the State, are "so vague and broad that [they] describe 90% of all sexual assaults." Defendant's Opposition at 28. However,

when examining the specific details of each case, Defendant argues that the facts vary widely. He contends they illustrate the differences between the alleged crimes and work to undermine the State's argument. The Court disagrees.

Indeed, there are factual differences between the prior bad acts and the factual allegations in this case. That is unavoidable. However, it is not necessary for the State to prove that they are identical; rather, all that is required is that they be roughly similar and fall into the same general category. Defendant's argument would be more persuasive if there were only one other allegation because it would naturally require more similarities to be persuasive. *See State v. Lomu*, 2014 UT App 41, ¶ 32, 321 P.3d 243, 252 ("[T]he commission of a crime on two occasions in a specific manner is certainly less compelling than the commission of the same crime a half dozen or more times."). Here, there are five separate occurrences involving Defendant.

Defendant has pointed out the differences between the victims, but fails to recognize the similarities attributable to his own actions. Though not identical, the allegations bear a number of resemblances with one another. For example, Defendant is alleged to have used physical dominance to control the women. He often did this by allegedly grabbing the women and strangling them to the point where they began to lose consciousness. A number of women also allege Defendant placed his hands over their faces so they could not breathe. Each woman also alleges that Defendant made specific verbal threats to harm or kill them. The majority of the women also allege that after Defendant threatened them, he would physically force them to perform oral sex and/or rape them. There are also allegations that Defendant detained a number of the women for a period of time after the sexual assaults. These allegations, when viewed in an

overall side-by-side comparison, "suggest a decreased likelihood of coincidence." *Id.* at 30. Thus, the Court finds sufficient similarities exist to satisfy this requirement.

c) Independence

The incidents must be independent of each other. "This is because the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event." *Verde*, 2012 UT 60, ¶ 60 (quotation and citation omitted). While the few cases addressing independence within the context of the doctrine of chances have done so by noting the number of different witnesses and lack of collusion between them, the foundation of this requirement is based on the premise that the events are independent if the occurrence of one does not influence the occurrence of another. Thus, all that is required is that "each accusation must be independent of the others." *Lomu*, 2014 UT App 41, ¶ 31.

Defendant contends this element has not been satisfied for two reasons. First, A.R. and A.K. have known each other all their lives. He contends there is evidence that A.R. knew of prior sexual assaults against other women and that is why she was scared of him. *See* State's Exhibit 21 at 69–70. The Court finds this insufficient to establish a factual connection. A.R. provides no details about another sexual assault against anyone. Even if she had heard of one, it could not have involved A.K. because that event happened two years later. A.K. did acknowledge at the evidentiary hearing that she does know A.R., but testified that she did not know anything about Defendant being accused of sexually assaulting her. Transcript of November 20, 2013, Evidentiary Hearing at 166–167. The Court finds nothing that would call into question the independence of the allegations by these two women.

Second, Defendant contends T.S. knew about the allegations made by G.M. Defendant relies on the testimony of Martin Spicer and Diane West in support of this proposition.

However, Defendant fails to specifically identify in his Opposition, beyond a general conclusion, how the incidents involving G.M. impacted the allegations made by T.S.

These five events occurred over a span of fifteen years in three different states. There is no evidence linking one allegation with another. Accordingly, the Court finds the independence requirement has been satisfied.

d) Frequency

Under this requirement, frequency is satisfied when a person is accused of a crime or bad act "more frequently than the typical person." *Verde*, 2012 UT 60 ¶ 61. "It is this infrequency that justifies the probability analysis under the doctrine of chances." *Id.* For example, in *Verde* the Utah Supreme Court used the following example:

> The probability that any given individual who might be accused of rape or child abuse will be falsely accused of those crimes is low. . . . Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the probability that the same innocent person will be the object of multiple false accusations is extremely low.

Id.

Defendant contends that the "likelihood or frequency standard is not particularly helpful and creates a significant likelihood that defendants will be subject to trial by statistics." Defendant's Opposition at 30. The Court disagrees. First, Defendant may not like the frequency standard, but the Court is required to consider it. Second, frequency underscores the very purpose of the doctrine of chances and why it is useful. As mentioned above, "[i]t is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Verde*, 2012 UT 60, ¶ 47. In this case, it does not require complex mathematical statistics to assess this requirement. Defendant has been accused of sexually assaulting five different women. The State has met the frequency requirement.

3. Unfair Prejudice under UTAH R. EVID. 403.

Even if evidence is admissible under a proper purpose, the Court may still exclude it "if its probative value is substantially outweighed by danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." UTAH R. EVID. 403. In a Rule 404(b) context, the ability to exclude relevant evidence is based on the "risk of an undue inference that the defendant committed each act because of the defendant's immoral character. . . ." *Verde*, 2012 UT 6, ¶ 51.

Traditionally, Utah courts have used the *Shickles* factors when weighing the probative value of evidence against the potential for unfair prejudice.[7] However, the factors have been displaced for the purpose of assessing the probative value aspect of a Rule 403 analysis under the doctrine of chances.[8] *Labrum*, 2014 UT App 5, ¶ 28. Accordingly, the Court will address the issue as directed. As stated above, the State has demonstrated the evidence has sufficient probative value. With respect to the unfair prejudice aspect of Rule 403, the Court must consider "the risk that the jury may draw an improper character inference from the evidence or that it may be confused about the purpose of the evidence." *Id.*

It is true that allowing this evidence carries a "risk of undue inference that [Defendant] committed each act because of [his] immoral character." *Verde*, 2012 UT 60 ¶ 51. Yet, this is universal in all cases where prior bad acts are admitted. Rule 404(b) is a rule that presents dual

[7] The *Shickles* factors include: "1) the strength of the evidence as to the commission of the other crime, 2) the similarities between the crimes; 3) the interval of time that has elapsed between the crimes; 4) the need for the evidence; 5) the efficacy of alternative proof, and 6) the degree to which the evidence will probably rouse the jury to overmastering hostility." *State v. Shickles*, 760 P.2d 291, 295–96 (Utah 1986).

[8] Defendant contends the *Shickles* factors have not been displaced, but should be considered as additional safeguards. Specifically, he contends that "[t]he Court of Appeals cases suggesting that the *Shickles* factors have been replaced by materiality, similarity, independence, and frequency when analyzing Rule 403 balancing for the doctrine of chances exception are simply mistaken." Defendant's Opposition at 24. Defendant may disagree with the Utah Court of Appeals' interpretation of *Verde*. However, that does not change the fact that it is binding authority upon trial courts. Defendant's primary contention appears to go toward the strength of the State's evidence. The State presented sufficient evidence at the hearings to satisfy this requirement.

inferences. "The language of the rule is inclusionary, rather than exclusionary, meaning that the evidence may be admitted despite its negative propensity inference. . . ." *Lucero*, 2014 UT 15, ¶ 14. In this case, the Court finds the probative value outweighs the risk of unfair prejudice. The information will be more helpful to a jury than harmful in eliciting truth. The reasoning is simple. "When two (or more) persons tell similar stories, the chances are reduced that both are lying or that one is telling the truth and the other is coincidentally telling a similar false story." *Verde*, 2012 UT 60, ¶ 48 (citation and quotation omitted). The jury will be in a better position to evaluate a witnesses' credibility with this evidence.

4. Presentation of Evidence

The parties disagree as to when the evidence should be presented to the jury. The State contends fabrication and self-defense are at issue from the start because Defendant has pled not guilty. However, the Utah Supreme Court has found the premises of the not-guilty rule unpersuasive and rejected it as a principle of Utah law. *Id.* at ¶ 22. The State contends its purpose in using the prior bad acts is to rebut Defendant's allegations of fabrication and self-defense. Rebut means "[t]o refute, oppose, our counteract by evidence, argument, or contrary proof." BLACK'S LAW DICTIONARY (2009). The State cannot rebut something until Defendant has put the issue into genuine dispute at trial. There must be a logical link between the bad acts evidence and the contested issues in this case for the evidence to become relevant. This does not happen simply because Defendant has pled not guilty and put *actus reus* technically at issue. There must be more. Defendant must actually do something before the prior acts may be presented to the jury for consideration.

In response, Defendant contends the evidence can only come in on rebuttal after he directly charges T.S. with fabrication as a formal defense. He argues that "cross-examination

alone is not a direct charge of fabrication and is not sufficient to create a need for rebuttal." Defendant's Opposition at 26. The Court disagrees. Defendant does not have to outright call T.S. a liar in order for the prior acts to become admissible. Cross-examination can be a powerful tool to undermine a witnesses' credibility and raise a defense. Fabrication and self-defense could very well be put into issue by the way counsel asks questions. This would open the door and allow the State to present the evidence during its case-in-chief. Unfortunately, the Court cannot predict what questions will be asked at trial. Thus, the issue must be reserved until the issues of fabrication and self- defense are raised. The State may approach the Court at the appropriate time when it believes the door has been opened. The Court will then address the issue outside the presence of the jury. If the State successfully demonstrates that fabrication and self-defense have become genuine factual issues, the evidence will be allowed.

CONCLUSION

Based on the foregoing, the State's Second Amended Motion to Allow Evidence of Defendant's Uncharged Misconduct under the Doctrine of Chances is granted. Defendant's Motion to Reopen Evidentiary hearing is denied. Should the evidence of the prior bad acts in fact be presented to the jury, the Court will provide an appropriate cautionary jury instruction similar to the jury instruction given in State v. Lomu 2014 UT App 41 at ¶33. The State shall prepare and submit a proposed order in conformity with this Memorandum Decision.

Dated this 4 day of March, 2015.

BY THE COURT:

Thomas J. Willmore

Judge Thomas L. Willmore
DISTRICT COURT JUDGE

Addendum C

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF CACHE, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ANTHONY CHARLES MURPHY, Defendant.	MEMORANDUM DECISION Case No. 091100683 Judge Thomas L. Willmore

THIS MATTER IS BEFORE THE COURT on Defendant's Motion for a New Trial and Motion to Merge Counts. In preparation of this Decision, the Court has reviewed the pleadings, each document submitted to the Court, and the applicable legal authorities. Having considered the foregoing, the Court issues this Decision.

SUMMARY OF FACTS

The Defendant was charged, and ultimately convicted, of: (1) aggravated sexual assault (domestic violence), a first degree felony; (2) aggravated kidnapping (domestic violence), a first degree felony; (2) forcible sexual abuse, a second degree felony; and (4) aggravated assault, a third degree felony.

I. Motion for a New Trial

On September 15, 2009, the State filed a Motion to Introduce Evidence of Prior Bad Acts of the Defendant Under Rule 404(b). The State sought to admit evidence related to the Defendant raping his ex-wife, G.O., in Florida during 1997. On January 29, 2010, the Court issued a Memorandum Decision denying the State's motion. Subsequently, the Utah Supreme

Court decided *State v. Verde*, where rule 404(b) evidence could be admitted under the doctrine of chances.

On November 11, 2013, the State filed a Motion to admit doctrine of chances evidence at Defendant's trial. Specifically, the State requested permission to admit evidence of sexual assaults that the Defendant allegedly committed against G.O., A.R., A.K., and M.M. Four evidentiary hearings were held on the following dates: (1) November 20, 2013; (2) January 30, 2014; (3) January 31, 2014; and (4) March 19, 2014. Additionally, oral arguments were held before the Court on January 7, 2015.

On March 4, 2015, the Court issued a Memorandum Decision which granted the State's Motion. In reaching this conclusion, the Court considered whether the evidence was being offered for a proper, non-character purpose, whether the specific requirements of the doctrine of chances had been met, and whether Defendant would be unfairly prejudiced if the evidence was admitted. When determining if the doctrine of chances had been met, the Court addressed whether there was materiality, if the uncharged incidents were significantly similar to the charged crime, if the incidents were independent of each other, and frequency. The Court also assessed the whether the Defendant would be unfairly prejudice by allowing the admission of the requested evidence, concluding that the probative value far outweighed the risk of unfair prejudice. Where the State contended its purpose for the evidence was to rebut the Defendant's allegations of fabrication and self-defense, the Court limited the admissibility only to the issues of fabrication and self-defense, if and only when they were raised at trial by the Defendant. Additionally prior to trial, the Court determined no evidence would be mentioned with regards to Defendant having an ex-wife shoot him five times during an alleged incident.

At trial, during April 26-29 and May 3-4 of 2016, A. R., M.M., and A.K. testified of the uncharged incidents. T.W., the Defendant's ex-wife and victim in the case, also testified. During cross-examination of T.W., the Defendant's counsel placed fabrication at issue. On redirect, the State attempted to introduce the doctrine of chances evidence by asking T.W. if she had knowledge of the sexual assault allegations made by G.O., A.R., A.K., and M.M. Defense counsel objected, and the Court instructed the State to articulate the question in a more generic manner, whether T.W. was aware of these other women making general accusations against the Defendant prior to her report to the police. In response to the more generic framed question, T.W. testified she was aware the Defendant had been shot by his ex-wife. The testimony was immediately stopped, and Defendant motioned for a mistrial. The Court denied his Motion, determining that he could still receive a fair trial and the testimony about the shooting had not been intentionally elicited by the State. The court read the jury a cautionary instruction, which instructed them to disregard any statements made about a shooting by T.W. In order to further minimize the impact of the statement and prevent any further evidence of the shooting from potentially being brought out, the Court excluded G.O. from testifying. The jury ultimately found the Defendant guilty on all four charges.

On July 6, 2016, Defendant filed a Motion for a New Trial. Defendant alleges the State's case hinged on the testimony of the several witnesses the Court allowed to testify, A.R., A.K., M.M in addition to the victim T.W. Defendant alleges only twenty percent of the evidence presented had anything to do with the alleged incident, and the other eighty percent regarded the witnesses who were allowed to testify through the doctrine of chances. Additionally, Defendant alleges that at the end of the day T.W. testified, a juror asked again about the testimony and how to disregard it. Defendant also alleges that counsel became aware that the jurors took the knife,

admitted into evidence, and performed experiments to see how sharp it was in the jury room. Defendant asserts this is jury misconduct. Moreover, he alleges that during sentencing, the State referred to the testimony of the witnesses as well as the shooting as evidence of his bad character. Defendant further alleges the State alluded to medical records that it had regarding the his stay at a behavioral health unit ("BHU"). Defendant alleges this evidence was never provided in discovery to the defense, and no Court order was ever issued allowing this evidence in at trial or allowing it to be subpoenaed.

The Defendant argues that the doctrine of chances evidence the State introduced does not satisfy the requirements of the rules of evidence. He contends that the probative value is substantially outweighed by the danger of the unfair prejudice, and it must have been excluded under rule 403. Defendant argues that the evidence was not introduced for a proper purpose, and did not meet the requirements of rule 404(b) or the doctrine of chances. Specifically, he argues that when applying the *Shickles* factors, the evidence should have been excluded. Even if the Court concluded the rule 403 factors weighed in favor of admitting the evidence, Defendant argues it should have been excluded because it was not being introduced for a proper, non-character purpose. The Defendant contends the State evidenced its true motive and purpose when it utilized the evidence to demonstrate the Defendant's bad character at sentencing. Additionally, Defendant argues that the evidence does not meet the factors required under the doctrine of chances. Moreover, the he argues that where the Court had ruled evidence of the shooting was not admissible, and, due to it coming out at trial and the cautionary instruction not being effective, he should receive a new trial. Defendant also argues where the State failed to disclose to the medical records pertaining to the his stay at a BHU in any way prior to trial, it constitutes misconduct in that evidence could be exculpatory in nature. Lastly, Defendant argues

where the jury, with the knife entered into evidence, attempted to cut other jurors arms to test the level of sharpness and ability to cut, it constitutes jury misconduct and the jury doing their own investigations. Based upon these arguments, Defendant contends that he was denied a fair and impartial trial and the Court should grant his Motion.

On July 12, 2016, the State filed a Response to the Motion for a New Trial. The State alleges the testimony pertaining to the shooting was not intentionally sought, and rather, it was attempting to ask a narrow question about whether T.W. had knowledge of other sexual assault accusations made by the other women. The State notes the Defendant filed a Motion to Arrest Judgment which was ultimately denied by the Court. The State notes that the Court concluded that the Defendant had received a fair trial, and there was strong evidence at trial which demonstrated his guilt. The State alleges the Defendant now raises the same arguments on his current Motion. The State argues that the Court found that there was a legitimate issue in bona fide dispute, the other misconduct evidence offered was sufficiently similar, the State met the frequency requirement in *Verde*, and nothing would call into question the independence of the women's accusations against the Defendant. The State argues the Court correctly concluded that the *Shickles* factors, pursuant to *State v. Labrum*, were appropriately displaced for purposes of assessing the probative value under the doctrine of chances. The State argues that the Defendant, at trial, opened the door for the admission of the doctrine of chances evidence, which it properly introduced. Additionally, the State argues the Court read a cautionary jury instruction to ensure the evidence would not be considered multiple times. The State contends that it, in its closing argument, also told the jury that it could only use the doctrine of chances evidence to determine whether T.W. had fabricated her account and whether the Defendant had acted in self-defense. The State concludes that the doctrine of chances evidence was properly admitted, and the jury

was properly instructed on how the evidence was to be considered. Moreover, the State argues that it immediately stopped T.W. from continuing to testify, the Court ordered T.W.'s testimony that she heard G.O. had previously shot the Defendant five times be stricken from the record and disregarded by the jury, and, in an abundance of caution, prevented G.O. from testifying in order to ensure no further evidence of the shooting would be introduced. The State argues that a mistrial is not required where only an improper statement was not intentionally elicited. The State further argues that Defendant has failed to demonstrate there is a substantial likelihood the jury would have found him not guilty had it not heard T.W.'s statements concerning the gun shot. The State argues the physical evidence in the case, coupled with the doctrine of chances evidence, left no room for doubt that the jury could reasonably have found the Defendant guilty. The State argues that, concerning the BHU documents, discovery was provided to the Defendant's previous attorney, Mark Flores, well in advance of trial. The State points to the references it made of Defendant's BHU stay in its first doctrine of chances motion, filed on October 11, 2013. The State also argues the evidence of the Defendant's treatment and release is clearly inculpatory. Lastly, the State argues the Defendant has not provided any evidence regarding the alleged jury misconduct. Even if the jury tested the knife, the State argues that, in order to determine whether the Defendant's testimony was based on reasonably based on all the evidence that had been presented at trial, it was reasonable for them to examine the sharpness of the knife. The State ultimately concludes the Defendant's Motion for a New Trial should be denied.

On January 12, 2017, Oral Arguments were held before the Court.

II. Motion to Merge Counts

On July 7, 2016, the Defendant filed a Motion to Merge Counts. Defendant asserts the aggravating kidnaping charge should merge with the aggravated assault charge in this action. He asserts that Utah utilizes a three part test to determine if aggravated kidnapping merges with another crime, and the facts of this case do not meet this test. First, Defendant argues that the movements of the victim were inconsequential and incidental to the assault. Specifically, Defendant argues that he did not force the victim out of the residence, change location, or even force her to an area within the residence. Second, he argues the confinement of the victim was inherent in the aggravated assault. Third, he argues there is no significance independence of the aggravated assault. Defendant argues he never took the victim outside of the residence, never forced her into a vehicle, and never forced her into another room in the house. Thus, Defendant concludes that the aggravated kidnapping should merge into the aggravated assault charge.

Additionally, he argues the aggravated sexual assault charge with a domestic violence enhancement, should merge with the forcible sexual abuse charge. Defendant argues these statutes punish the same conduct, and, pursuant to the *Shondel* doctrine, he must be sentenced under the provisions carrying the lessor penalty. Defendant concludes he should have been sentenced only on the forcible sexual abuse charge, not the aggravated sexual assault with the domestic violence enhancement charge.

On July 22, 2016, the State filed a Response to Defendant's Motion to Merge Counts. The State alleges that T.W. testified on the night of the incident she and the Defendant were in the backyard dancing. The Defendant spun her to the ground hard and ripped T.W.'s clothes off. T.W. screamed for help as she ran into the house, and when the Defendant caught up to her he pushed her down the stairs. T.W. testified he dragged her to the family room, and he told her

that she would remember him as she begged him to stop. She testified that Defendant was naked, and straddled her with his knees on her chest, making it hard to breathe for her. After pinching T.W.'s nipples and forcing her to perform oral sex, T.W. tried to crawl away. The Defendant caught her in the hallway, and told her he would kill her as he strangled her until she was unconscious. When T.W. awoke, she realized she had urinated on herself. The Defendant then threw her into a bathtub of cold water, and informed her she needed to clean up. T.W. testified he then took her into the master bedroom, but she does not remember what happened there. She testified Defendant next threw her down the stairs again, and dragged her into the bedroom at the back of house where she was forced to perform oral sex again. She testified Defendant pinned her shoulders down, his weight was on top of her, and she could not breathe. Eventually, T.W. lost consciousness again. After coming to and having the Defendant fall over from intoxication, T.W. testified she was able to finally crawl down the hallway, grab her robe and keys, and escape the residence.

The State alleges during closing argument for a conviction under aggravated sexual assault, it argued the Defendant had compelled T.W. to perform oral sex on him by threat of kidnapping, death, or serious bodily injury to be inflicted imminently. For conviction under forcible sexual abuse, the State alleges that it argued the Defendant had touched the breasts of T.W. without her consent and/or took indecent liberties with her. The State argues that where separate and distinct conduct is being punished under each count, it is clear the Defendant is not being punished twice for conduct that amounts to only one offense. The State contends that the Defendant never presented his merger argument prior to this Motion, and it is now improper as the Court no longer has jurisdiction. The State argues that the *Shondel* doctrine does not apply, as the charges have different elements that proscribe different conduct.

On October 14, 2016, the Defendant filed a Reply to the State's Response. The Defendant asserts that his counsel made arguments that the counts should be merged at the sentencing hearings. Additionally, the Defendant asserts that briefs were prepared and submitted by the Defendant in this matter. The Defendant argues that merely because the State argued different factual allegations for each of the counts does not mean the charges do not merge. Defendant argues the case clearly involved one criminal episode, and the charges are clearly based on the same conduct.

On December 21, 2016, the State filed an Amended Response to Defendant's Motion to Merge Counts. The State alleges that Defendant's only argument prior to sentencing was a reference to *State v. Elliot*. 641 P.2d 122 (Utah 1982). The State alleges that after this reference the Court specifically asked if the Defendant was requesting a hearing to address the merger issue. The State alleges Defendant never requested a hearing nor moved for a continuance to address the merger issue prior to sentencing. Rather, the State alleges he proceeded with the sentencing hearing and made sentencing recommendations. The State alleges when it began to address the Court, it proceeded to respond to the issue of merger. The State alleges the Court indicated it would not rule on the motion, as it had not been briefed and that it would sentence Defendant then address the merger issue at a later time. The State argues the arguments made within the Defendant's Motion are completely different than those raised at the sentencing hearing. The State reiterates its argument that where these arguments were not made prior to sentencing, the Court no longer has jurisdiction to address this Motion. Additionally, the State argues that, pursuant to the three-part test provided in *State v. Finlayson*, the aggravated kidnapping charge does not merge into the aggravated assault charge. 2000 UT 10, ¶ 23, 994 P.2d 1243. Specifically, the State contends that T.W.'s confinement was not slight,

inconsequential, or merely incidental to the aggravated assault. Moreover, the State argues that confining T.W. in the house is not inherent in the aggravated assault. Furthermore, the State argues the confinement of T.W. had significance independence of the aggravated assault. Lastly, the State argues that the elements for aggravated sexual assault and forcible sexual abuse do not proscribe exactly the same conduct and the *Shondel* doctrine does not apply.

On January 12, 2017, Oral Arguments were held.

ANALYSIS

I. Motion for a New Trial

The Utah Rules of Criminal Procedure provide that a court may "grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party." Utah R. Crim. P. 24(a). It is the moving party's responsibility to present "affidavits or evidence of the essential facts in support of the motion." *Id.* at 24(b). "[T]he decision to grant or deny a new trial is a matter of discretion with the trial court . . . ." *State v. Williams*, 712 P.2d 220, 222 (Utah 1985) (citing *State v. Lesley*, 672 P.2d 79 (Utah 1983)); *see also* State v. Menzies, 845 P.2d 220, 224 (Utah 1992) (stating that the decision to grant a new trial is within the discretion of the trial court, and it will not be reversed "absent a clear abuse of that discretion.").

Presently, the Defendant raises four major issues concerning the trial: (1) the doctrine of chances evidence; (2) evidence of the previous shooting; (3) disclosure of the BHU Medical Records; and (4) juror misconduct.

A. Doctrine of Chances Evidence

Utah Code provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to who that on a particular occasion the person acted in

conformity with the character." Utah R. Evid. 404(b)(1). However, "evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* at 404(b)(2). This is not an exhaustive list of non-character purposes, and other purposes, such as fabrication and self-defense, are acceptable. *State v. Allen*, 2005 UT 11, ¶ 17, 108 P.3d 730. Moreover, under these rules, the admissibility of an act is "dependent upon its avowed purpose." *State v. Verde*, 2012 UT 60, ¶ 15, 296 P.3d 673. Utah has recognized that there is difficulty in applying this rule, and prior bad acts often yield both a permissible purpose and an improper one. *Id.* at ¶ 16. However, the rule requires a trial court to make a threshold determination of whether the evidence is aimed at proper or improper purposes. *State v. Nelson-Waggoner*, 200 UT 59, 6 P.3d 1120. If the evidence is aimed at a defendant's "propensity to commit crime," it should be excluded, even if a proffered under a legitimate purpose. *State v. Decorso*, 1999 UT 57, ¶¶ 21-25, 993 P.2d 837. Furthermore, Utah has recognized that, under the doctrine of chances, the relevance of uncharged misconduct may be admissible when a defense of fabrication has been raised. *Verde*, 2012 UT at ¶ 52.

The doctrine of chances is "a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Id.* at ¶ 47. It "starts with the low baseline probability" that a particular circumstance would befall an individual multiple times. *Id.* at ¶ 49. "As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases." *Id.* Evidence offered to prove actus reus "must not be admitted absent satisfaction of four foundation requirements," considered within the context of rule 403. *Id.* at ¶ 57. These four requirements are: (1) materiality; (2) similarity; (3) independence; and (4)

frequency. *Id.* at ¶¶ 57-61. Once the foundation factors have been met, a court must conduct a rule 403 analysis. *State v. Lowther*, 2015 UT App 190, ¶ 57, 356 P.3d 173. However, where the context involves the doctrine of chances, *Verde* "ha[s] displaced the *Shickles* factors" traditionally used. *State v. Labrum*, 2014 UT App 5, ¶ 28, 318 P.3d 1151. Rather, a court must focus "on the risk the jury may draw an improper 'character' inference from the evidence or that it may be confused about the purpose of the evidence." *Lowther*, 2015 UT App at ¶ 22 (quotation omitted).

Defendant argues the Court previously applied the *Shickles* factors, finding that it weighed against submission of the prior acts. He argues that these factors should still be applicable, and the evidence should not be admissible. However, the Court disagrees. The Court's decision in 2009 did not utilize the doctrine of chances; thus, the *Shickles* factors were applicable. The State filed a new motion to admit the prior acts under the newly adopted doctrine of chances. As caselaw indicates, when utilizing a doctrine of chances theory the *Shickles* factors have been displaced. *Labrum*, 2014 UT App at ¶ 28. Thus, the Court applied the requisite doctrine of chances factors and weighed the prejudice and probative values under rule 403. *See* Memorandum Decision, filed Mar. 4, 2015, 5-6.

Defendant additionally argues that evidence of the prior acts were not admissible under the doctrine of chances. First, the Defendant contends the evidence was not offered for a proper, non-character purpose. Specifically, the Defendant argues the evidence was offered to bolster T.W.'s inconsistent testimony and to convince the jury that the Defendant had a propensity to commit sexual assault. The State sought to utilize the Defendant's prior acts to rebut the theories of fabrication and self-defense. The Court found that the evidence of the prior acts properly demonstrated the improbability that the Defendant was being falsely accused. *Memorandum*

Decision, filed Mar. 4, 2015, at 9. Precedent recognizes rebutting a defense of fabrication and self-defense to prove actus reus is a proper, non-character purposes. *Verde*, 2012 UT at ¶¶ 48, 51. Moreover, when multiple individuals tell similar stories, similar to the case at hand, chances are reduced that both are lying and tend to prove that the Defendant more than likely played a role in the events. *Id.* Additionally, T.W.'s testimony was not unbelievable as the Defendant contends. Rather, T.W. was consistent, compelling, and she was not tripped up by the Defense's questions. Multiple times when referencing its notes during objections, the court confirmed that T.W. testified on cross-examination to exactly what she testified to on direct examination. Furthermore, the Court gave limiting instructions to the jury providing exactly what the evidence of the Defendant's prior acts could be used for. *See* Complete List of Jury Instructions, filed May 4, 2016, at Instruction No. 13, 56 (providing that the jury could use the evidence of the prior acts to determine if the T.W., the alleged victim, had fabricated her accusation, but the evidence could not be used to determine the Defendant's character or if the Defendant committed the crimes charged in the case at hand). Therefore, the Court concludes that the evidence was proffered and utilized for a proper, non-character purpose.

Second, Defendant argues that in order for the issues to be placed in bona fide dispute, the Defendant needed to present an actual defense of fabrication or self-defense. He contends that merely challenging T.W.'s version of events does not adequately place those issues in a bona fide dispute. The Defendant previously made this argument, and the Court disagreed. *Memorandum Decision*, filed Mar. 4, 2016, at 16. The Court found that the State had satisfied the requirement of materiality by showing that the actus reus element of the alleged crime would be in genuine dispute when the Defendant raised the issues of fabrication and self-defense, showing that his actions did not constitute a criminal act. *Id.* at 10. The Court provided that

cross-examination is a powerful tool used to undermine a witness's credibility and raise a defense, and that fabrication and self-defense could very well be raised or put into issue by the way counsel asked questions. *Id.* at 16. Thus, the Court concluded that only if the Defendant raised these issues on cross-examination could the doctrine of chances evidence be admitted. *Id.* Not only did the Defense directly accuse T.W. of lying and not telling the truth, it also raised the issues of fabrication and self-defense. *See*, e.g., *Trial Recording*, Apr. 26, 2016, 3:14 PM-3:25 PM (stating that T.W. fabricated her story, and that the Defendant reacted in self-defense when T.W. went into a fit of rage attacking him with the knife); *Trial Recording*, Apr. 27. 2016, 10:58–11:05 AM (Defense stating that T.W. had access to the money in the checking account at all times, but told the jury she did not; providing that T.W. was not telling the jury the truth when she said she was not a quitter but had been divorced three times; admitting the purpose for bringing in the previous marriages was to demonstrate T.W. was not telling the truth; and questioning T.W. on telling her friends that she made up the physical abuse allegations concerning the Defendant). Therefore, the Court finds that the issues were placed in genuine, bona fide dispute through opening statements and cross-examination of T.W., and that the State adequately proved the materiality.

Third, Defendant argues that the prior acts were not sufficiently similar to the case at hand. Defendant references the Court's findings in its September 2009 Memorandum Decision. As the Defendant correctly stated, "there must be some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence . . . ." *Verde*, 2012 UT at ¶ 58. The Court acknowledged that there are factual differences between the prior bad acts and the case at hand. *Memorandum Decision*, filed Mar. 4, 2015, at 11. However, there were five separate occurrences involving the Defendant. In every occurrence, Defendant is

alleged to have used physical dominance to control the victims. All the victims were women. Allegedly, in order to control the victims, the he would grab and strangle them to the point of unconsciousness. Each victim alleged that the Defendant made specific verbal threats to harm or kill them. In a majority of the incidents, Defendant allegedly would force the victims to perform oral sex and/or rape them, further detaining them afterwards. Thus, the Court still finds these similarities are more than "roughly similar" and the similarities "suggest a decreased likelihood of coincidence," which is sufficient to meet the requirement. *Verde*, 2012 UT at ¶ 58.

Fourth, Defendant contends that because some of the victims were aware of the previous allegations, the prior acts are not "independent of the others." *Verde*, 2012 UT at ¶ 60. However, Defendant fails to acknowledge the Court's previous decision. The Court found that the events spanned fifteen years, three different states, and no evidence linked any of the incidents or allegations together. *Memorandum Decision*, filed Mar. 4, 2015, at 12. The Court acknowledged that A.R. and A.K. have known each other their whole lives, but A.K. testified she did not know anything about the incident or accusations against the Defendant involving A.R. *Id.* Additionally, the incident involving A.K. occurred two years later. *Id.* While the Defendant argues T.W. was aware of the incident involving G.O., the Court clarified at trial that T.W. only knew of G.O. as a result of the Defendant telling her. *Trial Recording*, Apr. 27, 2016, 12:00 PM. Furthermore, Defendant has not provided any evidence that T.W. or the other victims were aware of any other prior incidents. Therefore, the Court still finds the incidents were independent of each other.

Lastly, Defendant argues that the questionable probability calculations required by *Verde* are not a solid foundation on which the Court rested its decision. However, the Court did not rest its decision on the frequency factor alone. Rather, the Court found all the doctrine of chances

factors and spent time weighing the probative value against any potential unfair prejudice. *Memorandum Decision*, filed Mar. 4, 2015, at 6-16. The Court found that there was a risk of undue inference that the Defendant committed these acts because of his immoral character, but that is universal in all cases where prior bad acts are admitted. *Id.* The Court further found the jury would be in a better position to evaluate the witnesses' credibility and the evidence would be more helpful than harmful in eliciting truth. *Id.*

Therefore, based on the foregoing, the Court finds that the doctrine of chances evidence was properly admitted and Defendant's Motion is denied.

B. Evidence Concerning the Shooting

Defendant contends that because evidence concerning the shooting, which was previously determined inadmissible, was introduced during trial, the Court should grant a new trial. The State contends that the evidence was not purposefully elicited, and the Court properly excluded testimony from G.O. and read a cautionary instruction in order to prevent any further emphasis on the evidence.

Utah case law "amply reveals that a mistrial is not required where an improper statement is not intentionally elicited, is made in passing, and is relatively innocuous in light of all the testimony presented." *State v. Allen*, 2005 UT 11, ¶ 40, 108 P.3d 730; *see generally* State v. Butterfield, 2001 UT 59, 27 P.3d 1133 (holding that the district court did not abuse its discretion in refusing to grant a mistrial after a defendant could not point to evidence in the record suggesting the jury had relied on the witness's vague statement that he witness had obtained the defendant's photograph from the Salt Lake County Jail); *State v. Wach*, 2001 UT 35, 24 P.3d 948 (holding a district court did not abuse its discretion where it declined to grant a mistrial after a witness violated the parties' stipulation by introducing evidence of the defendant's prior bad

acts); *State v. Decorso,* 1999 UT 57, 993 P.2d 837 (holding that a district court's refusal to grant a mistrial after a witness made improper references to the defendant's prior bad acts was not an abuse of discretion); *State v. Griffiths*, 752 P.2d 879 (Utah 1988) (holding a district court did not commit reversible error by allowing a witness to improperly state the defendant possessed an outstanding warrant on other offenses, because the statement was unintentionally elicited, was brief, made only in passing, provided no details of why the warrant was issued, and the district court read a cautionary instruction); and *State v. Case*, 547 P.2d 221 (Utah 1976) (holding a district court properly denied a motion for a mistrial after a witness inadvertently stated the defendant had been incarcerated in prison).

Analogous to the precedent, the statement made by T.W. was not intentionally elicited from the State. The State began to ask T.W. if she had any knowledge of the other individuals and any allegations made against the Defendant, and the Defense objected multiple times. *Trial Recording*, Apr. 27, 2016, 11:53 AM-12:00 PM. A sidebar was held with the Court, and the State again, rephrasing the question, began to ask T.W. if she had any knowledge of the individuals and the allegations made against the Defendant. *Id.* Upon this objection, the Court specified what the content of the questions could be. *Id.* The State rephrased again, and the Court agreed that was a permissible question. *Id.* The question was phrased in a way to elicit a "yes" or "no" answer. *Id.* However, upon asking the same question concerning G.O., T.W. responded, "Well I am aware she shot [the Defendant] five times." *Id.* at 12:00 PM. The State immediately stopped T.W., and the Court asked T.W. if she had received that information from the Defendant. *Id.* T.W. confirmed the Defendant was the source, and the Court dismissed the jury. *Id.* No further testimony or evidence concerning the shooting was introduced. The Court, in an abundance of caution, excluded G.O. from testifying. Furthermore, the Court read a

curative instruction, which provided the jury was to completely disregard that evidence. *Curative Instruction Given on 4/27/2016*, filed Apr. 28, 2016. Upon a juror's later question, the Court again provided the curative instruction. Furthermore, the Defendant cannot point to any evidence the jury relied upon the shooting evidence in making their decision.

Therefore, based on the foregoing, the Court finds granting a new trial based upon this issue inappropriate.

C. Disclosure of BHU Medical Records

The Defendant argues he did not receive a fair trial, because the State did not disclose that it had his BHU medical records. Defendant contends counsel only became aware the State had the BHU records at sentencing. The State argues that it did disclose it had the BHU records to the Defendant's original attorney, and referred to the details of the Defendant's BHU stay in its first doctrine of chances motion.

Upon closer examination of the record, the Court finds the State did reference the Defendant's BHU stay within its doctrine of chances motion. *State's Mot. to Allow Evid. of Def. Other Alleged Sexual Assaults Pursuant to the Doctrine of Chances*, filed Oct. 11, 2013, at 5-7. Thus, the Defense was aware at that time the State was in possession of the BHU records. Additionally, the State asserts that it provided the records to the original defense attorney. Furthermore, even if the State failed to disclose the BHU records, there is no evidence the Defendant did not know he stayed at the BHU and received treatment.

Therefore, based on the foregoing, the Court finds granting a new trial based upon this issue inappropriate.

D. Juror Misconduct

Defendant contends there was juror misconduct, when jurors attempted to test sharpness of the knife on other jurors during deliberations. However, as the State points out, Defendant has failed to provide the Court with any evidence of this. When the Court questioned counsel on how this information was obtained, counsel admitted it was merely what a juror told him. Where the Defendant has produced no other evidence of juror misconduct and is relying upon hearsay alone, the Court finds it inappropriate to grant a new trial based upon this issue.

Therefore, where the evidence was appropriately admitted under the doctrine of chances theory, curative instructions and measures were taken to prevent the evidence of the shooting from being utilized or further introduced, the State disclosed the BHU medical records and Defendant was aware of his BHU stay and treatment, and there is no evidence of juror misconduct, the Defendant's Motion for a new trial is denied.

II. Motion to Merge Counts

A. Shondel Doctrine

Defendant argues the aggravated sexual assault (domestic violence enhancement) and forcible sexual abuse charge punish the same conduct. He contends, pursuant to the *Shondel* doctrine, that he should be sentenced under the provision carrying the lessor penalty.

The *Shondel* doctrine requires that "where two statutes define exactly the same penal offense, a defendant can be sentenced only under the statute requiring the lesser penalty." *State v. Bluff*, 2002 UT 66, ¶ 33, 52 P.3d 1210, *abrogated by* Met v. State, 2016 UT 51, 2016 WL 6884576, (quoting *State v. Shondel*, 435 P.2d 146, 147-48 (Utah 1969)). Thus, if one or both of the crimes at issue "'require[] proof of some fact or element not required to establish the other,' the statutes do not criminalize identical conduct and the State can charge an individual with the

crime carrying the higher classification or more severe sentence." *State v. Fedorowicz*, 2002 UT 67, ¶ 47, 52 P.3d 1194 (citing *State v. Clark*, 632 P.2d 841, 844 (Utah 1981); *State v. Honie*, 2002 UT 4, ¶ 21, 57 P>3d 977 (stating when the elements of the crime differ, no equal protection violation under *Shondel* applies); and *State v. Bryan*, 709 P.2d 257, 263 (Utah 1985) (holding that *Shondel* applies only when the two statutes are duplicative as to the elements of the crime)).

Therefore, as *State v. Gomez* noted, "the question is whether the two statutes at issue proscribe exactly the same conduct, i.e., do they contain the same elements[.]" 722 P.2d 747, 749 (Utah 1986). The Defendant was convicted of forcible sexual abuse, which elements are: (1) touching or taking indecent liberties; (2) of the breast of a female; (3) without the victim's consent; and (4) with the intent to cause substantial emotion or bodily pain to any person or to arouse or gratify the sexual desire of any person. *See* Utah Code Ann. § 76-5-404; *and* Jury Instruction, filed May 5, 2016, Instruction No. 46. The Defendant was also convicted of aggravated sexual assault (domestic violence enhancement), which elements are: (1) "in the course of a rape, object, rape, forcible sodomy, or forcible sexual abuse"; (2) the actor "uses, or to threaten the use of, a dangerous weapon"; (3) "compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person". Utah Code Ann. § 76-5-405(1); *and* Jury Instructions, filed May 5, 2016, Instruction No. 33. However, dependent upon whether the Defendant was committing rape, object rape, attempted rape, attempted forcible sodomy, or attempted forcible sexual abuse, there are further elements that are required. *Id.* (1)(b) and (1)(c). Defendant contends the elements required by both conduct are exactly the same. However, the Court disagrees.

The most obvious difference between these two statutes is the extra elements required to be proven under the aggravated sexual abuse statute. While both statutory elements for forcible sexual abuse and aggravated sexual abuse require the elements of forcible sexual abuse, they are distinguished by the additional elements of use or threat of a weapon, compelling the victim to submit, and causing serious bodily injury. Utah Code Ann. § 76-5-405. Furthermore, forcible sexual abuse requires intent, while the requisite mens rea for aggravated sexual assault is dependent upon whether a rape, object rape, forcible sodomy, or forcible sexual abuse is occurring. *See* Utah Code Ann. §§ 76-5-405 and 76-5-404. Where the two statutes require different elements and mens rea, the Court finds the *Shondel* doctrine does not apply.

B. Finlayson Test

The Defendant argues that the aggravated kidnapping charge should merge with the aggravated assault charge because the three parts of the *Finlayson* test have not been satisfied. *State v. Finlayson*, 2000 UT 10, 994 P.2d 1243. Utah courts have utilized a three-part test in order to determine if kidnapping merges with another crime:

> If a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnaping the resulting movement or confinement:
> (a) [m]ust not be slight, inconsequential and merely incidental to the other crime;
> (b) [m]ust not be of the kind inherent in the nature of the other crime; and
> (c) [m]ust have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Finlayson, 2000 UT at ¶ 23 (quotations and citations omitted). However, concerning the third prong, the words utilized "are not necessarily words of limitation because there may be instances . . . in which the kidnapping and the 'other crime' are virtually independent of one another." *State v. Lopez*, 2001 UT App 123, ¶ 16, 24 P.3d 993.

In *Finlayson*, the Utah Supreme Court held that a separate conviction for aggravated kidnapping was not supported by the facts of the case. *Finlayson*, 2000 UT at ¶ 24. The defendant had handcuffed the victim to the bed during the course of raping her, and then drove the victim home using a lengthy, roundabout way home in order to confuse the victim. *Id.* at ¶¶ 4-5. The court determined "[t]he only argument asserted by the prosecutor at trial in support of the aggravated kidnap[p]ing charge was [the] defendant's handcuffing of the victim." *Id.* at ¶ 13. While the court agreed that driving the victim home utilizing a lengthy, roundabout way home was sufficient to establish a conviction for simple kidnapping, but refused to uphold the aggravated kidnapping because the requisite intent was not proven. *Id.* ¶¶ 33-35.

Presently, the Defendant was convicted of aggravated assault due to the strangling of T.W. The Court finds the aggravated kidnapping conviction does not merge with the conviction. First, the victim's confinement was not "slight, inconsequential, or merely incidental" to the aggravated assault. *Finlayson*, 2000 UT at ¶ 23. Specifically, testimony indicated the strangulation lasted less than two and half minutes, but T.W. was held against her will for several more hours. *Trial Recording*, Apr. 28, 2016, 11:08 AM-12:06 PM (Nurse Beth Fitzgerald-Weekly's testimony that loss of consciousness during a strangulation would occur at approximately six seconds, loss of bladder control at fifteen seconds, and death would result at two and a half minutes). Second, confining T.W. for several hours is not inherent in aggravated assault. *See* Utah Code Ann. § 76-5-103. Confinement is not a requisite element to aggravated assault, but it is to aggravated kidnapping. *See* Utah Code Ann. § 76-5-302. Lastly, the confinement of T.W. had significant independence to that of aggravated assault. Specifically, the Defendant dragged her from room to room, upstairs and downstairs, holding T.W. against her will for several hours. While the Defendant argues there is no evidence the Defendant held T.W.

against her will or moved her from room to room, the Court disagrees. T.W. provided ample testimony of being dragged from room to room. *See* Trial Recording, Apr. 27, 2016, 8:37 AM-12:00 PM. Moreover, the jury found the Defendant acted as such and with the requisite intent. Where the aggravated kidnapping was not incidental or inherent, and also had significance independent to the aggravated assault, the Court finds that the two convictions do not merge.

Therefore, based on the foregoing, the Defendant's Motion to Merge Counts is denied.

CONCLUSION

Based on the forgoing, Defendant's Motion for a New Trial and Motion to Merge Counts are denied. This decision represents the order of the Court. No further order is necessary to effectuate this decision.

DATED this 15th day of March, 2017.

BY THE COURT:

Thomas L. Willmore

Judge Thomas L. Willmore

Addendum D

INSTRUCTION NO 13

You will hear evidence related to A[redacted] M[redacted] A[redacted] K[redacted] and M[redacted] M[redacted] You may not use this evidence as evidence of the Defendant's character in order to show that on a particular occasion he acted in conformity with that character. Thus, you may not use this evidence to convict the Defendant of the crimes he is charged with in this case merely because you believe he committed a similar crime against one or more of these other witnesses. However, you may consider this evidence to the extent that you deem it relevant to determine (1) whether the alleged victim in this case, T[redacted] W[redacted] fabricated her accusation; and (2) whether the Defendant acted in self-defense. Keep in mind that the defendant is on trial for the crimes charged in this case stemming from allegations made by T[redacted] W[redacted] and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO 56

You have heard evidence related to A[redacted] M[redacted] A[redacted] K[redacted] and M[redacted] M[redacted] You may not use this evidence as evidence of the Defendant's character in order to show that on a particular occasion he acted in conformity with that character. Thus, you may not use this evidence to convict the Defendant of the crimes he is charged with in this case merely because you believe he committed a similar crime against one or more of these other witnesses. However, you may consider this evidence to the extent that you deem it relevant to determine (1) whether the alleged victim in this case, T[redacted] W[redacted] fabricated her accusation; and (2) whether the Defendant acted in self-defense. Keep in mind that the defendant is on trial for the crimes charged in this case stemming from allegations made by T[redacted] W[redacted] and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

Addendum E

Kentucky?

A. No.

Q. Were you ever aware of any accusations that she had ever made against this defendant?

A. No.

Q. Last question, question 4. Do you know a woman by the name of G[redacted] O[redacted]?

A. I know of her. That's Tony's ex-wife.

Q. Okay. Is that his ex-wife that he was married to in Florida in 1997ish?

A. That's what I understand.

Q. At the time that you reported this assault to the Smithfield Police Department were you aware of any general allegations that she had made against this defendant?

A. That they had filed for divorce.

Q. Well, I'm talking about like a criminal accusation. Were you aware that she had accused him of any crimes?

A. I understand she shot him five times.

MR. WALSH: Okay, wait. Wait.

A. That's all I know.

MR. DEMLER: There you go.

THE COURT: Hey, stop.

MR. DEMLER: Perfect.

THE COURT: Stop. All right. Had you visited with--what was the lady's name in Florida?

MR. WALSH: G[redacted] C[redacted].

THE COURT: Did you ever talk to her prior to the time you made the report to the Smithfield Police? And the only knowledge that you may have concerning what may or may not have occurred between Mr. Murphy and her is information that you received from Mr. Murphy.

A. That's correct.

THE COURT: All right. Do you have any other question?

MR. WALSH: I don't have any other questions.

THE COURT: Do you have any other questions, Mr. Demler, on re-cross?

MR. DEMLER: Just one second, Your Honor.

[Inaudible discussion.]

MR. DEMLER: Not at this time.

THE COURT: You may step down, ma'am. Thank you. Jurors, we're going to take our lunch break. I want you back at 1:30. Do not discuss the case among yourselves or allow anyone to discuss it with you. Avoid all media coverage. Do not show your notes to anyone. Do not attempt to investigate or learn anything about the case outside the Courtroom. It's your duty to not form or express an opinion until you've heard all the evidence and the case has been delivered to you for your deliberations. Do you have any questions, jurors? All right, thank you. GO with Deputy Richards.

[The jury leaves the courtroom.]

THE COURT: All right. We'll see you all back here at 1:30.

MR. DEMLER: I have a motion for the record.

MR. WALSH: Can we wait until the door is shut?

THE COURT: Okay. Go ahead.

MR. DEMLER: I make a motion for a mistrial. There was specific rulings--

THE COURT: Why don't you come up here to argue it so I can hear you better.

MR. DEMLER: I make a motion at this time for a mistrial. There were specific rulings by this Court that none of the incident where he was shot could come in. It wasn't allowed under 404(b) or anything such as that. We had a side-bar. Talked about how to approach these questions. Mr. Walsh come over, asked the questions, and now she's talked about it.

It puts us in an unfair situation. It's against the ruling that the Court made. There's no way to have a fair trial at this point now that that evidence has come in. I ask for a mistrial.

THE COURT: Do you want to point me to the prior ruling concerning being shot?

MR. DEMLER: I don't have it here, but it's [inaudible].

MR. WALSH: Well, I can articulate that. The State was not--

THE COURT: Come on up here.

MR. WALSH: Sure.

THE COURT: Everyone can sit down. You don't need to stand up.

MR. WALSH: So the State had filed a doctrine of chances motion to get into prior independent or other independent similar sexual assault accusations. Now we've stated in our motion that we were not going to get into the shooting; although I believe Mr. Murphy is still making a strategic decision on whether he wants to get into that. But we were not going to bring it up.

There was also a pre-trial ruling that we cannot bring up the doctrine of chances witnesses and evidence until the door had been opened. The way the door would be opened is if the defense argued that Mr. Murphy had acted in self-defense in inflicting injuries on T[redacted], and if the defense argued that [redacted] M[redacted] was fabricating her account.

So the door has been opened both in the opening statement and in the cross-examination for me to ask questions about whether she has any knowledge of these other women, and whether she knew about prior sexual assault accusations. That's what I was trying to do. That's what I was trying so hard to do to frame my question so that it wasn't very generic.

And it's a bit frustrating because once it became generic, the witness became confused and she started to answer

the question. I cut her off immediately. And then the Court clarified that point.

I don't know exactly what was said, but I heard something about that his ex-wife shot--and then it was stopped.

THE COURT: Shot him multiple--I can't remember.

MR. DEMLER: Shot him five times is what she said.

THE COURT: Five times is what she said.

MR. WALSH: Okay. I mean, that's not good, but the Court can still cure that problem by instructing them that that evidence should be stricken. There's no context for what happened. In fact, the way that made that sound is more like his ex-wife had shot her. There was nothing bad about what Mr. Murphy had done on that incident.

So for that reason the State asks that the motion for a mistrial be denied, and that the Court issue an instruction to strike that comment and completely disregard it. They have sworn to follow the law and the Court's instructions, and we can move this trial forward.

THE COURT: Let me ask you this, Mr. Walsh. Why did you feel you needed to get into--when you were asking your questions at first about sexual assault allegations by these individuals when I had already made the ruling, the legal ruling that the allegations were independent? I can see you wanting to ask her did you know M[redacted] M[redacted]. Did you know so and so. Did you know--just to show the jury that she didn't know them at the time

she made the report, but why were you compelled to start asking about a more specific--

MR. WALSH: The answer to that is just because you don't know someone personally doesn't mean that you haven't heard that they've made a prior accusation. So what if, in theory, Teri had--

THE COURT: Well, it could have been asked did you know or have you heard.

MR. WALSH: Or have you heard what?

THE COURT: Have you heard of this individual and any allegations she may have made against Mr. Murphy.

MR. WALSH: I feel like that's what I asked ultimately.

THE COURT: Well, no. You started--yeah. We got to that point, but--and maybe that has nothing to do with the motion for a mistrial.

MR. WALSH: Well, what I would say on that is our Utah Supreme Court in State v. Verde has given us these tools on how, under a logical relevance theory, we can use a logical relevance to determine that this person is not fabricating. And so really the independence, even the Court has already ruled, I still have to make that argument to the jury that she didn't hear about the sexual assault accusation and then adopt it as her own, and then falsely accused the defendant. I have to do that.

THE COURT: You can do that through when you put the individual on, as far as what their allegations against the

defendant were, and then you--

MR. WALSH: But they can't testify to what T[redacted] knows.

THE COURT: But you've already established that she had never met or knew anything. All right, let's go to anything else you want to say on the motion for a mistrial?

MR. WALSH: Well, I would note that it probably makes strategic sense now to act like the mention of the shooting is grounds for a mistrial, but my understanding is that's still on the table; that Mr. Murphy may be wanting to bring that up. And so I get that it's a convenient argument now.

I guess the last option there is we could think of something creative about whether or not G[redacted] A[redacted] gets to testify if the Court is that gravely concerned about the mention of the ex-wife. If G[redacted] [redacted] O[redacted] never testifies, then--

THE COURT: Do you have her subpoenaed?

MR. WALSH: Yeah. She's flying out here on Monday. I mean, I'm not saying I want to do that, but I'm just saying if the Court was going to order a mistrial, short of that it would be a better solution to just exclude any mention of her.

THE COURT: You agree there was a previous ruling that the shooting should not be mentioned?

MR. WALSH: Yeah and that was based on the State's own motion. The State didn't want to bring that up, but that's why the State's a bit frustrated, because if I could have just asked were you aware of any sexual assault accusations that would have

framed the question properly. When it became very generic, then the witness became confused and now here's where we're at.

THE COURT: I'm not sure it was so generic, and I'm going to take the time during the lunch hour to go look at the video.

MR. WALSH: Okay. All right.

THE COURT: Mr. Demler?

MR. DEMLER: Quick response, Your Honor.

THE COURT: Come back up here.

MR. DEMLER: The issue is the shooting.

THE COURT: Let me stop you before.

MR. DEMLER: Yeah.

THE COURT: Are you going to--

MR. DEMLER: No.

THE COURT: Do you want--I forget her name, from Florida. What's her name?

MS. LACHMAR: G[redacted] O[redacted].

THE COURT: O[redacted], you weren't calling her. The State was going to call her.

MR. DEMLER: The State's calling her.

THE COURT: Okay, go ahead.

MR. DEMLER: And we were not going into that because the Court's already made a ruling. Now you have a witness--

THE COURT: So you were not going to ask about the shooting?

MR. DEMLER: Positively not.

THE COURT: Okay.

MR. DEMLER: Positively not. We didn't want to bring that in and now you've got a witness who says she shot him five times.

MR. WALSH: But that doesn't necessarily mean he did anything wrong.

THE COURT: Just a minute. He gets a chance to respond.

MR. DEMLER: Here's the thing. The ruling was because of the State. The Court made a ruling they couldn't bring that in. Now you've got Attorney Walsh, Attorney Lachmar, and you have Heidi Nestel. Surely someone could have told the witness you can't bring this up. That's their obligation to do that. There's no way to erase that out of their minds now, that he was shot five times. You can give all the curative instructions you want and it's not erasing it out of their mind. No way, and that denies him a fair trial. And so we think the motion should be granted.

THE COURT: All right. I'm going to take the lunch hour, review the prior ruling of the Court, and also review the record. I'll let you know before we have the jury brought back in. Thank you.

MR. DEMLER: Thank you, Your Honor.

BAILIFF: Court's in recess.

MR. DEMLER: What time do you want to be back, Your

Honor?

THE COURT: 1:30.

[RECESS.]

BAILIFF: Court for the First Judicial District of the State of Utah, in and for the County of Cache, is now in session, the Honorable Thomas L. Willmore presiding. You may be seated.

THE COURT: All right. I spoke with counsel in chambers, and I want to give you an opportunity to make any other arguments that you may have in support of your motion, and anything that you feel that you need to make for the record. This is your motion, Mr. Demler. Go ahead.

MR. GALLOWAY: Judge, I think a lot has already been said.

THE COURT: Come on up to the podium.

MR. GALLOWAY: I think that we stated a lot of the basics on this. Our objection for a mistrial is based on the statement of the witness regarding Mr. Murphy being shot five times by a prior spouse. That's already been reviewed by the Court. We understand that. Our argument that that statement being made in front of the jury is just too prejudicial. It's not an innocuous statement. I mean, it's a statement that nobody--it's not the type of statement that would lead to a curative instruction doing any good in our opinion. I mean, these folks sit here and listen to this and, then, out of nowhere comes this statement about this individual being shot five times.

The Court has already ruled that that particular incident can't come in. The only way it can come in is if we open the door to it. Mr. Murphy has the option of opening the door to that. By that statement being blurted out, that option has completely been taken off the table to the defense. That becomes prejudicial to us.

I've listened to Ms. Lachmar and Mr. Walsh. I understand their arguments that no. This is not prejudicial simply because there's a lot of evidence against Mr. Murphy. And to be honest with you, I don't think that holds any water at all, and I said this in chambers, but I'll say it again here. The amount of possible potential evidence against an individual does not lead to the Rules of Evidence being more flexible. They still apply. In fact, this has already been ruled upon.

The fact that more evidence may come in against Mr. Murphy which is prejudicial to him, that doesn't mean that we can play fast and loose with this particular issue. In all honesty, that type of statement to a jury in Cache County, Utah, is not one they are going to simply set aside and I wouldn't expect them to.

THE COURT: Let me ask you this. Let me ask you this. One of the options I have available to me is to find that it's prejudicial, but exclude the testimony concerning the Florida, and I'll just use the initials G.M. How does that, with regards to the other three allegations, how does that, the statement that

he was shot five times, prejudice your client with regards to the other doctrine of chances?

MR. GALLOWAY: Well, and I guess--I was just trying to think of this logically. I guess my answer to that would be okay. They've already heard this. They've already heard there's an incident out there where he gets shot. They're going to hear three other individuals come in. They're going to hear their stories, and none of these stories is that fact, that incident of him being shot five times going to arise? And so in the back of their mind they're going to be like okay. I know they've got this. I know we've got this, and I know we've got this, and honestly I know we've got something else out there.

I know it's out there. The jury is going to be thinking I know it was out there. We don't know the details. It might be the worst of the bunch, but I know it's there. And so I think it's definitely prejudicial. They're going to come in here and hear all these things, and then they're going to hear a fragment of another possible incident. I don't think you can take that out of their mind, Judge.

THE COURT: Okay. Anything else?

MR. GALLOWAY: No, Your Honor.

THE COURT: Mr. Walsh?

MR. WALSH: First of all I would just state for the record that it's clear from reviewing the transcript that the State was in no way eliciting or trying to get into that.

THE COURT: I will go through that. I will go line-by-line.

MR. WALSH: Okay, you're going to--so I don't need to address that aspect of it.

THE COURT: No. You don't need to address that. I agree fully with you. Your questions were proper questions. It's the witness that responded in a non-responsive manner.

MR. WALSH: So obviously no trial is ever perfect where everything is done exactly the way we would like it. That does happen in every trial, and obviously the Court has to look and say, you know, does the defendant get a fair trial. That's important. The State agrees with that.

In State v. Butterfield, 2001, the Utah Supreme Court states "in view of the practical necessity of avoiding mistrials and getting litigation finished, a trial court should not grant a mistrial except where the circumstances are such as to reasonably indicate that a fair trial cannot be had, and that a mistrial is necessary to avoid injustice."

"Once a trial court"--this is that same case, State v. Butterfield. "Once a trial court has exercised its discretion to deny a mistrial," this Court's prerogative on appeal--the Court of Appeals gives great deference to the trial court's decision making because Your Honor was here in the Courtroom. You know the case. This is at least probably an eight day case. There's a lot of testimony from a lot of different witnesses. It was

unfortunate that that was mentioned.

It can be saved. The Court can give a curative instruction to the jury to disregard the testimony of T[redacted] M[redacted] and I wouldn't repeat it. But what we could do is say when Mr. Walsh asked T[redacted] W[redacted] the question about G[redacted] A[redacted] O[redacted] you're only to consider this particular response. And then the Court can highlight her response about no. She hadn't heard of any accusations. And we won't repeat it. The State won't reference it, won't make argument on it.

Nothing further will be discussed about it unless the defendant decides that strategically it is helpful to him to bring that up.

THE COURT: Isn't the safe thing for me just not to allow you to bring in any evidence concerning G[redacted] A[redacted]? I've got G.M., but you're calling her--

MR. WALSH: Her name now is G[redacted] A[redacted] O[redacted] but it was G[redacted] M[redacted].

THE COURT: It's the safe thing, isn't it?

MR. WALSH: It could be. I still feel like it can be cured without excluding her from the trial, but if the Court was weighing do I declare a mistrial or do I proceed with the doctrine of chances evidence excluding G[redacted] A[redacted], then certainly the State would agree with the Court's discretion there if that's what the Court feels, and that could be definitely one approach to handle this.

Here's the standard on appeal, judge. The Court of Appeals will not find an abuse of discretion in your decision making on whether you were proper in denying a motion for a mistrial. So they will not find an abuse of discretion unless the record clearly shows that the trial court's decision is plainly wrong and that the incident is so likely to influence the jury that the defendant cannot be said to have a fair trial.

And then the last thing I wanted to quite here, Judge, is State v. Duran, 2011 Utah Supreme Court. It says--

THE COURT: Let me just stop you there. I've been around long enough I know how to make findings of fact to avoid being overturned on abuse of discretion.

MR. WALSH: Okay. I'm not going to actually discuss that further, but I wanted to respond to Mr. Galloway's statement that you can't say that, you can't say that it wasn't that bad just because you have all this other evidence in, but that's exactly what we are saying. Because it says "a statement made in passing, and was relatively innocuous in light of all the testimony presented."

So this jury is going to hear testimony. Has already heard it from Teri. They're going to hear testimony from A[redacted] K[redacted]. She's going to testify about being brutally raped and threatened to be drowned. They're going to hear testimony from A[redacted] R[redacted]. She's going to testify that he came into her bedroom, threatened to kill her, chased her out of the house over

to the neighbors, strangled the neighbor.

They're going to hear testimony from M[redacted] M[redacted] who is going to testify that he strangled her, tried to remove her panties and wanted to have sex with her.

They're going to hear all of this evidence. And so one five second statement about shots being fired at Mr. Murphy from an ex-wife, in light of all the testimony, it's not going to be problematic. So that's the State's argument, Judge.

This case has been pending for seven years. We ask that the Court deny the defendant's motion for a mistrial.

THE COURT: All right, thank you. Any rebuttal, Mr. Galloway?

MR. GALLOWAY: Judge, the only thing that came to mind, to be honest with you--

THE COURT: Come on up here. Come on up here.

MR. GALLOWAY: Okay. Sorry. And I don't want to go back and forth all day. I think the Court has a good grasp of the issues. I guess the only thing that came to mind is it's just me personally, not even necessarily legal by a case law argument, but I hope we haven't come to the day where a statement about an individual getting shot five times in any scenario is relatively innocuous, and I'll just leave it at that.

THE COURT: All right, thank you. We were able to pull up the--I long for the days when we had court reporters because you could ask them to read back the record. The way it works now

is when it's being recorded, it is there and then, for some reason, everything has to go to Salt Lake. And then you can't review it until the next day, but Angie was able to work a miracle and pull back and review the time frame that we're talking here.

At 11:59 Mr. Walsh asked a proper question concerning A[redacted] R[redacted]. He asked [redacted] W[redacted] a proper question. She responded properly about any criminal accusations made, whether she had knowledge of any criminal accusations against Mr. Murphy.

Then after she answered, the next question was a proper question asked by Mr. Walsh concerning A[redacted] K[redacted]. And it was "were you ever aware of any accusations that she made against the defendant." Now the key word there is "accusations," and it's also used in there "criminal accusations," because that becomes important when I look at the response of the witness, because she doesn't even talk about an accusation.

And then Mr. Walsh asks about G[redacted] M[redacted], or I'm just going to call her G.M. because that's what has been in the prior court rulings. He asks about her, and then the witness responds "I know of her. That's Tony's ex-wife." And then Mr. Walsh, trying to control the situation, talks about them being divorced in, and he uses the phrase "1997ish" specifically.

And then this is the key question because it relates to criminal accusations. Mr. Walsh asks "at the time you reported, were you aware of any" he says "general allegations" in this

first question "she had made against defendant." Once again, the response is not about an allegation. The answer is that they had filed for divorce.

And then Mr. Walsh clarifies it and says "I'm talking about a criminal accusation. Were you aware that she had accused him of any crime?" So two very proper, good questions going very simple as to about a criminal accusation or accusing him of any crime. She just blurts out, which is a non-responsive answer, "I understand she shot him five times."

And then that all of a sudden gets--I looked at the jury. Heads come up and Mr. Walsh, he's trying to control the situation says "no, wait." So that brings further attention to that issue. And then she still keeps talking, even after that. She says "that's all I know" about him being shot five times.

And then Mr. Demler improperly states there "there you go. Perfect" and he claps his hands. So that's how it occurred.

And then I tried to remedy the situation by me jumping in and I hardly ever will ask a question in a jury trial, but I was trying to stop the loss of blood on that one. And so I jumped in and asked those questions to end that.

So the first question I have to look at is, the first issue, does that prejudice the defendant, where she blurts out, unresponsive to three questions, where she blurts out "I understand she shot him five times." And so that's what we're dealing with.

I'm going to have a jury that's going to be wondering right from here on out why he was shot five times in that G.M. situation, what he did to be shot five times. They'll think about that over and over again, especially in light of the testimony that's been given in this case, testimony that is alleged to be very violent, very glaring. And so it creates in the jury's mind so many unanswered questions.

So what we've got, and what magnifies it--if it was just a case of [redacted] W[redacted] testifying this is what happened to me, and then Mr. Murphy taking the stand, we wouldn't have it. But we've got these situations of very, very alleged violent-type similar situations. And so it becomes very glaring and there are a lot of many unanswered questions.

We had just finished--and this is a key factor and a finding by the Court. We had just finished that very graphic and violent allegation against the defendant--by the defendant against the alleged victim. And as I indicated, the doctrine of chances evidence that was to come in was very violent and very graphic.

So I'm finding that that does--there is prejudice to the defendant because what it does--the Court did order that there wasn't going to be any reference to him being shot unless defendant opened the door. Well, that takes away his option with regards to G.M. and the situation with G.M. And so the next question I've got to look at, will a curative instruction

concerning that work so it's not that prejudicial to the defendant.

The same things happen and the same concerns are going to be there, and the same issues arise. And so I don't feel that with regards to that a curative instruction will work concerning the testimony of G.M.

You know, I spoke with counsel and I'm going to tweak this a little bit. I'm not going to declare a flat-out mistrial, but to cure this I'm going to not allow the State to bring up any evidence concerning G.M. because of how it would force the defendant to address those issues.

The facts are that there were attorneys in that office that could have clearly helped [redacted] W[redacted] understand she was not to bring that up. She disregarded and didn't even pay attention to the three questions that were asked to her prior to her blurting that out. I can't see, Mr. Demler and Mr. Galloway, how--as I've thought about it and tried to work through, and I immediately jumped on it and did what I could to sort this out. In 17 years I've never declared a mistrial.

That doesn't mean that I shouldn't in this case. But as I think about it, I cannot see how those statements with a curative instruction do not--Mr. Murphy is not prejudice if I tell them to disregard it; that there will be no evidence concerning G.M., and leave it at that, and move ahead.

MR. GALLOWAY: Can I address one thing, Your Honor?

THE COURT: Sure.

MR. GALLOWAY: The only thing that would leave a concern for me, just sitting there trying to think strategically how we go forward, as I would argue that a curative instruction to the jury--look. Honestly, we're sitting over here wondering now whether we need to have Mr. Murphy address this because it's already been planted in their mind. That seed is planted. What do we do now?

It's not like it takes G.M. completely off the table. G.M. has already been thrown on to the trial by her statement.

THE COURT: The only way you could address it is if G.M. comes to testify.

MR. GALLOWAY: Well, and now we're back into that circular problem, you know? And so that's why I'm saying I appreciate the direction the Judge is going, but I'm not sure it completely cures anything because G.M. has already been thrust upon the trial.

THE COURT: Why do you think you would have to address it if I don't even allow them to bring up anything with regards to G[redacted] M[redacted]?

MR. GALLOWAY: Well, okay. It's not just G[redacted] M[redacted]. It's the fact that a statement was made regarding five shots being placed into Mr. Murphy. How are we going to address that? That's already been opened up.

THE COURT: I understand that.

MR. GALLOWAY: That's already opened up now.

THE COURT: But I have enough faith in a jury that they will follow my instructions, disregard it.

MR. GALLOWAY: Okay and I guess that would be--with regards to the Court's ruling, that would be my concern and objection to that because I'm still not convinced that even with a curative instruction and no more G.M. that it will be curative enough to not be prejudicial to Mr. Murphy.

THE COURT: All right. That's my ruling. Now, what I want you to do--I even hate to even suggest this because you're going to say you don't want--because you don't want to participate in a curative--I'm going to ask--I'm going to step out. I'm going ask you to take ten minutes and draft a curative instruction that I'll look at.

MS. LACHMAR: Thank you, Your Honor.

THE COURT: And I know Mr. Demler is going to probably say I don't want to participate in that, and I understand. So, but I want you to take a stab at it, and then I'll make some modifications and we'll get the jury in.

MR. GALLOWAY: Can we have them take a stab at it?

THE COURT: Yeah, they're going to do it. They're the ones that created the problem.

MR. GALLOWAY: And then we'll put our objection on the record.

THE COURT: Uh-huh [affirmative].

MR. GALLOWAY: Yeah. Okay.
MS. LACHMAR: Thank you, Your Honor.
THE COURT: All right. Now, before we break, are you done with [redacted] W[redacted]?
MR. WALSH: W[redacted], yes.
MS. LACHMAR: Yes.
THE COURT: You don't have any other questions?
MS. LACHMAR: No.
MR. WALSH: Not at this time in the trial.
THE COURT: Now, did you have any? We were back on--you had done your cross.
MR. WALSH: I had just done my re-direct.
THE COURT: Had you done your re-cross? Did you have any other questions, Mr. Demler?
MR. DEMLER: No.
THE COURT: Okay. All right.
MR. WALSH: Now, Judge, I would state also for the record, we have made arrangements for G.M. to travel to Utah on Monday. If the defendant would like, if he's still considering that could be a strategic decision, that he'd like to discuss that, I can still have her come, and then he can make that judgment call next week if he'd like. If he doesn't want it, then we need to cancel their plane tickets and not have them travel.
THE COURT: Can they let you know by 8:00 tomorrow morning?

MR. WALSH: Sure. Yeah.

THE COURT: Okay. They will let you know by 8:00 tomorrow morning. If they don't let you know, cancel it.

MR. WALSH: Okay, thank you.

THE COURT: All right, thank you.

[RECESS.]

THE COURT: I have read what Mr. Walsh prepared, and I know you have objections, Mr. Galloway. What I suggest is the following. It's different from what Mr. Walsh has prepared. Something to this effect, "prior to the lunch break you heard questions and testimony from [redacted] W[redacted] about allegations involving the defendant and his ex-wife, G[redacted]"--is it O[redacted]?

MS. LACHMAR: It's G[redacted] O[redacted],[redacted]

THE COURT: "M[redacted] W[redacted] improperly responded to questions asked by Mr. Walsh. Because her questions were improper, I am striking from the record all questions by Mr. Walsh and answers by [redacted] W[redacted] "

MR. GALLOWAY: Judge, did you just say "because her questions were improper."

MR. WALSH: Her answers.

MS. LACHMAR: It should be answers.

THE COURT: I probably just should--I shouldn't strike all questions.

MS. LACHMAR: No. No, that's not--

MR. GALLOWAY: I just heard that "her questions were improper." I just wondered if that was meant to say "her answers."

THE COURT: "Her answers." Maybe I misread. "[redacted] improperly responded to questions asked by Mr. Walsh. Because her answers were improper, I am striking from the record all questions by Mr. Walsh and answers by [redacted] concerning [redacted]" or did you refer to her at all as [redacted]?

MS. LACHMAR: No.

THE COURT: Okay. I was going to put that in, but--"you are to disregard the questions and the statements by [redacted] concerning [redacted]. You must not consider any of [redacted] statements concerning [redacted] in your deliberations." Now do either side have any objections?

MR. GALLOWAY: Judge, I would object. First of all, I know that Mr. Walsh presented one potential curative instruction. I would object as to that one.

THE COURT: I'm not going to give that one.

MR. GALLOWAY: Okay. I believe that one is too vague. With regards to the one the Court proposed, I would put an objection on the record. Number one, that that is going--I do not believe that will be curative in nature. I go back slightly, and I hate to digress, but I think that the statement said is beyond the point where this particular instruction was going to be

curative.

Also, I am slightly concerned that just bringing up the curative instruction referring to [redacted] several times, and the witness' statement regarding [redacted] just serves to embed that into the jury's mind and it, in fact, has the opposite effect of a curative instruction.

THE COURT: Do you want me to mention specific statements of being shot five times?

MR. GALLOWAY: Honestly I think that makes it worse.

THE COURT: Okay. I agree. That's why I didn't put it in.

MR. GALLOWAY: I think that makes it worse. I'm just not sure what we had [inaudible]. So that's my objection.

THE COURT: Okay. Understand.

MS. LACHMAR: Judge Willmore, I just want to spell her name for her. It's [redacted] I've lost--

MR. WALSH: [redacted]

MS. LACHMAR: [redacted]

THE COURT: So there's not an "F?"

MS. LACHMAR: No.

THE COURT: [redacted] okay.

MS. LACHMAR: Yes.

THE COURT: Let's get the jury in. Who is your next witness?

MS. LACHMAR: It will be Kami Nelson, Your Honor.

THE COURT: Do you have her in Court?

MS. LACHMAR: She's in the hallway.

THE COURT: Let's get her in so we can get her sworn once the jury is in.

MS. LACHMAR: Okay.

[The jury enters the courtroom.]

THE COURT: You can go ahead and sit.

BAILIFF: Court's back in session.

THE COURT: Jurors, thank you for your patience. I apologize for the delay. There were some matters that had to be taken care of with the attorneys, and we've got those done now. Jurors, we've concluded the testimony of--

MR. WALSH: T[redacted] W[redacted], Judge.

THE COURT: --T[redacted] W[redacted], and I need to instruct you concerning something about her instructions. So I need you to-- about her testimony. So I need you to listen very carefully.

Prior to the lunch break you heard questions from Mr. Walsh and testimony from [redacted] W[redacted] about allegations involving the defendant, Mr. Murphy, and his ex-wife, G[redacted] O[redacted]. [redacted] W[redacted] improperly responded to questions asked by Mr. Walsh. Because her answers were improper, I'm striking from the record all questions by Mr. Walsh and answers by [redacted] W[redacted] concerning G[redacted] O[redacted].

I'm instructing you, jurors, to disregard all questions

by Mr. Walsh and statements by [redacted] concerning [redacted] and Mr. Murphy. You must not consider any of [redacted] statements concerning [redacted] and Mr. Murphy in your deliberations.

All right, jurors, with that instruction we will get back to the testimony. The next witness?

MS. LACHMAR: Your Honor, the State calls Kami Nelson.

THE COURT: Come up here by the Bailiff, please.

MR. DEMLER: Your Honor, Travis Allen is sitting here. He's excluded from the Courtroom. I'm not sure why he's in here.

MR. WALSH: Your Honor, he's the lead investigator in this case and so he's allowed to stay. He just got back from his training.

THE COURT: He's the State's representative. So he'll be allowed to stay in. Raise your right hand, please.

KAMI NELSON called as a witness by the State of Utah, having been duly sworn, was examined and testified on her oath as follows.

THE COURT: Our witness stand is over here by Deputy Richards. If you'll come over there, please.

DIRECT EXAMINATION

BY MS. LACHMAR:

Q. Can you see me?

A. Yeah.

Addendum F

Thank you.

THE COURT: Thank you, Mr. Demler. Rebuttal, Mr. Walsh?

[Long pause.]

MR. WALSH: Thanks for your patience, ladies and gentlemen. Just a few more comments and you get to go and make an important decision. Defense counsel has given you this analogy of a cat and a mouse in the box, right? And he says that you come back and the mouse is gone. There's a hole in the box. Did the cat eat the mouse? Did the mouse get away? The inference is that we don't know, and that means reasonable doubt.

He suggests that there's these big holes in the State's box here, and there's just reasonable doubt. We don't know what happened. It's an interesting analogy, but I think that the analogy should be more along these lines. You come back to look at this box, and you're right. There's a hole in the box. And you don't see the whole mouse, but guess what? You see this cat, and he's licking his lips, and you've got a foot, and you've got a tail hanging out the front of his mouth. So just because you didn't see him eat it doesn't mean you don't know he did it.

This defendant committed these crimes. There is no reasonable doubt. Take a step back and look at the totality of the evidence.

If you look at a painting, like an impressionist painting where they use all these brush strokes, big, bulky brush strokes. If you were to walk right up to that painting and just

stare at one of the brush strokes, you don't have any idea what the painting is of. But if you step back and look at all the brush strokes all at once, the picture comes into focus, and you can see that it's a painting, a beautiful painting of some flowers. That's what I'm asking you to do, is to not get stuck down in the minutia, every little teeny nuance, but look at all the evidence in its totality and you will know that this defendant sexually assaulted, strangled T[redacted] W[redacted]. He held her against her will and terrorized her for a substantial period of time. She was strangled.

Now, like I say, I'm not going to get down into every single little tit-for-tat, but I do want to address a couple items, points that defense counsel, Mr. Demler, made about these supposed holes in the State's box here. It seemed like he spent a lot of time dwelling on memory, supposedly inconsistent statements.

If you'll recall, during jury selection I asked you some questions, and I don't even remember at this point, it's been so long, who I asked. But I asked one of you, most likely, a question about a wedding. Like if you could remember your wedding day. And over the years have you told the story of your wedding day multiple times?

Well, sometimes you're tired, and so you summarize things. Sometimes you're talking specifically about the wedding reception, and whoever is asking you the questions are asking

specific questions about that part of the event. Just because you haven't told the exact same story about your wedding for your entire life doesn't make it any less true that you're still married and you had a wedding.

So to sit here and say that just because Teri didn't tell every single person every single aspect, to sit there and say that's a hole in the box, no. Absolutely not. In fact, the neurobiology of trauma, the way our brains work when we're presented with a traumatic situation, as you heard from Dr. Hancock, is we fight, or we flee, or we freeze. It's called self-preservation. He compared it to if you get chased by a grizzly bear, do you remember every single rock or tree, everything that happened? Or do you remember there was a big ole grizzly bear, and you remember his teeth, and he was chasing you, and you were really terrified? That's what you remember. That's not a hole in the box whatsoever.

No DNA, supposedly another hole in the box. It's hard to have DNA when the defendant has cleaned up the crime scene.

No carpet burns, supposedly. Look. The photo quality is not good. Is the carpet that was in the Murphy home of the same quality as the hotel room in West Valley when the defendant attacked M[redacted] M[redacted]? I don't know. I wasn't there. I would submit to you, usually in hotel rooms, an industrial grade quality of carpet. It's not as soft.

And no one is saying that he literally is dragging her

by her legs and just banging her around on every single thing, no. This is about domestic violence. He's controlling her. He's abusing her. He's pulling her around into different parts of the house. Throwing her down the stairs. That doesn't mean that you're going to have grotesque injuries, blood everywhere, black and blue on every part of your body. These injuries are consistent with her account.

They absolutely are, and Mr. Demler says it's a huge hole in the box that there's no injuries that are noted on her neck. And he shared his opinion about what that meant, but Judge Willmore ruled on that and said you're not to rely on the opinions of attorneys. You are to base your decision on the evidence, your world of evidence that's been presented.

And Beth Weekley, she's qualified. I think she said over 900 exams personally, or case reviews of these forensic medical examinations. The peer-reviewed scientific research that she testified to says less than fifty percent of strangulation victims have any visible injury on their neck.

Well, Officer Zitterkopf sees red marks on her neck. Beth Weekley testified that all the time she notes injuries on these forensic exams, and then when she takes a photo you can't really see the injury like you could using the naked eye. That is not a hole in the box.

Supposedly T[redacted] maybe recanted at the BHU. Did she? Did she not? But if she did, if she recanted that she had been abused

by her husband back in January, would it be surprising? She is trying to leave the hospital. The defendant is present. What is she going to say, no? Absolutely he beats me all the time?

That's not how domestic violence works, and you heard about that from Dr. Hancock on the first day of this trial. It's about power, control, manipulation. That's not a hole in the box.

And I love the spin job, with all due respect to Mr. Demler. How he tried to take Dr. Grey's testimony and tried to sell you folks on how that creates reasonable doubt. I submit to you that that is not a hole in the box, but that's a foot hanging out the cat's mouth. That's a big ole tail hanging out this cat's mouth.

Let's look at what Dr. Grey said specifically about the defendant's lie that he told on the stand. I submit to you that based on the evidence that was not the truth. And Dr. Grey said this. The defendant's story, his explanation, it would be unlikely to produce the pattern of injury. How that creates reasonable doubt is beyond me.

They are very superficial cut wounds that are grouped in a very tight pattern. I mean, seems a little odd that if you have supposedly an erratic, unstable, jealous woman, she's punching at you with a knife, which I would still invite each of you--I don't want anyone to get hurt back there. But all I'm saying is that it's not going to hit your skin. That's a big whopper. But even if you could hit the skin, would they really be

almost overlapping one another almost in the exact same location? No. The only way you do that is if you hold still and if you methodically make at least four cut marks, or maybe like this. But this, not a chance.

The mechanism described, according to Dr. Grey, the defendant's mechanism that he describes is unlikely to produce long, superficial slices on the skin. The blade doesn't stick out from the--very farm from the hilt. And so the knuckles would be the first thing to make contact. I don't see how a blade would slice down on the skin if the motion was a punch.

Then when Ms. Lachmar gives him the alternate explanation of a self-inflicted injury in an effort to preserve himself, defend himself, he says that's a plausible explanation. It's an area of the body that is easily accessible. It's a natural and easy location to injure, and it's very superficial in nature. He likened it to a hesitation injury that he's seen on some suicide patients before they actually go through with it.

To say that Dr. Grey's testimony is a whole in the box, I submit to you there's nothing that could be further from the truth. Isn't it weird that the defendant testified yesterday that after he was punched, while he supposedly sat very still and laughed, because that supposedly was very funny, and she punches him 8 to 10 times over 45 seconds to two minutes, that at some point he feels like a burning sensation. And he tries to go strike her, but he just can't move his left arm. It was like

paralyzed or something, but that's my recollection of his testimony.

Dr. Grey says there's no explanation as to why that injury would have caused paralysis in his left arm. It's not true.

And if the defendant's little story isn't true, why tell it? The only reason you plant a knife in the shed and go get it tested to confirm that it's your own blood on there, the only reason that you lie about this story is because what you did is you threw your wife down the stairs. You strangled her. You shoved your penis in her mouth. You whipped your penis--his penis in her face. You pinched her nipples.

I'm not going to get into each one of these women in a lot of depth that Mr. Demler has referenced. And he's right. This case is about T[redacted] M[redacted], but you can't consider this other evidence for a very specific purpose, and I'll just reiterate that one more time. You may consider the evidence to the extent that you deem it relevant. And I submit to you this is extremely relevant evidence.

I submit to you that you should put great stock into this evidence, and give great weight to this evidence so you can use it to determine: (1) whether T[redacted] fabricated her account; and (2) whether the defendant acted in self-defense.

What are the odds, folks? What are the odds that these four women would accuse the defendant of similar violent assaults

involving a sexual component, alcohol, strangulation suffocation, or an injury on a neck? What are the odds?

Just briefly, remember your world of evidence. You can only consider what was presented on that witness stand and through the exhibits.

A[redacted] M[redacted] testified she was burned on the neck with a cigarette, and on her finger. You heard testimony from Beth Weekley that it was the photographs--

MR. DEMLER: Your Honor, I'm going to object. This is beyond the--my closing, in rebuttal. I didn't go into that.

THE COURT: Rebuttal is to address what Mr. Demler raised.

MR. WALSH: Right. He raised that there were no charges on Angela Kiskaden, thereby casting doubt on her account. So I can present evidence and make argument on the evidence that was presented that would go to her credibility, Judge.

THE COURT: I'm going to allow you to go on that.

MR. WALSH: So, we heard the story, right? A note? I mean, who does that? He sexually assaults her. He burns her with a cigarette. She's got cigarette burns. She's got bruises. She's got petechiae on the neck.

There's a bottle of Jim Beam in that truck. There's blood on the seat. She was on her period at the time according to the police report that you'll read in there. He remembered at that time. Now there's no DNA. That's true, there's no DNA.

There is this note in here and I don't recall what the exhibit was. Go look at the note, okay? Because this note is also corroborated by A[redacted]'s mom, Rosetta. It talks about how she scribbles a name, signs this note. Look carefully at the handwriting up here that starts to say "I A[redacted]." Then compare it with defendant's written statement in West Valley City. And what you're going to notice, I submit to you, is that the as match, and this very distinct G in the word "massage" matches.

Very briefly, speaking of M[redacted] M[redacted], yeah. I mean we're not--the State's not arguing. Yeah, she was addicted to heroine. She was a prostitute. Sad story, but look at the evidence that was presented in that case. Read that defendant's witness statement. It is not consistent with what everyone else is saying. All the people are singing the same song, except for this defendant. He's out of tune.

Officer Zeller takes photos of his fingers. He's got fresh cuts on his fingers, with fresh blood on those. That's consistent with [redacted] M[redacted] testimony that he shoved his fingers into her mouth to get her to shut up.

April Rouse hears a blood curdling scream, but if you read that defendant's statement, he asked her for sex. She yelled no, and then they sat and talked on the bed.

Rexene Boyd knocks on the hotel door, and M[redacted] stumbles out naked, fresh injuries on her body, red marks on her neck. Thank you. You just saved my life.

Beth Weekley reviewed the evidence in that case. She's got fingerprint marks on the back side of her neck. She's got a fresh rug burn. No explanation of that in the defendant's witness statement. Clearly, something happened. Yet he doesn't make any mention of it.

Once again, this evidence cannot be ignored, because the defendant has put this at issue. He has called T[redacted] a liar. He said that she attacked him with a knife, and this cannot be ignored. What are the odds?

There were a few little things in there about why would she go back? Well, she explained that. Why would she go back to the house the next morning? It does seem counter-intuitive. It does seem odd, but she wanted to keep her job, and Marty was there to protect her.

All right. I wanted to just address a couple of the jury instructions before I close so that you understand what the State of Utah is asking you to do.

Instruction No. 33 is what I'm going to refer to right now, folks. Instruction No. 33 details the elements for aggravated sexual assault, and I'm not going to read all of those. But I would draw your attention to number 2. The State's got to show that the defendant put his penis in T[redacted] mouth, and that it was non-consensual. Very clear from the evidence. Just because they were married before and engaged in consensual sexual activity doesn't give this defendant the right to do what he did.

Now, number 5. In the course of committing said act--and in the course of committing said act compelled T[redacted] W[redacted] to submit to forcible sodomy--that means forced oral sex--by threat of kidnapping, death or serious bodily injury to be inflicted. Well, he did it both ways. He said "I'll kill you, bitch." And then he said the same thing through his actions, and you can consider both of those.

MR. DEMLER: Your Honor, I'd like to approach for a second.

THE COURT: What's that?

MR. DEMLER: Can I approach?

THE COURT: Sure.

[Inaudible discussion at the bench.]

MR. WALSH: Okay. So there's an instruction in there that talks about it doesn't need to be a verbal threat, although the defendant did do that. It can also just be a threat to his actions. He also threatened her with serious bodily injury. In fact, he inflicted her with it. Strangulation is a serious bodily injury.

I'm going to ask you to find the defendant guilty of aggravated sexual assault.

Now I want to turn your attention to Instruction No. 36. Excuse me, Instruction No. 39, aggravated kidnapping. Down on number 4, it talks about I've got to prove--the State has to prove beyond a reasonable doubt that he unlawfully detained or

kidnapped T[redacted]. You will read about what the distinction is there. Unlawful detention just means that you detained someone against their will. It's very clear that he did that. Kidnapping is when there's a substantial period of time. Either way, the State has proven that because this went on for hours.

And then under 5 there's a variety of ways that we can arrive at the defendant's guilt here. I'm just going to touch on a couple. (C) in the course of this unlawful detention he acted with the intent to inflict bodily injury. In fact, folks, he did inflict bodily injury.

Four, to terrorize. He absolutely terrorized this woman. You'll read the definition of terrorize in Instruction 41, which says "an act which creates and maintains a state of extreme fear and distress in another; or coerces another by threat or violence to do something." Both of those took place. She was in an incredibly fearful state, and the defendant forced her to perform oral sex.

And then (d), to commit forcible sodomy or forcible sexual abuse. That's in 5(d). Or to facilitate a felony, and you will read about what the different felonies are. There's a lot of different ways you can arrive here. I'm going to ask each one of you to find the defendant guilty of aggravated kidnapping.

Now moving forward quickly to Instruction 46, forcible sexual abuse. I want to direct your attention to the State has to prove that the defendant, beyond a reasonable doubt, touched T[redacted]

Willden's breast. Well, we know he did that because T[redacted] has testified that he pinched her nipples.

Now, Mr. Demler does note that there's no photographs of that. You're right. Those pictures weren't taken at the Hobby Lobby. Sounds like Dr. Firth didn't make her completely undress, but you know she's telling the truth because all the evidence corroborates it in addition to this here. However, there's another option for you to find him guilty of forcible sexual abuse, and that's he took indecent liberties with her. He took his penis and he slapped her face with it. Either way, he's still guilty.

Then 5. He clearly did this to cause emotional or bodily pain to T[redacted], and he did it to arouse his sexual gratification.

It's hard to believe that each one of you, during jury selection, agreed that there are some in society [inaudible]. There are some who find pleasure in hurting and degrading another person.

Finally, aggravated assault. This is the instruction where the State needs to prove that he used unlawful force and violence against T[redacted] M[redacted]--T[redacted] W[redacted] and he used other means or force likely to produce death or serious bodily injury. Beth Weekley testified about how dangerous strangulation is, that it can produce death, that it can produce serious bodily injury, and it often does.

Furthermore, there's an instruction here that makes it very simple for you. It says strangulation is serious bodily injury.

Thank you for your patience. Appreciate your thoughtfulness and your attention [inaudible]. I ask you to consider the whole picture, not just a couple of the strokes. I ask you to consider this evidence which shows T[redacted] W[redacted] is not lying, and she did not attack this defendant at the time.

I ask you to find on behalf of the people of the State of Utah the defendant guilty of each and every one of these charges: aggravated sexual assault, aggravated kidnapping, forcible sex abuse, and aggravated assault.

Thank you.

THE COURT: Thank you, Mr. Walsh. Now is the time to talk, okay? Now is the time for you to begin your deliberations. We do have two alternates on the jury. The alternates were the last two that sat in these chairs up front. And so, Mr. Irhaim, you're an alternate, and then Jessica Tomkinson, you're an alternate. And so you don't get to go back and talk about it. You're going to be free to go as soon as we get you all out of here.

And so I'm going to have the Bailiff sworn. Come over here, Vince, where she can swear you.

THE BAILIFF IS SWORN.

THE COURT: All right, jurors. Go with Deputy Sterling,

Addendum G

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IN THE FIRST JUDICIAL DISTRICT COURT
CACHE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. ANTHONY CHARLES MURPHY, Defendant	* * * * * * * * *	MOTION IN ARREST OF JUDGMENT No. 091100683 Judge: Thomas Willmore

Anthony Charles Murphy, by counsel, hereby moves the Court pursuant to Utah Rules Criminal Procedure 23, to arrest judgment. The following incorporated memorandum supports this motion.

RELEVANT FACTS

Anthony Murphy stands convicted of aggravated sexual assault (domestic violence), 1st Degree Felony, aggravated kidnaping (domestic violence) 1st Degree Felony, forcible sexual abuse, 2nd Degree Felony and aggravated assault, 3rd Degree Felony all alleged to have occurred on or about June 1, 2009. The State's case hinged on the testimony of T[redacted] M[redacted] an ex-wife of the Defendant in the above entitled matter as well as the following witnesses. A[redacted] R[redacted] who testified that the Defendant in the year 2001 had improperly touched her. This case had proceeded to trial and the jury could not reach a decision and therefore the Court held that it was a hung jury on any allegation regarding her. The jury found the Defendant guilty of a misdemeanor assault for assaulting a neighbor who was on the street during the incident. Even though, there was no conviction in this case the Court allowed A[redacted] R[redacted] to testify in the trial before the Court.

The next witness relied on by the State was A[redacted] K[redacted] This witness testified that the Defendant had allegedly raped her in Kentucky in the year 2003. In this case there was never any criminal charges filed due to the fact that the prosecutor, after a thorough investigation found no DNA in the truck that she was allegedly raped in and/or any physical evidence of the crime, the rape kit also came back negative. Even though no charges were ever filed the Court as well allowed her to testify about the incident.

The next witness the State relied on M[redacted] M[redacted] She testified that the Defendant had sexual abused her as well as caused physical harm to her. This case had previously went to trial in the year 2013 and the jury had found the Defendant guilty of assault and not guilty of the remaining charges. Even though a jury found the Defendant not guilty of the sexual allegations she was allowed to testify.

At the trial in this matter only approximately 20 percent of the evidence presented had anything to with the night in questions and the allegations that occurred in Smithfield, Cache County, State of Utah. The other 80 percent of the trial was with regards to the other three witnesses who where allowed to testify through the Doctrine of Chances and Rule 404 B.

Additionally, the Court had issued a previous order that no evidence would be mentioned with regards to the Defendant having an ex-wife shoot him 5 times during an alleged incident. The Court clearly ruled before the trial that this was not to be allowed in as evidence. During the State's direct examination of T[redacted] M[redacted] the State asked a questions which solicited a response from T[redacted] M[redacted] indicating that she was aware that his ex-wife had shot him 5 times. This was indirect contrast to the previous ruling of the Court that this evidence could not be allowed into the trial in the above entitled matter.

A mistrial was requested by the Defendant. The Court denied this request and instead the Court issued a cautionary instruction to the jury to disregard the statement. At the end of the day of trial a juror as the jury was excused from the courtroom asked again about the testimony of that

witness and how they were to disregard it from their notes etc. This clearly indicated that the juror had not listened or obeyed the cautionary instruction that the Judge had given.

The fact that most all of the witnesses that testified in this trial were unlawfully allowed to testify through the Doctrine of Chances and Rule 404 B and were not witnesses to the incidences that had happened in Smithfield, Cache County, State of Utah and the fact that a witness was able to testify to facts that were clearly prohibited previous to trial by your honor and then they were introduced by the State prevented the Defendant from receiving a fair trial in the above entitled matter.

Wherefore, because the Defendants Utah and United States Constitutional Right to a fair trial were violated the Defendants Motion to Arrest Judgment should granted in the above entitled matter.

ARGUMENT

Justice and judicial economy are served when trial courts have the opportunity to correct any errors at the earliest possible juncture. See,~' State v. Beck, 2007 UT 60, ~ 8, 165 P.3d 225. Utah Rule of Criminal Procedure 23 describes arrest of judgment as a broad and flexible remedy, stating:

> At any time prior to the imposition of sentence, the court upon its own initiative may, or upon motion of a defendant shall, arrest judgment if the facts proved or admitted do not constitute a public offense, or the defendant is mentally ill, or there is other good cause for the arrest of judgment. Upon arresting judgment the court may, unless a judgment of acquittal of the offense charged is entered or jeopardy has attached, order a commitment until the defendant is charged anew or retried, or may enter any other order as may be just and proper under the circumstances.

Our courts normally give effect to the plain language of our rules. See,~, Hartford Leasing Corp. v. State, 888 P.2d 694, 697 (Utah App. 1994). The language of the rule, in permitting arrest of judgment and retrial "for other good cause" is very broad and provides a remedy for a wide array of trial errors beyond the failure of the facts proved to establish a public

offense. See id. It is much broader than the federal rule. Utah courts deciding arrest of judgment motions have considered the merits of a wide array of trial errors and other issues. As is detailed herein, there were several errors that individually and/or cumulatively provide good cause for arrest of judgment.

Allowing bad act witnesses to testify in the above entitled matter justifies the court granting an arrest of judgment.

1.IMPROPER EVIDENCE ALLOWED AT TRIAL

There are a number of hurdles a piece of evidence must cross before being admitted at trial, including having a proper, non-character purpose, meeting the requirements of Rule 402, and meeting the requirements of Rule 403. *Slate v. Nelson-Waggoner,* 2000 UT 59,~~ 18-20, 6 P .3d 1120. The evidence of prior bad acts that the State introduced does not satisfy any of these requirements. First, the probative value of the proposed evidence is substantially outweighed by the danger of unfair prejudice and must be excluded under Rule 403. Second, the prior bad acts evidence is not being introduced for a proper purpose and did not meet the requirements for application of the Rule 404(b) or the "doctrine of chances." Finally, the evidence should be excluded under Rule 402 because introduction is prohibited under the United States and Utah Constitutions.

A. The Proposed Evidence Does Not Meet the Requirements of Rule 403

All evidence must satisfy Rule 403 's balancing requirement, regardless of the purpose of the evidence or whether or not its admission is allowed under other rules. The limited probative value of the allegations in Utah, Florida and Kentucky was substantially outweighed by the overwhelming danger of unfair prejudice that would result if the jury learned of these allegations. The relevant factors in conducting this balancing analysis include:

> the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988). The State had not met there burden pursuant to Rule 403 and the evidence should not have been let in.

B. There is No Reason The Court Should Have Reversed this Court's Prior Ruling

This court previously applied *Shickles* to the Florida allegations and concluded that, even if the Florida evidence was offered for a non-character purpose, the Rule 403 factors weighed against admitting evidence of those allegations. That was the law of this case. More than three years later, the State again asked the court to find that *Shickles* supports admission of the Florida evidence without even acknowledging the court's prior decision. Except for the ever changing account of the alleged victim in this case, the facts of this case are no different than they were three years ago and the State points to neither fact nor law suggesting why this court should have reversed its prior decision. Thus, the court should exclude the Florida allegations based on the same Rule 403 analysis it discussed in its January 2010 order.

C. The *Slzickles* Factors Require Exclusion of all Evidence of the Allegations in Kentucky and Florida

i. *Stength of the Evidence*

The cases in Kentucky, Florida and Utah clearly lack in strength of evidence. The Angela Kiskadin case was never even filed due to the prosecutor not having enough evidence. The Angela Richardson case resulted in a hung jury after a full blown trial. This case was never retried and there was never a conviction on this case. The M[redacted] M[redacted] case that alleged to have happened in Utah, again, did not result in a conviction for any kind of sexual behavior etc.

It becomes clear that due to lack the of strength of the evidence the State had not met their burden to allow the Court to have this testimony admitted at the trial.

A[redacted] R[redacted] case went to a full blown jury trial and resulted in a hung jury., This case was never retried and there was never a conviction. The strength of this case is obviously questionable.

A[redacted] K[redacted] case was never even filed due to the prosecutor believing there was a lack of evidence and the fact that the DNA and the rape kit did not offer any physical evidence to support her claims. Again, this case was not even filed because of its lack of strength.

The M[redacted] M[redacted] case that alleged to have happened in Utah proceeded to a trial and the Defendant was found not guilty of all allegations except for a Class B Misdemeanor, Assault. This case is clearly lacking in strength and this is verified by the verdict of the jury.

The strength of these cases is suspect as shown by the Court proceedings in these matters. Therefore, the requirement has not been met to allow the evidence into the trial.

ii. *Similarities*

There are important differences between the Utah allegations and the allegations in Florida and Kentucky. The one important similarity between the Florida and Utah cases is that in both cases forensic evidence does not support the alleged victims' testimony and that there are serious credibility issues with the alleged victims' testimony, but these similarities weigh in favor of excluding the prior conduct.

In the Utah case, Murphy was in his own home and (most of) T[redacted] M[redacted] accounts allege that she was awake and calmly talking to Murphy when he suddenly attacked her. The witnesses and alleged victim in the 2000 case did not indicate that Murphy was intoxicated. Murphy said that he consumed six beers in the three hours between 10:30 pm and 1:15 am, but the police indicate that the alleged attack did not occur until approximately 6 am. The victim statement from the 2001 Kentucky incident does not state that that Murphy threatened to kill her. In addition, the alleged victim in the 2001 case did not allege that Murphy removed her clothes, physically injured her, or actually raped her. A neighbor in that case noticed that the alleged victim's face was red, but he did not say that she appeared to have been physically injured. There are few similarities, and no consequential similarities, between the allegations in the Utah and Kentucky cases.

The "similarities" argued by the State-Murphy was acquainted with the victim, he was intoxicated, he sexually assaulted the victim, and threatened to kill the victim "through word or action," are so general that they are meaningless. Indeed the State fails to site specific facts in support of their general allegations. If the alleged presence of alcohol, alleged threats born solely from hearsay statements, and the accusation of a sexual assault make allegations sufficiently similar for purposes of the *Shickles* similarity requirement, it is not a real requirement.

In the cases of the alleged victims who testified at court only one alleged to have been raped by the Defendant. No similarities on this case allegation. There were two girls that indicated that oral sex was required to be performed on the Defendant. The other two girls never made any allegation of the same. Again, no similarities in this area. The allegations all took place in different areas. One in a truck, one in the Defendants home, one in a friend of the Defendants home and one a motel. No similarities whatsoever in the place or time that these happened. Again, the similarities are not present in this case and the alleged victim should not have been able to testify.

iii. Interval of time

The events alleged in the Florida case occurred over nineteen years ago; the alleged events in the Kentucky cases occurred over fifteen and thirteen years ago. The long passage of time lends itself to fading memories and increases the risk that fading memories will be replaced by false memories. The passage of time also made it difficult or impossible for Murphy to rebut the allegations because it is unknown whether the individuals involved are were alive or could be found and it is likely that exculpatory evidence or files have been lost or destroyed. In addition, the many hundreds of miles that separate Utah and Florida and Kentucky make it even more difficult for Murphy to be able to locate evidence to defend himself against the additional charges in the Florida and Kentucky cases.

The State points to two out-of-state cases, *State v. Cichon,* 458 N.W.2d 730 (Minn.App. 1990), and *People v. Rath,* 44 P.3d 1033 (Colo. 2002), in support of the proposition that prior bad acts from thirteen or fourteen years ago may be admitted into evidence. However, in *Cichon,* the Minnesota Court of Appeals found that every other factor weighed in favor of admission. With so many factors weighing in favor of admission, including lack of prejudice, reliability of the evidence, and similarity between the crimes, the length of time, alone, was not sufficient to render the evidence inadmissible. *Cichon,* 458 N.W.2d at 734-35. The *Rath* case is even less applicable because Colorado's test for allowing evidence under Rule 403 does not include a separate time factor and the court did not address the issue. 44 P.3d at 1038, 1041-43.

iii. Need for evidence

As this court noted the State's need for the prior bad acts evidence was not substantial. This case is not a typical "he said, she said" case where there is no evidence to support either side's story. There is substantial physical evidence related to T[redacted] M[redacted] allegations, including her own, albeit inconsistent, testimony, reports by investigating officers, doctor's reports, photos of the alleged victim and crime scene, various pieces of clothing, bedding, a section of carpet and mattress pad from the crime scene, forensic reports performed by the state crime lab, voicemail messages, and testimony by witnesses who observed T[redacted] M[redacted] shortly after the alleged assault. If the State needed additional evidence, such need is a result of the victim's decision to continually change her story, investigating officers' decision to stage evidence before photographing it, officers' complete failure to secure and protect the crime scene. If the physical and forensic evidence is not what the State hoped, the proper course is to dismiss the charges, not seek to improperly bolster the alleged victim's inconsistent testimony through unproven alleged prior bad acts.

There is a qualitative difference between a general lack of evidence and the lack of *supporting* evidence. The lack of *any* evidence suggests a real necessity that may, in some

instances, appropriately justify the relaxing of the rules of evidence. The lack of *supporting* evidence means there is sufficient evidence to assist in uncovering truth, but that the evidence does not support the State's theory of the case nor the alleged victim's story. In those circumstances, the attempt to introduce evidence that is normally barred is nothing more than an effort to sway the jury with character and propensity evidence. If the evidence is admitted in that scenario, the protections offered by Rule 403 are empty and the right to a fair trial is illusory.

iv. Efficacy of alternative proof

The evidence the State has already amassed in this case is more than sufficient, assuming the evidence supports the State's theory, to prove the truth of T[redacted] M[redacted] testimony. The State has medical reports, photos of the victim, photos of the crime scene, physical evidence from the crime scene, the result of forensic tests conducted on evidence gathered at the crime scene, voicemail messages, and several, albeit inconsistent, statements by the alleged victim in support of its case.

v. Degree to which the evidence will result in jury hostility

The allegations from Utah and Kentucky roused even the most objective jury to overmastering hostility towards Murphy. One consideration in examining this factor is whether the evidence presented in the prior bad acts is no worse that the evidence already before the jury. *See State v. Widdison,* 2001 UT 60, ~52, 28 P.3d 1278.

There are even greater grounds for excluding the alleged conduct in Kentucky. First, the alleged crimes are much more serious that the conduct alleged by T[redacted] M[redacted] because it includes the allegation that Murphy broke into the bedrooms of minor girl. Crimes against children, especially sexual assault crimes, are more likely to create anger and prejudice with the jury than alleged crimes against adults. There is a great risk that the jury will allow their anger and frustration that an alleged child abuser "got away" or was never charged to justify a conviction in the Utah case even if the facts do not

support a conviction.

For all these reasons, the court should again rule that the probative value of the Florida incident is substantially outweighed by the danger of unfair prejudice and that the Rule 403 factors similarly weigh against admitting evidence of the Utah and Kentucky incidents.

D. No Proper, Non-character Purpose

Even if the Rule 403 factors weighed in favor of admitting the allegations from Utah and Kentucky, such evidence should be excluded because it is not being introduced for a proper, non-character purpose. The prohibition on admitting evidence of prior bad acts is intended to address the very real possibility and danger that allowing a jury to hear evidence of prior conduct will lead even the most careful jury to convict a defendant based on that prior conduct rather than the evidence immediately before them. In *State v. Verde,* 2012 UT 60, ~~ 18, 22, 24, the Utah Supreme Court repeatedly cautioned that a court must be sure that the *genuine* and *predominant* reason for introducing the contested evidence is a proper, non-character purpose. Thus, if the State's alleged purpose "is merely a ruse, and the real effect of prior misconduct evidence is to suggest a defendant's action in conformity with the alleged bad character, the ruse is insufficient and the evidence should not be admitted." *Id* at~ 22.

E. Real Purpose is to Show Propensity

This court previously concluded that the State failed to demonstrate how the Utah and Kentucky evidence was relevant except to prove a proclivity to commit bad acts. Seeking a second, and bigger, bite at the apple, the State again argues, under the guise of the doctrine of chances and without acknowledging this court's prior Rule 403 decision, that the Utah and Kentucky evidence should not be admitted essentially to bolster T[redacted]M[redacted] inconsistent testimony. T[redacted]M[redacted] testimony is rendered completely unbelievable by her own inconsistencies and the scientific and forensic evidence. Introducing allegations that Murphy assaulted other individuals does nothing to erase the inconsistencies in T[redacted]M[redacted] many

stories or change the scientific evidence to match her varying stories. The only purpose for admitting the Utah, Florida and Kentucky allegations is to convince the jury that Murphy has a propensity to commit sexual assault and to lead the jury to convict Murphy on the prior allegations rather than on the weak facts that exist in the Utah case.

F. The Evidence does not Meet the Requirements for Admission under the "Doctrine of Chances"

Not only does introduction of the evidence fail to satisfy the genuine purpose requirement, the Florida, Utah and Kentucky allegations fail to meet the requirements for admission under the "doctrine of chances." This doctrine has four foundational requirements: materiality, similarity, independence, and frequency. *Verde,* 2012 UT 60, flfl57-58, 60-61.

a. Materiality

The State concludes that the prior bad acts are material for purposes of the "doctrine of chances" because the State and defense disagree as to whether the alleged victim in this case is was lying about what happened. But the mere disagreement about whether an alleged victim is lying cannot be sufficient, by itself, to circumvent the rule excluding evidence of prior bad acts. Otherwise, the existence of a disputed eyewitness account would be sufficient to allow evidence of prior bad acts and the "doctrine of chances" exception would swallow the rule. *Cj Verde,* 2012 UT 60, flfl21-24 (holding that a not guilty plea, alone, is insufficient to allow the State to present evidence of prior bad acts for the purpose of proving intent).

The State argues that the evidence is material to rebut what it believes will be the defense's strategy of fabrication at trial. Simply challenging on cross examination the alleged victim's version of events, the investigation of the police officers, and lack of supporting forensic evidence cannot itself constitute a defense of fabrication sufficient to open the door to prior bad acts evidence. This is not a case were the identity of the alleged perpetrator is at issue. The Defendant is the husband of the alleged victim. Either he did what the alleged victim claims or he did not. To find that he cannot challenge her version of events on cross-examination or

through the results of forensic tests without exposing himself to prior bad acts evidence is to strip the Defendant of the right to defend himself. At a minimum the State should be prohibited from preemptively introducing prior bad acts evidence to respond to what it believes will be the defense's strategy. The defense has a right to present its case as it sees fit and may, if it chooses, rest its case without presenting any evidence. The contradictions by T[redacted]M[redacted] testimony and scientific evidence make any attempt to bolster her testimony futile, but even if that was the State's genuine purpose, it should not have been allowed to introduce such evidence unless and until the defense actually argues fabrication.

b. The Cases in Florida, Utah and Kentucky are not Sufficiently Similar to the Allegations in Utah

To admit evidence under the doctrine of chances, "there must be some significant similarity between the charged and uncharged incidents." *Verde,* 2012 UT 60,, 58. Such "significant similarity" is not present here.

As detailed above, this court previously concluded that there are important differences between the allegations in Utah and Florida and there are even more significant differences between the allegations in Utah and Kentucky, including:

• The alleged victims in Kentucky was a minor girl

• The Kentucky victim were daughters of friends, not Murphy's adult spouse

• In Kentucky, Murphy allegedly unlawfully entered the victims' bedroom

• The victims in Kentucky had not been drinking

• The victim and witnesses in the 2000 case did not allege Murphy was intoxicated

• The victim statement from the 2001 Kentucky incident does not state that that Murphy threatened to kill her

• The alleged victim in the 2001 case did not allege that Murphy removed her clothes or that Murphy physically injured her.

• No rape was reported in 3 cases only in one Kentucky case.

• Oral sex was only alleged in 2 of the 4 cases

If the "rough similarities" identified by the State-threats, attempted sexual assault, and force are sufficient to satisfy the similarity requirement, it would be a requirement in name only.

c. The Allegations Are Not Completely Independent of Each Other

To satisfy this requirement, the uncharged conduct must be completely unconnected to the present accusations. *Verde,* 2012 UT 60, ~ 60. The allegations in the three prior incidents and the present case are not entirely independent. That the complainant in the 2001 case was at least aware of the allegations in the 2000 case. In addition, Teri Murphy was aware of the allegations in the Florida and (the defense believes) Kentucky prior to making her own allegations.

d. The State's Frequency

The fourth requirement is that "[t]he defendant must have been accused of the crime more frequently than the typical person." *Verde,* 2012 UT 60, ~ 61. In the doctrine of chances, "[t]he question for the jury is not whether the defendant is the type of person who, [commits a particular crime]. The question is whether it is objectively likely" that multiple accusations could be false. *Id* at~ 50.

In sum, these questionable probability calculations are not a solid foundation on which this court should have rested its decision.

G. Admitting this Evidence would Violate Rule 402

Under Utah Rule of Evidence 402, evidence is not admissible if the Utah Constitution, United States Constitution, or Utah Rules of Evidence provide otherwise. In this case, all three prohibit the introduction of the allegations in Utah, Florida and Kentucky.

For the above reasons, defendant respectfully requests this court to grant the Motion to Arrest and to deny the State's Judgment and to not allow evidence under the doctrine of chances.

2. **The Motion for Arrest of Judgment Should be Granted due to the Evidence being admitted that had previously been ruled inadmissible.**

The Defendant in the above entitled matter had a ruling previous to trial that no one could mention the fact that his ex-wife shot him 5 times during a previous incident. The Court made it clear that this was not to be allowed in as evidence. When the State got dangerously close to asking questions that may solicit this response and a side bar was held and the Court indicated to the State how the Court felt the questions should be asked. The questions was asked how the Court indicated it felt was proper. The answer of the witness was to blurt out that she was aware that the Defendant's ex-wife had shot him 5 times. Immediately, the Defense objected. After the jury left the room the Defense argued for a for a Motion for a mistrial due to the fact there was no way to un-ring the bell. After consideration the Judge denied the Motion for Mistrial and issued a cautionary instruction indicating that the jury should not consider the statement that was made. At the end of the trial that day a juror as the jury was leaving the Court room asked the Judge a question of something to the effect of "how do we take the witness that testified testimony out of our notes or can we still consider the notes". Clearly this juror did not understand the Judge's cautionary instruction and had the testimony that was solicited by the prosecution in her mind.

This testimony especially, since the Court had previously ruled that it was admissible made it unfair and impossible for the Defendant to receive a fair trial.

Due to this evidence being let into the trial in the above entitled matter it deprived the Defendant of his Utah and United States Constitutional right to a fair trial.

Wherefore, based on this evidence and the damaging effect that it had on the Defendants rights to a fair and impartial jury for his case the Court should grant the Defense's Motion for Arrest of Judgment in the above entitled matter.

3. The Evidence should be excluded based on the inference on an inference rule

The Doctrine of Chances is merely a presumption rule. It uses the fact that the Defendant is accused before even though he was not convicted in one case and not even charged in another as a basis for determining the current charge was not fabricated. An ultimate fact. Based on the inference on inference rule as contained in Blacks Law Dictionary the principle that a presumption based on another presumption can not serve as a basis for determining an ultimate fact. Definition of ultimate fact in Blacks Law Dictionary is essential to the claim or the Defense. Since the claim was not fabricated and the State used the Doctrine of Chances rules based to determine the ultimate fact renders the Doctrine of Chances evidence illegal based on the Definition of the inference on inference rule.

In summary, you can not use the presumptions or assumption that it was not charged or convicted in other cases as a basis for determining the ultimate fact that the State presumes or assumes her story was not fabricated.

Wherefore, the evidence should not have been allowed into the trial under the inference on an inference doctrine and the Motion to Arrest Judgment should be granted.

CONCLUSION

Based on the foregoing arguments the Motion for Arrest of Judgment should be granted.

DATED this 8th day of June, 2016.

/s/ Shannon R. Demler
SHANNON R. DEMLER
Attorney for the Defendant

LOGAN, UTAH; THURSDAY, JUNE 23, 2016; 1:59 P.M.

BAILIFF: Court is back in session.

COURT CLERK: Case No. 091100683, State of Utah v. Anthony Charles Murphy. Counsel, please state your names for the record.

MR. DEMLER: Shannon Demler appearing with the defendant Mr. Murphy, Your Honor.

MR. WALSH: Spencer Walsh for the State of Utah.

MS. NESTEL: And Heidi Nestel on behalf of the victim, Your Honor.

THE COURT: All right. We're here today on two motions that Mr. Demler filed: a motion to arrest judgment, and a motion for a new trial. The State has responded. The record should reflect that Mr. Murphy is present. Mr. Murphy has also written me two letters, and I need to make a record so we're clear here.

Previously, Attorney Cole Cooper entered an appearance on behalf of Mr. Murphy. He was on the phone when we set the hearing for today. Any idea why he's not here?

MR. DEMLER: Your Honor, Mr. Cooper indicated on the phone he was hired by Mr. Murphy's family, I believe, to do some research and look into some issues to hopefully help us with the defense in this case. I made numerous calls to Mr. Cooper since our last hearing. Left a message for him to call me. He needed to talk to me so I knew if he was going to argue today or not. I didn't receive any response whatsoever.

Last night myself and Attorney Galloway called his number again. I did get in contact with him. He said he's only in a supportive fashion. He's not going to argue any motions or anything such as that; that he would meet me here today. He has not showed up.

THE COURT: And he called and spoke with Angie, or did he leave a message?

COURT CLERK: He spoke with me.

THE COURT: He spoke with Angie and told her that he would not be coming, and that he wasn't going to participate.

COURT CLERK: Yeah. He said he talked to Attorney Demler and said that it wasn't his motion. He wasn't going to argue anything, and he wasn't coming today, but could be reached by phone if we needed him.

THE COURT: All right. The way it was left when I--when he appeared by phone last time, I told him to get with Mr. Demler and figure out how they were going to proceed. Apparently, he did not do that. And it was Mr. Demler that's made all the effort here.

MR. DEMLER: And I am ready to proceed. I had an indication, just by not receiving a call, that he would not be here today probably. So I am ready to proceed today.

THE COURT: Mr. Murphy, do you want Mr. Demler to proceed on your behalf?

MR. MURPHY: Yes. On this motion, yes, sir, Your Honor.

THE COURT: All right. Go ahead, Mr. Demler.

MR. DEMLER: If I can approach the podium, Your Honor.

THE COURT: If you would, please. Now just so we're all on the same page, are you going to argue both motions today, or going to wait until after sentencing?

MR. DEMLER: My understanding the motion for new trial was untimely filed; that he has to be sentenced before we can argue a motion for new trial.

THE COURT: Correct.

MR. DEMLER: So I'm not intending to argue that. We're to preserve that. If we don't prevail on the motion today and there is a sentencing, then we would argue a motion for new trial. I've informed Mr. Murphy of that.

THE COURT: All right. Go ahead.

MR. DEMLER: Your Honor, this has been a case that took years and years to get to trial. A lot of motions, a lot of arguments that have been made about the evidentiary issues that presented themselves when this case proceeded down the pre-trial avenues before the trial. And there's been a lot of rulings by the Court, and a lot of arguments by counsel that have been I think very adequately argued, and very adequately briefed.

The Court made some rulings before Court started, before the trial, with regards to some evidence that was allowed to be let in at the trial. We filed a motion for arrested judgment and I'd like to make a record of the situation that we

feel would allow the Court to grant that.

This was a case about T M, an incident that happened in Smithfield, Cache County, State of Utah. Those are the allegations and the charges that were before the Court, is an incident involving her.

The Court allowed, as the Court's aware, three other people to testify. A R, a 2001 case from Kentucky, and it went to trial with regards some allegations of Mr. Murphy touching her. The jury could not reach a verdict and reached a hung jury verdict on that case, was issued by the Court, and there was never a conviction. So the A R case came before the Court with no conviction.

There was a conviction for assault that happened on another individual that was in the street.

The next person that was allowed to testify is A K. This is a 2003 case in Kentucky. No charges were ever filed once the prosecutor did an investigation, and they looked at the DNA and forensic evidence. There was never any charges filed in that case.

The third person that was allowed to testify is M M, a 2013 case that happened in Salt Lake City, Utah, where Mr. Murphy was found guilty of assault. And after the court hearing arguments and a jury trial, at the end of the day all of the other charges were dismissed.

As you heard the trial that was held here that lasted

basically a couple of weeks before Your Honor, it became apparent that the trial had changed some of its focus, if not most of its focus, from T[redacted] M[redacted] and the allegations that she made against the defendant that happened in Smithfield, Utah, to a trial about these three other witnesses. It became that they, in my opinion, absorbed the trial. They had become bigger and bigger and bigger as the trial went on. And in the end of the day, we feel that because of those witnesses, the defendant was convicted in this case.

The second argument we have is there was a ruling by the Court that no one was supposed to mention the incident with regards to a wife of Mr. Anthony's who got into a situation with him and shot him. It was a peculiar situation because as the questions were asked, we had a side-bar, myself, Attorney Walsh and the Court, and come up with a way that we thought the questions could be asked that wouldn't elicit that information from the witness.

Even after that the witness, T[redacted] M[redacted], stated in Court that she was aware that his ex-wife had shot him five times. It was tried to be stopped at that point, but the toothpaste was already out of the tube. There was no way to put that back in. Clearly she stated evidence that was clearly barred by the Court previous to the trial in this matter.

A mistrial was asked for. It was denied. The defense feels that a mistrial should have been granted at that point, and

I think it went further to bolster our argument when a juror, after they were leaving Court, asked the Court a question with regards to the notes regarding that person, and what to do with those, and how to handle that.

The Court, after considering everything, denied the mistrial and prevented another victim, G[redacted]C[redacted] I believe is her name, from testifying, which was the ex-wife involved in the shooting. Obviously we feel that this prevented the defendant from having a fair trial because of the impact that had on the jury.

When you look at a motion for arrested judgment, in the Beck case it indicates judicial economy can be served by fixing wrongs or correcting errors at the earliest convenience.

Utah Rule of Civil Procedure 23 allows the Court to arrest the judgment if it's for good cause. In the cases and the notes, etc., it's a broad rule. It allows the Court to have discretion to fix wrongs that have happened at any time, basically, and especially at the earliest convenience preferably because of judicial economy.

We feel that there's been briefs prepared and briefs argued with regards to this evidence coming in. I would incorporate those briefs into my argument. I think the motion for arrested judgment and response sets out the issues as we see them.

There's also briefs that were filed previously in the

Court, before the Court made its ruling, that we would incorporate in as well. To reiterate what's in the briefs, we feel that the evidence should have not been allowed in. We feel that under Rule 402 it was irrelevant. Under Rule 403, the probative value in no way, shape or form outweighs the prejudice that this evidence put upon the defendant.

This is a clear case of the prejudice outweighing any probative value that this information had. The prejudice was huge in this case. And if you look at the Shickles factors--and I understand in the Verde case, that's the leading case from 2012, that they talk about a new standard and everything. But as the Court goes through that case and reviews it, there's about 15 pages of talking about Rule 403 and different things, and Rule 404.

And my position is--and I still maintain that the Court by no means has made 403, Rule 403 irrelevant--that the Court still needs to weigh very heavily these factors. And I think the Shickles factors, even though they may have been changed by the doctrine of chances and the Verde case, but I think they are still a good guide for the Court.

And when you look at the opinion in the Verde case, it has a ruling that I think is the rule of law, basically. "Whether the evidence is presented for a proper purpose, or only for the purpose of suggesting an improper inference of action and conformity with the alleged bad character, and even if the court

finds both legitimate and improper purposes for such evidence, the Court should still weigh the proper and improper uses of the evidence and include it under 403 where the terms of the rules so apply.

So I think that in reading that case there's still the 403 balancing to be done. There's still issues that need to be considered there. And it further states earlier, "evidence of a prior misconduct often presents a jury with both a proper and an improper inference, and it won't always be easy for the court to differentiate the two inferences or to limit the impact of the evidence for the purposes under the rule."

And it goes through there and it finally concludes, "when such evidence is offered to suggest action in conformity with a person's alleged bad act character, it is inadmissible under the rules," citing 404(b).

Now it goes through there, and it goes through that analysis, and gives the Court guidance. Then in the end it does give more guidance as to what we need them to do in the future with the doctrine of chances.

I think that the Shickles factors still have bearing on the Court, and I would assert that when you look at those, understanding the case may have made this list applicable, the Shickles factors, the strength of the case. There was no convictions on these cases. In one case the jury was a hung jury. On another case they weren't even charged. The crimes weren't

even charged. And in the Salt Lake case there's no convictions on anything that would be directly relevant, necessarily, to the trial here.

We also don't feel that it meets the similarities, and similarities is included in the Shickles factors. It's also included in the doctrine of chances. When you look at the cases, there was only one that was alleged to be a rape. Three weren't. So they aren't consistent there. Two involved oral sex. Two don't. The physical locations are all different: one in a truck, one in a dad's house, one in a motel, one in the defendant's home. And I listed numerous other things that aren't consistent in my brief that I would incorporate into that as well.

Additionally, there was no convictions is the similarity that they have in these cases. And so that similarity favors the defendant of not including these witnesses in the trial. If you include that these cases are similar, then essentially there would be no rule at all because this is such a far-fetched situation.

When you look at Waggoner and you look at the Verde case--if you look at the Verde case and we talk similar, there's a young boy that's been sexually abused. There's two other young boys that come forward and say we were sexually abused. Very similar. Very consistent.

In Waggoner, I happened to have the ability to do that trial and be part of that. In Waggoner there was numerous girls

that came forward, and the court went through and actually eliminated some, as I recall, because they didn't have similarities even though they were accusing Waggoner of similar behavior, sexual behavior. The Court and Judge Hadfield went through and made sure that each one had similarities before they let them in, and they let in like three, and kept, I think, four out, as I recall. I may be off on that, but there was others.

The interval of time. A Florida case which wasn't let in, I believe it was in '97. The Kentucky case was 2001, 2003--15, 12 years ago. I mean there was time, years and years between those cases and this case.

The need. I don't think the State had a need. They have the I.D. They have witnesses. They have forensic evidence. They have police officers do an investigation. They have photos. They didn't need this evidence for the jury to decide the facts before the Court.

And lastly, the decree of hostility. In this case it was huge. On some of these allegations, and you look through the case, are the acts in these cases worse than the act he's charged with? Now, they may not be worse in physical injury that's alleged or something like that, but one of the cases was a rape. Clearly worse than the acts that are alleged here in this case.

The other case was a 15 year-old girl which raises the issue with the jury of child abuse and things such as that, which is clearly, at least in my mind, would be more serious than the

acts before the Court.

So you look at the Shickles factors even when you consider the decision. I'll get to the other part here in a second with the doctrine of chances. I think they still apply to give the Court guidance to make its decision in this case.

Now, the evidence as well, when you look at the Verde case, cannot be admitted for an improper non-character purpose. It has to be admitted for the proper purpose still. Verde says it can't be a rouse used to support that the defendant act in conformity with it. If that's the case, then it shouldn't be admitted.

Your Honor, clearly in this case the State, even though the right language was used, and the right language will be on the record, used this evidence to prove that the defendant in this case acted in conformity with that, and it should not be admitted. Again, the prejudice of this is so huge in this case that we think that it should not have been allowed.

Then you come to the doctrine of chances, which is the new case law and the new decision in the Verde case and others. It talks about four things that the Court should now consider, and it does that in about the last two or three pages of the opinion. It gives the Court guidance.

Now I think what's important about that in my opinion is the Court's opinion in the Verde case. As I indicated it's a young man who was improperly touched, sexually abused by a

gentleman. Two other people come forward and say he sexually abused us too. And the Verde opinion actually reverses the District Court allowing that evidence in. And then it gives guidance pursuant to the doctrine of chances for the District Court to go back and consider this at an evidentiary hearing, and make a decision of whether those cases come in.

I think what's telling about that is those cases are young boys that clearly, in my opinion, would meet the guidance they gave. And the court didn't say we're not going to reverse this case because this evidence would have come in and met the Verde factors. The court sent it back for a hearing and a determination.

So even with that strong evidence, and that factual basis where they are almost identical three cases, the court didn't even hold that for sure they could come in. In fact, said we're not making that decision. That essentially we'll work through this, and these are my words. We'll work through this and, you know, get this doctrine in place as we go, so to speak.

THE COURT: Well, they sent it back so the District Court could analyze the four factors.

MR. DEMLER: That's correct. That's correct.

THE COURT: Okay.

MR. DEMLER: But my point is that they sent it back for the four factors, and I understand, because that isn't what the court let the evidence in for. The court based--the District

Court based it on other factors that they thought were inappropriate.

So they sent it back so that they could, you know, make that ruling. And we've had a hearing that's required by that decision, I think, in this case, or we were involved. But I think that hearing was held.

THE COURT: Three separate hearings.

MR. DEMLER: Yeah, and I think that's been argued thorough, and that's why I incorporate those arguments in. I think when I read the briefs, it's been briefed well by both sides, and argued. But we think the Court should change the decision, after hearing the trial specifically and seeing how it all transpired, because it doesn't meet the materiality issue. It doesn't bolster her testimony when they say things as that.

The unfairness of this is that the ruling of the Court is that if we challenge her credibility, her fabrication, which is what the Court allows, then this can all come in. But the witness in this case admitted, numerous times, that she changed her story. She admitted every time she told her story there was different inconsistencies. And to prevent a defendant from cross-examining a witness such as this, and bringing those inconsistencies out with essentially a hammer over his head that says if you asked her a question about her credibility, this all comes in, is unfair. And it doesn't give him a right to a fair trial.

And one of the things that really is important, because I read through the briefs, she came to court. And it's an inconsistency. She had said he had choked her twice. Then when she got here she said she was choked once and she choked on his penis once. Totally inconsistent all through, in our opinion. I mean the State, I'm sure, has another part of that, but the defense, to have a fair trial for Mr. Murphy, should be allowed to cross-examine a witness without the hammer sitting there of these women coming in to testify to substantially prejudice his case.

The similarities aren't there, as I discussed before. That's the second factor. It's not independent. The 2000 and 2003 victims said they were from the same town. It's presumably that they had talked about these things, especially when they are coming to trial. And T[redacted] M[redacted]--

THE COURT: Now wait a minute. Let me stop you there. There was questions by Mr. Walsh about whether it was independent, even at trial.

MR. DEMLER: Yes. He asked them if they knew each other, and they said yes. They're in the same town.

THE COURT: They knew, and whether they talked.

MR. DEMLER: I think they said they didn't talk though.

THE COURT: Yeah, they didn't talk. So--

MR. DEMLER: That's what the evidence is.

THE COURT: All right, go ahead.

MR. DEMLER: And T[redacted] M[redacted] had to become aware of all these things. She had to be aware of them because she said all the things out of her mouth that the Court had prevented her from saying hopefully in the case.

So they're not independent. They have information. Then the frequency. How can multiple allegations, in our opinion--it talks about the doctrine of chances. How can a guy be accused so many times? I guess I asked the Court how can a guy be found guilty, or not guilty, so many times? How can he be found not guilty, or not be charged on any of these cases, then them allowed to testify in the trial.

We feel that Your Honor, by these people testifying, that it prevented him from having a fair trial under the United States and State of Utah Constitutions, and a new trial should be granted, and an arrested judgment be ordered by the Court.

The second issue, just briefly, is the ruling of evidence that came in. The Court did make a ruling, and we think proper, that evidence could not be admissible with regards to his wife and a previous shooting. We went to the side-bar, talked about that. It was agreed of how those questions would be asked.

They were asked and the answer came out, but we feel that this answer coming out was so detrimental to the defendant that it violated his Utah and the U.S. Constitutional rights to a fair trial. We feel that there was an injustice done after that because of what the jury held.

The Court tried to remedy that by doing a cautionary instruction, and not allowing one of the witnesses to testify. But we don't feel that was adequate. We don't feel that one person not being able to testify is adequate in this matter. So we think that, as well, violated his right to a fair trial.

And the last thing is the inference on our inference doctrine that we've cited from Black's Law Dictionary. And that basically says that you can't have an inference of something prove an ultimate fact, and that is the fabrication. The ultimate fact is whether Teri Murphy fabricated her story, and we're asking the jurors to make inferences based on things of 20 year old cases, and make inferences about that to determine whether the ultimate fact of fabrication happened in this matter. And we feel that that is improper, and I think we set that out.

Your Honor, based on that I would ask that the motion for arrest of judgment be granted, and then a new trial be set in this matter.

THE COURT: All right, thank you. Mr. Walsh?

MR. WALSH: Judge Willmore, I'll just briefly address the arguments raised by Mr. Demler. I guess he's arguing that even though the Court spent--actually it was four days of evidentiary hearing, and then we had another day where we had oral argument. And the Court took, I think, 60 days to render a very thorough and well thought out decision in accordance with the guidance from our Utah Supreme Court.

Mr. Demler makes the self-serving argument for his client that he just wants you to ignore the guidance of our Utah Supreme Court and grant him a new trial, and that's improper. This is the guidance from the highest court in our state, and it's very well thought out and described legal opinion that gives guidance to trial courts on how they weigh doctrine of chances evidence. And the Court did a very thorough job and found that each of the four foundational requirements were met. The Court did a 403 analysis, and the Court directly determined that this evidence was admissible.

Furthermore, at trial there was a very favorable jury instruction read to make sure that this jury was not going to improperly interpret any of the other bad act evidence in an improper way. And so Jury Instruction 13 was read before the evidence came in. Then at the conclusion of the trial, Jury Instruction 56 was read. And it was very favorable language to the defendant because it said that you may consider this evidence to the extent that you deem it relevant.

It's possible, and Mr. Demler did make the argument, that they shouldn't consider any of the evidence relevant, and they had that ability to put whatever stock they wanted to put into that for two specific purposes; not to show that he acted in propensity with some sort of bad character, but to determine whether T[redacted] W[redacted] had fabricated her account, and to determine whether the defendant had truly acted in self-defense.

And in the State's closing argument the State even highlighted that, and made sure to caution the jury that those were the only two proper purposes they could consider the evidence for. And it was very, very clear to this jury.

So, simply put, the State argues that the Court has made a very well thought out, correct decision. It will be upheld by subsequent courts because of the great time, and care, and effort that the Court took to hold those evidentiary hearings. So there is not good cause to arrest judgment.

The second issue that Mr. Demler points to is [redacted] W[redacted] testimony when she mentioned that she knew that the defendant had been shot by his ex-wife. Now that was unintentional. The Court even held as much and put that on the record; that that was not intentionally elicited by the State.

You know, trials are difficult, and the parties and the Court does their very best to make sure there are specific parameters, and that we only get the proper evidence in front of our jury. And sometimes unfortunate mistakes happen, and that's what happened there.

The State had prepared [redacted] W[redacted] for the question that it intended to pose. The question was not allowed to be asked, and she meant no ill will by it. And it was not intentionally elicited. It was just a couple of seconds in the trial, and the Court gave a very direct, cautionary instruction that they should not consider the evidence.

Then the Court even, probably with great wisdom, prevented G[redacted] O[redacted] from even coming from Florida to testify. That would have been extremely damning evidence, most likely, for the defendant because they would hear that another one of his former spouses was accusing him of rape; that he had a protective order violation; that he had a protective order issued against him at the time of that alleged assault in Florida.

All of that was kept out of evidence. And so to some degree it did weaken the State's doctrine of chances logical relevance argument by giving the State one less independent accuser.

THE COURT: Well, and also Mr. Murphy was convicted in Florida of the crime of--I can't remember.

MR. WALSH: Burglary.

THE COURT: Yeah, burglary.

MR. WALSH: Yeah. So there was strong evidence.

THE COURT: And there was a conviction.

MR. WALSH: There was a conviction. That is a good point, Judge. Additionally, I would go even a step further and say that this jury never even got into the context or understood. Based on that statement, there was nothing about a rape allegation. There was nothing about him breaking in. The jury didn't know that actually he was found bleeding in G[redacted] O[redacted] bed with a razor blade-type knife, and a screw driver that he had used to pry open the door. They didn't hear any of

that.

So for all they thought is that some lady shot him, you know? It was intentionally stopped immediately by the State. The Court jumped on it, corrected the issue. And looking at the guidance from our Utah Supreme Court in State v. Butterfield, our Utah Supreme Court has held that in view of the practical necessity of avoiding mistrials and getting litigation finished, a trial court should not grant a mistrial, except where the circumstances are such as to reasonably indicate that a fair trial cannot be had, and that a mistrial is necessary to avoid injustice.

So to prove an abuse of discretion, which is what this defendant is going to have to do on appeal on this particular issue, he's going to have to show that the verdict was substantially influenced by that testimony. He's going to have to show--he is going to have to show that there is a substantial likelihood that the jury would have found him not guilty had the improper statement not been made. And this was a couple of seconds on day two of a six-day jury trial. Tons of evidence, overwhelming evidence, absolutely overwhelming evidence.

She's got bruises all over her body. His story is--frankly, it was ridiculous. It was debunked by Dr. Grey, the Chief Medical Examiner for the State of Utah who said that his account was unlikely, and that it was a plausible explanation that these were superficial self-inflicted injuries. It didn't

add up, not to mention just the common sense that a jury can use in listening to that story. There's no way.

The evidence was overwhelming, not to even mention the logical relevance evidence that the jury was able to consider. So the Court correctly denied the mistrial, and took the proper measures to issue the cautionary instruction, and to preclude Geri Anne Oleson's testimony from the trial.

And then finally, once again, the third argument from the Black's Law Dictionary is kind of a regurgitation of that first argument; which is basically that Mr. Demler, he's advocating very well for his client. Doing a very good job, but he wants you to throw out a holding from our Utah Supreme Court based off of some rambling dictionary entry in the Black's Law Dictionary. The Court can't do that.

So I'm going to ask the Court to deny this motion to arrest judgment. There is no good cause, and when the evidence is viewed from this trial in the light most favorable to the jury's verdict, it's clear that the evidence supports the verdict. That's the State's argument, Judge.

THE COURT: Thank you. Rebuttal?

MR. DEMLER: I think the argument has been hashed out before the Court, Your Honor. All we want is to have a fair trial. It's a right guaranteed to the defendant by the United States and Utah Constitution. And we feel with all of the evidence that was allowed in in this case, that he didn't get a

fair trial. And we'd ask you to grant the arrest of judgment. Thank you.

THE COURT: All right, thank you. I'm going to take just a brief recess. I need to review one case. So if you'll just be patient with me, I'll be back in in probably 20, 25 minutes.

BAILIFF: Court is in recess.

[RECESS.]

THE COURT: You can sit down. You don't need to get up.

MR. DEMLER: Your Honor, if I could have just 15 seconds. I forgot to argue something that--

THE COURT: Go ahead.

MR. DEMLER: --I want to put on the record, okay?

THE COURT: Go ahead.

MR. DEMLER: Your Honor, one of the things that I've been considering in my mind and looking at is when you look at the Verde case, those are uncharged crimes. I think I would point out the difference in this case of Mr. Murphy's cases have actually went to court. One was a hung jury. One wasn't filed, of course, and then the one in Salt Lake he was found not guilty.

I do think that makes a distinction and I forgot to mention that in my argument; that I think when you've went to court and found not guilty, that makes a distinction of whether the witness should be able to testify. So I want to make a record of that.

THE COURT: All right, thank you. Is there anything you

want to--

MR. WALSH: Well, just briefly in response, that's not one of the four foundational requirements set forth by the Supreme Court. The Shickles factors have been displaced according to our Utah Court of Appeals in State v. Labrum.

Even if the Court applied the Shickles factors, there's a lot of cases, including State v. Marchette, that gives guidance. It's not a requirement that someone is convicted, or charged, or not charged. That wasn't even one of the strength of the evidence requirements.

So that's the only response the State has.

THE COURT: All right, thank you. All right, thank you for your patience. I had prepared quite extensively for today's hearing by reviewing the memoranda of the parties, and also going back and reviewing many of my trial notes, jury instructions. Also reviewing the cases that we're dealing with here, Verde.

The break that I took is that I wanted to look at some additional language, not only from Verde, but also from the Lomoo case and the Lucero case. And I've gone back and looked at that with regards to the doctrine of chances.

With regards to the motion to arrest judgment under Rule 23, the Court can arrest or stop the judgment if the facts proved or admitted to not constitute a public offense, or the defendant is mentally ill, or there is any other good cause.

The standard has been set forth by the Utah Supreme

Court for a motion to arrest judgment that I must view the jury verdict in the light most favorable to the verdict. And you arrest judgment if it's so inconclusive, or so inherently improbable as to an element of the crime. Or Mr. Demler's arguments would also fall in the provision of Rule 23 where it talks about there's any other good cause for arresting judgment such that, as the Supreme Court says, that reasonable minds must have entertained a reasonable doubt as to that element, or what was put forth by the State.

This whole thing, as far as I'm first going to address the doctrine of chances, it was a very detailed, long process to work through. The State initially tried to get these bad acts in by Rule 404(b). The Court prohibited that with regards to 404(b). And then out of the blue here comes the Verde case, which is an extremely detailed case. I don't have it right here as far as the number of pages that was set forth by the Supreme Court. And the Supreme Court was very detailed as to how to weigh and look at the situations where the prosecutor may want to bring in other acts done by a charged defendant.

And the whole case focuses on when two or more persons tell similar stories, the chances are reduced that both are lying, or that one is telling the truth, and the other is coincidentally telling a similar false story. And so in this very detailed area, I felt that we needed to have hearings. And Mr. Walsh is right. We had four separate hearings. And the alleged

victims testified, came to court, and the Court heard testimony from them, and also reviewed trial transcripts from.

And let me just stop here and say right now, the fact that Mr. Murphy may have been found not guilty in the Kentucky matters, or that a charge wasn't filed in Kentucky, does not prohibit these things coming forth and being used under the doctrine of chances, because we're focusing on the alleged acts, and not whether or not there was a conviction.

And the jury is in the best place, and that's what I indicated in my memorandum decision. The jury is in a better position to evaluate the witnesses' credibility with the evidence once they've heard it. And that falls within 402, and also 403, about whether it would be helpful to a jury, and the reasoning is there as far as that goes, and set forth in my memorandum decision.

After hearing all of the evidence concerning these uncharged misconduct under the doctrine of chances, then we had oral arguments. The parties had previously briefed it. I went through all of that. And then on March 4, 2015, I issued a very detailed memorandum decision, 16 pages. And I am incorporating and noting for the record that I have reviewed that again in preparation of today's hearing. And that sets forth the alleged uncharged misconduct for the various alleged victims: the one in Florida, G[redacted] A[redacted]; and the alleged victim R[redacted]; and the alleged victim K[redacted]; and the alleged victim M[redacted] M[redacted]

And then I get into the analysis, and I follow the instructions from the Supreme Court and from the Court of Appeals as far as the Labrum case and the Lomoo cases, which came after, and Lucero case that came after the Verde case. And we get to the point where I first must decide whether it's offered for a legitimate purpose. And I found then, and I still find, that it was a legitimate purpose concerning the credibility of T[redacted] W[redacted], and also whether she was fabricating her testimony against Mr. Murphy.

The jury heard that, and they heard the arguments of counsel. They heard the testimony of Mr. Murphy, where and why he felt there was also fabrication. And so they weighed that. They weighed whether there was fabrication, and also the credibility issues which were very well presented by Mr. Demler and Mr. Galloway concerning not only T[redacted] W[redacted], the victim in this case, and also whether there was fabrication or credibility issues concerning the other individuals that testified under the doctrine of chances.

I then covered very clearly the four factors of Verde. First, materiality. I found that it is material with regards to credibility and fabrication. And then went into a detailed analysis of similarity. And I will note also Mr. Walsh asked questions concerning similarity and pointed things out in the trial concerning such things as the use of alcohol, the use of strangulation, and the type of sexual contact or attempted sexual

contact, and other areas were brought forth not only at the hearing prior to the trial, and at the trial.

And then the third factor, independence. It's clear these folks--the two Kentucky individuals knew each other, but they testified at trial and at the hearing that there had been no discussion about Mr. Murphy and what he had done to each of them. They had no idea. Nobody knew each other as far as M[redacted] M[redacted] or T[redacted] W[redacted]. And so I found that it was independent, clearly independent.

And then the frequency issue was addressed.

I also weighed prior to the trial, and have looked at it again, whether there is unfair prejudice, whether the prejudice outweighs the probative value as set forth in pages 14 and 15 of my memorandum decision. And this is where the Shickles factors get addressed. And in that I set forth the language from Labrum and Verde that talks about Utah courts have used the Shickles factors when weighing the probative value of evidence against the potential unfair prejudice. However, the factors have been displaced for purposes--and this is right out of Labrum, the Labrum case from the Court of Appeals, for purposes of assessing the probative value aspect of 403.

And having weighed all that I found that what I must focus on and consider is whether the risk that the jury may draw an improper character inference from the evidence, or that it may be confused about the purpose of the evidence. Well, Mr. Walsh is

right. There were two jury instructions given: Instruction 13 and 56--13 before the evidence was presented, and Instruction 56 at the end of the trial, which clearly told the jury that they are not to use it for an improper character purpose or inference, and that it was used only for the limited purposes of credibility, and also fabrication.

And with the proper instructions and the use of the evidence I find that the jury would not, and did not, draw an improper character inference from the evidence. And that the probative value was not outweighed by the prejudice.

I went so far in the memorandum decision to even talk about the presentation of that evidence, and how it was to be done. The State wanted to do it up front right from the start. I said no. You can't do that right from the start. It only can be done once there is--the defendant puts forth some allegations of fabrication or self-defense. And questions were asked on cross by Mr. Murphy's counsel. And then that opened the door in those areas so it could come forward at that point in time.

So with all of that I'm finding that on the basis of the motion to arrest judgment on the basis that it was improper to allow the doctrine of chances evidence in, I'm denying that.

The next issue raised by Mr. Demler is concerning whether a mistrial should have been declared or not. Concerning that matter I made a very clear record, once the situation had arisen where T[redacted] W[redacted] testified that Mr. Murphy had been shot

five times, that she understood she shot--G[redacted] O[redacted] shot him five times. We stopped that. I had a brief conversation with the attorneys. I then had the jury taken out, and heard arguments from counsel.

Then I spent the bulk of the noon hour reviewing the transcript. I shouldn't say transcript, reviewing the recording. And I made a clear record of what was said. The record I'll review again was Mr.--and these questions that Mr. Walsh asked leading up to that. He asked concerning A[redacted] K[redacted], ever been aware of any accusations that she made against this defendant. And then Mr. Walsh asked about G[redacted] M[redacted] or G[redacted] O[redacted]. And the response was "I know of her. That's Toni's ex-wife. Divorced 1997ish" is what she said.

Then Mr. Walsh asked "at the time you reported, were you aware of any general allegation she had made against this defendant?" And this is going to the independence issue under the doctrine of chances that Mr. Walsh is asking these questions. And the answer really isn't responsive. Her answer was that they had filed for divorce.

And then Mr. Walsh clarifies and says "I'm talking about a criminal accusation. Were you aware that she had accused him of any crime?" A very simple question. And I still don't understand why she blurts this out, because it is a very clear and simple question. But then she blurts out "I understand she shot him five times." It had nothing to do with the question that

was asked. And then that's when it kind of erupted here, and we got to the point.

Well, having reviewed that and weighed that, what had come forward, and understanding that G[redacted]O[redacted], formerly G[redacted]M[redacted], was going to testify under the doctrine of chances, and the position that it put Mr. Demler and Mr. Murphy in if she was able to testify, where I had previously ruled there should be nothing about being shot five times coming in.

Then as I weighed and spent the rest of the noon hour trying to figure out how to handle this, I felt that a curative instruction, which was given to the jury, and then also prohibiting the State from using any doctrine of chances evidence concerning G[redacted]O[redacted], formerly G[redacted]M[redacted], would cure and take care of this issue. And the instruction that was given was "prior to the lunch break you heard questions and testimony from [redacted]W[redacted] about allegations involving the defendant and his ex-wife G[redacted]O[redacted].[redacted]W[redacted] improperly responded to questions asked by Mr. Walsh. Because her answers were improper I am striking from the record all questions by Mr. Walsh and answers by [redacted]W[redacted] concerning G[redacted] O[redacted]. You are to disregard all questions by Mr. Walsh and statements by [redacted]W[redacted] concerning G[redacted] Oleson and Mr. Murphy. You must not consider any of Ms. Willden's statements concerning G[redacted]O[redacted] and Mr. Murphy in your deliberations."

And then the State accepted and followed through, and there was no more evidence put forth to the jury concerning Geri Anne Oleson. And I'm finding that that was sufficient to cure that issue and problem. And based upon that I'm denying the portion of the motion to arrest judgment.

And the last area raised by Mr. Demler is whether there's an inference on an inference. Well, it's not inferences. There were evidence. It was testified to as to what Mr. Murphy did in these various other situations. There was evidence of that. And the proper purposes were explained, as I've already ruled, to the jury in two different jury instructions.

Mr. Walsh stuck to that. He did not go beyond that. And so, in my mind, I just can't see how it's an inference on an inference, and I'm denying the motion on that basis also.

Now do you want to proceed with sentencing?

MR. WALSH: Yes, Judge. The State does want to.

THE COURT: Well, I'm asking the defendant.

MR. DEMLER: My client would like to have some time based on the ruling.

THE COURT: Have what?

MR. DEMLER: Have some time to set sentencing after this ruling so that he can--

THE COURT: Well, I'll set it on Monday. So--

MR. DEMLER: We'll be ready.

MR. WALSH: And for the record, the State does object