PUBLIC

No. 20171012-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

AFIMUAO S. LEOTA,
Defendant/Appellant.

Appellant is not incarcerated

BRIEF OF APPELLANT

Appeal from a judgment of conviction for one count of Forcible Sexual Abuse, a second degree felony, in violation of Utah Code §78A-4-103(2)(e) in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judge Bruce Lubeck presiding.

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INTRODUCTION

This Court should reverse Afimuao Leota's Forcible Sexual Abuse conviction because insufficient evidence supports that conviction. At trial, Leota was found not guilty of sixteen of the seventeen felony counts for which he was charged. The acquitted charges included various first-degree felonies of rape, object rape, and forcible sodomy, as well as a few second-degree felony forcible sexual abuse charges. Of the seventeen charges, the jury found Leota guilty of only one count—count 14—Forcible Sexual Abuse, a second-degree felony.

The trial evidence for all seventeen counts was based on allegations made by M.B., the complaining witness, who testified that Leota engaged in various sexual activities with her during two distinct time frames. The first time frame was November 1, 2013-December 26, 2013 (counts 14-17), when M.B. was 15 years old. The second time frame was September 1, 2014-October 15, 2015 (counts 1-13), when M.B. was 17 years old.

As highlighted by the prosecutor in closing arguments, the trial evidence specific to count 14 involved M.B.'s allegation that on one occasion in 2013, Leota touched M.B.'s breast over her clothes ("the touch"). R.1082. According to M.B.'s testimony, the touch occurred when she and Leota, who was M.B.'s stepfather, were both watching football on Leota's bed. M.B. testified that after the touch occurred, Leota asked M.B., "is it ok if Daddy does this?" When M.B. shrugged and said "huh-uh... I don't know," Leota removed his hand and apologized. But the trial evidence also showed that Leota told a detective and M.B.'s mother that the touch was an accident. After Leota realized that he accidentally touched M.B.'s breast over her clothes, he removed his hand, apologized, and asked M.B. if she was okay.

The State's theory at trial was that the touch constituted taking indecent liberties. But the trial evidence taken in the light most favorable to the verdict does not support such a verdict. First, the evidence supported that the touch was accidental. But, even if the jury believed that the over-the-clothes touch was not an accident, the State failed to prove that the momentary over-the-clothes touch rose to the same magnitude of gravity as a skin-to-skin touching of the vagina, anus, buttocks, or breasts as is required by the statute. And Utah case law indicates that the touch did not constitute indecent liberties because Leota did not harm M.B. or place her in fear, Leota immediately removed his hand when requested, and M.B. first reported the incident weeks after the alleged incident when she was angry at Leota for disciplining her.

Second, M.B.'s testimony was too inherently improbable to support the verdict where (1) it was materially inconsistent, patently false, and lacked corroboration, (2) it was motivated by animus towards Leota, and (3) there was no other circumstantial or direct evidence that supported Leota's guilt. Simply put, for the same reasons that M.B.'s testimony was inherently improbable to support convictions for the acquitted charges, it was also inherently improbable to support a conviction on count 14.

Lastly, the insufficiency of the evidence issue was preserved by trial counsel's directed verdict motion made at the close of the State's case and by counsel's post-trial motion to arrest judgment. But to the extent this Court believes this issue is not preserved, it should review the issue for plain error.

STATEMENT OF THE ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue I: Whether the evidence was insufficient to convict Leota of Forcible Sexual Abuse where the State failed to prove that Leota's over-the-clothes touch constituted indecent liberties, and where the complainant's testimony was too inherently improbable to support the verdict.

Standard of Review: "When a defendant challenges a jury verdict for insufficiency of the evidence, '[this Court] review[s] the evidence and all inferences which may be reasonably drawn from it in the light most favorable to the verdict.'" *State v. Noor*, 2012 UT App 187, ¶4, 283 P.3d 543. This Court "will reverse the jury's verdict 'only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable that reasonable minds must have

entertained a reasonable doubt that the defendant committed the crime of which he was convicted.'" *Id.*

Preservation: This issue is preserved by trial counsel's directed verdict motion made at the close of the State's case, and by counsel's post-trial motion to arrest judgment. R.989-96,1496-97,1642-50; *see infra*, Part IC. But to the extent this Court believes this issue is not preserved, it should review the issue for plain error. *See State v. Mohamed*, 2012 UT App 183, ¶3, 282 P.3d 1066 (per curiam); *see infra*, Part IC. "When challenging the sufficiency of the evidence under the plain error doctrine, 'a defendant must demonstrate first that the evidence was insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.'" *Id.* (quoting *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346).

STATEMENT OF THE CASE

a. The State's evidence at trial regarding count 14.

The evidence pertaining to count 14, for which a jury found Leota guilty of Forcible Sexual Abuse, is as follows. M.B. testified that she was 11-years-old when Leota started living with her family. R.1001-02. Leota married M.B.'s biological mother (Mother). R.1000,1055,1343. Because Leota was M.B.'s stepfather, she called him "daddy." R.1001-02,1346,1479,1488.

According to M.B., when she was 15-years-old, there was an occasion in November or December of 2013 where she was in Mother's and Leota's room.

R.1003,1485-86. M.B. and Leota were on the bed watching football, and Mother was asleep on a recliner. R.1003-04. At one point, M.B. was "laying against [Leota] and [he was] rubbing [her] back." R.1004-05. It was common for M.B. and Leota to tickle and snuggle each other while they watched television; according to Mother, it conveyed "an image that melts your heart of the dad holding his kids." R.1352-53,1004-05,1479-80.

According to M.B., after Leota rubbed her back, he put his hand on her breast over her clothes. R.1003,1005,1082. M.B. was wearing a shirt and a bra. R.1005. Leota then asked, "is it ok if Daddy does this?" R.1005. M.B. shrugged and said "huh-uh... I don't know." R.1006-07. Leota then apologized and said, "Sorry, daddy shouldn't have done that." R.1006. When Leota apologized, he removed his hand from M.B's breast. R.1006.

A police officer testified at trial that he spoke to Leota about M.B.'s allegations. R.1481-95. Leota told the officer that he and M.B. had an affectionate relationship and they would often "hug and cuddle on the couch" while watching television. R.1479-80. It was common for Leota to "snuggle" with all of his children. R.1486-88. Regarding the allegation of the improper touch, Leota told the officer that "his hands were accidentally on [M.B.'s] boobs." R.1482,1492. Leota then asked M.B., "are you ok with this?" R.1483,1485,1492. M.B. said "no," and Leota removed his hand and apologized to M.B. R.1484-95. Leota also told the officer that around the time of M.B.'s allegations, M.B. was upset with Leota because he had recently disciplined her. R.1481-91. Specifically, Leota took away

M.B.'s phone and access to electronics because she did not do her homework and she was disrespectful to Mother. R.1481-91. Leota believed that M.B.'s allegations were her way of getting back at him for disciplining her. R.1481.

Mother testified that she spoke to Leota and M.B. about M.B.'s allegations. R.1368. Leota told Mother that he and M.B. were watching television when he accidentally touched M.B.'s breast. R.1368,1377-79. When he noticed this, he immediately removed his hand and apologized, telling M.B. that he did not realize where he had placed his hand. R.1368,1377-78. Leota then asked M.B. whether she was okay. R.1368,1378. Mother did not know whether to believe Leota or M.B. R.1368. Mother knew that M.B. would exaggerate the truth, and on one occasion when M.B. argued with her sister, M.B. tried to make herself out as being the victim in order to pass blame onto her sister. R.1369.

At trial and in closing arguments, the prosecutor told the jury about the pertinent evidence for counts 14-17. R.1082-83. Specifically, count 14 was based on M.B's allegation about the 2013 touch wherein Leota allegedly touched M.B.'s breast over her clothes and subsequently asked her if she was okay. R.1082.

b. The State's evidence at trial regarding the counts for which a jury acquitted Leota.

M.B. made additional allegations, which formed the basis for the remaining 16 counts. The jury rejected these allegations and acquitted on all 16 counts. M.B.'s allegations—which the jury rejected—were as follows.

M.B.'s allegations

M.B. testified at trial that after the touch alleged in Count 14—for which the jury convicted—Leota immediately "touched [her] breast again" and said nothing. R.1006-07. M.B. did not remember how long Leota's hand remained on her breast or what events happened next. R.1007. This claim constituted Count 15, for which the jury acquitted. R.1082.

M.B. also alleged other instances of sexual conduct involving Leota in 2013 when she was 15-years old. R.1008-14. M.B. claimed that on a few occasions, Leota rubbed her back, butt, stomach, and breasts—on top of her clothes—while they were on Leota's bed. R.1009-13. These claims constituted Counts 16 and 17, for which the jury acquitted. R.1083.

In January of 2014, M.B. told her therapist (Therapist) about various incidents wherein she claimed Leota touched her. R.1014,1053-54,1346,1550. Around the time M.B. spoke to her therapist, M.B. was mad at Leota because he spanked her sister. R.1054-55,1365. M.B. told Mother that she was so mad at Leota for disciplining her sister that she wanted to beat him with a baseball bat. R.1054,1364-65,1549,1551.

Soon after M.B. spoke to Therapist, prosecutors initiated a criminal case against Leota regarding the 2013 allegations. R.1017,1346. Around this time, M.B. moved out of Leota's and Mother's home and moved in with her dad (Father) and stepmother (Stepmother). R.1015-16,1055,1350,1366. Prosecutors dismissed the criminal charges against Leota after M.B. told an attorney that she did not want to press charges, and M.B. wrote a letter to the District Attorney's office saying

that the charges against Leota should be dropped. R.1015,1056-57,1346-67. M.B.'s letter did not confirm nor deny the allegations. R.1346-47,1367-68.

After living with Father for 8-9 months, M.B. decided to return and live with Mother and Leota. R.1016-17,1056-59,1347-69. M.B. claimed that approximately one month later, Leota started going into her bedroom at night, and Leota told M.B. that she was his "kryptonite" and that he was in love with her. R.1018-19,1059.

M.B. alleged that various sexual encounters occurred between her and Leota in 2014 and 2015. R.1020-62. M.B. claimed that these encounters involved having her rub his penis, R.1020-23; putting his fingers in her vagina, R.1023-28; sexual intercourse, R.1025-30; and anal penetration. R.1028-29. M.B. claimed she and Leota had sexual intercourse "probably 100 times," R.1028,1059, and that Leota wanted to get M.B. pregnant and have a son. R.1030. The jury acquitted Leota of all these 2014 and 2015 allegations. R.968-71.

M.B. claimed that family members were in the room during some of the sexual encounters. R.1021-29,1059-62. M.B. also claimed that Leota would have sex with her with the door open, even when a lot of people were inside the house. R.1060. And around this time, there were a lot of people living in M.B.'s house, including M.B.'s grandmother (Grandmother), sisters, aunts, and uncles. R.1042-44.

M.B. claimed that her last sexual encounter with Leota occurred on October 15, 2015. R.1030,1042,1047. According to M.B., she and Leota were

having sexual intercourse when Grandma knocked on the door. R.1030-32,1044. Leota went to the bathroom and showered, then left to talk to Grandma. R.1032. M.B. then showered. R.1033,1035. During this time, Leota sent M.B. a few text messages. R.1032-35; *see also* State's Exhibit #1 (photo of text message). Text messages introduced at trial indicated that at 1:44 p.m., Leota sent M.B. a text that said, "Don't come out yet." *See id.* At 2:03pm, Leota sent M.B. a text that said, "U can come out now." *See id.* Leota then texted, "Just stay in my room and watch tv." R.1035. The jury acquitted Leota of the charges related to this alleged sexual encounter. R.968-71.

M.B. gets into trouble then tells Mother about Leota.

Two days later, on October 17, 2015, M.B. told Mother about the alleged sexual encounters. R.1036-40,1063,1370. Before telling Mother, M.B. left a family barbeque with her friend (Friend) without first getting permission from Mother. R.1036-37,1048-49,1353-54. M.B. and Friend had gotten in trouble repeatedly before: they snuck out of the house a few times and, on one occasion, they stole Father's car. R.1049,1370. Mother was upset with M.B for leaving the family barbeque so she phoned M.B. R.1038,1049. Mother told M.B. that she was in big trouble and that she needed to immediately come home. R.1049,1355,1371. M.B. was afraid that she was going to be grounded and inquired about her punishment. R.1050-51,1355-56,1371. M.B. then told Mother that she was not coming home and that she left the house because she was "tired of being raped." R.1038,1051,1355-56,1371-72. Mother believed that M.B. was referring to Leota

and asked M.B. to describe Leota's penis. R.1356-58,1371-72. M.B. said that Leota's "penis was small and that there was a bump on it." R.1038-39,1051,1358. After M.B. told her mother about Leota, M.B. ended the call and turned off her phone. R.1066-67. M.B. and Friend then went to a church to meet-up with a boy and hang-out. R.1066-67.

M.B.'s claims about whether Leota ejaculated.

Soon after M.B. told Mother about the sexual encounters involving Leota, M.B. spoke to a SANE nurse (S-Nurse) and did a rape exam. R.1040,1047,1335, 1433-1436. M.B. was 17 years-old at the time of the exam. R.1452. M.B. told S-Nurse that two days before (on October 15, 2017) Leota touched her mouth, breast, and genitals with his mouth and genitals, and that Leota ejaculated. R.1439-40,1452-53.; *see also* State's Exhibit 2 (S-Nurse's report indicating that M.B. told her that Leota had ejaculated into her vagina). Although a urine test indicated that M.B. was not pregnant, M.B. was concerned she was pregnant and accepted an emergency contraceptive pill. R.1047,1444-58. According to S-Nurse, even though M.B. washed, urinated, and defecated after the sexual encounter, this would not impact the evidence in the vagina area (only the cervix area). R.1441-64. There was nothing abnormal about M.B.'s pelvic exam, and her only injury was a small scratch on her left leg. R.1442-63.

M.B. met with a detective (Detective) the day after she met with S-Nurse. R.1335. M.B. told Detective that Leota ejaculated into her vagina on October 15,

2015. R.1046,1340. M.B. also told the detective that Grandma did not knock on the door until after Leota ejaculated and when Leota was in the shower. R.1046.

At trial, M.B. testified that Leota did not ejaculate on October 15, 2015. R.1044. And it was a week before trial that M.B. first told prosecutors that Leota did not ejaculate. R.1044-45.

When M.B.'s friends are upset with her, she tells them about Leota.

In addition to telling Mother about her sexual encounters with Leota, M.B. also told two of her friends about these encounters. R.1064-65. First, M.B. told Friend when Friend was upset with M.B. because the two of them had been caught stealing Father's car. R.1064-65. Second, M.B. told another friend (Male Friend) about Leota when the two of them got into an argument and Male Friend was yelling at her. R.1064.

c. Leota's case at trial.

Leota did not testify at trial. R.1498-99,1564. Leota's sister (Sister) testified that she and many other adults lived with Leota's family in 2013. R.1502. At any given time, there was usually an adult in the house in addition to Leota. R.1042-44,1502. Sister never saw anything improper between Leota and M.B. R.1502. Moreover, in the 8-10 years that Sister has known M.B., Sister reached the opinion that M.B. is not an honest person. R.1502.

Stepmother also testified and gave her opinion that after knowing M.B. for 14 years, she believes that M.B. is not an honest person. R.1546,1548,1556. In addition, around December 31, 2015, Stepmother and M.B. had a "heart to heart"

conversation wherein M.B. told Step-mother that she was a virgin. R.1552. Step-mother was shocked and asked M.B., "what about [Leota]?" R.1553. M.B. said nothing and just shrugged her shoulders. R.1553.

The defense also called a Nurse to testify (D-Nurse). R.1509-44. According to D-Nurse, "there are no bodily injuries and no DNA evidence that supports [M.B.'s] allegations." R.1528. Specifically, although M.B. alleged various events—i.e., sexual intercourse, ejaculation, and mouth and digital contact—the lab results indicated "nothing" or no foreign DNA on M.B. R.1519,1518-1528. The following stipulation regarding the DNA results was read to the jury:

> The items from the Sane nurse examination were sent to a DNA laboratory. Two of the three swabs, the cervical and the vulvar swab yielded no DNA results. The vaginal swab contained an invalid result. Because of the limited amount of data present, no further testing could be conducted.

R.1518.

D-Nurse was surprised that there was no DNA on the swabs given the short time frame from the reported event to the time of the examination, and because the DNA swabs and procedures had the highest chance of getting DNA. R.1516-19,1535. Given M.B.'s allegations, it was "surprising" and unusual to find no foreign DNA on M.B. where there are "products from [] male [] ejaculation", "epithelial cells" from penis and digital contact, and saliva from oral contact. R.1520-28. And although showering and wiping can remove DNA, it is still possible to have foreign DNA. R.1526. Thus, even if Leota had not ejaculated, D-

Nurse expected the presence of foreign DNA on M.B. given M.B.'s description of events. R.1524,1535.

Defense counsel introduced pictures of Leota's penis at trial. R.1559-64. In closing arguments, counsel emphasized that after looking at the four pictures of Leota's penis—which depict Leota's penis from various angles—there is no bump on Leota's penis. R.1601; *see also* Defendant's Exhibits 1-4.

d. Procedural history.

The State filed an Amended Information charging Leota with seventeen counts: six counts of Rape, a first-degree felony, in violation of Utah Code §76-5-402, four counts of Object Rape, a first-degree felony, in violation of Utah Code §76-5-402.2, three counts of Forcible Sodomy, a first-degree felony, in violation of Utah Code §76-5-403(2), and four counts of Forcible Sexual Abuse, a second-degree felony, in violation of Utah Code §76-5-404. R.47-51.

A two-day jury trial was held on September 12 and 13, 2017. R.904-09,960-967,973-80. Defense counsel moved for a directed verdict on all counts at the end of the State's case. R.1496-97. Counsel argued that the State had not proved its case because M.B.'s testimony was "entirely uncredible." R.1497. The State opposed the directed verdict motion and the court denied Leota's request for a directed verdict. R.1497-98. The court also denied defense counsel's renewed directed verdict motion that was argued after all of the evidence was presented at trial and before the jury received the case. R.1566.

Jury Instruction 34 informed the jury that a "person commits forcible sexual abuse" if he, in part, "takes indecent liberties with another." R.1583; *see also* Jury Instruction 34, attached in Addendum B. The instruction noted that the indecent liberties prong does not require skin-to-skin touching, but that any over-the-clothing touch must be "of equal seriousness and gravity" as the skin-to-skin touching prong. R.1584. The instruction also noted factors that the jury could consider in determining whether an over-the-clothing touch constituted indecent liberties. These included:

> The nature of the other's participation and whether defendant required such participation, the duration of the act, the presence or absence of clothing, the defendant's willingness to terminate conduct at the other's request, the relationship between the defendant and the other, the age of the other, [and] how intrusive the act was against the other person.

R.1583; Jury Instruction 34.

At the close of trial, the jury convicted Leota of count 14, Forcible Sexual Abuse, a second-degree felony. R.968-71. The jury acquitted Leota of the remaining sixteen felony charges. *See id.*

After trial and before sentencing, defense counsel filed a Motion to Arrest Judgment, and on November 2, 2017, the court heard argument and issued a decision. R.989-96,1642-50. Defense counsel argued that insufficient evidence supported the conviction because Leota's over-the-clothing touch did not constitute indecent liberties where it did not "rise to the same magnitude of gravity as the other prongs within the forcible abuse [statute]." R.1644.

Specifically, even if the jury believed that the over-the-clothes touch "was non-accidental," it was not of the "same magnitude and gravity as a skin-to-skin touching." R.1647-48. The State argued that Leota was a "father-figure" who knew that "the touch of [M.B.] was wrong." R.1649. The court denied the motion because, "given the nature of the relationship of the parties... and the way it occurred, and the circumstances of where it occurred," Leota's over-the-clothing touch was "relatively the same magnitude" to constitute indecent liberties under the pertinent statute. R.1650.

On November 2, 2017, the trial court sentenced Leota to an indeterminate and suspended prison term of not less than one year not more than fifteen years. *See* Addendum A (Sentence, Judgment, and Commitment); R.1221-22. The trial court placed Leota on supervised probation and imposed sex offender conditions. *See id.* Leota filed a timely notice of appeal. R.1223-24. This Court has jurisdiction to hear this appeal under Utah Code §78A-4-103(2)(e). *See* R.1231-32.

SUMMARY OF THE ARGUMENT

There was insufficient evidence to support the jury's verdict that Leota committed the crime of second-degree felony Forcible Sexual Abuse.

First, the trial evidence taken in the light most favorable to the verdict did not support the Forcible Sexual Abuse conviction where the State did not prove that Leota's conduct constituted indecent liberties. Here, Leota told others that his over-the-clothes touch of M.B.'s breast was an accident. However, even if the

jury believed that Leota's touch was not an accident, the over-the-clothes touch did not constitute Forcible Sexual Abuse where it did not rise to the same magnitude of gravity as a skin-to-skin touching of the vagina, anus, buttocks, or breasts. Utah case law indicates that, under the totality of circumstances, Leota's momentary over-the-clothes touch did not constitute indecent liberties where Leota did not harm M.B. or place her in fear, where Leota immediately removed his hand when requested, and where M.B. reported the incident weeks after the alleged incident when she was mad at Leota for disciplining her.

Second, M.B.'s testimony was too inherently improbable to support the verdict where (1) it was materially inconsistent, patently false, and lacked corroboration, (2) it was motivated by animus towards Leota, and (3) there was no other circumstantial or direct evidence that supported Leota's guilt. For the same reasons that M.B.'s testimony failed to support convictions for the sixteen felony counts for which the jury acquitted Leota, M.B.'s testimony also failed to support the count for which the jury convicted Leota. For example, in the three instances where M.B. discussed her sexual encounters with Leota to others—to Mother, Friend, and Male Friend—all three people were upset with M.B. about an unrelated matter before M.B. discussed Leota. The evidence also indicated that M.B. was angry with Leota for disciplining her and her sister around the same time that M.B. made her allegations against Leota.

Finally, defense counsel preserved the insufficiency of the evidence claim. But if this Court decides otherwise, it may review this case for plain error.

ARGUMENT

I. The evidence was insufficient to prove that Leota committed the crime of second-degree felony Forcible Sexual Abuse.

This Court will reverse a jury conviction for insufficient evidence when, viewing "the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict . . . the evidence is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime . . . ." *State v. Shumway*, 2002 UT 124, ¶15, 63 P.3d 94. "[A] guilty verdict is not legally valid if it is based solely on inferences that give rise to only remote or speculative possibilities of guilt." *Id.* at ¶18 (internal quotation marks omitted). The Court "cannot take a speculative leap across a remaining [evidentiary] gap in order to sustain a verdict." *Id.; see also State v. Cristobal*, 2010 UT App 228, ¶7, 238 P.3d 1096 (stating that a jury verdict must be based on reasonable inferences and not just "speculation and conjecture"). "Every element of the crime charged must be proven beyond a reasonable doubt." *State v. Harman*, 767 P.2d 567, 568 (Utah Ct. App. 1989). "If the evidence does not support those elements, the verdict must fail." *Id.*

Here, this Court should reverse the Forcible Sexual Abuse conviction because the trial evidence taken in the light most favorable to the verdict was insufficient. First, the evidence was insufficient to prove Leota guilty of second-degree felony Forcible Sexual Abuse where the State did not prove that Leota's

conduct constituted indecent liberties. Second, the evidence was insufficient to prove Leota guilty of second-degree felony Forcible Sexual Abuse where M.B.'s testimony was inherently improbable. Lastly, defense counsel preserved the sufficiency of the evidence issue for the Forcible Sexual Abuse count, or, if not, this Court may review the sufficiency issue under the plain error doctrine.

A. The evidence was insufficient to prove Leota guilty of second-degree felony Forcible Sexual Abuse where the State did not prove that Leota's conduct constituted indecent liberties.

Forcible Sexual Abuse is a second-degree felony punishable by a prison term of not less than one year nor more than 15 years. Utah Code §76-5-404(2)(a). A person commits Forcible Sexual Abuse "if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant." Utah Code §76-5-404(1)(a) (2010).

Recently, and after the jury decided this case, the Utah Legislature enacted legislation that defines "indecent liberties." *See* Utah Code §76-5-416 (Indecent Liberties—Definition, effective 5/8/2018), attached as Addendum C. Prior to the enactment of the 2018 statute, the legal definition of what constituted "indecent

liberties" under the forcible sexual abuse statute was fleshed out in Utah case law. *See, e.g., State v. Lewis*, 2014 UT App 241, ¶11, 337 P.3d 1053; *State in re J.L.S.*, 610 P.2d 1294, 1295-96 (Utah 1980). This case law indicates that the "indecent liberties" prong of the statute is distinct from the skin-to-skin "touching" prong, and to be guilty under the "indecent liberties" prong requires evidence of "an action that is of the 'same magnitude of gravity' as touching the vagina, anus, buttocks, or breasts." *Lewis*, 2014 UT App 241, ¶11; *see also State in re J.L.S.*, 610 P.2d at 1295-96. Moreover, in determining whether conduct is of equal gravity to the touching prong, a jury could consider the following factors:

> (1) the duration of the conduct, (2) the intrusiveness of the conduct against [the victim's] person, (3) whether [the victim] requested that the conduct stop, (4) whether the conduct stopped upon request, (5) the relationship between [the victim] and the defendant, (6) [the victim's] age, [and] (7) whether [the victim] was forced or coerced to participate . . . .

Lewis, 2014 UT App 241, ¶12 (quoting the Model Utah Jury Instructions 2d CR1602).

In *State v. Thatcher,* the Utah Supreme Court held that conduct satisfied the "indecent liberties" prong of the Forcible Sexual Abuse statute where there was a special relationship between the defendant and the victim, and the defendant's "more than momentary" conduct required the victim's participation. 667 P.2d 23, 23-25 (Utah 1983). In *Thatcher*, the defendant was the victim's father and he engaged in simulated sexual conduct with his daughter. *Id.* Not only was defendant's conduct "more than momentary," it "did not stop . . . when

requested." *Id.* at 25. In addition, the victim reported the defendant's conduct to a school counselor and her mother the day after the incident occurred. *Id.*; *see also State v. Carrell*, 2018 UT App 21, ¶¶2-13, 34-35, 414 P.3d 1030 (affirming that "indecent liberties" occurred where the defendant was a special needs bus driver who had a special relationship with the victim and the improper conduct was more than momentary).

Utah case law also indicates that conduct constitutes "indecent liberties" if the defendant places the victim in fear or pain. For example, in *State v. Lowder*, the Utah Supreme Court held that the defendant committed "indecent liberties" where he caused the two-year-old victim pain in touching the child's buttocks and genitals. 889 P.2d 412, 413 (Utah 1994). In addition, in *State v. Peters*, this Court determined that the defendant's over-the-clothes touch of the victim's breast constituted indecent liberties where the defendant lured the victim into an abandoned house and held her against her will for 20 minutes. 796 P.2d 708, 709 (Utah Ct. App. 1990).

More recently, in *State v. Carvajal*, this Court held that the defendant's over-the-clothes touch of a 14-year old's breast constituted indecent liberties where the defendant ignored the victim's efforts to stop and the victim had the intelligence of a 7-year-old. 2018 UT App 12, ¶¶21-22, 414 P.3d 984. In *Carvajal*, the defendant sent the victim flirtatious texts to induce her to be with him, and he told her that he loved her and wanted to marry her. *Id.* ¶¶1, 4-5. On one occasion,

the defendant's hand touched the victim's breast for fifteen minutes, and after "she took it off, [] he put it back." *Id.* ¶4.

By contrast, in *State in re J.L.S.,* the Utah Supreme Court held that a momentary over-the-clothes touch of a juvenile's breast did not constitute "taking indecent liberties" under the Forcible Sexual Abuse statute. 610 P.2d at 1294-96. In *State in re J.L.S.*, a motel maid was cleaning the bathtub when a 17-year old male entered the motel room, put his hands on the maid's breasts, and said, "because [the maid] wouldn't give it to him he was going to take it." *Id.* at 1295. The male left after the maid pushed him and told him to leave her alone. *Id.* The maid did not report the incident to police until a week after the incident allegedly occurred. *Id.*

In interpreting the Forcible Sexual Abuse statute, the Court in *State in re J.L.S.* noted that the phrase "indecent liberties" must not be interpreted "as subsuming a mere offensive touching where the circumstances do not indicate conduct of sufficient gravity to be equated with the specific descriptions set forth in the statute." *Id.* at 1296. And although the conduct of the 17-year-old defendant could not be "condoned, much less approved or admired," it did not constitute indecent liberties where there was "no touching in anger, no actual violence or injury, and [the defendant] desisted immediately upon [] request." *Id.* "This, coupled with the fact no complaint was made about the matter for a week," led the Court to conclude that the defendant's "misconduct should not reasonably be regarded as of the seriousness proscribed by the statute." *Id.*

Similarly, in *State in re L.G.W.*, the Utah Supreme Court held that a juvenile was not guilty of "taking indecent liberties" under the Forcible Sexual Abuse statute where he briefly touched the clothed buttocks of the victim. 641 P.2d 127, 128-31 (Utah 1982). The Court noted that "[i]f the brief touching of a clothed breast does not constitute ["taking indecent liberties"], as we held in *J.L.S.*, [] we are unable to see how the brief touching of a clothed buttocks is any more felonious." *Id.* at 129. The Court then determined that the defendant's conduct instead constituted a class B misdemeanor Lewdness, a lesser included offense of Forcible Sexual Abuse. *Id.* at 131; *see also* Utah Code §76-9-702.

In this case, this Court should reverse the Forcible Sexual Abuse conviction because, even when looking at the evidence in the light most favorable to the verdict, the evidence was insufficient to prove that Leota's conduct constituted indecent liberties as required under the pertinent statue. *See* Utah Code §76-5-404(2)(a); *Cristobal*, 2010 UT App 228, ¶7. Specifically, the jury's finding that Leota committed Forcible Sexual Abuse by conduct amounting to indecent liberties was based on "speculation and conjecture" and not reasonable inferences. *Cristobal*, 2010 UT App 228, ¶7.

The marshaled evidence pertaining to count 14 is as follows. *See State v. Nielson*, 2014 UT 10, ¶¶40-44, 326 P.3d 645.

> 1. Leota was M.B.'s step-father and M.B. called him "daddy." R.1000-02, 1055,1343-46,1479,1488.
>
> 2. M.B. was 11 years old when Leota started living with her, and on various occasions, Leota disciplined M.B. and her sisters. R.1054-55,1365,1481-91.

3. Leota affectionately tickled, hugged, and snuggled M.B. and M.B.'s sisters. R.1352-53,1004-05,1479-88.

4. According to M.B., when she was 15-years-old, there was an occasion in November or December of 2013 where she was in Mother's and Leota's room. R.1003,1485-86. M.B. and Leota were on the bed watching television while Mother was asleep on the recliner. R.1003-04. At one point, M.B. was "laying against [Leota] and [he was] rubbing [her] back." R.1004-05. After Leota rubbed her back, he put his hand on her breast. R.1003,1005, 1082. Leota's hand was on top of M.B.'s clothing and M.B. was wearing a shirt and a bra. R.1005. Leota then asked, "is it ok if Daddy does this?" R.1005. M.B. shrugged and said "huh-uh... I don't know." R.1006-07. Leota then apologized and said, "Sorry, daddy shouldn't have done that." R.1006. When Leota apologized, he removed his hand from M.B's breast. R.1006.

5. In closing arguments, the prosecutor informed the jury that this touch constituted the pertinent evidence for count 14. R.1082-83.

Here, both Detective and Mother testified that Leota told them that the touch described by M.B. was an accidental touch. R.1368,1377-79, 1482,1492. However, even if the jury found that Leota's touch was not accidental, under the totality of the circumstances, it did not constitute second-degree felony Forcible Sexual Abuse where the over-the-clothes touch did not constitute indecent liberties under the pertinent statute because it was not of the same magnitude of gravity as a skin-to-skin touch. *See* Utah Code §76-5-404(1)(a); *State in re J.L.S.*, 610 P.2d at 1294-96; *State in re L.G.W.*, 641 P.2d at 128-31.

First, applying the pertinent factors for determining whether a touch is of equal gravity to the touching prong, the touch in this case did not constitute indecent liberties. *See Lewis*, 2014 Ut App 241, ¶12. The touch lasted only a short

period of time (duration). *See id.* Leota also stopped the touch upon M.B.'s request and Leota did not force or coerce M.B. to participate. *See id.*

Second, unlike in *Lowder* and *Peters,* there was no evidence that Leota's over-the-clothes touch caused M.B. pain or fear. *See* R.1003-07; *Lowder*, 889 P.2d at 413-14; *Peters*, 796 P.2d at 709. According to M.B., when the touch occurred, she "shrugged," but there was no evidence that M.B. screamed, yelled, or cried. *See* R.1003-05, 1082; *cf. Peters*, 796 P.2d at 709. There was also no evidence that Leota's touch caused any physical markings or bruises. *See* R.1003-05,1082; *cf. Lowder*, 889 P.2d at 413-14.

Third, unlike in *Thatcher, Carvajal,* and *Carrell,* Leota's over-the-clothes touch was brief and momentary, and Leota removed his hand from M.B. upon her request. *See* R.1003-07; *Thatcher*, 667 P.2d at 23-25; *Carvajal*, 2018 UT App 12, ¶¶21-22; *Carrell*, 2018 UT App 21, ¶¶34-35. According to M.B., after Leota touched her, he asked, "is it ok if Daddy does this?" R.1005. When M.B. shrugged and said "huh-uh... I don't know," Leota removed his hand and apologized. R.1006-07.

Fourth, like in *State in re J.L.S.* and *State in re L.G.W.,* Leota's conduct did not indicate sufficient gravity to be equated with Forcible Sexual Abuse. *See* R.1003-07; *State in re J.L.S.*, 610 P.2d at 1294-96; *State in re L.G.W.*, 641 P.2d at 128-31. Leota's alleged over-the-clothes touch did not constitute indecent liberties where there was "no touching in anger, no actual violence or injury, and [Leota] desisted immediately upon [] request." *See State in re J.L.S* 610 P.2d at

1296. In addition, because M.B. did not report the incident until January of 2014 (to Therapist), which was weeks-to-months after the alleged incident, Leota's alleged "misconduct should not reasonably be regarded as of the seriousness proscribed by the statute." *Id.*; *see also State in re L.G.W.*, 641 P.2d at 128-31; Utah Code §76-5-404(2)(a).

It is also important to note that Utah Code §76-5-416—which was enacted in 2018 and defines "takes indecent liberties"—provides additional support that Leota's conduct did not constitute indecent liberties where it does not meet the statutory requirements of the newly enacted statute. Utah courts assume "that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, . . . [and] in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together." *See Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983).

Under the 2018 statute, "takes indecent liberties" means:

(1) touching the actor's genitals, anus, buttocks, pubic area, or female breast against any part of the body of the victim;
(2) causing the victim to touch the actor's or another's genitals, pubic area, anus, buttocks, or female breast;
(3) simulating or pretending to engage in sexual intercourse with the victim, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or
(4) causing the victim to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse.

Utah Code §76-5-416.

Here, Leota's momentary over-the-clothes touch of M.B. does not meet any of the four definitions of "takes indecent liberties" enumerated in the 2018 statute. *See* Utah Code §76-5-416; Addendum C. First, Leota did not touch his "genitals, anus, buttocks, [or] pubic area" against M.B. *See id.* at (1). Second, Leota did not "caus[e] [M.B.] to touch [Leota's] genitals, pubic area, anus, [or buttocks]." *See id.* at (2). Third, Leota did not "simulat[e] or pretend[] to engage in sexual intercourse with [M.B.], including genital-genital, oral-genital, anal-genital, or oral-anal intercourse." *See id.* at (3). Lastly, Leota did not cause M.B. "to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse." *See id.* at (4). Thus, Leota's over-the-clothes touch does not constitute "taking indecent liberties" under either the Utah statutes that were in effect at the time of this case or under the plain language of the newly enacted 2018 statute. *See* Utah Code §76-5-416; Utah Code §76-5-404(2)(a); *Murray City*, 663 P.2d at 1318; *State v. Guard*, 2015 UT 96, ¶60, 371 P.3d 1; *State v. Yates*, 918 P.2d 136, 138 (Utah Ct. App. 1996).

Ultimately, the jury's finding that Leota committed Forcible Sexual Abuse by conduct constituting indecent liberties was based on "speculation and conjecture" and not reasonable inferences. *Cristobal*, 2010 UT App 228, ¶7; *State v. Cowlishaw*, 2017 UT App 181, ¶13, 405 P.3d 885.

B. The evidence was insufficient to prove Leota guilty of second-degree felony Forcible Sexual Abuse where M.B.'s testimony was inherently improbable.

According to the Utah Supreme Court, inherently improbable testimony cannot support a conviction because it is "incredibly dubious and [] apparently false." *State v. Robbins*, 2009 UT 23, ¶18, 210 P.3d 288. Thus, a court can "reevaluate the jury's credibility determinations" when "(1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt." *Id.* ¶19; *see also State v. Herrera*, 2009 UT App 80, *1 (stating that "[g]enerally, reviewing courts are precluded from reassessing witness credibility except in rare circumstances, such as where the testimony is 'inherently improbable' because there 'exists[s] either a physical impossibility of the evidence being true, or its falsity [is] apparent, without any resort to inferences or deductions.'"(alteration in original)(quoting *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)).

In *Robbins*, our supreme court held that the evidence was insufficient to support the jury's verdict for aggravated sexual abuse of a child where the complainant's testimony was inherently improbable due to multiple inconsistencies, and where the "allegations of abuse were motivated by animus between" the complainant's father and the defendant. *Robbins*, 2009 UT 23, ¶¶1, 8,13. In *Robbins*, the complainant was inconsistent about (1) the age at which the sexual abuse occurred, (2) the clothing that she was wearing when the abuse took place, and (3) whether the defendant physically abused her. *Id.* ¶¶8-9,22. In

addition, the complainant described fearing that someone was listening in on her conversation from a closet in a room that did not in fact have a closet. *Id.* ¶23. *Robbins* noted that although a trial court "must ordinarily accept the jury's determination of witness credibility, when the witness's testimony is inherently improbable, the court may choose to disregard it." *Id.* ¶16.

Recently, in *State v. Prater*, the Utah Supreme Court addressed the *Robbins* case and noted that "[i]t was the inconsistencies in the child's testimony *plus* the patently false statements the child made *plus* the lack of any corroboration that allowed [the Court] to conclude that insufficient evidence supported Robbins's conviction." 2017 UT 13, ¶38, 392 P.3d 398 (emphasis in original). Moreover, "[i]n *Robbins*, 'no other circumstantial or direct evidence' supported the defendant's guilt." *Id.* ¶42 (quoting *Robbins*, 2009 UT 23, ¶19).

In *Prater,* our supreme court held that the inconsistencies between the complainant's pre-trial statements and trial testimony did not render the testimony apparently false where there was also substantial evidence that supported the defendant's murder conviction, including an incriminatory letter written by the defendant from jail. *Id.* ¶¶15-18,39-43. Defendant's letter discussed how he disposed of the murder weapon. *Id.*¶17,43. Likewise, in *State v. Crippen,* this Court held that the inconsistencies in the complainant's statements did not rise to the level of rendering her testimony inherently improbable because her allegations of sexual activity were corroborated by other evidence, including the

defendant's jailhouse phone call wherein he admitted to engaging in oral sex with the victim. 2016 UT App 152, ¶¶14-15, 25.

In this case, M.B.'s testimony was inherently improbable where (1) it was materially inconsistent, was patently false, and lacked corroboration, (2) it was motivated by animus towards Leota, and (3) there was no other circumstantial or direct evidence that supported the defendant's guilt. *See Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶38; *Crippen*, 2016 UT App 152, ¶¶14-15,25. Simply put, because M.B.'s testimony was inherently improbable to support convictions for the acquitted charges, it was also inherently improbable to support a conviction on count 14. *See id.*

First, like in *Robbins*, the complainant's testimony was materially inconsistent, was patently false, and lacked corroboration. *Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶38. M.B.'s testimony was materially inconsistent where M.B. initially told a nurse and a detective that Leota ejaculated during sexual intercourse on October 15, 2015, R.1046,1340,1440; State's Ex. 2. However, M.B. testified at trial that Leota did not ejaculate. R.1044; *see also Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶38. M.B. also testified that on October 15, 2015, Grandma knocked on the door when Leota and M.B. were having sex. R.1030-32,1044. However, a few days after the event allegedly occurred, M.B. told a detective that Grandma did not knock on the door until after Leota ejaculated and when Leota was in the shower. R.1046. M.B. also testified that she had sexual intercourse with Leota "probably 100 times," yet

around December 31, 2015, M.B. told Stepmother that she was a virgin. R.1028, 1059,1552.

M.B's testimony was patently false where M.B. testified that Leota had a bump on his penis. R.1038-39,1051-53,1358-59. However, as pointed out by defense counsel in closing arguments, pictures indicated that Leota did not have a bump on his penis. R.1601-02; Defendant's Exs. 1-4; *see also Prater*, 2017 UT 13, ¶38. Importantly, M.B. revealed that she really did not know about Leota's penis because she was unable to say whether the penis bump was bigger or smaller than a grape. R.1052.

M.B.'s allegations also lacked corroboration where the DNA results and rape exam did not corroborate M.B.'s version of events. R.1442-43,1460-66, 1518,1528 ; *see also Prater*, 2017 UT 13, ¶38. As noted by D-Nurse, given M.B.'s allegations and the reliable procedures that were used by S-Nurse in examining M.B., it was "surprising" and unusual for there to be no foreign DNA on M.B. R.1520-1529,1540.

In addition, evidence did not corroborate M.B.'s testimony that family members were present when the alleged sexual conduct occurred. *See* R.1502; *see also Prater*, 2017 UT 13, ¶38. In other words, in a house full of adults, no adults had concerns about inappropriate sexual conduct between Leota and M.B. despite M.B.'s claims that she had sexual intercourse with Leota "over 100 times"—while the door was open, while family members were in the room, and while M.B. was concealed under a blanket. R.1028,1021-29,1042-44,1059-61,

1502,1060-61. M.B. also claimed that Leota had sex with her in order to get her pregnant so that they could have a son together. R.1030. Thus, like in *Robbins*, M.B.'s description of her sexual encounters with Leota were not only uncorroborated, they were so incredible and fantastical that her testimony was "incredibly dubious and [] apparently false." *Robbins*, 2009 UT 23, ¶¶18, 23.

Second, like in *Robbins*, M.B.'s testimony and allegations was motivated by animus towards Leota. *See Robbins*, 2009 UT 23, ¶¶1,8,13. The evidence indicated that at the time that M.B. told Therapist about sexual misconduct involving Leota, M.B. was mad at Leota for disciplining her sister. R.1054-55, 1365. In fact, M.B. was so mad that she told Mother that she wanted to beat Leota with a baseball bat. R.1054,1364-65,1549,1551. In addition, Leota told an officer that at the time of M.B.'s allegations, M.B. was upset with him for disciplining her. R.1481-1491. Specifically, Leota took away M.B.'s phone and access to electronics because she did not do her homework and she was disrespectful to Mother. R.1481-91.

Third, unlike in *Prater* and *Crippen*, there was no other circumstantial or direct evidence that supported the defendant's guilt. *Prater*, 2017 UT 13, ¶42; *Crippen*, 2016 UT App 152, ¶¶14-15,25. Although text messages introduced by the State coincided with M.B.'s testimony that Leota's phone sent M.B. texts on October 15, 2015, that stated, "Don't come out yet," "U can come out know" and "Just stay in my room and watch tv", R.1032-35; *see* also State's Ex. #1, these texts do not provide circumstantial or direct evidence that Leota was guilty of a

crime where the content of the texts was innocuous and did not reference sexual acts. *Cf. Prater*, 2017 UT 13,¶17,43; *Crippen*, 2016 UT App 152, ¶¶14-15,25. Importantly, the texts do not provide circumstantial or direct evidence to support M.B.'s allegations of what occurred in 2013 as is pertinent to count 14. R.1003-07,1032-35,1082; *see also* State's Ex. #1. The texts only involve the timespan for which the jury acquitted Leota of charges. *See id.*

Lastly, M.B.'s reputation for dishonesty, especially when in trouble, also indicated that her testimony was inherently improbable. *See Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶¶15-18,39-43. In the three instances where M.B. discussed her sexual encounters with Leota to others—to Mother, Friend, and Male Friend—all three persons were upset with M.B. about an unrelated matter before M.B. discussed Leota. R.1036-40,1048-49,1064-70. And immediately after M.B. told Mother that Leota had raped her, she turned off her phone and went with Friend to meet-up and hang-out with a boy. R.1066-67. Moreover, both Leota's sister and M.B.'s stepmother testified that after knowing M.B. for many years, they both reached the opinion that M.B. is a dishonest person. R.1502,1546-48,1556. Mother also testified that she was skeptical about believing M.B. because M.B. had a history of exaggerating the truth, blaming other people, and making herself out to be the victim. R.1368-69.

In sum, just as the various problems in M.B.'s testimony failed to support convictions for the sixteen felony counts for which the jury acquitted Leota, M.B.'s testimony also failed to support the count for which the jury convicted

Leota. *See Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶38. Ultimately, M.B.'s inherently improbable testimony cannot support the jury's finding that Leota committed Forcible Sexual Abuse.

C. The sufficiency of the evidence issue for the Forcible Sexual Abuse count was preserved, or if not, this Court may review the sufficiency issue under the plain error doctrine.

The sufficiency of the evidence issue was preserved by defense counsel's directed verdict motions and counsel's post-trial Motion to Arrest Judgement. R. 989-96,1496-97,1566-66,1642-50. An issue is considered preserved when it is presented by counsel in a manner that the trial court had an opportunity to rule on it. *See Patterson v. Patterson*, 2011 UT 68, ¶12, 266 P.3d 828 (abrogated on other grounds).

Here, defense counsel moved for a directed verdict on all counts at the end of the State's case. R.1496-97. Defense counsel argued that the State had not proved its case because M.B.'s testimony was "entirely uncredible." R.1497. Defense counsel also renewed the directed verdict motion after all of the evidence was presented at trial and before the jury received the case. R.1565-66. Defense counsel relied on the arguments in the initial directed verdict motion, and added an argument that D-Nurse indicated that M.B.'s testimony was not supported by the physical evidence. R.1566-66. In addition, after trial and before sentencing, defense counsel filed a Motion to Arrest Judgment. R.989-96,1642-50. Defense counsel argued that insufficient evidence supported the conviction on count 14 because Leota's over-the-clothing touch did not constitute indecent liberties

where it did not "rise to the same magnitude of gravity as the other prongs within the forcible abuse [statute]." R.1644. Specifically, even if the jury believed that the over-the-clothes touch "was non-accidental," it was not of the "same magnitude and gravity as a skin-to skin touching." R.1647-48.

Both the prosecutor and the trial court understood defense counsel's insufficiency of the evidence objections. *See Patterson*, 2011 UT 68, ¶12; R.1497, 1649,1566,1650. At the initial directed verdict, the prosecutor argued that M.B.'s "testimony alone is sufficient evidence for a conviction." R.1497. And at the hearing on the Motion to Arrest Judgment, the prosecutor argued that the indecent liberties prong was met where Leota was a "father-figure" who knew that "the touch of [M.B.] was wrong." R.1649. Moreover, in denying defense counsel's directed verdict motions, the trial court ruled that the prosecution provided sufficient evidence to give the case to the jury. R.1498,1566. And in denying defense counsel's Motion to Arrest Judgment, the court held that "given the nature of the relationship of the parties... and the way it occurred, and the circumstances of where it occurred," Leota's over-the-clothing touch was "relatively the same magnitude" to constitute indecent liberties under the pertinent statute. R.1650.

To the extent this Court believes that this issue was not preserved, it should review the issue for plain error. *See State v. Mohamed,* 2012 UT App 183, ¶3, 282 P.3d 1066. "When challenging the sufficiency of the evidence under the plain error doctrine, 'a defendant must demonstrate first that the evidence was

insufficient to support a conviction of the crime charged and second that the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.'" *Id.* (quoting *State v. Holgate*, 2000 UT 74, ¶17, 10 P.3d 346).

For reasons mentioned *supra*, the trial court erred in denying defense counsel's directed verdict motions and counsel's Motion to Arrest Judgment because the evidence was insufficient to support Leota's conviction for second-degree felony Forcible Sexual Abuse. *See supra*, Part IA & IB. First, the evidence was insufficient to prove Leota guilty of Forcible Sexual Abuse where the State did not prove that Leota's over-the-clothes touch constituted indecent liberties. R.1003-07; *see also supra*, Part IA. Specifically, under the totality of the circumstances, the over-the-clothes touch did not constitute indecent liberties where there was "no touching in anger, no actual violence or injury, [] [Leota] desisted immediately upon [] request," and M.B. delayed in reporting the alleged incident. *See State in re J.L.S.*, 610 P.2d at 1296; *State in re L.G.W.*, 641 P.2d at 128-31; R.1003-07; *supra*, Part IA.

Second, the evidence was insufficient to prove Leota guilty of Forcible Sexual Abuse where M.B.'s testimony was inherently improbable. R.1006-67, 1346-72,1549-51; *see also supra*, Part IB; *Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶¶15-18,39-43. Specifically, M.B.'s testimony was inherently improbable where (1) it was materially inconsistent, was patently false, and lacked corroboration, (2) it was motivated by animus towards Leota, and (3)

there was no other circumstantial or direct evidence that supported the defendant's guilt. *See supra,* Part IB. For example, M.B. was materially inconsistent about whether Leota had sexual intercourse with her. R.1028,1340,1044-46,1440,1059. M.B.'s testimony that Leota had a bump on his penis was patently false. R.1038-39,1051-53,1358-59,1601-02; *see also* Defendant's Exs. 1-4. In addition, DNA results did not corroborate M.B.'s statements that Leota had sexual intercourse with her or that family members were present when the alleged sexual conduct occurred. R.1442-43,1460-66, 1518-28,1540. Importantly, M.B.'s reputation for dishonesty, especially when in trouble, and anger towards Leota for disciplining her and her sister also indicated that her testimony was inherently improbable. *See supra* Part IB; R.1036-49, 1054-70,1364-65,1481-91,1549,1551.

Furthermore, the insufficiency of the evidence was obvious. The "obviousness requirement poses no rigid and insurmountable barrier to review." *See State v. Eldredge,* 773 P.2d 29, 35 n.8 (Utah 1989), *cert. denied,* 493 U.S. 814 (1989). Leota need only "show that the law governing the error was clear at the time the alleged error was made." *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276. Here, the error was obvious because a straightforward application of Utah case law establishes that verdicts cannot be supported by speculation and conjecture. *Cristobal*, 2010 UT App 228, ¶7. Moreover, Utah case law establishes that for Forcible Sexual abuse, the conduct must be of sufficient gravity to be equated with indecent liberties, and that inherently improbably testimony alone cannot

support a verdict. *See e.g., State in re J.L.S.*, 610 P.2d at 1294-96; *State in re L.G.W.*, 641 P.2d at 128-31; *Robbins*, 2009 UT 23, ¶18; *Prater*, 2017 UT 13, ¶38; *Crippen*, 2016 UT App 152, ¶¶14-15,25; *see also supra*, Part IA and Part IB.

Applying Utah law to this case shows that the trial court's denial of counsel's direct verdict motions and Motion to Arrest Judgment was obvious error. First, the over-the-clothes touch did not constitute Forcible Sexual Abuse where it was not of sufficient gravity to be equated with indecent liberties. *See supra* Part IA; R.1003-07; *State in re J.L.S.*, 610 P.2d at 1294-96; Utah Code §76-5-404(1)(a); Utah Code §76-5-416. Second, the State failed to prove that Leota committed Forcible Sexual Abuse where M.B.'s testimony was inherently improbable. *See supra* Part IB; R.1006-67,1346-72,1549-51; *Robbins*, 2009 UT 23, ¶¶1,8,13; *Prater*, 2017 UT 13, ¶¶15-18,39-43. Just as the jury found that M.B.'s testimony was not sufficient to convict Leota of the 16 acquitted charges, her testimony was insufficient to convict Leota of count 14 because all, not just part, of M.B.'s testimony was inherently improbable where (1) it was materially inconsistent, patently false, and lacked corroboration, (2) it was motivated by animus towards Leota, and (3) there was no other circumstantial or direct evidence that supported the defendant's guilt. *See supra* Parts IB.

Thus, the insufficiency of the evidence was so obvious and fundamental that the trial court erred in denying counsel's direct verdict motions and Motion to Arrest Judgment. *See Cristobal*, 2010 UT App 228, ¶7.

CONCLUSION

Based on the foregoing, Afimuao Leota respectfully asks this Court to reverse and remand the Forcible Sexual Assault conviction with an order of dismissal because the evidence was insufficient.

SUBMITTED this ~~XX~~ 26th day of July, 2018.

TERESA L. WELCH
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 9,346 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

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

TERESA L. WELCH

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11 this ~~XX~~ 26th day of July, 2018.

TERESA L. WELCH

DELIVERED this 27th day of July, 2018.

ADDENDUM A

The Order of the Court is stated below:
Dated: November 02, 2017 01:07:05 PM /s/ BRUCE LUBECK
District Court Judge

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151402812 FS
AFIMUAO S LEOTA,	:	Judge: BRUCE LUBECK
Defendant.	:	Date: November 2, 2017

PRESENT
Clerk: melodys
Prosecutor: MAY, THADDEUS J
Defendant Present
The defendant is not in custody
Defendant's Attorney(s): SEAMAN, CHRISTINE M

DEFENDANT INFORMATION
Date of birth: January 25, 1985
Sheriff Office#: 373253
Audio
Tape Number: 32 Tape Count: 9.03

CHARGES
14. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony
Plea: Not Guilty - Disposition: 09/13/2017 Guilty

HEARING

Motion to Arrest Judgment is argued.

9.15
Court denies the motion. Defendant is sentenced.

SENTENCE PRISON
Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the

defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.
The prison term is suspended.

ORDER OF PROBATION
The defendant is placed on probation for 60 month(s).
Probation is to be supervised by Adult Probation and Parole.

No other violations.
Report to AP&P within 24 hours
Maintain fulltime verifiable employment/education.
No contact directly or indirectly with the victim without approval of AP&P.
Comply with group A sex offender conditions.
Complete a psycho-sexual evaluation and comply with recommended treatment.
Defendant is given credit for 705 days previously served.
Court will allow contact with minor children if approved, after completion of psycho-sexual evaluation.
Restitution is left open.

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

ADDENDUM B

On the other hand, if you are not so convinced beyond a reasonable doubt of any one or more of the foregoing essential elements, you must find the defendant not guilty of the count you're considering, object rape in Counts 2, 9, 10, or 11.

34. The defendant is charged in Counts 14 through 17 with forcible sexual abuse. A person commits forcible sexual abuse if that person touches the unclothed anus -- anus, buttock, or any part of the genitals of another or touches the unclothed breast of a female or otherwise takes indecent liberties with another or causes another to take indecent liberties with the defendant or another with intent to cause substantial emotional or bodily pain to any person or with intent to arouse or gratify the sexual desire of any person without the consent of the other person regardless of the sex of either.

Thus, there are two prongs to this statute. The touching prong, requires the State prove that the touching was not through clothing, but skin-to-skin. The indecent liberties prong does not require a touching that is skin-to-skin. The word "forcible" as used in counts -- that's wrong. Counts 14 through 17, it should say, means without consent of the other person.

The Utah statute prohibiting forcible sexual abuse specifies and probits certain enumerated touching of the

unclothed anus, genitals, or female breast of another. And then adds the phrase "or otherwise takes indecent liberties,' as a catchall phrase extending the scope of the statute to force -- to forbid other sexual misconduct of equal seriousness and gravity as the touching prong or aspect.

The indecent liberties prong cannot met by the State merely by showing words were spoken. There must be conduct as well, akin and alike to the touching prong though such touching need not be skin-to-skin under that prong.

When determining such other sexual misconduct, if any you find, you may consider the following factors: The nature of the other's participation and whether the defendant required such participation, the duration of the act, the presence or absence of clothing, the defendant's willingness to terminate his conduct at the other's request, the relationship between the defendant and the other, the age of the other, how intrusive the act was against the other person.

Touching means to bring a bodily part briefly into contact with another, so as to feel or to examine by feeling with the fingers or to cause to be briefly and lightly in contact with something.

As to the first prong of this statute, the touching prong, if the State intends to prove defendant violated the statute only by touching the other person, the State must prove the touching was skin-to-skin. If the State intends to prove

defendant violated the statute by otherwise taking indecent liberties, any touching is shown -- any touching which is shown, if any, need not be skin-to-skin.

Genitals or genitalia means the reproductive organs.

35. In order for you to convict the defendant of the offense of forcible sexual abuse charged in Counts 14 through 17 of the information, the State must prove each of the following essential elements beyond a reasonable doubt. On or about the date charged in the information. You're considering 14 through 17.

The defendant touched the unclothed anus, buttock or any part of the genitals of [redacted] or touched the unclothed breasts of [redacted] or otherwise took indecent liberties with [redacted] and that such conduct was done intentionally, knowingly, or recklessly.

3. That the Defendant was [redacted] stepparent.

4. That [redacted] was 14 years of age or older and younger than 18 years of age.

If after careful consideration of all of the evidence in this case you're convinced the State has proven each of the foregoing essential elements beyond a reasonable doubt, you must find the defendant guilty of the count you're considering, 14, 15, 16 or 17, forcible sexual abuse.

On the other hand, if you are not so convinced beyond

ADDENDUM C

Utah Code § 76-5-416

§ 76-5-416. Indecent liberties--Definition

Effective: May 8, 2018

As used in this part, "takes indecent liberties" means:

(1) touching the actor's genitals, anus, buttocks, pubic area, or female breast against any part of the body of the victim;

(2) causing the victim to touch the actor's or another's genitals, pubic area, anus, buttocks, or female breast;

(3) simulating or pretending to engage in sexual intercourse with the victim, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse; or

(4) causing the victim to simulate or pretend to engage in sexual intercourse with the actor or another, including genital-genital, oral-genital, anal-genital, or oral-anal intercourse.

Credits

Laws 2018, c. 192, § 7, eff. May 8, 2018.