No. 20171012-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

AFIMUASO S. LEOTA,
Defendant/Appellant.

Appellant is not incarcerated

REPLY 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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REPLY BRIEF OF APPELLANT

INTRODUCTION

In this case, Afimuaso Leota asks this Court to reverse and remand his Forcible Sexual Abuse conviction because the evidence was insufficient for two reasons: (1) the evidence viewed in the light most favorable to the verdict did not prove that Leota's over-the-clothes touch constituted indecent liberties, and (2) M.B.'s testimony was too inherently improbable to support the verdict.

This reply brief responds as follows to points made in the State's response brief. First, Utah law indicates that Leota's touch did not constitute indecent liberties. *See infra* Point I.A. Second, this Court can look to the 2018 statutory definition of "indecent liberties" that was enacted subsequent to the date of the alleged offense in this case in determining that Leota's conduct did not constitute indecent liberties. *See infra* Point I.B. Lastly, Leota does not concede any matters not addressed in this reply brief but believes that those matters are adequately

addressed in his opening brief. *See* Utah R. App. P. 24(b) (Reply briefs shall be limited to answering any new matter set forth in the opposing brief.).

ARGUMENT

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

Leota's reply brief makes two points in responding to the State's brief. First, Utah law indicates that Leota's touch did not constitute indecent liberties. Second, this Court can look to the 2018 statutory definition of "indecent liberties' that was enacted subsequent to the date of the alleged offense in this case in determining that Leota's conduct did not constitute indecent liberties.

A. Utah law indicates that Leota's touch did not constitute indecent liberties.

Lane's opening brief argues that under Utah law, both statute and case law, Leota's momentary over-the-clothes touch of M.B.'s breast did not constitute indecent liberties; moreover, Leota preserved his insufficiency of the evidence objection. Utah Code §76-5-404(1)(2010); *see also* Br. Appellant 18-26,33-34; *Patterson v. Patterson*, 2011 UT 68, ¶12, 266 P.3d 828 (abrogated on other grounds). The State agrees that Leota preserved his insufficiency of the evidence claim. Br. Appellee 12, n.3. But the State argues that Leota's touch constituted indecent liberties because it was of the same gravity of magnitude as a skin-to-skin touch. *Id.* at 14-29. Specifically, the State argues that (1) applying the "*Carvajal* factors," Leota's over-the-clothes touch constituted indecent liberties, (2) evidence that Leota did not cause M.B. pain, fear, or harm is irrelevant to

whether he took indecent liberties with M.B., and (3) the reasoning in *In re L.G.W.* and *In re J.L.S.* does not apply to this case because of the changes to Utah's forcible-sexual-abuse statute. *Id.* at 11-26.[1]

The State is mistaken. First, the State does not apply pertinent Utah case law in assessing the applicability of the "*Carvajal* factors"—e.g. the duration and intrusiveness of the contact, whether the conduct stopped upon request, etc.—to the facts of this case in determining whether Leota's over-the-clothes touch constituted indecent liberties. *See* Br. Appellee 16-21; *Cf.* Br. of Appellant 23-25 (applying pertinent Utah case law to the evidence to show that Leota's touch did not constitute "indecent liberties" under the pertinent factors). Instead, the State argues that the facts alone indicate that Leota's touch constitutes indecent liberties because it was not accidental or momentary. *See* Br. Appellee 18-21. For example, the State argues that Leota's touch was not accidental because he admitted that his hands "went over to where her boobs were." Br. Appellee 18. But Leota's acknowledgement that he touched M.B's clothed breast does not rise to the level of an admission that he did so intentionally or purposefully. By contrast, Leota maintained that he touched M.B. accidentally. R.1482,1492. The State also argues that Leota "admitted that he 'was touching her boobs,' [] suggesting that the touching was not momentary." Br. Appellee 18; R.1483. But again, Leota's admission that he touched M.B. does not indicate that the touch

[1] The "*Carvajal* factors" referred to by the State were initially outlined by this Court in *State v. Lewis*, 2014 UT App 241, ¶12, 337 P.3d 1054; *see also* Br. Appellant 19.

was not momentary. Rather, the touch was momentary because "once [Leota] realized where his hand was [] he said, 'Oh I'm sorry, I didn't know my hand was there." R. 1368. Leota then removed his hand. R. 1368,1377-78,1484-95; *Cf. State v. Carvajal*, 2018 UT App 12, ¶¶21-22, 414 P.3d 984 (indecent liberties occurred where the defendant's hand touched the victim's breast for fifteen minutes, and after "she took it off, [] he put it back."). *Id.* ¶4.

The State also argues that Leota's touch constituted indecent liberties because (1) Leota's question, "Is it okay if Daddy does this?" was "not a rational response to an accidental touching," (2) Leota felt bad for touching M.B., (3) Leota worried about the ramifications of his touch on his marriage, (4) science indicates that breasts are associated with female sexual arousal, and (5) Leota was a father figure to M.B. *See* Br. Appellee 16,20-21. But, contrary to the State's argument, these factors alone and combined do not indicate that Leota's over-the-clothes touch was of the same magnitude of gravity as a touching of the vagina, anus, buttocks, or breasts as required by Utah Code §76-5-404. As emphasized by the Utah Supreme Court, even if a touch is offensive and cannot be "condoned [] approved or admired," it does not constitute indecent liberties unless the circumstances indicate that it meets the sufficient gravity requirement of the statute. *State in re J.L.S.,* 610 P.2d 1294, 1296 (Utah 1980); *see also* Br. Appellant 21. Importantly, the Utah Code indicates that there are other lesser and more appropriate criminal charges for offensive touches that do not rise to the level of indecent liberties. *See* Utah Code §76-9-702 (class B misdemeanor

Lewdness); *see also State in re L.G.W.*, 641 P.2d 127, 131 (Utah 1982); Br. Appellant 22.

Second, contrary to the State's argument, pertinent and controlling Utah case law indicates that evidence that Leota did not cause M.B. pain, fear, or harm is relevant to whether Leota's touch constituted indecent liberties. Specifically, the Utah Supreme Court specifically noted in *In re J.L.S.* that a juvenile's over-the-clothes touch of a motel maid's breast did not constitute indecent liberties where there was "*no touching in anger, no actual violence or injury* and [the juvenile] desisted immediately upon []request." *In re J.L.S.,* 610 P.2d at 1296 (emphasis added); Br. Appellant 21. In addition, in *Lowder*, the Utah Supreme Court held that a defendant committed indecent liberties where he caused "substantial bodily pain" and "bodily injury" to the child's buttocks and genitals. *State v. Lowder*, 889 P.2d 412, 414 (Utah 1994); Br. Appellant 20. Both *In re J.L.S.* and *Lowder* are still good law; consequently, these cases indicate that when determining whether a touch constitutes indecent liberties, the inquiry looks at whether the touch inflicted pain, fear, or harm. Importantly, the evidence in this case indicates that Leota's over-the-clothes touch did not cause M.B. pain, fear, or harm—relevant indicators that Leota's touch did not constitute indecent liberties.

Third, the reasoning and important principle found in *In re L.G.W.* and *In re J.L.S* applies to this case in assessing whether Leota's touch constituted indecent liberties despite the changes to the forcible-sexual-abuse statute over

the past few years. The State argues that when the Utah Supreme court decided *In re L.G.W* and *In re J.L. S.,* the forcible sexual abuse statute made it unlawful to touch the anus or the genitals of another, but it did not prohibit the touching of the buttocks or female breast. *See* Br. Appellee 22-23. The State notes that after those cases were decided, the statute was amended to denote that the touching of the buttocks and female breast constituted an unlawful touch. *Id*. The State therefore reasons that *In re L.G.W.* and *In re J.L.S* are not controlling or pertinent to Leota's case because while the touching of a clothed buttocks or breast was not unlawful when those cases were decided, these types of touches are deemed unlawful by the statute in effect in Leota's case. Br. Appellee 23. The State is mistaken.

In *In re J.L.S.* the Utah Supreme Court highlighted that under the applicable forcible-sexual-abuse statute, a person could be guilty of violating the statute by (1) doing conduct specifically listed and prohibited by the statute (e.g. a touch of the anus or genitals of another), *or* by (2) doing conduct that constituted indecent liberties.[2] The Court emphasized the significance of "the format of the statute[,]" stating:

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[2] The forcible sexual abuse statute in 1980 stated that "A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, the actor touches the anus or any part of the genitals of another, *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." Utah Code §76-5-404 (1980); *see also In re J.L.S.,* 610 P.2d at 1295.

> In the first part [of the statute], the legislature describes in detail the specific conduct proscribed, viz., the actor's touching the anus or genitals of another. In the second part, which is separated from the first by the disjunctive "or" the conduct condemned is set forth in generalized terms, viz., "otherwise takes indecent liberties with another." The use of the disjunctive in combination with term "otherwise" is indicative of an intent to proscribe the type of conduct of equal gravity to that interdicted in the first part, although the acts are committed in a different way or manner than that set forth in the first part.

In re J.L.S., 610 P.2d at 1295.

Thus, in *In re J.L.S.*, the Utah Supreme Court interpreted the forcible-sexual-abuse statute to forbid conduct that was specifically enumerated, as well as to forbid conduct not specifically enumerated if it was of equal gravity to the conduct proscribed. The Court noted that "the legislature rather than attempting to set forth the various types of sexual aberrations that might constitute a type of serious assault equivalent to that specifically defined utilized the phrase 'otherwise takes indecent liberties with another.'" *Id.* at 1296. The Court also highlighted that the legislature did not intend to "include simple offense touching as a felony offense." *Id.* The Court concluded that a juvenile's momentary over-the-clothes grab of an adolescent girl's breast did not constitute indecent liberties because the touch lacked "sufficient gravity to be equated with the specific descriptions set forth in the statute." *Id.* Specifically, the touch was not made in anger, there was no violence or injury with the touch, the touch was immediately stopped upon request, and the complainant did not report the touch until a week after it occurred. *Id.*

Importantly, *In re J.L.S.* is still good law and applicable to Leota's case because it stands for the principle that in determining whether an indecent liberties has occurred, the inquiry is whether the factors surrounding the touch indicate that the touch was of a sufficient gravity to the types of conduct enumerated and prohibited by the forcible-sexual-abuse statute. *Id.* Contrary to the State's argument, the principle described in *In re J.L.S.*—that indecent liberties constitutes conduct that is of the same magnitude of gravity as conduct specifically enumerated in the statute—was not replaced or overturned by any subsequent Utah case law or amendments to the forcible-sexual-abuse statute. *See In re L.G.W.,* 641 P.2d at 129 (holding that "under [the] *principle* [described in *In re J.L.S.*]. . . the touching involved in this case did not constitute" indecent liberties where it was not of the same magnitude of gravity as required by the statute) (emphasis added); *State v. Balfour*, 2008 UT App 410, ¶15, 198 P.3d 461 (citing *In re J.L.S* for the principle that "[a]pplying the doctrine of *ejusdem generis*, the Utah Supreme Court interpreted [indecent liberties] to mean activities of the 'same magnitude of gravity as that specifically described in the statute.'"); *State v. Lewis*, 2014 UT App 241, ¶11 (citing to and referring to the principle in *In re J.L.S.*); *State v. Carrell*, 2018 UT App 21, ¶24, 414 P.3d 1030 (citing to and quoting *In re J.L.S.* for the principle that "[o]ur supreme court. . . has declared that the term [indecent liberties] is not unconstitutionally vague, as long as it is 'considered as referring to conduct of the same magnitude of gravity as that specifically described in the statute.'"). Simply put, contrary the State's

argument, *In re J.L.S.* and *In re L.G.W.* are both good law and their application to this case indicates that Leota's momentary over-the-clothes touch did not constitute indecent liberties because his touch was not of the same magnitude of gravity as the types of conduct enumerated and prohibited by the applicable forcible-sexual-abuse statute. *See* Utah Code §76-5-404(1)(2010); Br. Appellant 21-26.

In sum, pertinent and controlling Utah law, both statute and case law, indicates that Leota's touch did not constitute indecent liberties. *See* Br. Appellant 21-26.

B. This Court may look to the 2018 statutory definition of "indecent liberties" that was enacted subsequent to the date of the alleged offense in this case in determining that Leota's conduct did not constitute indecent liberties.

Leota's opening brief argues that the 2018 statutory definition of "indecent liberties"—enacted by the Utah State legislature after the date of incident in this case—supports Leota's argument that Leota's conduct did not constitute indecent liberties because Leota's conduct does not meet any of the four enumerated definitions. Utah Code §76-5-416 (2018); s*ee also* Br. Appellant 25-26. The State responds that "[a] cursory reading of the new statute suggests that the legislature has changed the definition of indecent liberties, as its prerogative… [and this] 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 determining whether Leota's conduct in 2013 constituted indecent liberties. Br. Appellee 28-29. The State is mistaken.

First, rules of statutory interpretation indicate that the Utah legislature did not change the conduct that constitutes "indecent liberties" under the forcible-sexual-abuse statute; rather, the legislature merely clarified its intentions regarding the definition, or types of conduct, that constitutes "indecent liberties." Utah Code §76-5-416 (2018). According to the Utah Supreme Court, "[w]hen faced with a question of statutory interpretation, [the] primary goal is to evince the true intent and purpose of the Legislature." *State v. Davis*, 2011 UT 57, ¶21, 266 P.3d 765. Moreover, "[t]o discern legislative intent, [Utah courts] first look to the plain language of the statute… [and] read the language of the statute as a whole and also in its relation to other statutes." *Id.* Utah courts also 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); Br. Appellant 25. A statutory amendment functions as a clarification, and not a change, when it describes how the law should have been understood prior to the amendment. *See Gressman v. State*, 2013 UT 63, ¶17, 323 P.3d 998; *Salt Lake Cty. v. Holliday Water Co.,* 2010 UT 45, ¶43, 234 P.3d 1105.

Importantly, in enacting the 2018 definition of "indecent liberties," the Utah legislature did not remove "indecent liberties" as conduct prohibited by Utah's forcible-sexual-abuse statute; rather, the statutory definition of indecent liberties was an added statute that describes specific types of conduct that constitutes indecent liberties. Utah Code §76-5-416 (2018); Utah Code §76-5-404. Stated differently, the 2018 statutory definition further clarified the Legislature's intent regarding the types of conduct that is prohibited by the forcible-sexual-abuse statute, but it did not change, alter, replace, or modify the forcible-sexual-abuse statute. *See Gressman*, 2013 UT 63, ¶17; *Holliday Water Co.,* 2010 UT 45, ¶43. Had the Utah legislature intended to change or replace the conduct constituting "indecent liberties," it would have explicitly indicated that it was doing so. *See Davis*, 2011 UT 57, ¶29; *Hall*, 663 P.2d at 1318.

Second, recent legislative history indicates that the Utah legislature was not intending to change but merely clarify the requirements of "indecent liberties." *See Davis*, 2011 UT 57, ¶27 (stating that "the legislative history that accompanies the [statutory] amendments contradicts the [prosecution's] position that the Legislature 'clearly intended' for the [statutory amendments] to overturn [Utah case law]"). At a House Judiciary Committee Meeting, Representative Michael McKell indicated that the statutory definition of indecent liberties was needed, in part, to prevent an overbroad interpretation by jurors of the conduct that constitutes indecent liberties, and that the statutory definition complied with current Utah case law. *See* House Judiciary Committee Meeting on H.B. 77

(January 31, 2018) (statement of Rep. McKell).[3] In addition, during the floor debates for H.B. 77, pertaining to Utah Code §76-5-416 (2018), Rep. McKell indicated that the purpose of the indecent liberties definition statute was to ensure the constitutionality of the forcible-sexual-abuse statute by enumerating conduct that constitutes indecent liberties, and to prevent jurors from having to guess at what conduct constitutes indecent liberties. *See* H.B. 77, Day 22 (February 12, 2018) (statement of Rep. McKell).[4] Rep. McKell specifically indicated that Utah legislators looked to common law to provide the statutory definition. *See id*. Importantly, Rep. McKell did not indicate that the statutory definition of indecent liberties was intended to change the conduct that constituted indecent liberties as indicated in Utah case law. *See id*; *Davis*, 2011 UT 57, ¶27.

In addition, Senator Todd Weiler subsequently described the need to statutorily define the term indecent liberties to prevent a "hopelessly ambiguous" reading of the forcible-sexual-abuse statute, and that prior Utah legislators were too shy and embarrassed to list body parts or provide enumerated examples of indecent liberties in the statute. *See* H.B. 77, Day 43 (March 6, 2018) (statement of Sen. Weiler).[5] Senator Weiler also noted that Utah legislators in 2018 opted to provide a definition of indecent liberties with enumerated examples in lieu of omitting the term indecent liberties from the forcible-sexual-abuse statute

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[3] https://le.utah.gov/av/committeeArchive.jsp?timelineID=106092.
[4] https://le.utah.gov/av/floorArchive.jsp?markerID=102311.
[5] https://le.utah.gov/av/floorArchive.jsp?markerID=104054.

altogether because prosecutors encouraged them to do so. *See* H.B. 77, Day 44 (March 7, 2018) (statement of Sen. Weiler).[6]

In sum, contrary to the State's argument, this Court can look to the 2018 statutory definition of "indecent liberties" that was enacted subsequent to the date of the alleged offense in this case in determining that Leota's conduct did not constitute indecent liberties because the 2018 statute clarified, not changed, the conduct that constituted indecent liberties. *See* Utah Code §76-5-416 (2018); *Davis*, 2011 UT 57, ¶27; *Gressman*, 2013 UT 63, ¶17; *Holliday Water Co.,* 2010 UT 45, ¶43. Importantly, an application of the 2018 statute indicates that Leota's over-the-clothes touch did not constitute indecent liberties where it did not meet any of the four enumerated definitions of "takes indecent liberties" in the 2018 statute. *See* Utah Code §76-5-416; Br. Appellant 26. Thus, Leota's 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* Br. Appellant 25-26.

CONCLUSION

For the reasons given above and in the opening brief, Leota asks this Court to reverse and remand the Forcible Sexual Abuse conviction with an order of dismissal because the evidence was insufficient.

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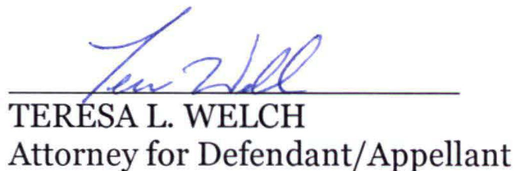
[6] https://le.utah.gov/av/floorArchive.jsp?markerID=104511.

SUBMITTED this 12th day of December, 2018.



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CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,286 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 84111. I have also caused a searchable pdf of the reply brief to be emailed at courtofappeals@utcourts.gov to the Utah Court of Appeals and to the Attorney General's Office at criminalappeals@agutah.gov pursuant to Utah Supreme Court Standing Order No. 11, this 12th day of December, 2018.

TERESA L. WELCH

DELIVERED this ____day of December, 2018.

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