Case No. 20171012-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

AFIMUAO S. LEOTA,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for forcible sexual abuse, a second degree felony, in violation of Utah Code Ann. §76-5-404 (West 2015), in the Third Judicial District, Salt Lake County, the Honorable Bruce C. Lubeck presiding

TERESA L. WELCH
CHRISTINE SEAMAN
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111
appeals@sllda.com

Counsel for Appellant

JEFFREY S. GRAY (5852)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: jgray@agutah.gov

THADDEUS J. MAY
Salt Lake District Attorney's Office

Counsel for Appellee

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES

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INTRODUCTION

In late 2013, defendant Afimuao (A.J.) Leota deliberately put his hand on his 15-year-old stepdaughter's clothed breast while he snuggled with her on his bed. After placing his hand on her clothed breast, Leota asked if she was okay with him doing it. She shrugged, indicating that she didn't know. But eventually, she said that it was not okay. Leota then apologized and removed his hand from her breast, promising that he would not do it again. When Leota was questioned about the incident, he admitted to the conduct and admitted that what he had done was wrong.

Contrary to Leota's claim on appeal, the evidence was sufficient to support a jury finding that Leota took indecent liberties with this

stepdaughter—his conduct was comparable to the touching specified in the forcible-sexual-abuse statute, which specifically prohibits touching another's bare breast or buttocks with intent to sexually arouse or gratify.

STATEMENT OF THE ISSUES

Was the evidence sufficient to support defendant A.J. Leota's conviction for forcible sexual abuse?

Standard of Review. When reviewing a challenge to the sufficiency of the evidence—whether made by a motion for a directed verdict before jury deliberations or by a motion to arrest judgment after verdict is rendered—this Court views the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict. *State v. Steed*, 2014 UT 16, ¶15, 325 P.3d 87 (articulating motion to arrest judgment standard); *State v. Garcia*, 2017 UT 53, ¶33, 424 P.3d 171 (articulating directed verdict standard). The Court will reverse for insufficient evidence only if "the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *Steed*, 2014 UT 16, ¶15 (motion to arrest judgment standard); *State v. Gonzalez*, 2015 UT 10, ¶27, 345 P.3d 1168 (holding that court will uphold denial of directed verdict so long as "some evidence exists," viewed in light most favorable to the State,

"from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt").

STATEMENT OF THE CASE

A. Summary of relevant facts.

Susan[1] was eleven years old when Leota married her mother and he soon assumed a father role—taking Susan to parks, giving her gifts, watching television together, and disciplining her. R1107-09,1343,1345. She called him "Daddy," and, by Leota's own admission, he was physically affectionate with her, as he was with her siblings. R1109,1112,1345-46. Even into Susan's teenage years, Leota would snuggle with her, rub her back, shoulders, and stomach, and tickle her. R1111-12,1479-80. But when Susan was 15 years old, Leota crossed the line. R1110.

Forcible Sexual Abuse in 2013

One day in November or December 2013, Susan had joined Leota in his and her mother's bedroom. R1110,1485-86.[2] Susan got on the bed with Leota, leaning against him while he rubbed her back as they watched football on

[1] To protect the victim's privacy, the State does not use the victim's real name but refers to her by the pseudonym "Susan."

[2] Susan recalled that her mother was also in the bedroom asleep in a recliner. R1110-11. Leota did not recall Susan's mother being in the room. R1482.

television. R1110-11. At some point, Leota put his hand on Susan's breast over her clothing. R1110,1112,1492. While he held it there, Leota asked, "Is it okay if Daddy does this?" R1110,1112,1482. Susan "shrugged and just said, 'huh-uh,' like, I don't know." R1112-13. But eventually Susan told Leota that she was not okay with what he was doing. R1484. Leota responded, "Sorry, Daddy shouldn't have done that," and removed his hand. R1113. He promised Susan that he would not do it again. R1484.

In January 2014, Susan confided with a counselor that Leota had fondled her and reported that it had occurred on at least two other occasions—once when Leota rubbed her buttock and breast over her clothes and once when he rubbed her breast under her shirt but over her bra. *See* R1114-21,1160,1346,1364. When Susan's mother confronted Leota about the abuse, he admitted that he touched her breast with his hand but claimed that it was an accident and that he told Susan that he didn't know his hand was there. R1368,1377-78. Susan and her mother notified authorities and Susan moved in with her biological father and his wife. R1122-23,1163-64,1347-48,1350,1366.

Leota's Confession to Detective Thompson

On January 30, 2014, Detective Andrew Thompson questioned Leota about Susan's allegations in a recorded interview. R1478,1483-87. At first,

Leota claimed that he was unaware of any inappropriate touching and suggested that Susan may have fabricated the allegations because she was angry with him for disciplining her. R1480-81,1488-90. But later in the interview, Leota admitted that two or three months earlier, he was cuddling with Susan on his bed and when she turned the other way, he "tr[ied] to hold her and then … was holding her, and then [his] hands—well, they went over here to where her boobs were." R1481-82,1485, 1492-94. Leota initially claimed that it was an accident, but when pressed by the detective to explain how, Leota "couldn't explain what was accidental about it." R1482.

Leota admitted that when his hands were on Susan's breast, he asked her, "*Are you okay with this?*" R1482 (emphasis added). Detective Thompson asked why he would ask Susan that question and Leota responded, " 'because I was—you know, I was touching her boobs.' " R1483-84. Leota said that Susan eventually told him it was not okay to touch her and he then apologized and stopped touching her breast, promising that he would not do it again. R1484,1492-93,1495. He claimed that Susan responded that it was okay because she knew he did not mean to do it. R1493. Leota acknowledged to the detective that what he did was wrong, but claimed that nothing like that happened again. R1485,1494-95. As the interview wound down, Leota

said he felt bad for what he did and expressed concern about the ramifications to his marriage. R1484.

Charges Filed then Dropped

Charges were filed against Leota, but the case was later dismissed after Susan wrote a letter to the prosecutor asking that charges be dropped—though she did not make the request because Leota did not do it. R1122,1163-64, 1176,1346-47,1366-68.

New Allegations of Sexual Abuse in 2014 and 2015

By September 2014—some eight months after moving away—Susan no longer wished to live with her father—she did not get along with his wife—and she moved back in with her mother and Leota. R1123-25,1350,1369. Susan explained at trial that notwithstanding the prior abuse, she did not believe Leota would continue to fondle her because he had "gotten caught" before. R1124. Susan's mother allowed her to move back in on the condition that she and Leota not be alone in the same room together so as "to avoid any image of impropriety, … anything that could be misunderstood." R1351. The rule, however, was not heeded for very long. R1351.

On October 17, 2015—just over one year after she moved back in with her mother and Leota—Susan reported, first to her mother and then to police, that Leota had been raping her since about a month after she moved back.

R1145-47,1165-66,1370. She made the allegations after leaving a family barbeque to be with a friend against her mother's wishes. R1143-44,1153-55. Soon after Susan left, her mother spoke with her on the phone, "reaming her out for leaving" and demanding that she return or face the consequences. R1145,1355,1370-71. Susan refused, explained that she was "tired of being raped," and hung up the phone on her mother. R1145,1355-56. About an hour later, Susan again spoke with her mother providing more detail of her rape allegations. *See* R1356-59.

Later that day, Susan's mother reported Susan's allegations to police. *See* R1147,1334-35,1337. After an officer responded to the home, Susan went with her mother to a hospital, where she was examined by a sexual assault nurse examiner (S.A.N.E. nurse). R1334-35. An officer also interviewed Susan at greater length the following today, as well as her mother and Susan's friend. R1335.

B. Summary of proceedings and disposition of the court.

Leota was charged with four counts of forcible sexual abuse for indecent liberties reported by Susan in 2013, when she was 15 years old (counts 14-17), and six counts of rape, four counts of object rape, and three counts of forcible sodomy for sexual assaults reported by Susan occurring in 2014 and 2015 after she moved back in with Leota, when she was 16- and 17-

years old (counts 1-13), including an incident that occurred on October 15, 2015 (counts 1-3)—two days before she told her mother that Leota was raping her. R47-52.

Leota was tried by a jury in September 2017. *See* R904-09,960-67. After the State concluded its case in chief, defense counsel moved for a directed verdict. R1496-97. Counsel "[s]pecifically [argued] regarding the counts dealing with the October 15, 2015, incident" when Susan was 17 years old, R1496-97—i.e., counts 1 through 3 for rape, object rape, and forcible sodomy, R47-48. He argued that there was "absolutely no physical evidence" to support the October 15, 2015 counts, even though "there should be some physical evidence, some type of DNA, some type of semen, some type of injury, something that would indicate that that has happened." R1497. Counsel also argued that Susan's testimony was "entirely uncredible" [sic] to the point that … [no] reasonable jury could find that Mr. Leota was guilty of any of the counts. R1497. Noting the State's opposing expert testimony regarding the lack of physical evidence of the October 2015 assaults, and concluding that "a jury could accept the [victim's] testimony," the court denied the motion. R1497-98.

The defense renewed its motion for a directed verdict at the close of all the evidence and the district court again denied the motion. R1565-66.

Following deliberations, the jury found Leota guilty of only count 14—based on the first incident of sexual abuse in late 2013 when Susan was 15 years old—and found him not guilty of the remaining counts. R968-70.

Leota thereafter filed a motion to arrest judgment on the guilty verdict for count 14. R989-96. During oral argument, counsel argued that although "an over-the-clothing touching could be some other indecent liberty," there had to be "something more" of a sexual nature occurring in addition. R1644. The court denied the motion, concluding that given "the nature of the relationship of the parties and so on, and the way it occurred, and the circumstances of where it occurred," the over-the-clothing touching was "relatively the same magnitude" as the touching specifically proscribed in the forcible-sexual-abuse statute. R1650; *accord* R1221.

The court thereafter sentenced Leota to a suspended prison term of one to fifteen years and placed him on supervised probation for 60 months. R1221-22. Leota timely appealed. R1223-24.

SUMMARY OF ARGUMENT

Contrary to defendant A.J. Leota's claim on appeal, the evidence at trial was more than sufficient to support his conviction for forcible sexual abuse of his 15-year-old stepdaughter Susan. Because the State proceeded under the

"indecent liberties" prong of the forcible-sexual-abuse statute, it was required to prove that Leota's conduct was comparable to the touching specifically proscribed in the statute, which includes the touching of the bare buttocks or breast. It did. The evidence established that Leota deliberately put his hand on Susan's breast; that after doing so, he asked her if it was okay and she shrugged; that Susan "eventually" said that it was not okay; and that only then did Leota apologize and remove his hand from her breast, promising not to do it again. Moreover, Leota did so while Susan was particularly vulnerable—while cuddling with Leota, his arms wrapped around her, as he had done as her father many times before. The trial court thus correctly ruled that Leota's conduct was comparable to the touching specifically prohibited under the forcible-sexual-abuse statute.

Leota additionally claims that the evidence was insufficient under the narrow inherent-improbability exception. This claim is a nonstarter because Susan's testimony was corroborated by other evidence—Leota's admission to police that what Susan had claimed was true and his acknowledgement that he was wrong in doing so.

ARGUMENT

The evidence was sufficient to support Leota's conviction for forcible sexual abuse.

On appeal, Leota contends that the evidence was insufficient for two reasons: (1) the touching did not constitute the taking of indecent liberties where it was momentary, stopped upon request, did not cause fear or pain in the victim, was not done in anger, and was not reported for weeks, Aplt.Br. 23-25; and (2) the victim's testimony was inherently improbable. Aplt.Br. 27-33. Both claims fail.

A. The evidence was sufficient to support a jury finding that Leota took indecent liberties with his 15-year-old stepdaughter.

The forcible-sexual-abuse statute makes it unlawful to touch a person's private body parts, including the buttocks and female breast, or to otherwise take indecent liberties with another. Utah Code Ann. § 76-5-404(1) (West 2015). The evidence established that while snuggling with his 15-year-old stepdaughter Susan, Leota placed his hand over her clothed breast, asked if she was okay with him doing so, kept his hand on her breast after she shrugged, and eventually—after Susan said that she was not okay with him doing so—apologized and removed his hand from her breast. Leota promised Susan that he would not do it again and later admitted to police

that what he did was wrong. The foregoing evidence was more than sufficient to support a finding that Leota took indecent liberties with his stepdaughter.

1. Leota bears a heavy burden in showing that the trial court erred in denying his motion to arrest judgment for insufficient evidence.

A defendant bears a heavy burden in showing that the trial court erred in denying a claim that the evidence was insufficient to support a finding of guilt in a jury trial. *See State v. Gonzalez*, 2015 UT 10, ¶21, 345 P.3d 1168 (holding that defendant "must overcome a substantial burden on appeal to show that the trial court erred" in denying directed-verdict motion). This is true whether the sufficiency challenge was raised in a directed-verdict motion before verdict or in a motion to arrest judgment after verdict. The standard is the same.[3]

To begin with, the Court gives "substantial deference to the jury," *State v. Ashcraft*, 2015 UT 5, ¶18, 349 P.3d 664, which—unlike the appellate court—had "the opportunity to hear the witnesses and see their demeanor in court

[3] The State agrees with Defendant that his challenge to the sufficiency of the evidence for his forcible-sexual-abuse conviction was preserved. Although the defense did not challenge the sufficiency of the evidence of the forcible-sexual-abuse count in his directed-verdict motions (apart from arguing an inherent-improbability exception for all counts), he did so in his motion to arrest judgment, and the district court denied that motion after reviewing the circumstances and concluding that Leota's conduct was "relatively of the same magnitude" as the conduct specifically proscribed in the touching prong of the forcible-sexual-abuse statute. *See* R1650.

and on the witness stand," *Nance v. City of Provo*, 29 Utah 2d 340, 342, 509 P.2d 365,366 (1973). As a result, this Court "'view[s] the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict.'" *State v. Steed*, 2014 UT 16, ¶15, 325 P.3d 87 (cleaned up) (motion to arrest judgment standard); *State v. Montoya*, 2004 UT 5, ¶29, 84 P.3d 1183 (directed verdict standard). Any "'conflicts in the evidence'" must be resolved "'in favor of the jury verdict.'" *State v. Prater*, 2017 UT 13, ¶32, 392 P.3d 398 (quoting *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)).

Neither this Court nor the trial court may adjudge the evidence insufficient so long as "'some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.'" *Gonzalez*, 2015 UT 10, ¶27 (quoting *Montoya*, 2004 UT 5, ¶29). Insufficiency may be found only if "*no* evidence existed from which a reasonable jury could find [guilt] beyond a reasonable doubt." *Id.* (emphasis added). Leota has not overcome the heavy burden of establishing that the trial court erred in ruling that the evidence was sufficient.

Additionally, the trial court's denial of the motion "lends [even] further weight to the jury's verdict." *State v. Bluff*, 2002 UT 66, ¶63, 52 P.3d 1201, abrogated on other grounds in *Met v. State*, 2016 UT 51, 388 P.3d 447; *accord State v. Robbins*, 2009 UT 23, ¶15, 210 P.3d 288 (same). This is so because the

judge "who presided over a trial is in a far better position than an appellate court to determine … whether the evidence was sufficient to justify the verdict." *ASC Utah, Inc. v. Wolf Mountain Resorts, L.C.*, 2013 UT 24, ¶22, 309 P.3d 201.

2. Leota has not met the heavy burden in showing that the trial court erred in denying his motion to arrest judgment for insufficient evidence.

Leota was found guilty of forcible sexual abuse for groping his 15-year-old stepdaughter's breast over her clothing in late 2013. Under the forcible-sexual-abuse statute, it is unlawful to inappropriately touch the private body parts of, or to otherwise take "indecent liberties" with, another person who is at least 14 years of age:

> 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, with intent to cause substantial emotional or bodily pain to any individual or with intent to arouse or gratify the sexual desire of any person, without the consent of the other ….

Utah Code Ann. § 76-5-404(1) (West 2015) (emphasis added). The statute thus prohibits two types of conduct: (1) inappropriate touching of enumerated body parts of another ("touching prong"), and (2) taking indecent liberties with another ("indecent liberties prong").

In *State v. Jacobs*, 2006 UT App 356, ¶¶6-9, 144 P.3d 226, this Court held that under the statute's touching prong, contact over the victim's clothing is insufficient—the perpetrator must touch "the victim's uncovered skin." But *Jacobs* explained that the statute's indecent liberties "extend[s] the scope of the statute to cover other sexual misconduct of equal gravity." *Id.* at ¶9 (cleaned up). *Jacobs* held that "even when the specified body parts are touched through clothing, the perpetrator may still be punished under the indecent liberties prong of the statute *when, considering all the surrounding circumstances, the conduct is comparable to the touching that is specifically prohibited*." *Id.* (emphasis added). It is under this prong that Leota was tried and convicted. *See* R1188-89 (prosecutor explaining in closing that State was alleging indecent liberties, not touching of skin).

In determining whether a defendant's conduct is comparable to the touching specified in the statute, his acts must be viewed "in relationship to the surrounding circumstances." *State v. Bishop*, 753 P.2d 439, 482 (Utah 1988), overruled on other grounds as recognized in *State v. Sanchez*, 2018 UT 31, 422 P.3d 866. In *State v. Carvajal*, 2018 UT App 12, 414 P.3d 984, this Court observed that circumstances relevant to that consideration include "(1) the duration of the conduct, (2) the intrusiveness of the conduct against Victim's person, (3) whether Victim requested that the conduct stop, (4) whether the

conduct stopped upon request, (5) the relationship between Victim and [the defendant], (6) Victim's age, (7) whether Victim was forced or coerced to participate, and [8] "any other factors [that are] relevant" to the question of whether the conduct is "comparable to the touching that is specifically prohibited." *Id.* at ¶21 (cleaned up); *accord Jacobs*, 2006 UT App 356, ¶9 (holding that "all the surrounding circumstances" are considered when determining whether "conduct is comparable to the touching that is specifically prohibited").[4]

Contrary to Leota's claim, the evidence was more than sufficient to support the jury's verdict that Leota was guilty of forcible sexual abuse based on the indecent liberties prong of the statute.

First, the evidence established that Leota shared a close father-daughter relationship with Susan, who was only 15 years old at the time.

[4] Like the factors identified in *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988), for assessing unfair prejudice under evidence rule 403, the *Carvajal* factors should not be treated as a mandatory or exclusive list of factors. *See State v. Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 (holding that "while some of these factors may be helpful in assessing the probative value of the evidence in one context, they may not be helpful in another"). *Id.* Thus, as with rule 403, it is "unnecessary to evalutate each and every factor and balance them together" in assessing whether the conduct constitutes the taking of indecent liberties. *See id.* The Court should evaluate the relevant circumstances that shed light on whether the conduct is comparable to the touching specifically proscribed in the forcible-sexual-abuse statute.

Leota, on the other hand, was 30. *See* R47. Although Leota was merely Susan's stepfather, she called him "Daddy" and he was physically affectionate with her—he would rub her back, sides, and stomach, "tickle[ ] and touch[ ] her and stuff like that," and snuggle with her in a spooning position on the couch and on his bed. R1109,1111-12,1345-46,1352-53,1479-80. It was under these circumstances that he groped his 15-year-old stepdaughter's breasts in late 2013.

Leota and Susan were "cuddling" in a "spooning" position on the bed in his bedroom—Susan's "back was pressed up against [Leota's] chest and … he had his arms around her," with his legs away from her lower body. R1481. But then, unlike the previous occasions, he placed his hands "'over …to where her boobs were.'" R1492; *accord* R1110-12. Leota thus not only fondled a young teenage girl, but he did so to his own stepdaughter who looked up to him as her father—abusing that relationship.

Second, the evidence demonstrated that the touching was purposeful and not incidental. On appeal, Leota points to his initial claim to the detective that the touching was accidental, and he contends that the touching was "brief and momentary" in any event. Aplt.Br. 23-24. But a close examination of the testimony, and Leota's confession to police in particular, supports the

reasonable inference that the touching was deliberate and more than momentary.

During his interview with Detective Thompson, Leota confessed that while snuggling with Susan, she turned, after which—in his words—"'[I] tr[ied] to hold her *and then I was holding her*, and *then* my hands—well, *they went over here to where her boobs were*.'" R1492 (emphasis added). This account by Leota belied any claim that the touching was accidental.

Leota also admitted that he "*was touching* her boobs," R1483—suggesting that the touching was not momentary. And indeed, his account to the detective of how it happened, when pieced together with Susan's account, supports that view.[5]

Both Susan and Leota recounted that after Leota put his hand on Susan's breast, he asked her if that was okay. R1112,1482. Susan testified that she responded with a shrug and a verbal response ("huh-uh") that conveyed a message of "I don't know"—neither saying no or yes. R1112. She testified

[5] In their role as factfinder, a "jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime." *State v. Reed*, 2018 WL 4489483, *2 (Wisc. App. 2017) (per curium) (final publication decision pending). *See also State v. Haskins*, 150 A.3d 202, 205 (Vt. 2016) (observing that "jury was tasked with piecing together multiple witnesses' testimony—much of which was incomplete or conflicting—into a coherent picture of what occurred").

that Leota's hand was still on her breast when she shrugged, but the next thing she recalled was Leota apologizing and only then removing his hand from her breast. R1113. Leota recalled more—that his hand remained on her breast until she subsequently told him that she was not okay with what he was doing. He told Detective Thompson that "at one point" after placing his hand on her breast, Susan "*eventually* [told him] that she wasn't okay with the touch, that she wasn't okay with him touching her." R1484 (emphasis added). Leota said that "that's when [he] stopped," apologized, and promised her "that it wasn't going to happen again." R1484.

In sum, the evidence supported a jury finding that Leota deliberately put his hand on Susan's breast; that after doing so, he asked her if it was okay and she shrugged; that Susan "eventually" said that it was not okay; and that only then did Leota apologize and remove his hand from her breast, promising not to do it again. In other words, the touching was far from accidental and momentary.

Third, the evidence demonstrated that Leota knew what he did was wrong—he understood it at the time and he acknowledged it to the detective during the January 2014 interview. As discussed, after putting his hand on Susan's breast, Leota asked, "Is it okay if Daddy does this?" R1112; *accord* R1482. Later when Susan told him that she was not okay with what he was

doing, Leota "apologized to her, [and] told her that it wasn't going to happen again." R1484 (statement to detective); *accord* R1113. This is not a rational response to an accidental touching. It is an acknowledgement at the time that he was acting inappropriately. And Leota remained apologetic when he was interviewed by Detective Thompson, telling him that "he felt bad" and expressing remorse for what he had done. R1484. Significantly, Leota also admitted to the detective that "what he had done was wrong" and vented his worries about the "ramifications" of his actions to his marriage. R1485,1495.

Finally, Leota's conduct was extremely intrusive. The fact that Leota did not touch his 15-year-old stepdaughter's skin did not make the groping any less intrusive. Science has established that "breasts play a key role in female sexual arousal." N. Barber, *Psychology Today*, posted May 7, 2013, located at https://www.psychologytoday.com/us/blog/the-human-beast/201305/sexual-wiring-womens-breasts (last visited Oct. 24, 2018). Thus, like a person's groin, it is an intimate area of the human body not to be touched, *directly or indirectly*, absent consent—and this is certainly so where the victim is still three years shy of the age of majority and the perpetrator is an adult man twice her age who she looked up to as her father.

In light of all of these circumstances, the evidence was more than sufficient to support the jury's finding that Leota's conduct was comparable

to the touching of another's bare breast or buttocks—conduct specifically proscribed under the forcible-sexual-abuse statute's touching prong.

3. Leota's arguments against a finding of sufficiency are unavailing.

Leota makes several arguments against a finding that the evidence was sufficient. All of them lack merit.

a. Under the State's theory of the offense, evidence that Leota intended to cause the victim pain, fear, or harm was irrelevant to prove the taking of indecent liberties.

Leota contends that the evidence was insufficient in part because he did not act in anger and did not cause Susan "pain or fear," nor did he harm her in any way. Aplt.Br. 24-25. But the statute does not require such a showing. It is true that a person is guilty of forcible sexual abuse if the touching or indecent liberties are done "with intent to cause substantial emotional or bodily pain to any person." Utah Code Ann. § 76-5-404(1). But that is not the only way to commit the crime.

A person is also guilty of forcible sexual abuse if the touching or indecent liberties are done "with the intent to arouse or gratify the sexual desire of any person." Utah Code Ann. § 76-5-404(1). Causing pain, fear, or harm would generally not be needed, or used, to show intent to sexually arouse or gratify—the theory upon which the State proceeded. *See* R1189 (arguing at closing the sexual-rouse-or-gratify intent element). For this

reason, no such evidence was introduced and the lack of it cannot undermine the sufficiency of the evidence.

b. The reasoning in *In re L.G.W.* and *In re J.L.S.* does not apply to the circumstances of this case.

Leota also cites *In re L.G.W.*, 641 P.2d 127 (Utah 1982), and *In re J.L.S.*, 610 P.2d 1294 (Utah 1980), in support of his claim that his conduct "did not indicate sufficient gravity to be equated with Forcible Sexual Abuse." Aplt.Br. 24. Because of changes to the forcible-sexual-abuse statute, these cases do not support Leota's claim.

In *L.G.W.*, a motorcyclist rubbed his hand across the clothed buttocks of a female jogger, 641 P.2d at 128, and in *J.L.S.*, a 17-year-old teenager placed his hand on the clothed breasts of a motel maid, 610 P.2d at 1294-95. In both cases, the Utah Supreme Court held that the conduct was not "of sufficient gravity to be equated with the specific descriptions set forth in the [forcible-sexual-abuse] statute." *In re J.L.S.*, 610 P.2d at 1296; *In re L.G.W.*, 641 P.2d at 129 ("If the brief touching of a clothed breast does not constitute that crime, … we are unable to see how the brief touching of a clothed buttocks is any more felonious."). While at first glance those cases might appear controlling, they are not because the scope of the forcible-sexual-abuse statute was not as extensive as it is now.

When *L.G.W.* and *J.S.L.* were decided, the touching prong of the forcible-sexual-abuse statute only made it unlawful to touch "'the anus or any part of the genitals of another.'" *In re L.G.W.*, 641 P.2d at 129 (quoting 1980 version of statute); *In re J.L.S.*, 610 P.2d at 1295 (same). It did not include touching of the buttocks or female breast. The statute has long since added to the list of unlawful touches both the "buttocks" and "the breast of a female." Utah Code Ann. § 76-5-404(1). As a result, it is no longer true that the touching of a clothed buttocks or breast is not comparable in gravity to the touching specifically proscribed in the statute.

Relying on *L.G.W.* and *J.L.S.*, Leota also contends that the evidence was insufficient because the touching was brief, he stopped when Susan eventually told him that she was not okay with what he was doing, and Susan did not report the abuse for a month or two. Aplt.Br. 24-25. Relying on those same cases, Utah courts have continued to identify duration of touching and willingness to stop upon request as relevant when determining whether conduct is comparable to the touching that is specifically prohibited. *See, e.g., Bishop*, 753 P.2d at 482; *State v. Carrel*, 2018 UT App 21, ¶26, 414 P.3d 1030; *State v. Carvajal*, 2018 UT App 12, ¶22, 414 P.3d 984; *State v. Peters*, 796 P.2d 708, 711 (Utah App. 1990).

Consideration of duration and a defendant's willingness to stop makes sense where the conduct in question does not involve the body parts specifically described in the statute—as was the case in *J.L.S.* and *L.G.W.* But these factors seem less relevant where, as here, the conduct involves body parts that are specifically described in the statute's touching prong. As discussed, the groping of a young woman's breast over her clothing with the intent to arouse or gratify sexual desire is of sufficient gravity to be equated with the proscribed touching offenses.

In sum, whether a defendant takes indecent liberties by touching a young woman's breast cannot rise and fall on whether the touching was brief or stopped when requested. To suggest that a person does not take indecent liberties with another if he stops when told to stop, or "feels" for only a brief period, is to suggest that he gets one free bite of the forbidden apple without consequence. Surely the law cannot be so read.

Leota also relies on language in *J.L.S.* which identified the victim's one-week delay in filing a complaint as an additional reason for its conclusion that the "misconduct should not reasonably be regarded as of the seriousness proscribed by the statute." 610 P.2d at 1296. But Utah courts have since recognized that "delayed discovery and reporting are common with sexual offenses involving child victims" and such delay is thus not necessarily a

reason for discrediting an allegation of abuse. *See State v. Garcia-Mejia*, 2017 UT App 129, ¶23, 402 P.3d 82 (cleaned up).

In any event, duration of the touching, a defendant's willingness to stop the touching when requested, and delayed reporting are but a few factors among all the circumstances that can be considered when determining whether the conduct is comparable to the touching specifically proscribed in the statute. And in this case, their relevance pales in comparison to the other circumstances. The victim in this case was not one of Leota's peers, i.e., an adult woman, nor did the touching occur in a "dating" situation. Leota touched the breasts of a 15-year-old girl, who was just growing into young womanhood. And she was not just any 15-year-old, but his own stepdaughter, who called him "Daddy" and looked up to him as a father. Moreover, Leota touched Susan's breast while she was vulnerable—as they cuddled together with his arms around her—just as she had grown accustomed to him doing.

By noting these differences, the State does not suggest that Leota's conduct would be appropriate or lawful had the person been an adult woman he was dating. But the differences do make a stronger case for a finding of indecent liberties. As the Utah Supreme Court explained in *Bishop*, "[t]he reasons for considering, in addition to the defendant's acts, the characteristics

of the victim and the relationship between the victim and the defendant in determining whether 'indecent liberties' were taken with a young child are not difficult to understand." *Bishop*, 753 P.2d at 482. For one thing, "[t]he younger the victim, the more susceptible he or she is to suffering long-term physiological, emotional, social, and mental harm." And for another, "[t]he relationship between a young child victim and a defendant is particularly significant since the closer that relationship is, the more influence the defendant can exert over the victim." *Id.* The Court in *Bishop* was comparing victims 14 years of age or older (forcible sexual abuse) with younger victims (child sexual abuse), but those same principles apply when comparing minors who may be 14 years of age but are far from mature adults.

What is more, Leota admitted to the detective that what he did was wrong. R1485,1494-95. Under these circumstances, the evidence was more than sufficient for the jury to find that his conduct was "comparable to the touching that is specifically prohibited" under the forcible-sexual-abuse statute. *Jacobs*, 2006 UT App 356, ¶9.

c. Statutory changes since the date of the offense in this case are irrelevant to whether Leota's conduct violated the forcible-sexual-abuse statute in 2013.

Leota contends that changes to the definition of indecent liberties made just this year also supports his claim that his conduct did not constitute

indecent liberties "where it does not meet the statutory requirements of the newly enacted statute." Aplt.Br. 25.

Section 76-5-416 is a newly enacted statute, effective May 8, 2018, that defines indecent liberties. *See* Utah Code Ann. § 76-5-416 (Westlaw, 2018). That statute appears to restrict the meaning of indecent liberties, to include only acts of touching of the defendant's private areas against another and acts of simulating or pretending to engage in sexual activity. *See id.* Leota cites *Murray City v. Hall*, 663 P.2d 1314, 1318 (Utah 1983), in support of his claim that it is proper to consider this newly enacted statute when determining the statutory meaning of indecent liberties in 2013. Aplt.Br. 25. He contends that because his over-the-clothing touching of his stepdaughter's breast would not fit the definition of indecent liberties today, it didn't in 2013. Aplt.Br. 25-26. This claim lacks merit.

Hall had nothing to do with the retroactive effect of statutory amendments. The question in *Hall* was whether statutory changes to the DUI laws rendered the DUI statute "unconstitutional as a denial of equal protection of the laws because they permit arbitrary, capricious and irrational distinctions between defendants." 663 P.2d at 1317. In making his constitutional challenge, Hall argued for an interpretation of the amendments that would create a constitutional infirmity in light of previously enacted

laws. *See id.* In rejecting Hall's argument, the Court relied on a well-established rule of statutory construction—upon which Leota mistakenly relies here:

> In terms of legislative intent, it is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that 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.

Id. at 1318 (citation omitted). As the ensuing paragraph in *Hall* explains, this construct stands for the simple proposition that "[p]rior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision in all of them." *Id.* (citation omitted). That is not the issue here.

Whereas before this year the definition of "indecent liberties" was not addressed by the statute, but left to the courts, the legislature has now stepped into the void with an "express … amendment" that gives a statutory definition of indecent liberties. A cursory reading of the new statute suggests that the legislature has changed the definition of indecent liberties, as is its prerogative. But this Court need not address that question.

The Court can assume, for the sake of argument, that Leota's conduct does not fit the new, statutory definition of indecent liberties. But that new statute has no effect on whether Leota's conduct constituted an indecent liberty in 2013. The law is well settled that in cases involving an amendment to substantive law, as here, "the parties' primary rights and duties are dictated *by the law in effect at the time of their underlying primary conduct* (e.g., the conduct giving rise to a criminal charge …)." *State v. Clark*, 2011 UT 23, ¶14, 251 P.3d 829 (emphasis added). Thus, where Leota was charged with forcible sexual abuse for conduct occurring in 2013, courts "apply the [forcible-sexual-abuse] law as it exists when the alleged [forcible sexual abuse] occurs," i.e., in 2013. *See id*. At that time, indecent liberties was not statutorily defined, but was defined by caselaw. It is that caselaw that controls, not the new statutory definition.

B. The trial court could not, and this Court cannot, reweigh the victim's credibility under the "inherent improbability" exception because it was corroborated by Leota's own statements to police.

Leota also argues that the district court erred in denying his motion for a directed verdict because his stepdaughter's testimony was inherently unreliable and should have been disregarded. Aplt.Br. 27-33. This claim lacks merit.

The Utah Supreme Court has said that the evidence supporting the State's case must be "believable." *Montoya*, 2004 UT 5, ¶29 (cleaned up). But that is not an invitation for either the trial court or this Court to step into the jury's shoes—it is normally for the jury alone to judge " 'the credibility of the witnesses and the weight to be given particular evidence.' " *Prater*, 2017 UT 13, ¶31 (quoting *Workman*, 852 P.2d at 984).

Only in "unusual circumstances" may a reviewing court weigh the credibility of a witness when examining a claim that the evidence is insufficient, *id.* at ¶32—"when the witness's testimony is inherently improbable, the [trial] court *may choose* to disregard it," *State v. Robbins*, 2009 UT 23, ¶16, 210 P.3d 288 (emphasis added).[6] Even then, the Utah Supreme Court has made clear that the "inherent improbability" exception does not apply at all if the State introduces "other circumstantial or direct evidence of the defendant's guilt." *Id.* at ¶19. Thus, "[t]he existence of any additional evidence supporting the verdict *prevents the judge* from reconsidering the

[6] *Robbins* did not hold that trial courts are required to grant a motion for a directed verdict or to arrest a judgment when the evidence includes inherently improbable testimony. It held that trial courts have "*discretion* to disregard it when considering whether sufficient evidence supported [the] conviction." *Robbins*, 2009 UT 32, ¶13 (emphasis added); *accord Prater*, 2017 UT 13, ¶34.

witness's credibility" under the inherent improbability exception. *Id.* (emphasis added).

Leota contends that Susan's testimony was inherently improbable because (1) no DNA or other physical evidence supported her claims of rape, object rape, and forcible sodomy on October 15, 2015; (2) her claim that Leota had a skin bump on his penis was shown to be patently false by the photos of his penis introduced at trial; (3) she was motivated by animus towards Leota for disciplining her; (4) the text messages exchanged between Leota and Susan on the date of the alleged October 15, 2015 sexual assault did not corroborate her claim; and (5) she had a reputation for dishonesty and exaggerating the truth. Aplt.Br. 29-33. Leota's argument is unavailing.

As an initial matter, all but the last basis given by Leota for a finding of inherent improbability (Susan's reputation for dishonesty) went to Leota's alleged sexual assaults after Susan returned home in 2014 when she was 16 and 17 years old—rape, object rape, and forcible sodomy. But the jury acquitted Leota of those charges, as was its prerogative—it was "entitled to accept the evidence it believed and reject the evidence it did not." *See State v. Johnson*, 2015 UT App 312, ¶17, 365 P.3d 730. Thus, Leota is left only with the lack-of-trustworthiness evidence in support of his inherent improbability

claim. That is not a basis for finding testimony inherently improbable, but a question that is within the exclusive province of the jury.

In any event, Leota's inherent improbability claim is a non-starter. *Robbins* held that a court may "reevaluate the jury's credibility determinations *only in those instances* where (1) there are material inconsistencies in the testimony *and* (2) *there is no other circumstantial or direct evidence of the defendant's guilt.*" *Robbins*, 2009 UT 23, ¶19 (emphasis added). Only when both conditions are met is the trial court allowed to reevaluate a witness's credibility. *Robbins*, 2009 UT 23, ¶19; *Prater*, 2017 UT 13, ¶33.[7]

Leota's inherent-improbability exception fails at the outset because there was other evidence of his guilt—his own admission to Detective Thompson that he placed his hand on Susan's breast while they were snuggling, asked if she was okay with him doing so, and removed his hand only after she eventually said that it was not okay. R1481-84,1492.

[7] The Supreme Court has since suggested that because a witness's inconsistencies can usually be explained—*e.g.*, "a child's age and inability to accurately identify when an event took place," fear of retaliation by associates, etc.—inconsistencies alone do not render the testimony inherently improbable unless the testimony also includes "patently false statements." *See State v. Prater*, 2017 UT 13, ¶77, 392 P.3d 398; *accord State v. Klenz*, 2018 UT App 201, ¶¶78-79, ___ Utah Adv. Rep. ___ (concluding that testimony not inherently improbable because inconsistencies could reasonably be explained, testimony did not include patently false statements, and other evidence corroborated the testimony).

Accordingly, the district court did not err in refusing to reweigh Susan's credibility and disregard her testimony.

It is also important to note that *Robbins* did not hold that trial courts are required to grant a motion for a directed verdict or to arrest a judgment when the evidence includes inherently improbable testimony. *Robbins* held that trial courts have "*discretion* to disregard it when considering whether sufficient evidence supported [the] conviction." *Robbins*, 2009 UT 32, ¶13 (emphasis added); *accord Prater*, 2017 UT 13, ¶34. The Supreme Court explained that it "normally afford[s] weight to the trial court's denial of a motion to arrest judgment." *Robbins*, 2009 UT 32, ¶24. But the Court declined to do so in *Robbins* because the trial court was "constrained by an unduly narrow construction of the inherent improbability doctrine" and "was clearly troubled by the jury verdict." *Id.* As a result, the trial court's denial of the motion to arrest judgment did "not lend support to upholding the conviction." *Id.* That was not the case here.

Nothing in the record suggests that the district court judge in this case misunderstood the inherent-improbability doctrine. *See* R1496-98. In denying the directed-verdict motion at the close of the State's case, the judge simply concluded that "a jury could accept the testimony." R1498. And he expressed his belief—no doubt based on his own observations at trial—that "a

reasonable jury could find beyond a reasonable doubt that the things [Susan] described happened." *Id.* In short, the judge viewed the issue of Susan's testimony as "the prototypical, very classic question for a jury." *Id.* And the judge did not see it otherwise at the close of all of the evidence. R1566. Accordingly, even had there been material inconsistencies and no corroborating evidence, the judge's denial of Leota's motion for a directed verdict was entitled to considerable weight. *See Robbins*, 2009 UT 32, ¶24. Susan's testimony of indecent liberties in late 2013 did not run "so counter to human experience that no reasonable person could believe it." *See Prater*, 2017 UT 13, ¶¶33,39 (cleaned up).[8] There is thus no basis for reversing the district court's denial of the motion in any event.

CONCLUSION

For the foregoing reasons, this Court should affirm Leota's conviction.

[8] This quotation in *Prater* is found in the parenthetical of a "*see also*" citation to *Campbell v. State*, 732 N.E.2d 197, 207 (Ind. App. 2000). *See Prater*, 2017 UT 13, ¶33. But the Utah Supreme Court in *Prater* implicitly adopted that standard when it later held that the challenged testimony of the witnesses did "not run so counter to human experience that it renders their testimony inherently improbable." *Id.* at ¶39.

Respectfully submitted on October 26, 2018.

SEAN D. REYES
Utah Attorney General

/s/ *Jeffrey S. Gray*
JEFFREY S. GRAY
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 7,741 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:

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/s/ *Jeffrey S. Gray*
JEFFREY S. GRAY
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 26, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☑ mail ☐ email ☐ hand-delivery at:

Teresa L. Welch
Christine Seaman
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111
appeals@sllda.com

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