Case No. 20180487-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ROBERT ALONZO PERAZA,
Defendant/Respondent.

Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

Child accused her stepfather, Robert Alonzo Peraza, of sexually abusing her. She later recanted, but then she withdrew the recantation and the case moved forward to trial. Thirty-two days before trial, the State gave notice that it would call an expert witness. It provided the expert's name and contact information; a curriculum vitae; a list of over 130 studies on which the expert would rely; and a single-sentence description of the topics the expert would discuss, including recantations and the disclosure process in child-sex-abuse cases. The notice did not provide any detail about opinions the expert would offer on those subjects.

Peraza objected that the notice was inadequate under the expert-notice statute, Utah Code section 77-17-13, and argued that the expert's testimony was likely inadmissible under rule 702, Utah Rules of Evidence, although he said that he could not be sure about rule 702 because he did not have enough information about her testimony.

The district court agreed that more information was needed, and it ordered the State to narrow the list of studies to a manageable number and provide copies to Peraza. The court also ruled that the expert was qualified and tentatively ruled that she could testify, but it emphasized that it would revisit the issue at trial if Peraza objected.

In a telephone conference later that day, Peraza asked for a continuance to call an expert to address recantations and Child's therapy. The court denied the continuance because those issues could have been addressed much earlier, the trial had already been continued twice, and the victim had an interest in the trial moving forward.

The State provided copies of the relevant studies as ordered, and the expert testified without further objection under rule 702 or the expert-notice statute. Peraza was convicted of four counts of sodomy on a child, and he appealed the rule 702 issue.

The Court of Appeals reversed. It held that the State violated the expert-notice statute and that, as a result, the expert's testimony was inadmissible under rule 702. In other words, the court held that compliance with the expert-notice statute was an element of admissibility under rule 702. It concluded that admitting the testimony was prejudicial. The court further held that after erroneously admitting the expert testimony, the district court abused its discretion by denying a continuance. The Court of Appeals placed the burden of disproving prejudice on the State and held that the State failed to meet that burden.

This Court should reverse the decision of the Court of Appeals. That court erroneously conflated the requirements of the expert-notice statute with the requirements of rule 702. The expert-notice statute permits excluding expert testimony only when the proponent fails in bad faith to provide adequate notice. Rule 702 permits excluding expert testimony only when the testimony fails the rule's foundational requirements. In this case, there was no finding of bad faith under the statute. And there was no finding of inadequate foundation under the rule. Furthermore, the Court of Appeals erred by concluding that admitting the expert testimony was prejudicial, because it did not review the actual effect of the testimony on the totality of the evidence presented at trial.

This Court should also vacate the Court of Appeals' decision on the denial of a continuance. The Court of Appeals erroneously shifted the burden to the State to disprove prejudice based on its precedent applying the expert-notice statute. But Peraza did not seek the continuance under the expert-notice statute, or at least he abandoned any reliance on the statute on appeal. And even if the expert-notice statute applied, its plain language requires the defendant to show substantial prejudice. This Court should remand for the Court of Appeals to apply the proper standard.

STATEMENT OF THE ISSUES

1. Whether the Court of Appeals erred in vacating Respondent's convictions based on its construction and application of Rule 702 of the Rules of Evidence and Section 77-17-13 of the Utah Code.

This issue was presented in the State's petition for a writ of certiorari. Cert.Pet. 3, 11–14.

2. Whether the Court of Appeals erred in assigning Petitioner the burden of demonstrating that Respondent was not prejudiced by the district court's denial of his motion for a continuance.

This issue was presented in the State's petition for a writ of certiorari. Cert.Pet. 3, 18–20.

STATEMENT OF THE CASE

A. Summary of Relevant Facts

1. Abuse

When Child was about five years old, her stepfather, Peraza, came into her bedroom one night, woke her up, removed his and Child's clothes, and began showing Child his penis and having her touch it. R843, 846; SE1 at 34:00–34:45.[1] Peraza repeated this almost nightly; then one night he started having Child wrap her hand around his penis and move it up and down until he ejaculated. R846–48; SE1 at 24:00–24:45, 34:00–34:45. Later, Peraza showed Child pornography on the computer and told her to mimic it. R939; SE1 at 26:00–26:45. Child protested, but Peraza forced her to perform oral sex on him. SE1 at 24:00–24:40.

Peraza forced Child to manually stimulate him and perform oral sex several times a week. R850; SE1 at 46:47–49:05; SE2 at 9. When she protested, Peraza would say, "I don't care"; he would slap her face; or he would grab her hair and force her mouth onto his penis and move her head up and down. R850, 927–28; SE1 at 38:50–39:50. Once, he grabbed her by the throat, lifted her, and threw her back. R928; SE1 at 37:20–37:30; DE1 at 21–22.

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[1] In citing to the video of the CJC interview (SE1), the State indicates how far into the video the reference occurs; the time does not refer to the video recorder's digital clock as displayed on the screen.

Because protesting did not work, sometimes Child would try to hurry through the process to get it over with, but Peraza would make her slow down, telling her it would take longer if she went fast. SE1 at 38:30–38:45. Other times, he would say, "Hurry, hurry, it's gonna be right there. If [you] stop, it's gonna go all the way down and [you] have to start over." SE1 at 49:05–49:25. Sometimes Peraza would stop Child while she was performing oral sex, masturbate himself, say, "Do you want some milk?" and then wipe the semen on Child's face. R850; SE1 at 34:40–34:50, 49:20–49:40. Other times he would ejaculate into her mouth and tell her she had to swallow it; she pretended to but would then go to the bathroom to spit it out. R850–51; SE1 at 49:40–50:20.

As a nine-year-old, Child was able to explain male anatomy and physiology in detail. She described Peraza's penis as starting out soft and getting "really hard," and she said she could see veins on his penis when it was hard. SE1 at 36:10–37:05. Child could also describe the color and consistency of semen, describing it as somewhat "yellowish" but "mostly whitish," with the look of amoxicillin. SE1 at 34:50–35:20 (comparing semen to "that medicine, mockacillin").

About the time Child was seven years old, the abuse changed: Peraza began anally sodomizing her. R850, 852–54; DE1 at 19. Peraza would force a

sock into Child's mouth so others would not hear her scream. R852, 928–29. If she did say "ow[]," he would tell her to shut up. DE1 at 39. Peraza would put lubricant on himself or Child, and he would cover his penis with what Child described as "a bag"; the bag would be wet when Peraza was done and he would throw it in the garbage. R852, 929; DE1 at 43. On Child's eighth birthday, Peraza came into her room; said, "This is a birthday present"; then anally sodomized her. DE1 at 32. He did this about once a week until sometime after Child's ninth birthday. DE1 at 27. The abuse stopped only when Child's family moved out of their house; Peraza moved in with his mother, and the rest of the family moved in with Child's maternal grandfather. R794–96, 853, 933–35; DE1 at 27.

Almost every time Peraza abused Child, he threatened her not to tell. R926; SE1 at 40:50–41:15. He threatened to kill Child and her mother, brothers, and grandfather. SE1 at 41:15–42:10; DE1 at 54. Peraza offered to buy Child gifts to convince her to do what he wanted, but she refused them. SE1 at 35:20–35:35; DE1 at 24. Although Child acknowledged that she could not stop Peraza, she blamed herself for letting Peraza abuse her. R922. She repeatedly promised her deceased grandmother that she would not let him do it anymore, especially on Sundays—but she repeatedly felt like she let her grandmother down for not stopping Peraza. R922; SE1 at 54:00–56:15.

2. Disclosure Process

Child tried to tell her mother about the abuse when she was five and again when she was seven. R855; SE1 at 41:15–42:10; DE1 at 19, 23. Child thought she had been fairly explicit in what she told Mother, but Mother did not recall ever learning about the abuse until about two months after Peraza had moved out, when Child was nine. R786, 794–96, 853, 855. Mother and Child were watching a football practice, and Mother mentioned that she and Peraza were talking about separating. R856, 985. Child said she was glad. R856. After some prodding, Child explained that Peraza made her suck on his penis. R1164.

When they returned home, Child uncharacteristically ran into the house without acknowledging her grandfather, who was outside working in the yard. R786–87, 856. He could tell that she was emotional and that something was wrong. R786–87, 790. Although Mother had favored her sons over Child, she was distraught at the news and could hardly tell Child's grandfather what Child had said. R787, 805–06, 984, 986. After speaking with Child, the grandfather called the police. R791. Mother was not cooperative and would not answer questions, but she gave a written statement recounting what Child told her. R792, 1051. At some point that day Mother told Child,

"It's gonna get ugly, [Child]. It's gonna get really ugly." SE1 at 40:20–40:30. But Child was glad that Peraza would be in jail. SE1 at 40:20–40:50.

The next day, Child was interviewed at the Children's Justice Center (CJC), where she disclosed the details of Peraza repeatedly forcing her to manually stimulate him and perform oral sex. R814; *see generally* SE1. A medical examination revealed no injuries to Child's vagina or anus. R1005.

Peraza was arrested after the CJC interview and police interviewed him twice. R1034, 1045. Peraza began the first interview saying that he and Child had a great relationship, but as the interviews progressed and the officer told Peraza more details about Child's allegations, Peraza gradually changed how he characterized the relationship until, by the end of the second interview, he was saying, "I don't spend much time with her at all." R1051–52. He also asked how he could get the charges reduced. R1056.

Peraza said he would never intentionally do what Child alleged, but he admitted it "could have" happened when he was drunk. R1065, 1075. He said he remembered passing out on his couch once after drinking, and when someone who he assumed was Mother came to shake him awake, he grabbed the person's head and "guided it" to his penis, letting go only after the person "finished" performing oral sex on him. R1049–50. He fell back asleep, but when he thanked Mother the next day, she did not know what he was talking

about. R1050. Peraza said this happened "a few more times" after that, and he wondered if it "could have" been Child or one of his sons. R1049–50, 1068–69, 1075.

Child's grandfather saw "a noticeable change" in Mother when Peraza was arrested. R1034. She became "very concerned about the impact of it on her family, on her becoming a single mother." R1041. Over the next several weeks, she began to disbelieve Child's allegations. R987–89. She thought it "didn't feel right" that Child missed Peraza and even cried "for Daddy." R945, 996–97, 1006–07. Mother also believed Child had a "reputation" for "fabricating charges against someone," though she did not provide any example beyond a vague reference to how Child would "blame [neighborhood] boys for doing things and then later tell you that they actually didn't do it." R1011–13, 1024.

About a month after the disclosure, the woman who interviewed Child at the CJC conducted a follow-up interview to determine whether anyone was pressuring Child to recant. R833. Child said an attorney told her not to talk about the case with Mother, so she had not done so. R833.

But soon after that, Mother confronted Child and asked if the allegations against Peraza were true. R806, 946, 987–88, 1007. Child said they were not. R946, 1007. Mother told Peraza's defense counsel, because he "was

on our side," and he arranged for a private investigator to speak with Child. R989–91, 995–96, 1006–07. Child recanted to the private investigator. SE2 at 13. She said she heard Lucifer's voice in her head telling her to make the allegations. SE2 at 13; DE2.

Child moved to California to live with her father. R810, 991–92. She started therapy, where she disclosed more details of the abuse, including anal sodomy, and alleged that Peraza's brother also sexually abused her. R844–45, 971–72. One technique the therapist used was to have Child make effigy dolls of Peraza and his brother and have her kill the dolls by running over them with a (presumably toy) car. R959–60. In February 2015, Child was interviewed at California's equivalent to the CJC. DE1 at 2. In the California interview, Child reaffirmed her earlier descriptions of the abuse and then added details about anal sodomy by Peraza and abuse by Peraza's brother. DE1 at 25–44.

Although Child was disclosing more details about the abuse to her therapist and family in California, throughout the time she was living in California she continued to tell Mother when they spoke over the phone that Peraza did not abuse her. R952, 970–72, 1014–15. Child later explained that she lied when she recanted because she did not want her family to get split up. R915.

B. Summary of Proceedings

In August 2013, the State charged Peraza with four counts of sodomy on a child and one count of aggravated sexual abuse of a child. R1–3.

1. Pre-trial Proceedings

Trial was initially set for March 2015. R152–53, 450–51. But in February 2015, Peraza moved to continue trial because Child had made new allegations earlier that month, neither party had a copy of the forensic interview that was conducted in California that month, and Peraza wanted to subpoena Child's therapy records. R164–68, 456. The State agreed to the continuance and the court granted it. R456, 458.

Trial was later set for late October 2015. R212–13. Defense counsel received Child's therapy records, after in camera review, by early October. R512, 1330–32. After reviewing the records, Peraza moved to continue trial so he could call the therapist as a witness. R201, 1330–31. Peraza also needed a continuance because he needed more time to transcribe the recantation interview and get it to the State. R1330. The State said it was ready to proceed but did not object to the continuance, and the court granted it, setting trial to start in February 2016. R1331–38.

Thirty-two days before trial, the State filed notice saying it intended to call Chelsea Smith as an expert witness. R282. The notice stated that Smith

would testify about, "The methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantation." R283. No report was attached, but the notice was accompanied by Smith's curriculum vitae and contact information and a list of over 130 articles Smith would rely on, though the articles themselves were not attached. R288–92.

Fifteen days before trial, Peraza certified that he was ready for trial, though he objected to Smith's testimony without identifying why. R519–20. Twelve days before trial, the court held argument on the objection. R520–21, 532. Peraza argued under the expert-notice statute that the notice was insufficient to allow him to prepare to meet the testimony. R534, 548–49. He also argued that he expected that the testimony would be inadmissible under rule 702, Utah Rules of Evidence, though he based that argument on an assumption of what Smith's testimony might be. R534–35.

The district court ruled that Smith was qualified as an expert, but it agreed that without more information it could not say what Smith would testify about or whether her testimony would be helpful for the jury. R547–48, 550. The court stated that "at this point in time," it was going to let Smith testify. R550. But it clarified that Peraza could raise future objections to

Smith's testimony, and "maybe [Smith] doesn't come in." R550. The court also directed the State to narrow the studies to "a reasonable amount" and provide copies to Peraza, cautioning that if Smith testified about something based on studies Peraza had not been given, her testimony may not come in. R570–72. The State complied, providing copies before trial. R746.

The same day as the hearing, Peraza asked for a telephone conference and moved to continue trial. R589, 591. After speaking with a social worker and mitigation expert at the Salt Lake Legal Defender Association (LDA) about Smith and other aspects of the case, defense counsel had decided to get an expert to discuss the therapist's practice of killing effigy dolls and how that practice could have influenced Child to falsely withdraw her recantation or to describe the abuse in more violent terms than were true. R589–90.

The district court denied the continuance. It pointed out that this was the third time it had set the case for trial, and it "ha[d] to draw the line somewhere." R592. The court explained that the issues of recantation and the therapist's practices could have been dealt with much earlier. R592. The court also noted that it had an obligation to the alleged victim as well. R592. It was thus "too late in the game" to continue trial. R592.

2. Trial

Child testified at trial about the manual stimulation, oral sodomy, and anal sodomy. R842–53. She also testified that Peraza raped her—an allegation that neither the prosecutor nor defense counsel had heard before. R854, 951–52, 973.

Among other witnesses, the State also called Mother and the detective who interviewed Peraza. R983, 1041, 1045. Peraza called the private investigator who conducted the recantation interview with Child. R1105. The investigator opined that Child was not coerced into recanting and stated that he does "[n]ot very frequently" come across cases involving recantations. R1130, 1141.

On rebuttal, the State called Smith. Before Smith testified about recantations or the disclosure process, she testified without objection that the studies on which she would base her testimony were "generally accepted" within her field "as being sources that were reliable." R1138–40. Smith then testified that most children who have been sexually abused delay disclosure, usually until they are adults. R1143. She explained that a child may disclose details over time, because the child simply may not remember all the details during the initial disclosure, or because the child may be waiting to see how the disclosure is received. R1143–44.

Smith also testified that recantations were "not something that's typical," though it was "not unheard of." R1141–42. She testified that between 4 to 20 percent of child-abuse cases involve recantations. R1141. She stated that recantation does not necessarily mean the initial accusation was false. R1142. She identified two reasons a child might falsely recant: pressure from family members; and seeing negative results from disclosing the abuse, such as incarceration of someone the child still loves and its accompanying financial stress. R1142.

Peraza did not object to Smith's testimony at trial under rule 702 or renew a notice objection. Instead, he used the studies the State had provided to draw out concessions from Smith. R1146–48. He got Smith to acknowledge that her estimate of the frequency of recantations included both sexual as well as physical abuse. R1147. Peraza also got Smith to concede that a child may honestly recant, and that an allegation is not true just by virtue of its having been made. R1147–48. Counsel elicited one reason a child might truthfully recant: She feels guilty for lying about the allegations in the first place. R1148.

The State withdrew the aggravated sexual abuse charge, and the jury convicted on all four counts of sodomy on a child. R363, 367–68, 1199–1200.

3. Appellate Proceedings

On appeal, Peraza did not renew his notice objection. Aplt.Br. 1–3, 25–52. Instead, he argued that the district court abused its discretion by admitting Smith's testimony under rule 702 without requiring the State to present evidence of the reliability of Smith's testimony and without conducting a complete rule 702 analysis. Aplt.Br. 1–3, 25–35. He also argued that the court abused its discretion when it denied his third motion to continue trial, but not based on any notice deficiency. Aplt.Br. 35–44.

Even though Peraza did not raise the notice issue, the Court of Appeals stated that it was "asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13 and, if not, whether the district court erred in admitting [Smith's] testimony under rule 702 of the Utah Rules of Evidence." *State v. Peraza*, 2018 UT App 68, ¶2, 427 P.3d 276. The court held, as a matter of first impression, that "the first step" in meeting "the requirements of rule 702" "involves giving notice" according to the terms of the expert-notice statute. *Id.* ¶28. The court concluded that, in the absence of an expert report, the State's "single-sentence description of the broad subject upon which [Smith] would testify" and its failure "to provide meaningful access to the articles upon which [Smith] relied" was inadequate under the statute. *Id.* ¶¶31, 37. "Without this information the requirements

under rule 702 were not met … ." *Id.* ¶37. Therefore, the court held, the district court "exceeded its discretion in admitting [Smith's] testimony at trial because the State failed to comply with Utah Code section 77-17-13." *Id.*; *see also id.* ¶49. The court held that admitting the testimony was prejudicial because "there was no 'other evidence supporting [the] conviction'" besides Child's testimony, and Smith's testimony "was 'clearly calculated to bolster [Child's] believability.'" *Id.* ¶36 (alterations in original).

Next, the Court of Appeals addressed "whether, based on the lack of expert report, Peraza's third motion for a continuance should have been granted." *Id.* ¶2. Considering Peraza's diligence, the potential efficacy of a continuance, inconvenience to the court and opposing party, and the extent of any prejudice from denying a continuance, the court held that the district court abused its discretion in denying the continuance. *Id.* ¶¶40–43. The Court of Appeals placed the burden on the State to disprove prejudice. *Id.* ¶44. The court concluded that the State did not meet this burden because "Peraza's ability to put forward his best defense was materially hampered" by not being able to call a competing expert or better prepare to meet Smith's testimony. *Id.* ¶47. The court thus vacated Peraza's conviction. *Id.* ¶49.

SUMMARY OF ARGUMENT

I. The Court of Appeals erroneously conflated the expert-notice statute and rule 702. The statute and rule have distinct purposes, timing requirements, and remedies. The statute governs notice, with the goal of assisting trial preparation; the rule governs admissibility, with the goal of ensuring relevance and baseline reliability. The requirements of the statute must be satisfied thirty days before trial; the requirements of the rule may be satisfied before or during trial. The default remedy for a violation of the statute is a continuance, with exclusion permissible only on a showing of bad faith; the remedy for failing to satisfy rule 702's foundational requirements is exclusion of the evidence. Conflating the rule and the statute violates the plain language and distinct purposes of both. It also sows confusion in the law by excluding testimony under circumstances where that remedy is otherwise unavailable.

The Court of Appeals also erred when it concluded that admitting Smith's testimony was prejudicial. The court incorrectly assumed that Child's testimony was the only evidence supporting the conviction. And it concluded that because Smith's testimony was *calculated* to bolster Child's testimony, admitting the testimony was harmful. Regardless of what Smith's testimony was calculated to do, it did little if anything to bolster Child's testimony. And

its effect was further minimized by the totality of the evidence supporting the conviction. Considering Peraza's admission that he could have sodomized Child a few times, his and Mother's inconsistent statements, Mother's bias in favor of Peraza, and neither's ability to satisfactorily explain Child's detailed sexual knowledge, excluding Smith's testimony would have been unlikely to lead to a more favorable outcome for Peraza.

II. The Court of Appeals also erroneously placed the burden on the State to disprove prejudice from the district court's denial of a continuance. Peraza did not seek a continuance under the expert-notice statute, and he did not rely on the statute on appeal. Thus, the Court of Appeals erroneously relied on the expert-notice statute to shift the burden. When a party seeks a continuance based on the district court's inherent authority to grant continuances, and the court declines the request, this Court has squarely placed the burden on the moving party to prove prejudice.

Even if the Court of Appeals properly relied on the expert-notice statute, the statute's plain language places the burden of proving prejudice on the moving party in the district court and, by extension, on appeal. And even if that were not so, the court's rationale for shifting the burden is flawed. The Court of Appeals based its decision on this Court's opinion in *State v. Knight*, where the Court shifted the burden based on the prosecutor's

wrongful failure to disclose inculpatory evidence. But even when a continuance is sought based on the prosecutor's violation of a duty, determining whether to shift the burden turns on the nature of the prosecutor's error. And the nature of an expert-notice violation is unlike the errors involved in other cases where this Court has shifted the burden to the State.

ARGUMENT

I.

The Court of Appeals erroneously conflated the requirements of the expert-notice statute and rule 702 to require exclusion of non-prejudicial expert testimony under circumstances where neither authority would have permitted excluding it.

The Court of Appeals held that providing adequate notice under the expert-notice statute is an element of admissibility under rule 702, Utah Rules of Evidence. It then held that the State provided inadequate notice of Smith's testimony, that the testimony was thus inadmissible, and that admitting the testimony prejudiced Peraza.

The court's ruling conflicts with the plain language and purposes of the expert-notice statute and rule 702, and its prejudice analysis overlooked the totality of the evidence.

A. Notice is not an element of rule 702.

The Court of Appeals improperly held that satisfying the requirements of Utah Code section 77-17-13 (the expert-notice statute) is an element of admissibility under rule 702. *Peraza*, 2018 UT App 68, ¶28. Although the court cited the expert-notice statute as authority for this proposition, *id.*, the statute says nothing about admissibility under rule 702 and rule 702 says nothing about notice under the statute. Each has distinct purposes and may be satisfied at distinct times. Furthermore, the statute permits exclusion only when the proponent gives inadequate notice in bad faith—something that was never found or even alleged in this case.

The plain language of the expert-notice statute does not mention rule 702. *See State v. Rothlisberger*, 2006 UT 49, ¶15, 147 P.3d 1176 ("[W]e interpret a court rule in accordance with its plain meaning . . . ."). That is because the statute is not about the inherent admissibility of the expert's testimony. The statute is about giving adequate notice to ensure that each party is able to prepare for trial. Thus, a proponent of expert testimony must give notice at least thirty days before trial, accompanied by either a report or "a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony." Utah Code Ann. §77-17-13(1) (West 2017).

Because the expert-notice statute is designed to facilitate a party's trial preparation, the default remedy for a notice violation is a continuance. *Id.* §77-17-13(4). A continuance requires a specific showing: that the proponent of the expert testimony did not "substantially comply" with the statute, and that a continuance is "necessary to prevent substantial prejudice" to the moving party. *Id.* §77-17-13(4)(a). If the movant can make that showing, the movant is "entitled to a continuance . . . sufficient to allow preparation to meet the testimony." *Id.* The court has no discretion to exclude expert testimony as a sanction unless the notice violation was "deliberate[]" or in "bad faith." *Id.* §77-17-13(4)(b); *State v. Roberts*, 2018 UT App 9, ¶¶37–39, 414 P.3d 962.

In short, because the expert-notice statute is about preparing for trial, its requirements must be met before trial, and the default remedy is a continuance to accommodate preparation.

Rule 702 on the other hand says nothing about notice. That is to be expected. The rules of evidence generally do not govern notice; they govern the admissibility of evidence at trial. *See, e.g.*, Utah R. Evid. 702 (setting conditions under which an expert "may testify"). The purpose is to ensure the relevance and baseline reliability of evidence presented to the factfinder. *See, e.g., State v. Fullerton*, 2018 UT 49, ¶44 n.13, 428 P.3d 1052 (equating

reliability with admissibility under the rules of evidence); *State v. Nguyen*, 2011 UT App 2, ¶10, 246 P.3d 535 ("Our rules of evidence are designed to permit the introduction of relevant and reliable evidence 'to the end that the truth may be ascertained and proceedings justly determined.' Utah R. Evid. 102."), *aff'd*, 2012 UT 80, 293 P.3d 236.

It is true that some evidentiary rules expressly incorporate pre-trial notice requirements into the rule and make admissibility contingent on notice. *See, e.g.,* Utah R. Evid. 609(b) (stating that evidence of old convictions is "admissible only if . . . the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use"). But rule 702 is not one of them. Given that other evidentiary rules make their notice requirements express, the absence of express notice requirements in rule 702 must be presumed to be purposeful. *See Penunuri v. Sundance Partners, Ltd.*, 2013 UT 22, ¶15, 301 P.3d 984 (stating that statutes are to be read as "a harmonious whole" and that courts "seek to give effect to omissions in statutory language by presuming all omissions to be purposeful" (emphasis omitted)); *State v. Vargas*, 2001 UT 5, ¶31, 20 P.3d 271 ("When interpreting an evidentiary rule, we apply principles of statutory construction.").

The Court of Appeals was concerned that the State's notice "depriv[ed] the [district] court of the information necessary to rule on the admissibility of [Smith's] testimony under rule 702" at the pre-trial hearing. *Peraza*, 2018 UT App 68, ¶¶2, 30–31. Certainly, the court needs information to rule on a rule 702 objection, and it is the proponent's burden to supply that information. But absent explicit notice requirements in the rules of evidence, the district court may determine compliance with the rule (*i.e.*, admissibility) at the time of the proffer, and it may generally be done through preliminary questioning to lay foundation even in front of the jury. *See* Utah R. Evid. 104(a), (b), (c) (stating that court may generally take evidence in presence of jury to determine admissibility); *cf.* Utah R. Evid. 103(b) ("Once the court rules definitively on the record—*either before or at trial*—a party need not renew an objection or offer of proof to preserve a claim of error for appeal." (emphasis added)). That is because the rules of evidence are designed to ensure the relevance and baseline reliability of evidence submitted to the jury. The rules are generally not about ensuring that parties may be prepared for trial.

A party may move *in limine* to establish the admissibility or inadmissibility of anticipated evidence in advance, hoping to aid in trial preparation and enhance a smooth presentation of evidence at trial. But

under the rules of evidence, "courts are not required to make definitive pretrial rulings, even when asked by a party who makes a motion in proper form." 1 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE §1:11 at 56–58 (4th ed. 2013). Thus, unlike the expert-notice statute, which must necessarily be satisfied before trial, the requirements of rule 702 may be satisfied during trial.

Finally, rule 702 and the notice statute provide distinct remedies. If a party cannot meet rule 702's foundational requirements, there is only one remedy: The evidence is excluded. *See, e.g.*, *State v. Guard*, 2015 UT 96, ¶62, 371 P.3d 1 (concluding that testimony not meeting reliability standard of rule 702 was inadmissible). That is, rule 702 states the conditions under which an expert "may testify." Utah R. Evid. 702. The necessary corollary is that the expert may not testify when the conditions are not satisfied.

The language of rule 702 may be relevant to determining whether something qualifies as expert testimony and is thus subject to the expert-notice statute. *See Rothlisberger*, 2006 UT 49, ¶1 (addressing whether specialized fact testimony "is expert testimony pursuant to rule 702 of the Utah Rules of Evidence and therefore subject to the qualification and advance disclosure requirements associated with that classification of testimony"). But the overlap goes no further. Unlike the expert-notice statute, rule 702 is

about the relevance and baseline reliability of evidence submitted to the factfinder, it may be satisfied anytime before the evidence is admitted, and the remedy for failing to satisfy rule 702 is exclusion.

By ruling that "the first step" under rule 702 "involves giving notice" under the statute, and then by ruling that "the State failed to satisfy the notice requirements under Utah Code section 77-17-13 . . . and therefore the district court exceeded its discretion when it admitted [Smith's] testimony at trial without sufficient information to satisfy rule 702," *Peraza*, 2018 UT App 68, ¶¶28, 49, the Court of Appeals imported requirements into the rule 702 determination that the rule's plain text does not support. And it has created an irreconcilable conflict between the statute and rule, requiring exclusion under rule 702 for violations of the expert-notice statute even without a showing of bad faith. Peraza never made any allegation, argument, or proffer of bad faith before the district court or the Court of Appeals, and neither court ever found bad faith. Thus, the district court had no discretion to exclude Smith's testimony under the expert-notice statute, and the Court of Appeals erred in holding that it was required to. *See Roberts*, 2018 UT App 9, ¶39 (concluding that exclusion of expert testimony "was not a remedy available to" defendant because defendant "did not argue below that the State's failure

to give notice was deliberate or in bad faith, and the court made no such finding").

Furthermore, because it reversed by importing pre-trial notice requirement into rule 702, the Court of Appeals never addressed the State's arguments that Peraza had abandoned his rule 702 objection by the time of trial and that, in any event, the State satisfied rule 702 by laying a proper foundation during Smith's testimony. Aple.Br. 30–36; *see also* Oral Argument in Court of Appeals, 19:00–21:10 (February 21, 2018). This Court should reverse the Court of Appeals and remand so that court can consider the rule 702 issues presented by the parties.[2]

[2] Reversing based on the expert-notice statute was also error because neither party briefed or argued the issue on appeal. *State v. Johnson*, 2017 UT 76, ¶¶45, 49, 416 P.3d 443. Peraza's appeal relied exclusively on rule 702. *See* Aplt.Br. 26–32 (discussing the content of the State's notice solely in terms of whether the State had provided sufficient information to meet its burden under rule 702); *see also* Aplt.Br. 40 (conceding that Peraza "was properly notified of the state's expert witness"). Thus, the State never had the opportunity to address whether it had "substantially compl[ied]" with the statute. *See* Utah Code Ann. §77-17-13(4)(a). If this Court adopts the reasoning of the Court of Appeals, and if it concludes that Peraza's forfeiture of any notice objection should be ignored, the State asks the Court to remand the case to the Court of Appeals where the State may be given an opportunity to brief whether it substantially complied with the expert-notice statute and whether any violation was cured by giving defense counsel the studies on which Smith would rely.

B. Excluding the expert's testimony would not have changed the evidentiary picture enough to make a more favorable outcome reasonably likely.

The Court of Appeals also erred when it concluded that admitting Smith's testimony prejudiced Peraza. *See* Order Granting Petition for Writ of Certiorari (October 8, 2018) (granting review on "[w]hether the Court of Appeals erred in vacating Respondent's convictions based on its construction and application of Rule 702" and the expert-notice statute); *see also State v. Hummel*, 2017 UT 19, ¶42, 393 P.3d 314 (stating that reversable error requires proof of both error and prejudice).

The Court of Appeals held it reasonably likely that excluding Smith's testimony would have led to a result more favorable to Peraza. *Peraza*, 2018 UT App 68, ¶¶34–36. It based that conclusion on its assessment that, because there was "no 'other evidence supporting [the] conviction,'" the case "hinged on the jury's assessment of Child's credibility versus that of Peraza," and Smith's testimony was "'clearly calculated to bolster [Child's] believability.'" *Id.* ¶36 (alterations in original). The court briefly mentions two aspects of Smith's testimony that it says was calculated to bolster Child's credibility: testimony about recantation and delayed disclosure. *Id.*

Yet the Court of Appeals did not address the nature of the offending testimony, the effect it likely had on the case, and the strength of the evidence

supporting the conviction. Even if the court actually engaged in that analysis but did not articulate it, the court's opinion appears to endorse a formulaic prejudice analysis: Admitting expert testimony is prejudicial whenever that testimony relates to the victim's credibility and the victim's testimony is the only direct evidence of guilt. *See id.*

But prejudice must be determined from a review of the record as a whole. *State v. Maestas*, 2012 UT 46, ¶56, 299 P.3d 892. The strength of the evidence supporting the verdict is one factor. *Strickland v. Washington*, 466 U.S. 668, 696 (1984) ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); *State v. Knight*, 734 P.2d 913, 919–20 (Utah 1987) (explaining that *Strickland*'s prejudice standard is identical to the prejudice standard under rule 30, Utah Rules of Criminal Procedure). But the court must also ask what effect the challenged testimony likely had on "the entire evidentiary picture." *Strickland*, 466 U.S. at 695–96 ("Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect."). That requires a contextual analysis of the challenged testimony itself. While the centrality of the victim's credibility, the lack of other direct evidence, and the involvement of an expert witness are all

relevant to the prejudice analysis, those factors do not substitute for a contextual analysis of the challenged testimony and the circumstantial evidence supporting the verdict.

Considering the record as a whole reveals that excluding Smith's testimony was not reasonably likely to have led to a more favorable outcome for Peraza. Again, the court identified two aspects of Smith's testimony that it says bolstered Child's credibility: recantations and delayed disclosures. *Peraza*, 2018 UT App 68, ¶36. But examining Smith's testimony in context shows that it likely did little to affect the case.

Smith's testimony about recantation was a wash. After direct and cross-examination, the take-away from Smith's testimony was this: (1) recantations are uncommon, but they do happen, R1141–42; (2) a child's recantation may or may not be true, R1142, 1147–48; (3) reasons a child may falsely recant include pressure from family members and seeing negative results from disclosing the abuse, R1142; and (4) reasons a child may truthfully recant include a feeling of guilt for lying about the initial allegation, R1148.

The first point was cumulative of evidence Peraza presented. Immediately before Smith testified as a rebuttal witness, the private investigator who conducted the recantation interview testified that in his

experience, he "[n]ot very frequently" comes across cases where the alleged victim recants. R1130. The second point—that recantations may be true or false—does nothing to bolster Child's credibility.

The last two points about why a child may truthfully or untruthfully recant could have cut either way. Evidence was presented from which the jury could have deduced that Mother pressured Child into falsely recanting: Mother favored her and Peraza's sons over Child, R806; Mother became concerned about how the allegations affected her family, R1034, 1041; SE1 at 40:20–30; she doubted Child, R987–89; and, despite Child having been instructed not to talk to Mother about the allegations, Mother confronted Child to ask if the allegations were really true, R833, 946, 1007. There was also evidence that Child falsely recanted because of the negative results of having disclosed the abuse: Child testified that she recanted because she did not want her family to get split up, but that her recantation was a lie. R915.

On the other hand, evidence was presented from which the jury could deduce that Child truthfully recanted based on a feeling of guilt: Child's statements suggested that she was a religious person, and she was aware that her allegations had caused problems for her family. R915; SE1 at 54:00–56:15; SE2 at 7, 11, 13; DE2.

In other words, Smith's testimony helped both the defense and the prosecution, and at the end of the day the jury still had to focus on the facts; assess motives; weigh the credibility not only of Child and Peraza, but also Mother and the officer who interviewed Peraza; and determine whom to believe.

The second aspect of Smith's testimony that the Court of Appeals relied on—delayed disclosure—also did little to bolster Child's credibility. Smith's testimony about delayed disclosure covered only a paragraph in the trial transcript. R1143. And it told the jury that Child's delayed disclosure was atypical—most victims delay disclosure until adulthood. R1143. Child said she first tried to disclose the abuse when she was five and again when she was seven, but no one took her seriously until she was nine. R786, 855; SE1 at 41:15–42:10; DE1 at 19, 23. To the extent there was any delay in her disclosure as a child, Smith testified simply that disclosures from children "can be delayed." R1143. Thus, Smith's testimony about delayed disclosure was not likely to have bolstered Child's credibility in the eyes of the jury.

Although the Court of Appeals did not mention Smith's testimony about gradual—as opposed to delayed—disclosure, it may have had that aspect of Smith's testimony in mind when it referred to delayed disclosure. Smith testified briefly that children will disclose facts incrementally, either

because they simply remember more details later or because they gauge their initial disclosures based on how the information was received. R1143–44. Admittedly, this brief testimony provides some support for the gradual process by which Child disclosed the abuse.

But it is highly unlikely that the outcome of trial would have been more favorable to Peraza had Smith not offered this brief testimony about gradual disclosures. The effect Smith's testimony had on the entire evidentiary picture requires an examination of the other evidence supporting the verdict—evidence the Court of Appeals mistakenly assumed was non-existent. *See Peraza*, 2018 UT App 68, ¶36 ("Here, unlike *Rammel*, there was no 'other evidence supporting [the] conviction' [aside from Child's testimony and Smith's testimony]." (first alteration in original)). Child's account was corroborated by significant circumstantial evidence that the Court of Appeals did not account for.

This was not a case where the accusation was met by a clear denial. Peraza initially said he had a great relationship with Child, but he gradually changed that characterization over the course of two interviews until he claimed not to "spend much time with her at all." R1051–52. He asked the officer "what he should plead to and how he could get the charges [reduced]." R1056. And although Peraza maintained he would never

intentionally do any of the things Child alleged, he admitted that he "could have" forced Child to perform oral sex when he was in a drunken stupor, professing that he thought it was Mother. R1049–50, 1075. At first, Peraza said this happened "just once." R1049. Later, he admitted that "it happened a few more times." 1068–69. Even if Smith's testimony may have bolstered Child's testimony, it did nothing to explain away Peraza's admissions to police.[3]

There were also significant inconsistencies between Mother's and Peraza's stories. R1015–16, 1047. Wholly apart from Smith's testimony, these inconsistencies undermined Peraza's attempts to explain away nine-year-old Child's detailed descriptions of the abuse and her uncharacteristically detailed knowledge of sexuality, sexual processes, and male anatomy. Child acknowledged that she had seen her parents have sex once, when she was sleeping in their room and woke up during the night. R929–30, 962. But that

[3] Peraza did not rely on a voluntary intoxication defense to argue that he was unaware of any risk that he was sodomizing Child rather than Mother. Nor could he. Sodomy on a child requires only a reckless mental state, and involuntary intoxication does not negate a reckless mental state. Utah Code Ann. §76-2-306 (West 2015) ("[I]f recklessness or criminal negligence establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense."); *see also id.* §76-2-102 (West 2015) (setting default mental state of recklessness when statute is silent); *id.* §76-5-403.1 (West Supp. 2018) (not setting forth explicit mental state for crime of sodomy on a child). After the first instance, if not sooner, Peraza would have at least been reckless as to whether he was sodomizing Child.

single incident could not have accounted for the breadth and detail of her knowledge. And Peraza's and Mother's testimony was too conflicting to establish that Child had seen more than she testified to. Mother claimed that Child had only walked in on them "a couple times," and that she walked in when Mother was performing oral sex on Peraza "maybe like once." R1015–16. Peraza on the other hand claimed that the number of times Child had walked in on Mother giving him oral sex was "in the double digits," and that Child had walked in on them having sex "a number of times, and once in the shower." R1047. Mother acknowledged that Child could have accessed pornography on their electronic devices, but she implied that the likelihood was not great and she said that Child never asked her about pornography she had seen even though she was "inquisitive" enough to ask questions when she saw Mother and Peraza having sex. R999–1000, 1016–17.

And as discussed above, the jury also heard evidence of Mother's motive to side with Peraza over Child: She favored her and Peraza's sons over Child, was concerned about how the allegations would affect her family, and remained married to Peraza after Child accused him of abusing her. R806, 983–84, 989–91; SE1 at 40:20–40:30.

Thus, this was not a typical he–said, she–said case, where the defendant and victim each give plausible, conflicting accounts of what

happened and the jury was left to decide credibility with nothing more to go on. *Cf. Gregg v. State*, 2012 UT 32, ¶¶3–8, 27–30, 36–42, 279 P.3d 396 (reversing where counsel failed to investigate evidence that could corroborate defense when central dispute in rape case was consent); *State v. Iorg*, 801 P.2d 938, 939, 941–42 (Utah Ct. App. 1990) (reversing where only other evidence supporting victim's testimony was improper expert opinion on the truthfulness of victim's testimony, and defendant offered plausible, non-criminal explanation for his actions that was "fully corroborated" by another witness). Peraza's denials were undermined by his own admissions, his story conflicted with Mother's, and Mother was a biased witness. Thus, even if Smith's testimony had been as effective as the court assumed it was, admitting the testimony was harmless when viewed in the context of the evidence presented at trial.

II.

The Court of Appeals improperly placed the burden on the State to disprove prejudice when the defendant is denied a continuance.

After concluding that the State had violated the expert-notice statute, the Court of Appeals considered whether the district court abused its discretion in denying a continuance. This analysis started from the assumption that the expert-notice statute was relevant to the appeal. But Peraza had abandoned any reliance on the expert-notice statute as a basis for

relief. Because the court improperly relied on the expert-notice statute, it also placed the burden on the State to disprove prejudice from the denial of the continuance. That conflicts with this Court's precedent outside of the expert-notice statute requiring the party denied a continuance to prove prejudice. It also conflicts with the requirements of the expert-notice statute itself, which requires to moving party to prove substantial prejudice.

A. When a continuance request is not based on the expert-notice statute, the movant bears the burden of proving prejudice.

Relying on its prior precedent, the Court of Appeals held that the State bears the burden of disproving prejudice when a continuance is sought under the expert-notice statute. *Peraza*, 2018 UT App 68, ¶44. But Peraza did not seek a continuance under the expert-notice statute, and this Court has required the moving party to prove prejudice for non-expert-notice-statute continuances.

Before trial, Peraza objected that notice was inadequate, specifically citing the expert-notice statute. R534, 548–49. The court resolved the notice issue by ordering the State to provide more information. R547–48, 570–72. In a telephone conference later that day, Peraza asked for a continuance to consult and possibly call an expert. R589, 591. But he did not cite the expert-notice statute or refer to the statute's test for obtaining a continuance:

substantial noncompliance and substantial prejudice. R589–95; *see* Utah Code Ann. §77-17-13(4)(a).

But even if Peraza had relied on the expert-notice statute, he abandoned any reliance on the statute on appeal. Aplt.Br. 1–3, 25–52. In arguing on appeal that he should have been granted a continuance, Peraza conceded that he "was properly notified of the state's expert witness." Aplt.Br. 40.

Thus, even if the Court of Appeals were correct that the non-moving party must disprove prejudice when a continuance is sought under the expert-notice statute, the court erroneously applied that principle to this case. Peraza never asked the district court for a continuance under the statute or argued on appeal that the district court should have granted him one based on the statute.

When it comes to a court's inherent authority to grant continuances, this Court has repeatedly placed the burden of proving prejudice on the moving party, both at the district court and on appeal. *See Mackin v. State*, 2016 UT 47, ¶¶33–34, 37, 387 P.3d 986 (placing burden of proving prejudice on movant/appellant for denial of continuance to secure attendance of witness); *State v. Taylor*, 2005 UT 40, ¶¶13–19, 116 P.3d 360 (implicitly placing burden to show prejudice on appellant for denial of continuance when

information amended at close of evidence); *State v. Creviston*, 646 P.2d 750, 752 (Utah 1982) (requiring showing of materiality—prejudice—to obtain continuance for purposes of calling absent witness); *State v. Hartman*, 119 P.2d 112, 115 (Utah 1941) (same).[4]

In *Mackin*, for example, this Court reiterated the burden of a party seeking a continuance:

> When a defendant moves for a continuance to procure "the testimony of an absent witness, [he or she] must show that the testimony sought is material and admissible, that the witness could actually be produced, that the witness could be produced within a reasonable time, and that due diligence has been exercised before the request for a continuance." *Creviston*, 646 P.2d at 752. A failure to establish even one aspect of the above test defeats [the defendant's] claim.

2016 UT 47, ¶33. Proving materiality amounts to proving that the movant would be prejudiced without the continuance: "To establish that the witnesses he wanted to call would have provided testimony material to his defense, [a defendant] must demonstrate with a reasonable probability that the nonadmitted evidence 'would affect the outcome of the criminal proceeding.'" *Id.* ¶34; *see id.* ¶37 ("And because the witnesses' testimonies

[4] The Court of Appeals has also required the moving party to prove prejudice when addressing continuances based on the court's inherent authority. *See, e.g.*, *State v. Cornejo*, 2006 UT App 215, ¶14, 138 P.3d 97; *State v. Wallace*, 2002 UT App 295, ¶37, 55 P.3d 1147; *State v. Oliver*, 820 P.2d 474, 476 (Utah Ct. App. 1991).

would not have been material to his case, we cannot see 'a reasonable likelihood of a more favorable result' for Mackin."). Because the movant in *Mackin* bore the burden of proving materiality at trial, the Court required him to prove prejudice from the denial of the continuance to prevail on appeal. *See id*. ¶¶33–37.

That rule comports with well-established appellate principles. "[T]he appellant's burden of persuasion on appeal . . . has long been understood to encompass an obligation to prove not only *error* but *prejudice*." *Hummel*, 2017 UT 19, ¶42 (emphases in original); *see also State v. King*, 2008 UT 54, ¶24, 190 P.3d 1283 ("[W]e typically place on a defendant the obligation to demonstrate that the error prejudiced him."). That assignment of burdens "yields the benefit of the doubt on [the question of prejudice] to the appellee—or in other words to the outcome in the lower court." *Hummel*, 2017 UT 19, ¶42.

In short, the law governing this case is settled. When a party requests a continuance to procure a witness—and that party relies on the court's inherent power to manage the case, not a statutory or rule-based entitlement to a continuance—the movant must prove on appeal that he was prejudiced by the denial of the continuance.

B. The expert-notice statute places the burden of proving prejudice on the party seeking a continuance.

The Court of Appeals looked to the expert-notice statute and its caselaw applying that statute to determine whether Peraza was entitled to a continuance. *Peraza*, 2018 UT App 68, ¶¶39–40. Applying that precedent, the court explained that "because of the 'difficult burden placed on defendants to establish prejudice in cases such as these,' the burden is on the State to persuade the court there is no reasonable likelihood that, absent the error, the outcome would have been more favorable to the defendant." *Id.* ¶44 (quoting *State v. Tolano*, 2001 UT App 37, ¶14, 19 P.3d 400). Shifting the burden to the State to disprove prejudice represents an extension of the principle expressed in *State v. Knight*, 734 P.2d 913 (Utah 1987), where this Court shifted the burden to the State to disprove prejudice for some discovery violations. *See State v. Arellano*, 964 P.2d 1167, 1171 (Utah Ct. App. 1998) (extending *Knight* to violations of the expert-notice statute).[5]

[5] The Court of Appeals has been inconsistent in its placement of the burden in cases involving the expert-notice statute. *Compare Tolano*, 2001 UT App 37, ¶14, *and Arellano*, 964 P.2d at 1171 (placing burden on non-moving party to disprove prejudice), *with State v. Mills*, 2012 UT App 367, ¶29, 293 P.3d 1129, *and State v. Torres-Garcia*, 2006 UT App 45, ¶10, 131 P.3d 292 (implicitly placing burden on moving party to prove substantial prejudice).

The Court of Appeals' extension of *Knight* to this context conflicts with the expert-notice statute. The statute places the burden on the movant to show that he is entitled to a continuance in the first place. It states,

> If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

Utah Code Ann. §77-17-13(4)(a). Under the plain language of the statute, a continuance is not automatic; the opposing party must qualify for it and must seek it.

The Court of Appeals has held that the statute's use of the word *entitled* places the burden on the party desiring a continuance to request it. *State v. Perez*, 2002 UT App 211, ¶41, 52 P.3d 451. *Entitled* means "furnish[ed] with proper grounds for seeking or claiming something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 758 (1993). *Entitled* also means "give[n] a right . . . to." *Id.* But just like any right, it must be sought or it will be forfeited. *See State v. Bond*, 2015 UT 88, ¶42, 361 P.3d 104. And by implication, the party seeking it must prove that he qualifies for it, including that denying him the continuance will result in substantial prejudice.

If the use of *entitled* were not enough to establish that the movant bears the burden of establishing substantial prejudice, any uncertainty is removed by the statute's double use of the conditional *if*. The statute does not say that the opposing party is automatically entitled to a continuance. It says that he is entitled to a continuance on two conditions: "If . . . the prosecution fails to substantially comply" with the statute, and "if necessary to prevent substantial prejudice." Utah Code Ann. §77-17-13(4)(a). "The *if* clause expresses a condition." *State v. Wadsworth*, 2017 UT 20, ¶5 & n.4, 393 P.3d 338 (citing authorities for the proposition that "'if' is standard 'conditional language'"). And one of those conditions is the very question at issue here—the question of prejudice. When a statute states that a right is conditional upon a showing that granting that right is "necessary to prevent substantial prejudice," then the party asserting that right necessarily bears the burden of making that showing. If the legislature intended to shift the traditional burdens, it could have used language that created a presumption of prejudice or a presumption of entitlement to a continuance. *Cf. King*, 2008 UT 54, ¶¶20–25, 30–37 (phrasing appellee's burden to disprove prejudice in terms of a "presumption of prejudice"). It could have said that the opposing party is "entitled to a continuance unless that party would suffer no substantial prejudice without a continuance."

That is not what the statute says. It makes a continuance conditional upon a showing of substantial prejudice. And if the movant bears the burden of proving substantial prejudice before the district court, he necessarily bears the burden of proving substantial prejudice on appeal. In fact, he cannot establish that the district court *erred* without doing so. *See* Utah Code Ann. §77-17-13 (making district court's grant of a continuance contingent on a showing of substantial prejudice). And if the appellant cannot establish error, he cannot prevail on appeal. Thus, the plain language of the expert-notice statute does not allow a court to shift the burden to the nonmoving party to disprove prejudice on appeal.

C. The rationale of *Knight* does not apply to either type of continuance potentially at issue here.

Even if the burden-shifting scheme of *Knight* were not foreclosed by the plain language of the expert-notice statute and by this Court's precedent governing non-statutory continuances, the rationale of *Knight* does not justify its extension to this case—regardless of whether it is analyzed under the expert-notice statute or a court's inherent power to grant continuances.

Knight involved a two-fold discovery violation: (1) the prosecutor "did not notify defense counsel of the limited nature of his response to the request for production"; and (2) the prosecutor "did not provide defense counsel with after-acquired information responsive to the request." 734 P.2d at 917–18.

This Court held that when faced with "a wrongful failure to disclose inculpatory evidence," it would "place the burden on the State to persuade a court that the error did not unfairly prejudice the defense," provided that the defendant had met a threshold showing of presenting "a credible argument that the prosecutor's errors have impaired the defense." *Id.* at 921.

This Court's stated rationale for shifting the usual burdens of proof was the difficulty "posed by the record's silence" in cases involving the wrongful non-disclosure of inculpatory evidence. *Id.* at 920–21. While review for prejudice usually requires the court to "determine from the record what evidence would have been before the jury absent the error," that review was particularly difficult in *Knight* because "the record [did] not provide much assistance in discovering the nature or magnitude of the resulting prejudice to the defense." *Id.* at 920. "The record cannot reveal how knowledge of [the withheld] evidence would have affected the actions of defense counsel, either in preparing for trial or in presenting the case to the jury." *Id.*

But the inadequate-record rationale of *Knight*, if taken at face-value, would swallow the general rule that the party claiming error must prove prejudice to obtain relief. *See* 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."); *Hummel*, 2017 UT 19, ¶42 (stating that appellant bears

burden of proving "not only *error* but *prejudice*"); *King*, 2008 UT 54, ¶24 ("[W]e typically place on a defendant the obligation to demonstrate that the error prejudiced him."). In nearly every case that does not involve the erroneous *admission* of evidence, the appellate court would have no way to "determine from the record what evidence would have been before the jury absent the error" unless a proffer was made. *See Knight*, 734 P.2d at 920.

That is why the rules of evidence state that a party may claim error in the exclusion of evidence "only if . . . a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context." Utah R. Evid. 103(a). The requirement of a proffer has been applied beyond the context of the rules of evidence as well. For example, in *Met v. State*, 2016 UT 51, 388 P.3d 447, the defendant argued on appeal that the district court erroneously ruled that an otherwise inadmissible police interview could be used to impeach the defendant if he testified at trial. *Id.* ¶53. The defendant did not testify at trial, and he argued that it was because the court's ruling "discourage[ed] him from testifying." *Id.* This Court refused to reach the defendant's argument because he had not proffered what his testimony would have been. *Id.* ¶¶61–63. "[I]n order to present a persuasive argument on appeal, that defendant must, by some means, create and present a record in the district court sufficient to permit meaningful appellate review." *Id.* ¶62.

Cf. State v. Litherland, 2000 UT 76, ¶¶16–17, 12 P.3d 92 (stating in context of ineffective-assistance claim that "defendant bears the burden of assuring the record is adequate" and discussing the unique procedures for meeting that burden in such cases).

The *Knight* Court did not acknowledge the general rule that the burden of creating an adequate record rests on the party claiming error. Nor did it explicitly state why that rule did not resolve "the difficulties posed by the record's silence in cases involving a wrongful failure to disclose inculpatory evidence." *Knight*, 734 P.2d at 920. But this Court clarified in *State v. Bell* that the key to determining whether to shift the burden is revealed in "the nature of the error involved." 770 P.2d 100, 106 (Utah 1988).

Thus, *Knight*, as interpreted by *Bell*, requires a two-step analysis. First, a court asks whether there is some prosecutorial error, such as a "wrongful failure to disclose inculpatory evidence." *See Knight*, 734 P.2d at 917, 921. Second, the court considers "the nature of the error involved" and its effect on the record to determine whether the appellant should be absolved of his usual burden of making a proffer before the district court and proving prejudice on appeal. *See Bell*, 770 P.2d at 106.

When, as in this case, a party asks for a continuance based on a court's inherent authority and not based on a statutory or rule-based remedy for a

prosecutor's error, the second step of the *Knight–Bell* analysis is not triggered. If the prosecutor has not violated any duty, the first step is not met. There is no justification for absolving the defendant of his usual burden to make a proffer to show that he would be prejudiced by a denial of the request and then prove prejudice on appeal.

But even if the prosecutor here had failed to substantially comply with the expert-notice statute—and even if the statute did not preclude appellate courts from shifting the burden—the nature of any error in this case is distinct from the errors for which this Court has shifted the burden to the State to disprove prejudice.

In *Knight*, the prosecutor's error had the effect of misleading the defense. The prosecutor disclosed some requested information but did not state that he looked only in his own files, and he did not update his response when new information became available. *Knight*, 734 P.2d at 917–18. The response was thus incomplete but did not put the defendant on notice that it was. This Court explained the harm that comes from such responses:

> "[A]n incomplete response to a specific request not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued."

Id. at 917 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

In other words, the error at issue in *Knight* involved failing to disclose inculpatory evidence in such a way that the defendant was not aware of the limitations of the disclosure. The disclosure falsely gave the impression "'that the evidence does not exist.'" *Id.* For that kind of error, absolving the complaining party of his burden to make a record and prove prejudice makes sense.

But this case does not involve that kind of error. The "misleading-the-defense rationale" of *Knight* does not apply to a claim that the "written explanation of the expert's proposed testimony" was not "sufficient to give the opposing party adequate notice to prepare to meet the testimony." *See* Utah Code Ann. §77-17-13(1)(b)(ii); *Knight*, 734 P.2d at 917. Unlike an incomplete discovery response that does not disclose its incomplete nature, a party knows from the face of a notice whether it has sufficient information to prepare to meet the expert witness's testimony. There is no risk that the party will "'abandon lines of independent investigation, defenses, or trial strategies that it otherwise would have pursued'" simply because it knows the topics

an opposing party's expert will address but does not know the specifics. *See Knight*, 734 P.2d at 917.[6]

The notice in this case stated that Smith would testify about "[t]he methodology and science related to forensic interviewing of suspected child sex abuse victims; science and research regarding child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantation." R283. Any deficiency in the notice did not mislead Peraza into thinking that recantation would not be an issue or that the expert would say nothing about it. Peraza could not reasonably rely on this notice to "'abandon lines of independent investigation, defenses, or trial strategies'" related to recantation. *See Knight*, 734 P.2d at 917. And just how recantation would play into Peraza's strategy, and how much more information Peraza needed to be adequately prepared to meet Smith's testimony on that point is something that Peraza was in the best position to answer. Peraza should have born the burden of making a proffer to establish

[6] There may be situations involving expert notice where the "misleading-the-defense rationale" of *Knight* would apply, such as when the prosecutor elicits expert testimony wholly outside the scope of the notice. But the plain language of the expert-notice statute would preclude application of *Knight*'s burden-shifting scheme. *Supra* Part II.B.

how he would have been prejudiced by the denial of a continuance, and then to prove prejudice on appeal.

This Court extended the burden-shifting principle of *Knight* to a different type of error in *Bell*, but "the nature of the error" in *Bell* is also distinct from this case. 770 P.2d at 106. In that case, a grand jury indicted Bell on racketeering charges. *Id.* at 101. The indictment contained the minimal information necessary to be legally sufficient but did not provide notice of the basic facts underlying the charge. *Id.* at 104–05. Bell requested a bill of particulars; the prosecutor at first "ignored" the request, then provided a brief response when ordered by the court. *Id.* at 105. But "[b]y no stretch of the imagination" could the prosecutor's "enigmatic" reply "be construed as containing sufficient factual information . . . to permit Bell to prepare his defense" on a central element of the charge. *Id.* Because of the nature of the error and its effect on the record, this Court applied *Knight* to shift the burden to the State to disprove prejudice. *Id.* at 106–07.

At first blush, the error involved in *Bell* may appear to be similar to a violation of the expert-notice statute. Rule 4(e), Utah Rules of Criminal Procedure—which implements the constitutional right to notice of the nature of an accusation—and the expert-notice statute both explicitly protect a defendant's ability to prepare a defense. *Compare* Utah R. Crim. P. 4(e), *with*

Utah Code Ann. §77-17-13(1)(b)(ii), (4)(a). But for purposes of the *Knight* analysis, the difference between the two violations is significant. An inadequate bill of particulars leaves a defendant utterly unable to even begin preparing a defense. While defense counsel might not "'*abandon* lines of independent investigation, defenses, or trial strategies," *see Knight*, 734 P.2d at 917 (emphasis added), she might not even realize until it is too late which investigations, defenses, and strategies are even relevant.

On the other hand, a notice of expert witness that gives a name and contact information for the witness and identifies the topics of the expert testimony but gives no further details does not leave the defendant unable to even begin preparing a defense. By the time notice is given 30 days before trial, the defendant generally knows what the issues are going to be at trial. Investigations have been conducted. Discovery is complete.[7] And even when more details about a witness's testimony are needed to prepare to meet it, the universe of what is unknown is significantly smaller than when the prosecutor has not disclosed the basic facts underlying the charges. The defendant is facing a "known unknown." *See* Secretary Donald H. Rumsfeld,

[7] The scenario may be different when dealing with notice given before a pretrial evidentiary hearing. *See* Utah Code Ann. §77-17-13(1)(a). But that is not the situation at issue here.

Department of Defense News Briefing, February 12, 2002, *available at* http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636. He may not know all the details, but he has all the information he needs to find them. *See* R282–83. The defendant is thus in the best position to say how much more information he needs, how much more time he needs, and how denying him a continuance would impair the defense, if at all. And if he could have easily made that proffer before the district court, there is no justification for relieving him of his burden to prove prejudice on appeal.

Thus, *Knight* does not justify shifting the burden in this case, regardless of whether Peraza asked for a continuance under the expert-notice statute or the district court's inherent authority.

CONCLUSION

This Court should reverse the decision of the Court of Appeals because that court improperly based its decision on the expert-notice statute and concluded that the error was prejudicial. If necessary, this Court should remand for the Court of Appeals to consider the parties' rule 702 arguments and other claims the Court of Appeals did not reach. This Court should also clarify that Peraza bears the burden of proving prejudice in the denial of a continuance and remand for the Court of Appeals to apply the proper standard.

Respectfully submitted on November 26, 2018.

SEAN D. REYES
Utah Attorney General

/s/ *William M. Hains*
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Assistant Solicitor General
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 12,271 words, 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/ *William M. Hains*
WILLIAM M. HAINS
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on November 26, 2018, the Brief of Petitioner was served upon respondent'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 respondent 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.

☐ was filed with the Court on a CD or by email and served on respondent.

☐ will be filed with the Court on a CD or by email and served on respondent within 14 days.

/s/ *Lee Nakamura*

Addenda

Addendum A

Utah Code Section 77-17-13 (West 2017)
Expert testimony generally—Notice requirements

(1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.

(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:

(i) a copy of the expert's report, if one exists; or

(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and

(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.

(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose

appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.

(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Rule 103, Utah Rules of Evidence (2011)
Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record—either before or at trial—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 104, Utah Rules of Evidence (2011)
Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 702, Utah Rules of Evidence (2011)
Testimony by Experts

(a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony

(1) are reliable,

(2) are based upon sufficient facts or data, and

(3) have been reliably applied to the facts.

(c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Addendum B

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ROBERT ALONZO PERAZA,
Appellant.

Opinion
No. 20160302-CA
Filed April 19, 2018

Fourth District Court, Provo Department
The Honorable Darold J. McDade
No. 131402387

Douglas J. Thompson and Margaret P. Lindsay,
Attorneys for Appellant

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

JUDGE KATE A. TOOMEY authored this Opinion, in which JUDGES JILL M. POHLMAN and RYAN M. HARRIS concurred.

TOOMEY, Judge:

¶1 Robert Alonzo Peraza appeals his conviction of four counts of sodomy on a child (Child). Peraza's trial was continued twice because the State did not provide all relevant discovery in time for defense counsel to prepare a defense and to procure an expert witness for impeachment purposes. Then, thirty-two days before trial, the State filed a notice of expert witness to rebut Peraza's anticipated defense. The notice disclosed the name and address of the expert (Expert), her curriculum vitae, a one-sentence description of the nature of her testimony, and a list of citations to more than 130 articles upon which Expert would rely; the notice did not include an expert report.

¶2 We are asked to determine whether the State sufficiently complied with the notice requirements under Utah Code section 77-17-13 and, if not, whether the district court erred in admitting Expert's testimony under rule 702 of the Utah Rules of Evidence. We are also asked to determine whether, based on the lack of expert report, Peraza's third motion for a continuance should have been granted. We conclude the district court exceeded its discretion when it denied the motion to continue after erroneously deciding to allow Expert to testify. The State's notice did not comply with section 77-17-13, depriving the court of the information necessary to rule on the admissibility of Expert's testimony under rule 702. The State also failed to meet its burden of demonstrating that Peraza would not be prejudiced by the denial of his motion. Peraza was entitled to a continuance so that he could prepare to respond to Expert's testimony. We therefore vacate Peraza's convictions and remand for a new trial.[1]

BACKGROUND

The Allegations

¶3 Peraza was charged with four counts of first-degree sodomy on a child[2] after Child accused him of sexually abusing her.[3]

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1. Peraza also filed a motion for a rule 23B remand "for findings necessary to determine ineffective assistance of counsel." *See* Utah R. App. P. 23B. Because we vacate Peraza's convictions and remand for a new trial on other grounds, we need not address Peraza's motion or consider his claims that his counsel was ineffective. *See State v. Richardson*, 2006 UT App 238, ¶ 1 n.2, 139 P.3d 278.

2. Peraza was also charged with one count of first-degree aggravated sexual abuse of a child, but the State dismissed the charge after closing arguments and it is not an issue on appeal.

3. "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly. (continued...)

¶4 Child informed her mother (Mother) and her grandfather that Peraza did "bad things" to her that she "did not like." During an interview at the Children's Justice Center (CJC), Child told a social worker that Peraza did something to her that happens "when parents really love each other." Child explained that Peraza showed her his "pee pee," and made her use a hand gesture while she touched it, and he forced her to touch it with her mouth. She said he forced her to do this more than once.

¶5 After the first CJC interview, Child moved to California to live with her father, and after relocating to California she began therapy. Part of her treatment was to, "make effigy dolls, and . . . kill the effigy doll named [Peraza]." Eventually, Child disclosed that a second perpetrator may have also sexually abused her, and she made and "killed" effigy dolls of that person too.

¶6 Child's descriptions of the abuse varied over time. On some occasions, she was explicit in describing the acts Peraza had her perform, including descriptions of anal penetration; at other times she recanted what she had described. While she was living with Mother in Utah, Child wrote Mother a note asserting that the abuse did not happen. After she moved to California, Child called Mother, more than once, to say that Peraza did not do anything to her. She also told a private investigator that Peraza did not touch her and that she never touched him.

¶7 But at trial, Child withdrew her recantations and testified that Peraza sexually abused her. She also provided more detail when describing the abuse than she had done in previous interviews and therapy sessions. For example, at trial, she testified that "Peraza had put his penis in her vagina"; that testimony was the first time the prosecutor and defense counsel had heard that allegation.

(...continued)
We present conflicting evidence only as necessary to understand issues raised on appeal." *Mackin v. State*, 2016 UT 47, ¶ 2 n.1, 387 P.3d 986 (quotation simplified).

Pretrial Proceedings

¶8 Peraza's trial was first scheduled for March 2015. But the district court granted Peraza's motion for a continuance based on newly disclosed "evidence warranting additional investigation"—including a sexual assault nurse examination report; Child's second interview with someone at a CJC in California; and the State's indication of its "intent to have [Child's therapist] testify at trial." The court set a pretrial hearing in April to schedule a new trial date. During that hearing, defense counsel argued, based on arguments made in Peraza's motions supporting his motion for a continuance, that trial could not be scheduled because the State still had not produced the requested evidence, the therapist had not provided Child's therapy records, and these records had not been subjected to an in camera review.[4] The court determined it would postpone scheduling a trial until further evidence had been disclosed.

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4. "In camera" means "[i]n the judge's private chambers" or "[i]n the courtroom with all spectators excluded." *In Camera*, Black's Law Dictionary (9th ed. 2009). Rule 506 of the Utah Rules of Evidence "cloaks in privilege confidential communications between a patient and her therapist in matters regarding treatment." *State v. Blake*, 2002 UT 113, ¶ 18, 63 P.3d 56. An exception to this rule applies if an otherwise privileged communication is "'relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which that condition is an element of any claim or defense.'" *Id.* (quoting Utah R. Evid. 506(d)(1)). If a party resists disclosure of the physician-patient communications, "the defendant must petition for an in camera review in which the [district] court will review the records to determine if they actually contain material that is relevant and ought to be disclosed." *State v. Otterson*, 2010 UT App 388, ¶ 5, 246 P.3d 168. This review may be conducted "only if the defendant shows with reasonable certainty that exculpatory evidence exists which would be favorable to [the] defense." *Id.* (quotation simplified).

¶9 In June 2015, the district court issued a subpoena duces tecum for Child's therapy records, and the State stipulated to an in camera review of those records. By August, the court still had not received Child's therapy records, but the therapist indicated she was reviewing them to redact information not relevant to the case. Relying on this, the court scheduled trial for October 2015. Then in late September, after receiving the records and defense counsel's request for information from the records, the court informed the parties it would provide the redacted records "by the end of [the] week."

¶10 Although trial was set for the end of October 2015, defense counsel requested another continuance because he had learned that a private investigator recorded one of Child's recantations. Counsel also explained that he needed more time to secure Child's therapist as a fact witness "for impeachment purposes" because of Child's recantations. The State agreed that given the circumstances, "it'd be better to continue the trial" and stated that it was also "look[ing] at re-filing" a notice of expert witness based on Child's therapy records. The court commented that it did not "know that [it] ha[d] any choice" and continued the trial to February 2016 with a final pretrial conference scheduled for late January.

¶11 During the January pretrial conference, the State stipulated to the introduction of Child's therapy records for impeachment purposes because defense counsel was unable to procure Child's therapist as a witness at trial. Peraza also challenged whether Expert should be allowed to testify. The court agreed to hear oral argument on Peraza's objection the following week, on January 28, 2016—twelve days before trial.

¶12 During the hearing, defense counsel argued that the State's notice of expert witness was inadequate because it did not include an expert report or any written explanation that would inform the court "exactly what this expert would be testifying to." The notice provided Expert's name and address, her curriculum vitae, and a list of more than 130 articles that she would be relying upon. The notice also included a one-sentence statement that the State intended to use Expert to present

evidence of the "methodology and science related to forensic interviewing of suspected child sex abuse victims" and related to "child disclosures of sex abuse including identified factors related [to] delayed, partial and gradual disclosures and recantations." But counsel asserted that he could not get access to the articles cited, because the medical journals in which they were published required readers to pay for a subscription. And without an expert report, defense counsel argued that all he had been provided were "topics" that could be related to Expert's testimony. Further, he argued,

> What's troubling to me is, I don't know if those are case notes that talk about possible theories, which if they're just theories, that would be argument, and the state is clearly allowed to argue. But to present evidence of this nature, I think implies a statistical analysis. And the case law that was cited in my objection . . . ha[s] already said that [our courts] disfavor this type of testimony, because . . . it implies there's a scientific . . . [and] statistical basis for it, but yet there isn't an actual statistical basis for [the theories].

He asked the court "to incorporate the objection that [was] filed" in response to the State's initial notice of expert when the State sought to admit Child's therapist's testimony. This written objection, based on Utah Code section 77-17-13 and rules 702 and 403 of the Utah Rules of Evidence, discussed the prejudicial effects of expert witnesses testifying to "statistical evidence of matters not susceptible to quantitative analysis" and pointed out that the Utah Supreme Court had determined in *State v. Rammel*, 721 P.2d 498 (Utah 1986), that "statistically valid probabilities evidence that focuses the jury's attention on 'a seemingly scientific, numerical conclusion'" should be excluded. *Id.* at 501.

¶13 The State handed the court a copy of defense counsel's previous written objection, then explained that the purpose of Expert's testimony was to rebut the defense's assumed strategy

of showing "that [Child] changed her testimony over time, [and] at one point that there was a recantation." Moreover, it did not intend "to have [Expert] say that [Child] is telling the truth or lying, but to simply explain to the jury that there are circumstances" where children "with confirmed histories of sexual abuse" have expressed "denial or hesitation" in their disclosures of the abuse.

¶14 Defense counsel countered that "with no doubt, we will be presenting evidence that [Child] has recanted both to her mother and also [to] a private investigator." But he argued that without a report from Expert, the State's notice did not provide sufficient information with respect to Expert's proposed testimony to allow the defense to adequately prepare to rebut her testimony. Further, he argued that it appeared Expert's testimony would relate only to "possibilities" for why Child recanted and that to have "an expert testify about them without a scientific basis, is concerning because it gives more weight to the state's arguments than maybe it should." Defense counsel added that, if Expert were to mention the "possibility that there are repressed memories," such references are prohibited by Utah Supreme Court precedent, and while they may be "valuable in the therapeutic setting . . . they're too prejudicial and not allowed in a forensic setting."[5]

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5. This argument was further supported by Utah case law cited in Peraza's motion to exclude Child's therapist as an expert witness, which he incorporated into his motion with respect to Expert. For example, Peraza cited *State v. Rammel*, 721 P.2d 498 (Utah 1986), in which a detective drew on his experiences and provided anecdotal data to support his conclusions that "there was a high statistical probability" that a witness lied to the police in his first interview. *Id.* at 501. The Utah Supreme Court determined that the detective failed to show that the anecdotal data from which he drew his conclusions had any statistical validity or that the data established the detective as an expert. *Id.* It also determined that the detective's testimony stating that (continued...)

¶15 At the conclusion of the hearing, the district court determined that Expert would be allowed to testify at trial if the State determined her testimony was necessary for rebuttal. It told the parties, based on its assumption of what Expert would testify to, Expert was qualified because "according to the rules of evidence, this person would meet the criteria for being an expert even [though] . . . none of us can really tell until we get to the testimony . . . whether or not [Expert is] going to be needed [for rebuttal]."

¶16 Later that day, after the State "provide[d] some" of the articles on which Expert would rely, the court held a telephone conference to address defense counsel's motion to continue the trial in light of the court's decision to allow Expert to testify. The State's disclosure led defense counsel to consult a social worker from the Salt Lake Legal Defender Association to help prepare a defense strategy with respect to Expert's testimony. Counsel requested, once again, a continuance to allow him to procure an

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(...continued)
"there was a high statistical probability" that another witness lied should have been excluded because "its potential for prejudice substantially outweighed its probative value." *Id.* The supreme court explained that "[e]ven where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies." *Id.* And "[p]robabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts not susceptible to quantitative analysis, such as whether a particular individual is telling the truth at any given time." *Id.* (quotation simplified). Peraza used *Rammel* and other cases to support his argument that "proposed testimony linking [Child's] symptoms and behavior to behavioral norms testimony is presumptively unreliable and prejudicial . . . and inadmissible as expert witness evidence under Rule 403."

expert to rebut that testimony. He explained that he felt further obligated to make this request because of the therapy treatments Child received—specifically, killing the effigy dolls of her alleged abusers—"could give grounds for the recantation of the recantation . . . [and] might have led to the allegations becoming much more violent and much more pronounced as the years have gone on." The State responded that although it was "unhappy with the fact that we're continuing again" but understood the basis for it. Nevertheless, the court stated that it was "not inclined" to continue the trial and that it had to "draw the line somewhere." After denying the motion to continue, the court "recognize[d] this might be something that could be used later" on appeal, but determined "this [was] too late in the game."

The Trial

¶17 The following week, the case proceeded to trial. During the State's case-in-chief, Child testified to the nature of the abuse she allegedly suffered from Peraza, beginning when she was six years old. She also testified that she lied to Mother and the private investigator when she said the abuse did not occur.

¶18 The State also called Mother, who testified that Child recanted her allegations to her and to the private investigator. Mother testified that Child recanted her allegations more than once. Defense counsel called the private investigator, who testified about his interview with Child in which Child recanted her allegations.

¶19 In an effort to rebut Mother's and the private investigator's testimonies that Child had recanted her allegations on different occasions, the State called Expert to testify about disclosures and recantations by victims of sexual abuse. Defense counsel objected to Expert's testimony on the ground that she was not a "rebuttal witness" because "the evidence about [Child] recanting her statements came out in the [S]tate's case." Defense counsel added that it was the State that introduced Child's interview in which Child recanted her allegations against Peraza, and as such, Expert's testimony could not be characterized as a

rebuttal. The court overruled the objection and allowed Expert to testify.

¶20 Expert explained she was "trained as a forensic interviewer" and that she had provided "supporting research citations" for the "areas of inquiry for expert testimony." She said that the articles identified in the notice were "articles that [she had] read, and so, the topics that would be contained in some of those different articles" were information "that [she] felt" allowed her "to testify as an expert." But Expert did not interview or assess Child. She had not reviewed any evidence of the case before testifying and answered questions "based off of the testimony [she] heard, since [she had not] seen transcripts or anything." Expert acknowledged her testimony was only "academic."

¶21 Expert testified she had conducted around 1,900 forensic interviews with children and that recanting is "not something that happens in all cases, as far as some of the research says," and that recantations can "var[y] between four percent to 20 percent of cases, so it's not something that's typical, but it's not unheard of." She reiterated that "generally, because a child recants does not mean that it did not occur" and commented,

> Sometimes, when a child recants, it may be feeling pressure from family members. . . . [O]ften times if it's someone that they love, having gone to jail, or if the person's no longer in the home, and now the family is struggling for money, sometimes those are circumstances where the child might think, "things were not like this before I talked about it, I'll just—it's just better to go back to how things were, I can deal with that."

¶22 The jury convicted Peraza on all four counts of sodomy upon a child. Peraza appeals his convictions.

ISSUES AND STANDARDS OF REVIEW

¶23 Peraza contends the district court erred when it admitted Expert's testimony at trial because the State had not provided sufficient information to demonstrate the scientific validity or basis of the testimony that would have allowed the court to determine whether she met the requirements for expert testimony under rule 702 of the Utah Rules of Evidence.[6] Specifically, Peraza argues that the State did not provide "any

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6. Peraza also contends the district court erred when it permitted the jury to review the video of the CJC interview during deliberations. This argument is unpreserved. Generally, "an appellant must properly preserve an issue in the district court before it will be reviewed on appeal." *State v. Houston*, 2015 UT 40, ¶ 19, 353 P.3d 55 (quotation simplified). To preserve an issue, it must have been presented "in such a way that the court ha[d] an opportunity to rule on [it]." *Id.* (quotation simplified). There are limited exceptions to the preservation rule, including instances of plain error or exceptional circumstances—neither of which are argued by Peraza on appeal. *See id.*

Although this argument is unpreserved, we briefly address this issue to avoid its recurrence on remand. Rule 17 of the Utah Rules of Criminal Procedure allows the jurors to "take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury." In *State v. Carter*, 888 P.2d 629 (Utah 1995), *superseded by statute as stated in Archuleta v. Galetka*, 2011 UT 73, 267 P.3d 232, the Utah Supreme Court determined that rule 17 "indicates that exhibits which are testimonial in nature should not be given to the jury during its deliberations." *Id.* at 643. After Peraza's trial, this court determined in another case that video recordings of CJC interviews are recorded testimony and should not be given to the jury during deliberations. *State v. Cruz*, 2016 UT App 234, ¶¶ 37–41, 387 P.3d 618. Accordingly, on remand the district court should not provide any testimonial evidence to the jury during its deliberations.

details about what [Expert's] testimony would be so that the defense could investigate whether such testimony could be supported by" the more than 130 article citations Expert provided. The district court "has wide discretion in determining the admissibility of expert testimony, and such decisions are reviewed under an abuse of discretion standard." *State v. Hollen*, 2002 UT 35, ¶ 66, 44 P.3d 794 (quotation simplified). "[W]e will not reverse a decision to admit or exclude expert testimony unless the decision exceeds the limits of reasonability." *Id.* (quotation simplified). Even if we determine the testimony was erroneously admitted, the defendant must show that the error was prejudicial. *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶24 Peraza also contends that the district court's denial of his third motion to continue the trial to allow him to procure an expert witness to rebut Expert's testimony constituted an abuse of discretion and prejudiced his trial. We review the grant or denial of a motion to continue under an abuse of discretion standard. *State v. Tolano*, 2001 UT App 37, ¶ 5, 19 P.3d 400.

ANALYSIS

I. Expert Witness Testimony

¶25 Peraza contends the district court exceeded its discretion by admitting Expert's testimony without fulfilling its gatekeeping role under rule 702 of the Utah Rules of Evidence. He argues the court "failed to examine whether [Expert's] testimony and opinions were based upon principles and methods that were reliable, that they were based upon sufficient facts or data, and had been reliably applied to the facts" of this case.

¶26 Rule 702 provides that a witness may testify as an expert if that person "is qualified as an expert by knowledge, skill, experience, training, or education" and "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

Utah R. Evid. 702(a). An expert's "scientific, technical, or other specialized knowledge" must meet "a threshold showing that the principles or methods that are underlying in the testimony (1) are reliable, (2) are based upon sufficient facts or data, and (3) have been reliably applied to the facts." *Id.* R. 702(b). This threshold showing "is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community." *Id.* R. 702(c).

¶27 District courts are assigned the duty of "gatekeeper" and are responsible for preventing the admission of unreliable expert testimony. *State v. Jones*, 2015 UT 19, ¶ 21, 345 P.3d 1195. Even if the testimony satisfies rule 702, the court must also "determine whether the proffered scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence." *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996).

¶28 A party that intends to call an expert to testify at trial must demonstrate that the expert meets the requirements of rule 702. Utah Code Ann. § 77-17-13(1)(a) (LexisNexis 2017);[7] *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). In criminal cases, the first step involves giving notice to the opposing party "not less than 30 days before trial or 10 days before the hearing." Utah Code Ann. § 77-17-13(1)(a). The notice "shall include the name and address of the expert, the expert's curriculum vitae," and either "a copy of the expert's report," "a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony," or "a notice that the expert is available to cooperatively consult with the opposing party on reasonable

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7. Recent amendments to the relevant statutes cited within this opinion are not substantive and do not affect the outcome of this appeal. We therefore refer to the most recent edition of the Utah Code for convenience. *See State v. Rackham*, 2016 UT App 167, ¶ 9 n.3, 381 P.3d 1161.

notice." *Id.* § 77-17-13(1)(b). If the party seeking to admit expert testimony "fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony." *Id.* § 77-17-13(4)(a).

¶29 Here, thirty-two days before trial, the State filed a notice of expert testimony with a copy of Expert's curriculum vitae and a list of medical journal articles that she would rely upon for her testimony. The articles were not readily accessible to the court or to defense counsel because they were published in journals for which subscriptions were required.

¶30 Peraza argues the district court had no basis for determining that rule 702 was satisfied because "the court had no idea what [Expert's] testimony was going to be . . . what her opinions or conclusions were based upon . . . [or whether her] methods and principles had been reliably applied to the facts in this case."[8] We agree.

¶31 In determining that Expert was qualified under rule 702, the district court relied solely on her curriculum vitae, the list of article citations, and the State's "oral assertions about why it wanted to call [Expert]." There was no information from which to determine the principles or methods that would form the basis of Expert's testimony, or whether her opinions were based upon sufficient facts or data. *See* Utah R. Evid. 702(b). The State did not provide an expert report, gave only a single-sentence description of the broad subject upon which Expert would testify, and failed to provide meaningful access to the articles upon which Expert relied. We agree with Peraza that neither the court nor defense counsel had "any idea what [Expert's] testimony would be or what scientific basis it [was] based upon."

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8. At trial, Expert testified she had not read the transcripts of interviews, had not reviewed any material involving the case, and had not interviewed Child or any other witness.

¶32 We therefore conclude the district court exceeded its discretion when it admitted Expert's testimony at trial without complying with the requirements of rule 702.

¶33 Having made that determination, "we must separately determine whether the error was prejudicial." *State v. Stefaniak*, 900 P.2d 1094, 1096 (Utah Ct. App. 1995). "If there is a reasonable likelihood that, absent the error, there would have been a more favorable result for the defendant, then his conviction must be reversed." *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

¶34 Peraza argues that the improper admission of Expert's testimony constitutes reversible error because of "its [prejudicial] effect of bolstering [Child's] trial testimony." We agree.

¶35 In *State v. Rammel*, 721 P.2d 498 (Utah 1986), the district court admitted a detective's testimony stating that, "[b]ased on his experience interviewing several hundred criminal suspects," it was not "unusual for [a suspect] to lie" when first interrogated. *Id.* at 500. The district court determined that the detective "was an expert apparently qualified to testify on [a suspect's] capacity for telling the truth" as a witness in a criminal case. *Id.* Although our supreme court concluded that the testimony was inadmissible because it "did not relate to [the suspect-witness's] character for veracity, but instead invited the jury to draw inferences about [the suspect-witness's] character based upon [the detective's] past experience with other suspects," it held that, "in view of the other evidence supporting defendant's conviction," the admission of the detective's testimony was harmless. *Id.* at 500–01.

¶36 Here, unlike *Rammel*, there was no "other evidence supporting [the] conviction." *See id.* Instead, this case hinged on the jury's assessment of Child's credibility versus that of Peraza. *See Iorg*, 801 P.2d at 941–42. We agree that Expert's testimony was prejudicial because it was "clearly calculated to bolster [Child's] believability by assuring the jury no credibility problem was presented by the delay" in reporting the conduct or her subsequent recantations. *See id.*; *cf. State v. King*, 2010 UT App

396, ¶ 46, 248 P.3d 984 ("When Utah appellate courts reverse for improper bolstering, they usually do so not only where a case hinges on an alleged victim's credibility and there is no physical evidence, but also where the bolstering was done by an expert witness."(internal citation omitted)). Because there was "no[] other evidence [to support his] conviction beyond that which is tainted by" Expert's testimony, "we cannot say that absent the error there is not a reasonable likelihood of a more favorable result" to Peraza.[9] *See Iorg*, 801 P.2d at 942 (citation and internal quotation marks omitted).

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9. Peraza has suggested that Expert's testimony is the type of "anecdotal 'statistical' evidence" condemned by the Utah Supreme Court, *see State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990), and implies that, even if the testimony had been properly and timely disclosed, it should be excluded on its own merits. We recognize that our supreme court "has continued to condemn anecdotal 'statistical' evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories of evidence leading to undue prejudice." *Id.* 801 P.2d at 941 (referencing *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989)); see *also State v. Jones*, 2015 UT 19, ¶ 50, 345 P.3d 1195 (explaining that the Utah Supreme Court has "condemned anecdotal statistical evidence when it concerns matters not susceptible to quantitative analysis," but determining that testimony "regarding the percentage of crimes linked to drug use" was a quantifiable metric (citation and internal quotation marks omitted)); *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986) ("Even where statistically valid probability evidence has been presented . . . courts have routinely excluded it when the evidence invites the jury to focus upon a seemingly scientific, numerical conclusion rather than to analyze the evidence before it and decide where truth lies."). But because Peraza includes this argument only as part of the harmless error analysis, we are not asked to directly address whether the evidence is admissible even if it had been timely disclosed, and we therefore decline to do so.

¶37 We conclude the district court exceeded its discretion in admitting Expert's testimony at trial because the State failed to comply with Utah Code section 77-17-13 in that it did not provide an expert report or detailed information with respect to Expert's testimony or the scientific basis on which she would rely. Without this information the requirements under rule 702 were not met, and this error prejudiced Peraza's trial. We were not asked to determine whether—assuming that the testimony had been properly and timely disclosed—the Rule 702 requirements could be met with respect to Expert's testimony that "between four and 20 percent" of sex abuse victims recant their allegations or that the "majority" of these victims delay disclosures. On remand, if the State seeks to admit testimony with respect to delayed disclosure and recantations of sex abuse victims, from either Expert or any other expert witness, it must provide sufficient information, consistent with this opinion, to allow the court the opportunity to properly rule on its admissibility under rule 702.

II. Denial of the Motion to Continue

¶38 Peraza contends the district court abused its discretion when it denied his motion to continue the trial to allow him to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony. He argues that this prejudiced his trial because had he been able to procure a rebuttal expert, there would have been a "reasonable likelihood that the outcome of the case would have been different." We agree.

¶39 As we have discussed, the party seeking to use an expert witness at trial must disclose certain information. Utah Code Ann. § 77-17-13 (LexisNexis 2017); *see also State v. Torres-Garcia*, 2006 UT App 45, ¶ 11, 131 P.3d 292 (explaining the notice requirements under section 77-17-13). If the party "fails to substantially comply with [these] requirements . . . the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial . . . sufficient to allow

preparation to meet the testimony." Utah Code Ann. § 77-17-13(4)(a).

¶40 When we review the denial of an appellant's request for continuance, we consider four factors:

> (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the *need* for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the appellant might have suffered harm as a result of the court's denial.

State v. Begishe, 937 P.2d 527, 530 (Utah Ct. App. 1997), *superseded on other grounds by statute as recognized in State v. Roberts*, 2018 UT App 9. We will address each factor in turn.

¶41 First, defense counsel diligently prepared the defense prior to trial. He timely moved to exclude Expert's testimony, highlighting the State's failure to comply with the notice requirements and emphasizing the risk of unfair prejudice to the defense when "'statistical evidence of matters not susceptible to quantitative analysis'" is presented at trial because it is "'uniquely subject to being used to distort the deliberative process and skew the trial's outcome.'" (Quoting *State v. Dibello*, 780 P.2d 1221, 1229 (Utah 1989).) After the court determined it would admit Expert's testimony if necessary, counsel immediately contacted a social worker for assistance to prepare to cross-examine Expert. The social worker informed counsel that Peraza needed his own expert witness for rebuttal, and counsel requested an "emergency [telephone] conference" to request a continuance to allow sufficient time to procure an expert witness and to prepare for cross-examination. Considering all of these efforts, we conclude that defense counsel acted diligently.

¶42 Second, Peraza likely could have been adequately prepared to meet the expert testimony if the district court granted his motion to continue the trial. He would have had the opportunity to procure an expert witness to rebut Expert's generalized statement of the probability that a victim's recantation of an allegation does not mean that the abuse did not occur. This expert might also have been able to testify about whether the "effigy doll" treatment "could have led to the allegations becoming more violent and much more pronounced over the years."

¶43 Third, Peraza's "right to a fair trial outweighed any inconvenience to the court [and] the opposing party . . . that may have been caused by a continuance." *State v. Tolano*, 2001 UT App 37, ¶ 13, 19 P.3d 400. "Although inconvenience to the court and jury is one of the four factors considered, this court has specifically held that such an administrative concern is outweighed by the [defendant's] right to a fair trial." *Id.* (quotation simplified). The district court's concerns that Child needed to be considered and that it had to "draw a line somewhere" were outweighed by Peraza's right to a fair trial.

¶44 Finally, "the extent to which [Peraza] might have suffered harm as a result of the court's denial . . . is the most important among the factors." *Id.* ¶ 14 (quotation simplified). As this court explained in *Tolano*, because of the "difficult burden placed on defendants to establish prejudice in cases such as these," the burden is on the State to persuade the court there is no reasonable likelihood that, absent the error, the outcome would have been more favorable to the defendant. *Id.*

¶45 The State has not met that burden here. First, it argues that Peraza did not seek to continue the trial to procure an expert witness to rebut Expert's testimony but instead to discuss Child's therapy treatment. This mischaracterizes the type of expert witness Peraza sought to procure. Defense counsel argued that, based on Child's therapy treatments, he needed an expert witness to rebut Expert's testimony and to inform the jury that the type of treatment she received could have influenced her withdrawal of her recantations and that this treatment "might

have led to the allegations becoming much more violent and much more pronounced as the years have gone on." Essentially, he argued that this type of treatment has been shown to affect the description of the alleged abuse.

¶46 The State also argues that the motion's denial did not prevent Peraza from "'put[ting] forward the only defense he had'" or from putting on "'the only testimony potentially effective to his defense.'" (Quoting *United States v. Flynt*, 756 F.2d 1352, 1361–62 (9th Cir. 1985).) It argues that Peraza "was able to call [Child's] credibility into question by highlighting inconsistencies in her disclosures, including her recantation and then withdrawal of the recantation." But this argument is not persuasive and we find no support for it in Utah case law. *Compare Flynt*, 756 F.2d at 1361, *with State v. Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22, 131 P.3d 292 (explaining that appellate courts "must determine if the circumstances [in the present case] are such that a continuance was necessary"). Instead, we consider the circumstances related to defense counsel's ability to sufficiently prepare his defense strategy and to effectively cross-examine the State's witnesses. *See Torres-Garcia*, 2006 UT App 45, ¶¶ 18–22.

¶47 Although Peraza's counsel was able to call a fact witness, the private investigator that recorded one of Child's recantations, he was nevertheless "sufficiently prejudiced by the denial of his . . . request for a continuance." *Id.* ¶ 22. Defense counsel was able to highlight inconsistencies in Child's testimony and was able to present recantations through the private investigator. But this evidence was undercut by Expert's testimony, which should not have been permitted because it "rehabilitated [Child's] credibility, without challenge." And the harm to Peraza's trial was compounded when he was unable to present an expert witness whose testimony, arguably, would have been given similar weight to Expert's testimony. *See id.* Although counsel was able to elicit some concessions from Expert, the jury would have benefited from the opportunity to weigh Expert's testimony with a second expert from the defense. Ultimately, Peraza's ability to put forward his best defense was materially hampered by the denial of the motion to continue to

procure his own rebuttal expert. Under these circumstances, the State has failed to meet its burden of persuading this court that Peraza was not prejudiced by the denial of his motion to continue.

¶48 We conclude the district court exceeded its discretion when it denied Peraza's motion to continue the trial to adequately prepare to cross-examine the Expert and to procure an expert witness to rebut her testimony.[10]

CONCLUSION

¶49 We conclude the State failed to satisfy the notice requirements under Utah Code section 77-17-13 when it failed to provide an expert report or other written explanation articulating the scope of Expert's testimony and therefore the district court exceeded its discretion when it admitted Expert's testimony at trial without sufficient information to satisfy rule 702 of the Utah Rules of Evidence. The court also exceeded its discretion when it denied Peraza's motion to continue based on

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10. Peraza also contends that the error in admitting Expert's testimony at trial, along with the erroneous denial of his motion to continue, constitutes grounds for reversal under the cumulative error doctrine because "[t]he close relationship between these two rulings and the effect they had upon the evidence presented" were prejudicial. Generally, a party will invoke the cumulative error doctrine where "errors committed during the course of [the] trial were harmless individually, [but] were cumulatively harmful." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). Under this doctrine, we will reverse only if "the cumulative effect of the several errors undermines our confidence that a fair trial was had." *Id.* (quotation simplified). In this case, both errors were independently prejudicial and each warranted a reversal and new trial. Therefore, the cumulative error doctrine does not apply. But viewing the two harmful errors together, we are even more confident in our determination that Peraza was denied a fair trial.

the State's failure to comply with section 77-17-13. Neither of these errors was harmless. We therefore vacate Peraza's convictions and remand to the district court for a new trial consistent with this opinion.
