PUBLIC

20180076-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee/Plaintiff,

v.
DALE HARLAND HEATH,
Appellant/Defendant.

OPENING BRIEF OF APPELLANT

APPEAL FROM CONVICTION AND JUDGMENT FOR
THREE COUNTS OF SEXUAL BATTERY, CLASS A MISDEMEANORS;
ONE COUNT OF FORCIBLE SEXUAL ABUSE, A SECOND DEGREE FELONY;
AND ONE COUNT OF OBJECT RAPE, A FIRST DEGREE FELONY;
THE HONORABLE DEREK PULLAN PRESIDING IN THE
FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH
DISTRICT COURT CASE NO.151402675

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APPELLANT IS INCARCERATED
ORAL ARGUMENT IS REQUESTED

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INTRODUCTION[1]

Dr. Dale Heath ("Heath") is a Doctor of Chiropractic Medicine in Orthopedics who has lived in Orem, Utah, for twenty years. Heath and his wife moved to Utah to be closer to family and to raise their children in an environment conducive to their values. Heath has always been active in his community and in his church.

Before moving to Orem, Heath lived in the Los Angeles area. He originally moved to L.A. to attend chiropractic school in 1983. Before then, Heath went to Dixie College and obtained an associate's degree in the sciences and completed a service mission in New Zealand. After graduating from a shortened and intensive three-year program, Heath practiced chiropractics in California beginning in 1987. Heath worked with other chiropractors in California and practiced for ten years. (TR2568-72). Showing an interest in chiropractic orthopedics, Heath attended a three year post graduate degree program in the field. The advanced degree taught Heath about the muscular system and allowed Heath to better identify and diagnose to provide more comprehensive care. His training also consisted of deep tissue work. Heath finished his orthopedic training in 1991 and he passed requisite exams in 1992. (TR2572-85).

Heath used the same treatment methods for over thirty-one years. (TR2585). He treated almost 4,400 patients – 3,400 in Utah and 1,000 in California. (TR2586). He performed over 80,000 treatments over his career; 50-60,000 dealing with lower back

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[1] The record on appeal will be cited as "R" followed by page number of the record on appeal. All transcripts will be cited as "TR" followed by the page number of the record on appeal.

pain and 20-30,000 dealing with inner thigh and adductor muscle treatment. (TR2799). By 2012, other than the complaints made relevant to this prosecution, no other patient complained about Heath or his treatments. Certainly, no allegations of the nature posed here were ever levied. (TR2799-2800;R305,¶5).

As he has done all along, Heath adamantly denies the accusations made by B.C. and those of the other two complainants which underlie this prosecution. He currently sits incarcerated at the Utah State Prison, sentenced to a five-year-to-life term of imprisonment. As demonstrated herein, however, Heath's convictions were not based upon sufficient evidence of any crime. Rather, unproven allegations combined with speculation and conjecture have overridden the experiences of 4,400 patients over thirty years, plus the countless others who admire and respect Heath. (R657-1049).

This Court must remedy these faulty convictions.

STATEMENT OF THE ISSUES

Issue 1: This Court should vacate each of Heath's five convictions based upon the State's failure to present sufficient evidence beyond a reasonable doubt.

Preservation/Standard of Review:

Trial counsel moved to dismiss the Count 5 Object Rape charge at the close of the State's case. (TR2462-65;TR2962). Insufficiency of the evidence claims regarding Counts 4 and 5 were also raised in Heath's Motion to Arrest Judgment and denied by the

district court. (R1271-86;TR2995-3003).[2] Trial counsel did not pose a sufficiency of the evidence objection to Counts 1-3 as required to preserve the claim. *See State v. Prater,* 2017 UT 13, ¶28, 392 P.3d 398; *State v. Holgate,* 2000 UT 74, ¶16, 10 P.3d 346. To the extent the issues now raised were not preserved, this Court should correct the errors under the plain error, manifest injustice, or ineffective assistance of counsel ("IAC") doctrines.

When considering an insufficiency of the evidence claim, this Court reviews the evidence and all reasonable inferences in the light most favorable to the jury's verdict. *See State v. Patterson*, 2017 UT App 194, ¶2, 407 P.3d 1002, *cert. denied*, 417 P.3d 580 (Utah 2018) (quoting authority). This Court first reviews the elements of the relevant statute and "consider[s] the evidence presented to the jury to determine whether evidence of every element of the crime was adduced at trial." *Id*. IAC claims raised for the first time on appeal are reviewed as a matter of law. *E.g., State v. King*, 2010 UT App 396, ¶20, 248 P.3d 984; *State v. Clark,* 2004 UT 25, ¶6, 89 P.3d 162.

Issue 2: Alternatively, this Court should grant a new trial due to incomplete and erroneous jury instructions where:

A. The jury instructions failed to instruct the jury on essential terms and phrases; and

B. The jury instructions permitted the jury to convict upon charges for which Heath was not given fair notice, was not bound-over, and against which Heath had no ability to defend.

Preservation/Standards of Review:

Trial counsel did not object, agreed to, or submitted the faulty jury instructions at

[2] The court's oral denial of the Motion to Arrest Judgment (TR2995-3003), is attached in Addendum A. All relevant statutes are attached in Addendum E.

issue here.[3] To the extent the issues now raised were not preserved, this Court should correct the errors under the plain error, manifest injustice, or IAC doctrines.

Whether jury instructions correctly state the law is reviewed for correctness. *E.g., State v. Liti*, 2015 UT App 186, ¶8, 355 P.3d 1078; *State v. Loeffel*, 2013 UT App 85, ¶7, 300 P.3d 336. IAC claims raised for the first time on appeal are reviewed as a matter of law. *See Clark,* 2004 UT 25, ¶6.

Issue 3. Alternatively, this Court should grant a new trial where the district court abused its discretion and erroneously admitted a large amount of irrelevant "bad acts evidence and admissions" which pervaded the trial, drew the focus of the jury from the true issues of the case, and resulted in a fundamentally unfair trial.

Preservation/Standards of Review:

Pretrial, cross-motions in limine and a number of other motions were filed regarding the admissibility of a variety of "bad acts evidence and admissions." (R195-98, 220-82,304-77,383-92,396-419). The court issued a "Ruling and Order" regarding the Rule 404(b) motions in limine and allowed the State to admit a substantial amount bad acts evidence. (R396-419).[4] Both parties sought to exclude parts of the opposing experts' testimonies regarding standard of care opinion. (R285-94,474-90,448-53). The court granted in part and denied in part each of the expert's opinions respectively. (*E.g*. R528-36,546-48,595-97). Trial counsel also moved to exclude statements Heath made to

[3] The Closing Jury Instructions (R600-629), are attached in Addendum B.

[4] The Ruling and Order on Cross Motions in Limine Related to Rule 404(b) Evidence (R396-419), is attached in Addendum C.

DOPL under a variety of reasons including the *Garrity* doctrine. (TR1664). The court considered the motion at trial and ultimately denied the defense motion. (*E.g*., TR1688-95,1701-03,2005-26).

District courts are generally afforded a great deal of discretion in determining whether to admit or exclude evidence. *See State v. Martin*, 2017 UT 63, ¶18, __P.3d__. Thus, as long as the district court did not make an error of law, this Court will not reverse unless the decision "is beyond the limits of reasonability."*Id*.

Issue 4: Alternatively, a new trial is warranted where the cumulative effect of numerous errors undermines confidence that a fair trial was had.

Standard of Review:

Under the Cumulative Error Doctrine, this Court will reverse when the cumulative effect of several errors undermines confidence a fair trial was had. *See State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993).

STATEMENT OF THE CASE

Pre-Charging/ 404(b) Background

In June 2011, Heath treated Complainant J.T. for injuries in her lower abdominal area which lingered after a pregnancy. J.T. filed a complaint with the Orem Police Department. During her initial interview, J.T. claimed during one treatment while Heath was massaging her adductor muscle, his knuckles rubbed across her vagina over her clothing. After being asked to clarify, J.T. responded Heath's knuckles were in her crotch. During her initial interview, J.T. stated she did not ask Heath to stop and did not know if

Heath was getting pleasure from the act. On the same day of her interview, J.T. filed an online complaint with the Utah State Department of Commerce, stating Heath had made her uncomfortable by putting his fist in her crotch while performing a cross fiber technique massage. When interviewed on later occasions, J.T. again claimed Heath brushed his knuckles over the sensitive parts of her vagina during her adductor muscle massage, but again admitted she did not say anything to Heath and that she did not see or hear anything which would indicate that Heath was sexually aroused or gratified. At no time has J.T. ever claimed any form of penetration or any touching under clothing. After investigating the complaint, the investigating agents felt they lacked enough evidence to warrant either a referral for criminal screening or to prove sexual misconduct. (R304-06).

In January or February 2013, Complainant B.C. made allegations against Heath. B.C. was treated nine times by Heath from October through December 2012. In her initial interview with law enforcement, B.C. claimed on her fifth visit, Heath massaged her clitoris. In later statements and interviews, B.C.'s allegations of improper touching changed. Also, even though B.C. claimed she was inappropriately touched on several visits, B.C. repeatedly returned for treatments and failed to report any allegations to law enforcement until after she discussed the incidents with her boyfriend, her mother, her father, and her sister. In January 2013, the investigating detective referred B.C.'s allegations to the Utah County Attorney to be screened for criminal prosecution. The Utah County Attorney declined prosecution. (R307-08).

In February 2015, Complainant E.B. filed a complaint with the Orem Police Department. E.B. was treated by Heath in February of 2015 and saw Heath three times for treatment. In her initial interview, E.B. reported that during the first two visits, Heath did not inappropriately touch her. During the last visit, E.B. claimed Heath deliberately touched her vagina multiple times. In later statements and interviews, E.B.'s allegations of improper touching changed. In all of her interviews and statements, however, E.B. admits she said nothing to Heath during the treatment, admits a chaperone was present during all visits, and admits she only decided to report after reading the DOPL complaints associated with J.T. and B.C. E.B. never claimed Heath penetrated her vagina or ever touched her underneath her clothing. E.B. never reported her allegations to DOPL, but rather, law enforcement made the complaint. (R308-309).

Criminal Charging and Proceedings

On September 28, 2015, Heath was charged by Information with five counts of Sexual Battery, Class A Misdemeanors; one count of Forcible Sex Abuse, a Second Degree Felony; one count of Object Rape, a First Degree Felony, and one count of Written False Statement, a Class B Misdemeanor. (R1-5). The charges stem from the allegations made by B.C. and E.B. (R3-4).

Heath was represented during trial proceedings by attorneys Carl Anderson, Richard Matheson and associated attorneys ("trial counsel"). (R14). A summons was issued and Heath was not incarcerated pending trial. (R8-13,20-23). A Preliminary

Hearing was held January 8, 2016, and on January 12, 2016, the district court bound Heath over on all charges. (R24-27,30-31,TR46-132,TR1421-33).

Thereafter, the charges were hotly contested. Several motions were filed and litigated, including motions regarding the admissibility of expert witnesses (R133-88, 285-94,448-53,456-68,474-90); a motion to sever (R191-94,295-97); and motions in limine regarding "prior acts" evidence and statements. (*E.g.*, R195-98,220-82,304-77, 383-92,454-55). The court's rulings as to some of these motions underlie the issues raised herein. Relevant here, the parties stipulated to severance and the court ordered three trials, the first involving the allegations made by B.C. An Amended Information was thereafter filed which reflected the charges involving B.C. and alleged three counts of Sexual Battery (Count 1-3); one count of Forcible Sex Abuse (Count 4); and one count of Object Rape (Count 5). (R549-52).

Jury selection began September 15, 2017, with opening statements and evidence beginning the next day. On September 21, 2017, the jury found Heath guilty of all charges. (R632-33).

Prior to sentencing, Heath filed a Motion to Arrest Judgment. (R1050-51,1271-86). On January 9, 2018, the court heard argument on the Motion to Arrest, denied it, and proceeded with sentencing. (TR2976-3035). Heath was sentenced to an indeterminate term not to exceed one year in the Utah State Prison for each of the three counts of Sexual Battery, an indeterminate term of one to fifteen years for the count of Forcible Sex Abuse,

and an indeterminate term of five years to life for the count of Object Rape, with all counts to run concurrent with each other. (TR3018-21).

A final judgment entered January 11, 2018,[5] and the notice of appeal was timely filed on January 24, 2018. (R1385-89,1392-93). Heath is currently incarcerated in the Utah State Prison in Gunnison, Utah.

SUMMARY OF THE ARGUMENT

Heath stands convicted of five crimes involving B.C., all of which were not supported by sufficient evidence and should be vacated. Specifically, Counts Four and Five charge two felony crimes on the same date and during the same treatment, alleging separate touchings that purportedly occurred within seconds of one another. As to the Count Five charge of Object Rape, the State did not elicit evidence to prove the required "penetration" of the "genital or anal opening." Nor did the State present any evidence that if the touch did occur, it was done with the specific intent to arouse or gratify the sexual desire of any person. As to the Count Four charge of Forcible Sex Abuse, the State again failed to present sufficient evidence of specific intent, and ignored the other crucial elements of lack of consent and Heath's mens rea concerning any purported lack of consent. The State's proof was also insufficient as to the counts of Sexual Battery, where again, the State failed to present sufficient evidence of mens rea, instead relying on speculation and conjecture.

[5] The Judgment and Commitment (R1385-89), is attached in Addendum D.

Short of vacating all five convictions, this Court should alternatively grant a new trial because the jury was erroneously and incompletely instructed in a number of fundamental respects. The instructions failed to instruct the jury on essential terms, including those "sexual assault" and "consent" terms and phrases necessary to their consideration of the elements of the charges. The instructions also permitted the jury to convict Heath upon charges for which he had not been given notice, had not been bound over at preliminary hearing, and frankly, charges for which the parties did not intend.

This Court should also grant a new trial based upon the district court's erroneous admission of a substantial amount of irrelevant "bad acts" evidence and other irrelevant testimony that completely overtook the trial, distracted the jury from the true issues of the case, led to additional issues with the jury instructions, and therefore resulted in a fundamentally unfair trial.

Finally, if the Court does not find these errors, individually, warrant relief, the errors in the aggregate do and this Court should grant a new trial based upon cumulative error.

ARGUMENT

I.
THIS COURT SHOULD VACATE ALL FIVE CONVICTIONS BASED ON THE STATE'S FAILURE TO PRESENT SUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENTS OF THE CRIMES BEYOND A REASONABLE DOUBT

Relevant Facts[6]

B.C. was twenty years old in 2012 when she first went to Heath to treat her back pain. (TR1171). B.C. injured her back in a series of accidents and suffered from migraines and low back pain that made standing for long periods of time painful. (TR1166-68). B.C. was referred to Heath by her mother who was "over the moon" with the treatment he had been providing to her. (TR1170-72). B.C. testified at trial concerning nine separate visits to Heath for treatment.

The First Four Visits: October 2012

B.C. had four appointments with Heath in October 2012. (TR1172-1173,1178, 1184). She believes her mother accompanied her on the first two visits and her sister may have been present as well. (TR1173-80). On the third and fourth visits, B.C. believes she went alone. (TR1180,1220).

In her first visit, B.C. remembers:

> [H]e rubbed my back, my upper back and my lower back. Then I remember him doing a – a chest massage . . . I saw him do it on my mom, and he did the same one on me. Just pushing really fast back and forth on the upper

[6] Because the Court reviews the facts in the light most favorable to the jury verdict, the following facts are taken from B.C.'s trial testimony. Where necessary for context and explanation, disputed facts and inconsistencies are noted.

> chest, and then he popped my back . . . I don't remember anything else on that visit.

(TR1175).

B.C. added:

> He may have rubbed my stomach in the first appointments as well . . . He said something about the psoas having a connection to my lower back pain . . . Well, it hurt . . . I can't remember if he was doing circular motions or just going in, but it was mostly on my left side that I remember lots of pressure . . . I believe the stomach massage was on my skin . . . I think I pulled my shirt up a little bit.

(TR1176; *also* TR1220).

B.C.'s mother was in the room for part of her treatment. (TR1226). Nothing caused B.C. concern after that first visit and she "felt completely comfortable." (TR1177).[7]

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[7] Heath testified that over the course of thirty years, he developed routine habits and procedures in treating patients. (TR2600-01). He uses an office "muscle chart" to describe treatment to patients, and used this chart during his treatment with B.C. (TR2607).

During B.C.'s first visit, B.C. was fully clothed. Heath diagnosed lower and upper back pain and educated B.C. as to his findings by identifying on the muscle chart her problem areas. (TR2609-14). Heath explained the treatment she would need for her particular injuries, explained sometimes symptoms get worse and that is common after the initial treatment, and explained which muscles he would be treating. Heath asked B.C. if she was okay with his treatments in the areas she needed. B.C. wanted to receive treatment from Heath and was excited to get started, indicating she had seen other chiropractors and never received any relief. (TR2615-19). Heath did not perform a chest massage on B.C.'s first visit and that is not something Heath typically does on the initial visit. Heath finished the first visit with an adjustment. After the adjustment, Heath and B.C. walked out to the front to schedule her next appointment. B.C. never complained after the first visit or seemed uncomfortable. (TR2622-25).

B.C. came back for a second visit. Heath followed the standard procedure for the second visit, and asked all of the questions he normally would, including questions about pain. (TR2625-30). B.C. expressed she had taken anatomy classes and wanted Heath to

B.C. described she was alone for the third and fourth visits. In these first visits alone, she remembers "him beginning to rub [her] butt under [her] underwear, which made [her] feel a little uncomfortable; but that was the only touching that felt unwelcome during those visits." (TR1180).[8] B.C. described she would be on her stomach, she was in a shirt and pants, and:

> what I remember is that after he rubbed my lower back then he went down into my underpants and rubbed really hard on – he called the gluteal muscles, and he would do that for a few minutes. It felt a little deep in my underpants. I felt really strange, especially because I didn't remember him saying, 'Okay, now I'm going to do this. Is it all right?' When I was at Massage Envy they had given me a diagram of the human body, places I could consent to massage, and I don't remember him doing that. So I was surprised that he was doing that massage without informing me or asking me before-hand . . . I remember feeling really insecure. I remember being worried . . . because I feel like my skin was out and I felt really strange, and I remember feeling his fingers on my butt, on my skin . . . [then after the gluteal massage] I would flip over and then he would rub my upper chest. That's usually the way the appointments went, and then my stomach, and would conclude with an adjustment for the first appointments.

(TR1181-82).

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identify the muscles he was working, indicating he should talk to her like a colleague and use proper anatomical terms. (TR2631). During the second visit, Heath treated the same areas as the first. B.C. remained fully clothed. Heath also worked the muscles in B.C.'s chest because it was contributing to her neck soreness. B.C. gave permission for Heath to do so. It is possible B.C.'s breasts may have moved during treatment. Heath "cupped" his hands so he would not actually touch her breasts. B.C. never expressed she was uncomfort-able, and never asked him to stop the treatment during the session which other patients have done in the past because it is painful. Heath ended with post-treatment instructions. (TR2632-35).

[8] B.C. told the police the "glute massage" started on the second visit, which would have been during a time when her mother was present. (TR1225).

Heath did not touch or massage her breasts at all during the chest massage and B.C. was comfortable with the chest massages as performed. (TR1182-83). Other than the massage of her buttocks, there was nothing else that made B.C. uncomfortable during the first four visits. (TR1184).[9]

The Fifth Visit: November 3, 2012

A fifth visit occurred November 3, 2012. By this time, B.C. was experiencing some pain relief. (TR1183-84,1227). B.C. went alone. (TR1184). B.C changed into a

[9] Heath testified that during the third treatment, B.C. complained the pressure on her skin through her clothing was hurting and giving her a friction burn, which is common due to the pressure used and the rubbing of the clothing across the skin. Heath gave B.C. the option to wear a hospital gown with the use of lotion to prevent burns. B.C. opted to use a gown. When using a gown, the patient changes in the room with the door closed as Heath waits outside. (TR2635-39). Other than the use of the gown, the third treatment was essentially the same as before. When it came to the gluteal work, B.C. mentioned that the tool he used hurt because it was on top of clothing. Heath gave her the option of using the lotion there as they did on her back, and she agreed. Heath then treated her gluteals by lifting up her waistband just enough to get his hand under and work the muscle, applying fingertip pressure on the iliac crest. Heath was not comfortable with asking B.C. to take off her pants. (TR2642-45). B.C. never complained about Heath treating this area, never asked him to stop, never asked why he was treating this area under the clothing as opposed to over the clothing, and in fact, she asked him to do so because of the friction burns. After the back and gluteal work, Heath had B.C. roll onto her back. The chest treatment was the same as the last visit, the only difference being she was in a gown. Heath did not treat this area underneath the gown. After the upper chest treatment, Heath did an adjustment then post-treatment instructions. Thereafter, Heath exited the room and B.C. changed back into her clothing. They then met at the front scheduling desk and scheduled her next appointment. At no point during the third session did B.C. complain about being uncomfortable. (TR2646-50).

During the fourth visit, Heath followed the same procedures including escorting her into the room and asking about pain and any changes. B.C. expressed she wanted Heath to work all the same areas. She again chose to wear a gown and everything was identical to the last visit. At no point during the fourth treatment did B.C. complain, she never asked him to stop, and never said she was uncomfortable. (TR2650-51).

gown. In doing so, B.C. took off her shirt, thinks she took off her bra, and kept on her yoga pants. (TR1184-85,1228).[10] B.C. testified:

> [I]t was during this treatment when I was lying on my back at the end that he started a new massage, rubbing my inner thigh with one hand and then right over my vaginal area with the other hand. I opened my eyes for a moment, and the lights were off . . . it was dark.

(TR1185-1186,1230).[11]

She explained:

> The way I remember, he started on my back. The upper back, lower back, then he did the glute massage again. Then I remember I'd always flip over, and then I think he did that chest massage next. I don't remember if he did the stomach massage at this time, but he probably did because that was the routine. Then at the end he started rubbing between my legs.

(TR1186).

For the gluteal massage, Heath massaged her buttocks skin to skin. (TR1209).

B.C. described:

> I remember briefly his finger was – I described it as my 'inner gluteal cleft' in my statement because I didn't want to put the word 'butt crack' in there, but that's where I felt his finger for a moment, as he was going from side-to-side, which made me feel really, really strange . . . I remember him putting his hands down my under-pants and then doing very, very intense, painful massage on my butt . . . I don't know how long he was on one side,

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[10] B.C. remembers changing into a gown on this visit. It is possible she put on a gown on other occasions and that she complained about friction burns from the over-the clothing work. (TR1226-1227).

[11] B.C. later explained: "Sometimes [the lights] were on, sometimes they were off. I remember him usually turning them off when we would lie on our backs because our eyes were looking right at the – the lights. He would turn them off for my mom sometimes, too." (TR1203-04; *also* TR1230).

> but for a moment I felt his finger in my butt crack, and then I think he went to the other side and massaged that side as well.

(TR1186-87; *also* TR1209-10).

After B.C. turned onto her back:

> Well, I was in a gown this time, and he was massaging my chest which, as I said before, I felt okay with, but I had my eyes closed because it hurt, and I just would close my eyes. I remember at one point I did open my eyes, and I was really scared to see that the gown had slipped up over my right breast and I saw my nipple. So I pulled it down, and I didn't know if he had seen or not, or if it had been an accident . . . I just pulled it down to cover myself again.

(TR1187; *also* TR1210-11,1229-30).

Then:

> I don't remember the abdominal massage clearly in this visit, but I remember . . . He wanted to do a new massage. So he started rubbing my inner thigh, very deep, very painfully, as – as with all the other massages, and he was doing that on my right thigh with one hand. Then I remember feeling his other hand going up and down, back and forth, right over the seam of my yoga pants, right on my vagina. [B.C. questioned] "What are you doing?" . . . He claimed that he was doing some type of psoas attachment massage. I didn't know. I just closed my eyes and just waited for it to be over at that point.

(TR1188-89; *also* TR1190,1211-12).

During the treatment, Heath acted "like nothing was wrong, like nothing was different. He didn't say anything to me. I didn't say anything." (TR1189-1190). B.C. states she had an orgasm during this painful massage. She testified she gave no outward indication that she had an orgasm and never told Heath she had done so. (TR1189; *also* TR1219). The appointments always concluded with an adjustment. After the adjustment,

"I went and paid him $40 cash and I drove home." B.C. did not talk to Heath about what had happened. (TR1191).[12]

The Sixth Visit: November 24, 2012

A sixth visit occurred November 24, 2012. B.C. explained: "I was in a lot of pain. I wanted to pretend like everything was fine. I didn't really want to believe that it had happened. I wanted to trust him. I did trust him; and his treatment was helping me. So I

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[12] Heath testified he employed the same procedures on the fifth visit. However, B.C. complained of more pain than he thought she would be feeling at this point, and therefore, Heath looked to the deeper abdominal muscles (Psoas) to give her better results. Heath usually needs to work the muscle attachment to attachment and sometimes they are difficult to get to for treatment. Heath explained to B.C. he needed to work the additional psoas muscles in the thighs. He showed her the muscles on the muscle chart, used the correct anatomical words with B.C., and B.C. gave Heath permission to work in those areas. (TR2651-55).

Heath worked the Psoas first in the abdomen and then moved to the adductor muscles. He began working the abdomen muscles through the gown. As he was doing so, B.C. mentioned the pressure and the friction were bothering her skin. Heath accommodated her by rolling the gown up to expose the abdomen. He did not expose her breasts. (TR2656-58).

After the psoas treatment, Heath worked the adductor muscles. The gown was kept rolled to her waist to expose the adductor muscles. The adductor muscles attach the inner thigh to the pubic bone. It is impossible to work their attachments without having the hands in the groin area of the patient. Because this was the first time working B.C.'s muscles in this area, Heath would have explained this to B.C. because he was working in a sensitive area, would have shown her the chart, and she gave consent. (TR2660-63,2666). Heath never performs the adductor treatment under clothes and did not do so with B.C. Heath denies intentionally touching B.C.'s vaginal area and does not believe he actually did. Heath concedes due to the area, there is a possibility of incidental touching, but if it occurred it would have been over her clothing. (TR2664-65).

After the treatment, Heath gave B.C. an adjustment. She would have then changed out of her gown in the same way as before. B.C. never said anything about being uncomfortable. She never stopped the treatment; never asked why he was working that area; never told him she was sexually stimulated; and never said anything to him after the treatment was over. (TR2666-68).

went back." (TR1192). On this visit, B.C. was accompanied by her mother and sisters, ostensibly because B.C. was nervous. She also made an audio recording of the visit. (TR1193). B.C. later admitted she went with her mother and sisters for a number of reasons. "One, we always tried to coincide our appointments because it was a long drive. So it was more convenient for us to go together. Also, I just felt nervous to go alone, so I wanted to make sure we could be together." (TR1206). B.C. did not tell her family about feeling nervous, (*Id.*), and did not ask her mother or sister to accompany her in the treatment room. (TR1233-34).

There was nothing out of the ordinary with most of the treatment and it progressed in the usual way: "upper back, lower back, butt massage. Then my chest, then my stomach, then my inner thigh and vagina." (TR1193-94). B.C. does not remember if she was wearing a gown or regular clothing. (TR1194). With regard to the thigh massage:

> [I]t was the same as the appointment before, when he started rubbing my inner right thigh, and then with the other hand right over my clitoral or vaginal area. I remember again asking him, "What are you doing?" and this time he said something about a gricilis muscle. Again, he was doing it for a few minutes and I did climax again. . . . he was rubbing one hand on my leg, one hand on my vagina, and then my sister came in, and when she came in, I remember him moving his hand away from my vagina and then doing the thigh massage with two hands, and he talked to my sister when she came in . . .

(TR1195).

B.C. did not alert her sister or tell her what had happened. B.C. did not alert Heath and let him know something had happened. Heath did not put his hand back on B.C.'s vagina after her sister came in, and proceeded to do only the leg massage and then

adjustment after that. (TR1195-96). B.C. never asked her mother or sisters to accompany her after this visit. (TR1245).[13]

The Seventh Visit: December 1, 2012

B.C. returned for a seventh visit on December 1, 2012 alone. (TR1197,1243-55). She describes things were different in this appointments because this "was the first time that he had put his hands in my underpants, not just in the back, but in the front." (TR1198; *also* TR1236-37). B.C. explained:

> [During] the stomach massage, which was routine. . . He started just going lower and lower than ever before. I remember his fingers going in a circular pattern for this visit, and I remember it being dark. I remember him standing next to me on the left, . . . I remember feeling really nervous as his fingers went down past my waist into my underpants. Then he kept going down and down and down and down.
>
> I was just frozen. I didn't say anything to him, but I remember feeling his fingers stopping right on the left side of my vagina right where my leg is, right where my leg starts, and I remember his fingers going in a circular motion, which would move my outer lip of my vagina over. I remember feeling that.

(TR1198-99; *also* TR1242).

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[13] Heath testified the sixth treatment began the same way as the other visits. Heath asked B.C. about her pain levels and how she was doing, inquired if there was anything he needed to know, and asked where she would like to be worked. B.C. did not express she was uncomfortable with the procedures of the prior visit and gave no indication she was uncomfortable at all. B.C. consented to the treatment of her sixth visit and it was identical to that employed in the fifth. The gown placement was the same. B.C. did not express she was uncomfortable; did not ask him to stop; and she never expressed in any manner she was sexually stimulated. (TR2668-71).

B.C. wrote in her statement to police:

> December 1st I returned to Dr. Heath's office again. This time without my sisters or mother. I did not make an audio recording this time. At the end of the massage again he began to rub me in between my legs over my vaginal and clitoral area with one hand, while the other hand did a psoas and gricilis massage. He then put his hand in my underwear and massaged my pubic mound and adductor muscles right next to my vagina on my bare skin.

(TR1243).

When asked if Heath massaged directly on top of her labia underneath the clothes, B.C. testified: "He was . . . on the side of my vagina, not right on top." (TR1199). When the prosecutor questioned: "Did he actually touch your labia?" B.C. responded, "He touched my labia majora . . . The outer lip." B.C. explained: "To me that means the soft skin that's the starting of the vagina, but . . . not the opening, not the clit" agreeing it is "just on the outside." (TR1200; *also* TR1201,1212-14,1238;R1289). Up to this point, Heath had not touched B.C.'s vagina skin to skin. Again, B.C. said nothing. (TR1201). With regard to skin-to-skin touching, it is possible B.C. requested the skin-to-skin treatment as she complained that the over the clothing massage was painful. (TR1237-38).[14]

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[14] Heath testified that during the seventh visit, he followed the same procedures. In talking to B.C. before treatment and asking about pain levels, Heath became concerned that B.C. was not receiving more relief than she was expressing. As a result, Heath looked further into the superficial muscles of the abdomen, specifically the rectus abdominis and the pyramidalis. (TR2671-74).

During this treatment, Heath treated the Psoas muscles the same as before. This time he also treated the rectus abdominis and the superficial abdominal muscles at the same time. The lower attachment of the rectus abdominis ends at the top of the pelvis. In performing this treatment and working these muscles attachment to attachment, Heath would have gone below B.C.'s pant line three to four inches and been in the area where the pubic hair grows. (TR2674-77). Heath explained to B.C. the reasons why this treatment was added and used the muscular system chart in his explanation. B.C. did not

The Eighth Visit: December 8, 2012

An eighth visit occurred a week later on December 8, 2012, and B.C. was alone. (TR1202,1245). The treatment proceeded in the same order as before; back, buttocks, chest. (TR1202). B.C. does not "remember if he did the inner thigh" but knows he did the stomach massage again, "this time very deep into my underpants down the front." (*Id*.).

> . . . he was still doing the circular motions, and he was having his fingers right on the outer lip of my vagina, moving it around and around and around. Then I remember clearly feeling him move his finger, just one finger over, and it touched me right on my clitoris right in the middle of my vagina on my skin, and I flinched. I flinched, and then he moved his finger away. Then after that I don't remember what happened.

(*Id*.; *also* R1289-90).

B.C. believed Heath's pinky finger went beyond the labia majora to touch her clitoris. (TR1215-16,1239-40). After this, B.C. set up another appointment. (TR1203).[15]

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tell Heath she did not want him to work in that area. After the rectus abdominis treatment, Heath worked the adductors the same as before. At no time did Heath ask B.C. to take her pants off. At no time during this treatment did B.C. tell Heath to stop. At no point did B.C. indicate that she had been stimulated. Thereafter, Heath gave her an adjustment and she changed out of her gown as usual. B.C. never made comments or complaints during the final discussion at the scheduling desk, and she came back for another appointment. (TR2677-80).

[15] Heath testified the same procedures were followed during the eighth visit. B.C. again indicated things were progressing but not as much as they would like. As usual, Heath inquired if B.C. was okay and whether there was anything she wanted different. Heath asked permission to work in the same areas worked before. There was nothing that led Heath to believe B.C. was not comfortable with him working in the same areas. Heath proceeded with the treatment the same as before. As before, Heath came into contact with B.C.'s pubic hair. After the treatment, the same procedures were followed in having B.C. change out of the gown. B.C. gave no indication she was uncomfortable for

The Ninth Visit: December 15, 2012

A ninth and final visit occurred a week later on December 15, 2012, and B.C. came alone. (TR1203,1245). According to B.C., she was not touched inappropriately on that visit. (TR1203).[16]

Overall

B.C. acknowledges she asked Heath to use the correct medical terminology in describing muscles and treatments to her. She explained she had taken an anatomy class and wanted to be informed about the human body. Heath complied. (TR1207).

Heath would regularly ask B.C. if she was all right (TR1204-05,1250-51). Heath would ask:

> Is this okay? Is this okay? like when he's massaging here, massaging here, "Is this okay?" and you know, if it was hurting I would say, "Yeah, it's fine,"even though it was [sic.] fine, because I just wanted to be a big girl, but when he was massaging my vagina he did not say, "Let me know if you feel uncomfortable with me touching you here." He did not say that.

(TR1204-05; *also* TR1251).

Over the span of all the treatments, B.C. never gave any outward or verbal indication that anything was wrong. Though she testified to having an orgasm on two occasions, B.C. never said anything about being stimulated and never gave an outward

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any reason. She never asked him to stop. And she came back for a ninth visit. (TR2681-83).

[16] Heath testified that on the ninth visit, B.C. stated she was in a hurry and did not change into the gown. The treatment was the same except she was not in the gown. Heath does not remember the session ending early. (TR2683).

indication that she did so. Along those same lines, Heath acted completely normal. (TR1218-1219). Heath never said anything that would suggest he was being sexually aroused by what he was doing and Heath never said anything of a sexual nature to her. (TR1231). Nor did Heath ever restrain her or threaten her in any manner. (TR1241).

B.C. voluntarily returned for all appointments. (TR1241-42). She never told anybody about "what happened" until January, when B.C. first told her mother after B.C. returned from Christmas Holiday in Germany. (TR1216-17,1232).[17]

Argument

The Due Process Clauses of the federal and state constitutions protect an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime. *See In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Alfatlawi*, 2006 UT App 511, ¶27, 153 P.3d 804. A "conviction not based on substantial reliable evidence cannot stand" as it violates "due process to convict and punish a man without [sufficient] evidence of his guilt." *State v. Ramsey*, 782 P.2d 480, 483 (Utah 1989) (quoting authority). In reviewing a conviction for sufficiency of the evidence, the Court ensures "there is sufficient competent evidence regarding each element of the charge to enable a jury to find, beyond a reasonable doubt, that the defendant committed the crime." *State v. Thompson*, 2017 UT App 183, ¶33, 405 P.3d

[17] To the contrary, B.C. told law enforcement she disclosed to her boyfriend after the November 3rd treatment. (TR1232-33). If B.C. was truthful in her report to law enforcement, B.C. actually told someone about what happened *before the sixth, seventh, eighth and ninth visits*.

892, *cert. denied*, (Utah Mar. 1, 2018). If the Court finds the evidence presented at trial failed to establish the necessary elements of the crime, then the verdict must fail. *E.g., State v. Black*, 2015 UT App 30, ¶17, 344 P.3d 644; *State v. Strieby*, 790 P.2d 98, 101 (Utah App. 1990). To determine whether sufficient evidence exists, this Court "must scrutinize the testimony elicited at trial" and because the Court reviews the evidence in the light most favorable to the verdict, relies "primarily on Victim's account of what happened . . . which the jury apparently credited." *Patterson*, 2017 UT App 194, ¶4.

Here, the State failed to present sufficient evidence to establish the necessary elements of the offenses of conviction beyond a reasonable doubt. Under this circumstance, double jeopardy would "forbid[] a second trial for the purpose of affording the prosecution another opportunity to supply evidence that it failed to muster in the first proceeding." *State v. Steed*, 2014 UT 16, ¶55, n.62, 325 P.3d 87 (quoting authority). *Also, e.g., McNair v. Hayward*, 666 P.2d 321, 326 (Utah 1983); *State v. Becker*, 803 P.2d 1290, 1293, n.1 (Utah App. 1990).

A. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE COUNT 5 CONVICTION Of OBJECT RAPE

Count 5 of the Amended Information charged Heath with Object Rape occurring on or about December 8, 2012 (i.e. the eighth visit). Utah Code § 76-5-402.2 provides:

> A person who, without the victim's consent, causes the *penetration*, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the

intent to arouse or gratify the sexual desire of any person, commits an offense which is a first degree felony.

At trial, the State did not present sufficient evidence of all elements of this offense beyond a reasonable doubt.

1. Failure to Present Evidence of "Penetration" of the "Genital Opening"

"Sex crimes are defined with great specificity and require concomitant specificity of proof" and in "all sex-crime cases requiring penetration, prosecutors must elicit precise and specific testimony to prove the required penetration beyond a reasonable doubt." *Patterson*, 2017 UT App 194, ¶9 (quoting authority). Simply, "[t]here is no question that penetration is an essential element of the crime of object rape; indeed, it is the critical element distinguishing object rape from forcible sexual abuse." *Id.* ¶15. Here, the State did not elicit the requisite precise and specific testimony to prove the required penetration beyond a reasonable doubt – that is, "penetration" of the "genital opening."

a. No Evidence of "Penetration"

The State wholly failed to present evidence of "penetration" on December 8, 2012. Relying primarily on B.C.'s account of what happened to her, the State presented evidence that:

- An eighth visit occurred on December 8, 2012. (TR1197);
- The treatment proceeded in the same order as before; back, buttocks, chest. (TR1202);
- B.C. does not remember if the inner thigh massage was performed. (*Id.*);

- B.C. remembers Heath did the stomach massage again and this time went "very deep into my underpants down the front." (*Id.*);

- B.C. explained this time, Heath again did "circular motions, and he was having his *fingers right on the outer lip of my vagina*, moving it around and around and around." She then remembers "feeling him move his finger, just *one finger over*, and it *touched me right on my clitoris right in the middle of my vagina on my skin."* At that point, B.C. "flinched, and then he moved his finger away. Then after that I don't remember what happened." (TR1202) (emphasis and double emphasis added);

- B.C. believed it was Heath's pinky finger that touched her clitoris and when she flinched, he removed his finger. (TR1215).

Throughout B.C.'s testimony, the word "penetration" is never used. In fact, B.C. was never asked whether penetration occurred. B.C. never describes Heath touching anywhere "in" her vagina or "in" the vaginal opening, instead using words such as "outer lip" and "on" the clitoris. *Compare State v. Waldoch*, 2016 UT App 56, 370 P.3d 580 (finding sufficient evidence defendant's fingers penetrated genital opening for object rape where evidence included victim's statements that defendant put his finger "into" her vagina; he "kept sticking his finger inside me"; victim's statement in police report that "he did penetrate me"; and statements by physician's assistant that victim reported manual vaginal penetration).

The closest anatomical structure that B.C. asserts was fleetingly touched is her clitoris, which as discussed below, is not the requisite "genital opening" of which penetration supports an Object Rape conviction. But leaving that issue aside for the moment, without the State presenting direct evidence at trial that B.C.'s clitoris was contained wholly within and enveloped by her labia, any assumption that it was is pure

speculation. One juror even posed the question: "Would the definition of penetration change based upon the anatomy of the person under the law of object rape?" (R3051-52).[18] Thus, the State's plea to "common sense" does not fill the gap in an utter lack of evidence which the State has the burden to provide, and the court's finding otherwise is erroneous. (*E.g*. TR2987-92,3001-02).

Therefore, because the State failed to present any actual evidence of the necessary element of "penetration," this Court must vacate Heath's Count 5 Object Rape conviction.

b. No Evidence of Penetration of "Genital Opening"

Although the word "penetrate" was never uttered during B.C.'s testimony, the State argues *touching the clitoris* suffices. (*E.g*., R1293-1297;TR2962, 2989). In denying Heath's Motion to Arrest Judgment, the district court agreed, stating the "Utah Supreme Court has held that penetration in this context means entry between the outer folds of the labia as held in *State vs. Simmons*." (TR2997). Both the State's argument and the district court's findings ignore the plain language of the Object Rape statute. For a conviction of Object Rape, it is the "genital or anal opening" that must be penetrated. Again, jurors astutely questioned, "Does just touching the clitoris constitute penetration?" as they also requested to review the "diagram of the vagina" shown in court. (R3047-50).[19]

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[18] This juror question was left unanswered.

[19] The jury was not given the diagram to review. It is unclear why the diagram exhibit was not received and sent back into the jury room, however, since it contains marks placed upon it by B.C. during her testimony.

It appears that in attempting to define "penetration" generally in sexual assault cases, Utah jurisprudence has admittedly overlooked *the specific body part* required to be penetrated by statute. For example, in *State v. Simmons*, 759 P.2d 1152 (Utah 1988), the case most often cited for the definition of "penetration", the charge at issue was rape of a child. The Court reasoned:

> The first question is the definition of "penetration." *If that term requires entry into the vaginal canal of the victim, there is no question that the evidence here is insufficient*. This Court has never expressly addressed the question of whether "penetration" requires proof that the penis of the defendant or, in the case of object rape, the object being used to commit the rape, entered the vaginal canal of the victim or whether it is sufficient if it is merely inserted between the outer folds of the victim's labia.

Simmons, 759 P.2d at 1154.

Thereafter, the *Simmons* Court noted that "the generally accepted rule is that entry between the outer folds of the labia is sufficient to constitute 'penetration' as that term is commonly used in defining the *crime of rape*." *Id*. (emphasis added). Critically, *Simmons* was a *rape case* (specifically, rape of a child), not an Object Rape case, and therefore, did not go on to review the elements of Object Rape or even consider the specific requirement of the object rape statue to penetrate the genital or anal opening. Despite this fact, Utah courts have since cited the *Simmons* definition of penetration in circumstances beyond rape cases, overlooking the plain language of the Object Rape statute which requires penetration of enumerated anatomy. *Cf. Patterson*, 2017 UT App 194, ¶¶3,10 (in object rape case, noting in passing *Simmons'* definition of penetration meaning "entry between the outer folds of the labia"); *Waldoch*, 2016 UT App 56, ¶3

(same); *State v. Gray*, 2015 UT App 106, ¶29, 349 P.3d 806 (considering *Simmons* precedent in rape of a child case).

Despite this oversight in Utah precedent, under the plain language of the Object Rape statute, touching or rubbing the clitoris or other genitalia does not suffice to meet the requisite finding of penetration of the "genital opening" necessary for conviction. This interpretation comports with the plain language of the statute which requires distinct penetration of the *genital or anal opening* to establish first degree felony Object Rape, as opposed to *touching* any *part of the genitals*[20] necessary to establish the separate offense of misdemeanor Sexual Battery or second degree felony Forcible Sex Abuse.

The problem lies in the legislature's use of the term "genital opening." A definition search leads one to the phrase "vaginal opening" which, like the term "anal opening" also enumerated by the Object Rape statue, means the opening of an anatomical structure. Although used colloquially to describe the vulva, the "vagina" is actually

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[20] "Genitals" can be defined as "the organs of the reproductive system; especially: the *external genital organs*." *See* MedlinePlus at http://www.merriam-webster.com/medlineplus/genitalia (last visited 1/7/11) (emphasis added). The medical definition of "Genitalia" is: "male or female reproductive organs. The genitalia include internal and external structures. The female internal genitalia are the ovaries, Fallopian tubes, uterus, cervix, and vagina. The female external genitalia are the labia minora and majora (the vulva) and the clitoris. *See* https://www.medicinenet.com/script/main/art.asp?articlekey=11372 (last visited 12/4/17). Thus, the clitoris is female external genitalia. *See also,* http://www.merriam-webster.com/dictionary/genitalia (defining "genitalia" as "organs of the reproductive system; especially: the external genital organs") (last visited 12/4/17); http://www.merriam-webster.com/dictionary/clitoris (defining "clitoris" as "a small erectile female organ located within the anterior junction of the labia minora that develops from the same embryonic mass of tissue as the penis and is responsive to sexual stimulation") (last visited 12/4/17); http://en.wikipedia.org/wiki/VAGINA (diagraming clitoris as one of the organs of the female reproductive system) (last visited 12/4/17).

composed of a woman's internal reproductive organs.[21] So, the question arises whether the legislature's use of the term "genital opening" means the protective folds of the labia that protect the vulva (which contain the external female genitals), or whether "genital opening" means the "vaginal opening" which is contained well within the vulva and is the opening to the vagina (which contain the internal reproductive organs). Statutory construction reveals the term "genital opening" means the "vaginal opening."

Without question, the legislature's use of the term "genital opening" means something specific.[22] Under basic rules of statutory construction, terms of a statute must

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[21] "Opening" can be defined as "something (as an anatomical aperture) that is open or opens." *See* MedlinePlus at http://c.merriam-webster.com/medlineplus/opening (last visited 12/4/17). The "vaginal opening" is the external opening to the vagina. "The word *vagina* is quite often used colloquially to refer to *the vulva* or *female genitals generally*; *technically speaking, the vagina is a specific internal structure*." http://en.wikipedia.org/wiki/VAGINA (last visited 12/4/17) (emphasis added). The medical definition of "vaginal opening" is "[t]he exterior opening to the vagina, the muscular canal that extends from the cervix to the outside of the female body. Also called vaginal introitus and vaginal vestibule". *See* https://www.medicinenet.com/script/ main/art.asp?articlekey=8836 (last visited 12/4/17). *See also* https://en.wikipedia.org/wiki/Vulva (depicting and noting that the *vulva* includes the mons pubis, labia majora, labia minora, *clitoris*, bulb of vestibule, vulval vestibule, urinary meatus, greater and lesser vestibular glands, *and the vaginal opening*; also explaining "*the vulva* includes *the entrance to the vagina*, which leads to the uterus, and provides a double layer of protection for this by the folds of the outer and inner labia") (emphasis added).

[22] When interpreting statutes, a court's objective is to give effect to the legislature's intent. *E.g., State v. Ogden*, 2018 UT 8, ¶31, 416 P.3d 1132; *Burns v. Astrue*, 2012 UT 71, ¶11, 289 P.3d 551. Courts "first look to the plain language of the statute and give effect to that language unless it is ambiguous." *State v. Bruun*, 2017 UT App 182, ¶42, 405 P.3d 905 (citing authority). If the statutory language yields a plain meaning that does not lead to an absurd result, the analysis ends there. *See Burns*, 2012 UT 71, ¶11. Courts read each term according to its ordinary and accepted meaning, while at the same time giving effect to every provision of a statute, avoiding an interpretation that will render portions inoperative or superfluous. *See id.* The court initially reads statutory provisions

be read in context with other surrounding provisions. As applied here, the term "genital opening" must be interpreted in context with the term "anal opening." By way of comparison, the plain reading of the term "anal opening" means the anus, which is the anatomical opening where the gastrointestinal tract ends and exits the body. For Object Rape, penetration of the anus, however slight, is required. To the legislature, penetration of this opening justifies a more significant penalty than an improper touch alone. It follows then, that mere touching of the surrounding skin and folds within the intergluteal cleft does not constitute the requisite penetration of the "anal opening" to justify the heightened crime of Object Rape. Again, the "anal opening" is the actual opening and not the surrounding skin and folds. So, while an inappropriate touch of the anus without penetration or even an inappropriate touch of the skin and folds surrounding the opening might amount to a "touching of the anus or buttocks" that serves as a necessary element to the misdemeanor crime of Sexual Battery, *see* Utah Code § 76-9-702.1, and may also amount to a "touching of the anus or buttocks" that serves as a necessary element to the felony crime of Forcible Sex Abuse, *see* Utah Code § 76-5-404, such touching of the anus or buttocks *does not amount* to Object Rape.

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literally, unless such a reading would result in an unreasonable or inoperable result. *See e.g., Brown v. State*, 2013 UT 42, ¶44, 308 P.3d 486 (court looks first to statute's plain language and presumes legislature used each word advisedly and reads each term according to its ordinary and accepted meaning; if the language yields a plain meaning that does not lead to an absurd result, the analysis ends); *Jackson v. Mateus*, 2003 UT 18, ¶27, 70 P.3d 78 ("When construing a statute, we must give effect to legislative intent. To that end, we presume that the [l]egislature used each term advisedly, and we give effect to each term according to its ordinary and accepted meaning").

This same reasoning applies to the penetration of the genital opening. While an inappropriate touch of the clitoris or even an inappropriate touch of the protective skin and folds surrounding the clitoris and the vulva might amount to "a touching of any part of the genitals of another person" which serves as a necessary element to the misdemeanor crime of Sexual Battery, *see* Utah Code § 76-9-702.1; and may also amount to a touch of "the pubic area or any part of the genitals of another" which serves as a necessary element to the felony crime of Forcible Sex Abuse, *see* Utah Code § 76-5-404; a touch of the clitoris or the surrounding skin and folds *does not amount* to Object Rape because *no opening has been penetrated*. To interpret the Object Rape statute in any other manner would nullify any distinction between the crime of Object Rape (which is a first degree felony) and other sex offenses.

Heath believes the plain language of the statute makes clear the legislature's intent as to the meaning of the term "genital opening," and specifically, the intent that a touch of the clitoris does not amount to penetration of the genital opening. If, however, this Court deems the terms of the Object Rape statute to be ambiguous, the rule of lenity should apply to require any ambiguity in the statutory terms to be interpreted in Heath's favor. *E.g., State v. Rasabout*, 2015 UT 72, ¶22, 356 P.3d 1258 (rule of lenity requires Court to interpret ambiguous statute in favor of lenity toward person charged with criminal wrongdoing). The rule of lenity is one of constitutional magnitude and is dictated by the notice protections afforded by both federal and state due process. *See id.* ¶24. *Also e.g., State v. Watkins*, 2013 UT 28, ¶38, 309 P.3d 209, *superc'd by statute on other grounds*.

In sum, the State failed to present evidence of penetration of the requisite "genital opening" and as a consequence, this Court must vacate the Count 5 Object Rape conviction.

2. Failure to Present Evidence of Specific Intent[23]

To obtain a conviction for any offense, the State is required to prove, beyond a reasonable doubt, the "culpable mental state required." Utah Code § 76-1-501(2)(b). As charged in Count 5, the State had to present evidence of Heath's specific intent to arouse or gratify sexual desire. The evidence presented on this element was:

- Over the span of all the treatments, B.C. never gave any outward indication he was doing something wrong. (TR1218).
- Heath acted completely normal. (*Id*.).
- Heath never said anything that would suggest he was being sexually aroused by what he was doing. (TR1231).
- Heath never said anything of a sexual nature to B.C. (*Id*.).
- In the eighth visit on December 8, 2012, the treatment proceeded in the same order as before; back, buttocks, chest. (TR1202).
- B.C. doesn't remember if Heath did the inner thigh treatment, but she remembers the stomach massage again. (*Id*.).
- As Heath did the circular motions, his fingers were on the outer lip of her vagina. She remembers feeling what she believed to be Heath's pinky finger touched her clitoris. When she flinched, he moved his finger away. (TR1202,1215-16,1239-40).

[23] In the Motion to Arrest, trial counsel argued the State failed to show specific intent as to Count 4, but did not do so as to Count 5. (R1283-86). Insofar as the issue now raised was not preserved as to this count, this Court should review for plain error or ineffective assistance of counsel.

- After the touch, B.C. does not remember what happened. (*Id*.).

This evidence is wholly insufficient to establish Heath's specific intent to arouse or gratify sexual desire. Although a jury may have rejected Heath's testimony that this touch did not happen, the mere finding that the touch occurred does not allow the jury to then speculate, based upon zero evidence, that the touch occurred with the specific intent to satisfy sexual desires.

It is fundamental that a "jury's conclusion must be based upon reasonable inference and not mere speculation." *State v. Cristobal*, 2010 UT App 228, ¶10, 238 P.3d 1096; *also Patterson*, 2017 UT App 194, ¶14. It follows that a guilty verdict is not legally valid if based solely on inferences that give rise to only "speculative possibilities of guilt." *State v. Lyman*, 966 P.2d 278, 281 (Utah App. 1998) (citing authority). Although, "it is sometimes subtle, there is in fact a difference between drawing a reasonable inference and merely speculating about possibilities." *Cristobal*, 2010 UT App 228, ¶16 (quoting authority). Where a reasonable inference is "a conclusion reached by considering other facts and deducing a logical consequence from them," speculation is the "act or practice of theorizing about matters over which there is no certain knowledge." *Id.* (quoting *Black's Law Dictionary* (7th ed.1999)); *Also, Patterson*, 2017 UT App 194, ¶14. "[A] jury's inference is reasonable if there is an evidentiary foundation to draw and support the conclusion but is impermissible speculation when there is no underlying evidence to support the conclusion." *Patterson*, 2017 UT App 194, ¶14 (internal quotations omitted).

As this Court has explained:

> When the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation; while a reasonable inference arises when the facts can reasonably be interpreted to support a conclusion that one possibility is more probable than another.

Cristobal, 2010 UT App 228, ¶16.

Here, the State convicted (and incarcerated) Heath based upon speculation rather than facts. Rather than having presented any actual evidence establishing a sexual intent, the State bases its convictions upon the purely speculative foundation that because the touch occurred, it had to have been done for a sexual purpose. Speculation does not take the place of evidence, however, and this conviction cannot be deemed valid as it is based solely on the jury's "theorizing about matters over which there is no certain knowledge." *Id*. That the jury found the actus reas itself occurred says absolutely nothing about why, and the State's failure to show any sexual intent whatsoever highlights the fact that this conviction was not based upon reasonable inferences from evidence, but pure speculation.

B. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE COUNT 4 CONVICTION OF FORCIBLE SEX ABUSE

Count 4 charged Heath with Forcible Sex Abuse, a second degree felony, also occurring on or about December 8, 2012. Utah Code § 76-5-404 provides:

> An individual 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, pubic area, 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 the

intent to arouse or gratify the sexual desire of any individual, without the consent of the other, regardless of the sex of any participant.

This charge was based upon B.C.'s testimony that Heath touched her outer labia during the treatment and not the clitoris. The State again failed to present sufficient evidence of the requisite intent.

1. Failure to Present Evidence of Specific Intent

The crime of Forcible Sex Abuse contains two elements of intent: a general intent to touch the anus or genitals of another without that person's permission, and a specific intent or purpose to cause substantial emotional or physical pain or to sexually arouse or gratify any person. *E.g., Adams v. State*, 2005 UT 62, ¶21, 123 P.3d 400; *State v. Sessions*, 645 P.2d 643, 646 (Utah 1982). The jury was instructed as to this "specific intent" in Instruction 35. (R613).[24] However, the State failed in presenting evidence of it.

The Count 4 charge of Forcible Sex Abuse involves the same December 8th treatment charged in Count 5, and the evidence outlined above concerning this visit is the same. Relevant to the Count 4 charge of Forcible Sex Abuse, B.C. testified:

- Heath acted completely normal. (TR1218).
- Heath never said anything that would suggest he was being sexually aroused by what he was doing. (TR1231).

[24] The jury was instructed in Instruction 35 that they must find Heath acted with intent to "cause substantial emotional or bodily pain" or to "arouse or gratify the sexual desire of any person." (R613). As set forth below, inclusion of the "bodily pain" intent was erroneous. In response to Heath's Motion to Arrest Judgment, the State proceeded only on the "intent to arouse or gratify the sexual desires" element, and Heath therefore does so now as well. (R1299).

- Heath never said anything of a sexual nature to her. (*Id*.).
- In the eighth visit on December 8, 2012, the treatment proceeded in the same order as before; back, buttocks, chest. (TR1202).
- B.C. does not remember if Heath did the inner thigh treatment, but she remembers the stomach massage again. (*Id*.).
- As Heath did the circular motions, his fingers were on the outer lip of her vagina. (*Id*.).

Again, this evidence is wholly insufficient to establish Heath's specific intent to arouse or gratify sexual desire. Although a jury may have rejected Heath's testimony that this touch did not happen or that it happened accidentally or incidental to treatment, the finding alone that the touch occurred does not allow the jury to then speculate, based upon zero evidence, that the touch occurred with the specific intent to satisfy sexual desires. Admittedly, "[w]herever a special intent is an element of a criminal offense, its proof must rely on inference from surrounding circumstances." *State v. Kennedy*, 616 P.2d 594, 598 (Utah 1980). Here, however, the surrounding circumstances do not evidence the requisite specific intent "to sexually arouse or gratify any person" and the jury's verdict is based purely upon improper speculation. Consequently, for the same failures in evidence of specific intent detailed with regard to Count 5 above, the verdict on this Count 4 must likewise fail.

2. Failure to Present Evidence of Non-Consent and Evidence of Heath's Mens Rea as to Non-Consent[25]

The State also failed to prove B.C.'s non-consent to the touches of the pelvic area which occurred in this eighth treatment on December 8th, as well as Heath's mens rea as to non-consent.

First, the State failed to prove non-consent. Usually, a victim might express lack of consent through words or conduct. *E.g.*, *State v. Cady*, 2018 UT App 8, ¶11, 414 P.3d 974, *cert. denied*, 2018 WL 3342577 (Utah May 7, 2018). However, "[n]onconsent cannot be determined simply by asking whether a person physically fought back or attempted to escape." *Id*. (citing authority). Rather, "[t]he essence of consent is that it is given out of free will, and determining whether someone has truly consented requires close attention to a wide range of contextual elements, including verbal and nonverbal cues." *Id*. *Also, State v. Barela*, 2015 UT 22, ¶39, 349 P.3d 676.

Here, the State presented no evidence that B.C. expressed a lack of consent in any manner, whether express or through verbal or non verbal cues. Rather, the evidence established B.C. acted completely under her own free will. B.C.'s own testimony established she repeatedly and voluntarily returned for treatments; she knew she could have another person in the treatment room with her; she never refused any treatment; she never told Heath to stop; she never said no; she never pulled away; she never blocked his hands or moved them away; and she never expressed she was uncomfortable. *Compare*

[25] This issue was not raised by trial counsel. Insofar as the issue now raised was not preserved, this Court should review for plain error or ineffective assistance of counsel.

State v. Harrison, 2012 UT App 261, ¶13, 286 P.3d 1272 (sufficient evidence for non-consent where victim told defendant "it hurt" and to "stop" or told him "No"; where victim held her arms in a manner to stop defendant from continuing to touch her inappropriately; where victim testified she thought she should scream but no sound came out; and where defendant asked her to be quiet so as not to disturb others nearby). Nor did the State present evidence of the requisite elements under any statutory theory of non-consent set forth in Utah Code § 76-5-406, including all elements necessary to establish the theory that Heath committed an illegal touch under the guise of providing professional treatment, and at the time of the act B.C. reasonably believed the act was for a professionally appropriate treatment "to the extent that resistance . . . could not reasonably be expected to have been manifested." *Id*.(12). The State's failure to prove either factual or legal non-consent is fatal to the Count 4 conviction.

Additionally, the State likewise failed to present evidence to establish Heath acted with the requisite mens rea as to any purported lack of consent. Assuming here that a reckless mens rea as to consent will suffice, the State failed to prove Heath acted recklessly as to B.C.'s consent. Again, the facts and circumstances of which Heath was aware was that B.C. repeatedly returned for treatments; she never refused the treatment and was part of the decision making process; when he inquired about any problems, she never indicated she was uncomfortable; during the treatments, she never told Heath to stop; she never said no; she never pulled away; she never blocked his hands or moved them away; she never expressed she was uncomfortable; and she never expressed or gave

any indication whatsoever that she had been sexually stimulated. Without having been informed by any verbal or non-verbal cues whatsoever indicating B.C. was uncomfortable with the treatment and touches that had occurred and for which she repeatedly returned, Heath could not have acted recklessly with regard to them.

C. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE THREE CONVICTIONS OF SEXUAL BATTERY[26]

The Amended Information charged Heath with three counts of Sexual Battery, occurring on or about November 3, 2012 (Count 1), November 24, 2012 (Count 2), and December 1, 2012 (Count 3). Utah Code § 76-9-702.1 provides:

> A person is guilty of sexual battery if the person, under circumstances not amounting to an offense under Subsection (2), intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched.

The State was required to establish Heath's knowledge that his behavior would "likely cause affront or alarm to the person touched." *State v. Rackham*, 2016 UT App 167, ¶19, 381 P.3d 1161. Evidence which supports this specific knowledge element consists of the victim's reaction to the actions. *Compare id.* (evidence relating to A.F. was weak because there was no evidence of her reaction to defendant's actions, and the evidence presented was limited to innuendo and inference), *to id.* ¶21 (K.M.'s testimony provided ample evidence in support of the knowledge element where K.M. testified just

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[26] Trial counsel did not raise a sufficiency of the evidence claim with regard to Counts 1-3. Insofar as the issues now raised were not preserved, this Court should review for plain error or ineffective assistance of counsel.

prior to defendant touching her breast and on two previous occasions, she had made it clear the touching was unwelcome). The State has again failed in its burden as to the three counts of Sexual Battery.

As to Count 1 and the fifth visit on November 3, 2012, B.C. testified:

- She went alone. (TR1184).
- She changed into a gown. It is possible she put on a gown on other occasions and had been complaining about friction burns from the over-the-clothes treatments. (TR1184-85,1226-28).
- B.C took off her shirt, thinks she took off her bra, but kept on her yoga pants. (TR1185).
- With regard to the gluteal massage, Heath went down her pants and underwear and massaged her buttocks. B.C. felt his finger on her inner gluteal cleft and remembers a very intense, painful massage on her gluteals. (TR1186-87;TR1209-10).
- She then flipped-over onto her back. Heath did a chest massage, which she felt okay with although it hurt. At one point she opened her eyes and noticed the gown had slipped-up over her right breast and she saw her nipple. She pulled the gown back down and does not know if Heath saw it or not or if it had been an accident. (TR1187;TR1210-11).
- She does not clearly remember the abdominal massage. Heath then did a new treatment. He rubbed her inner thigh deeply and it was painful just like all the other massages. As he massaged her right thigh with one hand, B.C. felt his other hand going "up and down, back and forth, right over the seam of her yoga pants, right on her vagina." B.C. ask what he was doing and he stated he was doing some type of psoas attachment massage. (TR1188-89; TR1190,1211-12).
- Heath "was just acting like nothing was wrong, like nothing was different. He didn't say anything to me. I didn't say anything." (TR1189;TR1190).

- B.C. claims to have had an orgasm. She gave no outward indication she had an orgasm and did not tell Heath she had been stimulated. (TR1189,1219).

- Heath concluded the appointment with an adjustment, she paid for the treatment and went home. B.C. did not talk to Heath about what had happened. (TR1191).

As to Count 2 and the sixth visit on November 24, 2012, B.C. testified:

- She was accompanied by her mother and sisters for a number of reasons: "One, we always tried to coincide our appointments because it was a long drive. So it was more convenient for us to go together. Also, I just felt nervous to go alone, so I wanted to make sure we could be together." B.C. did not tell her family about feeling nervous. (TR1206).

- She did not ask her mother or sister to accompany her in the treatment room. (TR1233-34).

- There was nothing out of the ordinary with most of the treatment and it progressed in the usual way. (TR1193-94).

- B.C. does not remember if she was wearing a gown or regular clothing. (TR1194).

- The leg and thigh massage was the same as the appointment before where Heath rubbed her inner right thigh and the other hand went right over her clitoral or vaginal area. B.C. asked what he was doing and Heath "said something about a gracilis muscle." B.C. claims to have climaxed again. She gave no indication she had been stimulated. (TR1195).

- During the treatment, B.C.'s sister came in and Heath moved his hand away from over the vagina and did the thigh massage with two hands. Heath talked to B.C.'s sister when she came in. (*Id*.).

- B.C. did not let Heath know something had happened. (*Id*.).

- B.C. never asked her mother or sisters to accompany her after this visit. (TR1245).

As to Count 3 and the seventh visit on December 1, 2012, B.C. testified:

- She returned for a seventh visit on December 1, 2012, alone. (TR1243).
- During the routine stomach massage, Heath went lower than before. Heath's fingers were moving in a circular pattern and she felt nervous as his fingers went down past her waist into her underpants. (TR1089).
- She did not say anything. (TR1092).
- Heath's fingers stopped on the "left side of my vagina right where my leg is, right where my leg starts," and rubbed in a circular motion, which would move the outer lip of her vagina over. (TR1198-99, 1242).
- Heath was on the side of her vagina, not right on top. (TR1199).
- Until now, Heath had not touched skin to skin. (TR1201). It is possible B.C. requested the skin to skin treatment since she had complained that the over-the-clothing massage had been painful. (TR1237-38).
- B.C. said nothing about being uncomfortable. (TR1201).

The evidence admitted as to these three Sexual Battery counts fail to demonstrate in any manner the element of Heath's *knowledge* that his behavior would likely cause affront or alarm *to the person touched*. When B.C. questioned what he was doing, Heath explained. B.C. did not question further or indicate Heath should not continue. B.C. gave no outward indication anything was wrong or that she was surprised or alarmed. And Heath always acted normal "like nothing was wrong." Especially in light of the fact that B.C. returned on multiple occasions and never once voiced any complaint or concern, the evidence presented was limited to innuendo and inference rather than any evidence Heath knew the touchings would cause affront or alarm to B.C.

D. INSOFAR AS THESE ISSUES WERE NOT PRESERVED, THIS COURT SHOULD REVIEW FOR PLAIN ERROR, MANIFEST INJUSTICE, AND/OR IAC

As a general rule, a defendant must raise a sufficiency of the evidence claim by proper motion or objection to preserve the issue for appeal. *See Holgate*, 2000 UT 74, ¶16. As noted, some insufficiency grounds made herein were not raised previously. Insofar as they were not, this Court may review for plain error and/or ineffective assistance of counsel.

1. The Trial Court Committed Plain Error

"A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." Utah R. Evid 103(e). To establish plain error, Heath must show: (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. *See State v. Lee*, 2006 UT 5, ¶26, 128 P.3d 1179. An error is obvious when "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. An error is harmful if, absent the error, there is a reasonable likelihood of a more favorable outcome for the aggrieved party. *Lee*, 2006 UT 5, ¶26. "This harmfulness test is equivalent to the prejudice test" applied in assessing IAC claims. *Dean*, 2004 UT 63, ¶22.

Similarly, "manifest error" exists when the error is plain and made to appear on the record and to the manifest prejudice of the accused. *See State v. Bullock*, 791 P.2d 155, 164 (Utah 1989). In most cases, "manifest injustice" is synonymous with the "plain error" standard. *E.g., State v. Apodaca*, 2018 UT App 131, n.14, __P.3d.__; *State v.*

Alinas, 2007 UT 83, ¶10, 171 P.3d 1046. The purpose of the doctrine is to assure a defendant is not convicted even though technical requirements were not complied with in raising an error. *See Alinas*, 2007 UT 83, ¶10. Indeed, "[n]either a counsel's nor a judge's error should be the cause of one's going to prison." *Id*. "[T]he law should seek to make a party liable for his own transgressions, not for the sins of his lawyer." *Bullock*, 791 P.2d at 164 (Stewart, J., dissenting).

To establish plain error specifically based on insufficient evidence, a defendant must demonstrate not only that the evidence is insufficient to support a conviction of the crime charged, but also that the insufficiency is so fundamental that the trial court erred in submitting the case to the jury. *See Prater*, 2017 UT 13, ¶28. "An example of an obvious and fundamental insufficiency is 'the case in which the State presents no evidence to support an essential element of a criminal charge.'" *Id*. *Also, Holgate*, 2000 UT 74, ¶15.

Heath has met this burden and demonstrated the evidence was insufficient to support each conviction in this case. As detailed at length above, there was insufficient evidence (indeed, no evidence) of the requisite proscribed touch; the element of non-consent; and crucially, the requisite mens rea. The insufficiency of the State's evidence on these essential elements should have been obvious and was so fundamental that the trial court erred in submitting the case to the jury. Consequently, the court should have forthwith ordered Heath discharged, and plainly erred in failing to do so.

2. Trial Counsel Rendered IAC

Utah courts follow the standard set forth in *Strickland v. Washington*, 466 U.S.

668, 687 (1984), when assessing IAC claims. *See State v. Templin*, 805 P.2d 182, 186 (Utah 1990). To establish IAC, "a defendant must show that trial counsel's performance was deficient" and "fell below an objective standard of reasonableness." *State v. Baker*, 963 P.2d 801, 806-807 (Utah App. 1998). The defendant must also show the deficient performance was prejudicial in that "but for the deficient representation, there is a 'reasonable probability' that the result would have been different." *Id*. This finding, does not require that "the jury would have more likely than not" acquitted. *State v. Barber*, 2009 UT App. 91, ¶22, 206 P.3d 1223. Rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (citing *Strickland*, 466 U.S. at 694).

The failure to raise beneficial objections and arguments may constitute ineffective assistance of counsel. *E.g., State v. Larrabee*, 2013 UT 70, ¶17, 321 P.3d 1136; *State v. Ott*, 2010 UT 1, ¶24, 247 P.3d 344; *State v. Ison*, 2006 UT 26, ¶32, 135 P.3d 864. This is so because one of the most basic duties of a trial lawyer is to properly raise and preserve all issues in the trial court. *E.g., State v. Smedley*, 2003 UT App 79, ¶10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial, current law, this constitutes objectively deficient performance which will not be excused by the courts with hypothetical tactical reasons. *See State v. Moritzsky*, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current beneficial law was objectively deficient oversight which could not conceivably have been valid trial strategy).

Here, trial counsel performed deficiently in failing to recognize that the State had presented insufficient evidence to support the necessary elements it was required to prove beyond a reasonable doubt. Although trial counsel did move for directed verdict on the Object Rape count, and asserted additional claims in a Motion to Arrest Judgment, the failure to recognize the State's evidentiary deficiencies in other regards resulted in trial counsel's failure to object based upon the prosecution inability to meet its burden. Trial counsel's deficient performance was also prejudicial. Not only did trial counsel's failures undermine preservation of the issues, but had the insufficiency issues been raised, the motions should have been granted rather than Heath suffering unwarranted conviction and imprisonment. Accordingly, this Court should now reverse all of Heath's convictions due to insufficient evidence despite trial counsel's failures to properly preserve the issues.

II.
ALTERNATIVELY, THE COURT SHOULD GRANT A NEW TRIAL DUE TO INCOMPLETE AND ERRONEOUS JURY INSTRUCTIONS[27]

As noted above, the Due Process Clauses of the federal and state constitutions protect an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime. *See In re Winship,* 397 U.S. at 364. Along these same lines, a criminal defendant is entitled to instructions which provide jurors with a clear and meaningful statement of the law. *E.g., State v. Campos*, 2013 UT App 213, ¶41, 309 P.3d 1160; *State v. Potter*, 627 P.2d 75, 78 (Utah 1981); *State v. Torres*, 619

[27] Trial counsel did not object to the jury instructions for the reasons raised herein. Insofar as the issues now raised were not preserved, this Court should review for plain error or IAC.

P.2d 694, 696 (Utah 1980)*; State v. Haston*, 811 P.2d 929, 935 (Utah App. 1991), *overruled on other grounds*. Erroneous instructions to the jury are prejudicial and deprive a defendant of the right to a fair trial when they tend to mislead the jury or insufficiently or erroneously advise the jury on the law. *E.g., State v. Penn*, 2004 UT App 212, ¶28, 94 P.3d 308. "[W]hen the instructions, read as a whole, create a reasonable likelihood that the jurors were misled or confused as to the correct legal standard," remedy, including a new trial, is appropriate. *State v. Lambdin*, 2017 UT 46, ¶47, __P.3d __.

A. THE INSTRUCTIONS FAILED TO INSTRUCT THE JURY ON ESSENTIAL TERMS AND PHRASES

1. Failure to Instruct on Essential Sexual Assault Terms

"The general rule for jury instructions is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Bird*, 2015 UT 7, ¶14, 345 P.3d 1141. Neglecting to provide an instruction as to the meaning of specialized phrases that amount to an "element" constitutes a failure to instruct the jury as to all the essential elements of the offense, because without this knowledge, the jury does not know what constitutes the proscribed conduct in a legal sense. *Cf. State v. Ray*, 2017 UT App 78, ¶19, 397 P.3d 817, *cert. granted*, 406 P.3d 250 (Utah 2017) (in context of failing to define term "indecent liberties").

Instructions 32-34 instructed the jury as to the elements required for the offenses of Sexual Battery upon which Heath was tried. (R610-12). These instructions use the specific terms: "anus, buttocks, or any part of the genitals". While the terms "anus" and

"buttocks" might be common sense, the phrase "*any part of the genitals*" needed further definition here.

Instruction 35 instructed the jury as to the elements required for the offenses of Forcible Sex Abuse upon which Heath was tried. (R613). This instruction uses the specific terms: "anus, buttocks, or genitals"; and "indecent liberties." The jury was instructed as to the meaning of indecent liberties in Instruction 44 (R622), but again, was never instructed as to the definition of the term "*genitals*." This failure was critical since, as noted in Point I above, it impacts whether the clitoris is considered "genitals" or the "genital opening."

Instruction 36 instructed the jury as to the elements required for the offense of Object Rape upon which Heath was tried. (R614). This instruction uses the specific terms "penetration" and "genital or anal opening". None of these specific terms and phrases were further defined or explained. The failure to do so was fatal here since a distinction needed to be drawn as to the meaning of "genital opening" necessary to the count of Object Rape, the meaning of the phrase "any part of the genitals" necessary to the counts of Sexual Battery, and the meaning of the term "genitals" used in the count of Forcible Sex Abuse. And, the definition of the term "penetration" was essential, since the State's whole theory of "penetration of the genital opening" in this case was the purported split-second *touching* of the clitoris.

Of note, jurors picked up on these issues and questioned the distinctions during deliberations. In one question, the jury asked: "Does touching the clitoris constitute

penetration?" to which the court issued the reply, "[t]he jury instructions contain all the information you need." (R3047). Another question: "Can we view the diagram of the vagina the prosecution used in court?" The answer: "No." (R3049). And another inquiry: "Would the definition of penetration change based on the anatomy of the person under the law of object rape?" The answer: "The instructions contain all the information you need." (R3051). The response to the jury, however, that the instructions contained everything they needed was simply not true. The instructions contained no definition of penetration. The instructions contained no definition of "genital opening" or other guidance as to whether or not the clitoris was part thereof. The logical inference from the jury's request to look at the diagram was to review where the "opening" and "clitoris" were located, and to compare the two anatomical structures on that diagram with B.C.'s indication as to where she was touched. (R. Envelope, Exhibits Not Received). The Utah Supreme Court long-ago provided guidance in this situation:

> Where the jury requests it, the definition of a term critical to the meaning of a criminal statute is a point of law. Jurors cannot be considered properly instructed on a criminal statute if they are demonstrably confused about the meaning of the words used in it. . . . where a jury at its own instance requests the definition of a term whose understanding is essential to a proper application of the law, the trial judge must provide the requested definition. In the application of this rule, we see no reason to distinguish between terms of art and nontechnical words of common usage. The critical fact is that the jury has signified its lack of understanding of the meaning of a word it must apply in performing its function.

State v. Couch, 635 P.2d 89, 94-95 (Utah 1981).

Here, the jury signified its lack of understanding to critical concepts necessary to perform their duties. The court and the parties failed to properly instruct them, and as a result, this Court must vacate these convictions and order retrial before a properly instructed jury.

2. Failure to Instruct on Essential Consent Terms

Similarly, the jury was not instructed as to terms necessary to their determination of the element of consent. Instruction 38 instructed the jury as to consent. (R616). Although this instruction is erroneous for additional reasons noted below, relevant to this point, Instruction 38 sets forth a number of ways in which one's consent may be vitiated, using several legally specific terms and phrases such as: "overcame . . . through concealment or by the element of surprise"; or "committed the act under the guise of providing professional diagnosis, counsel or treatment". The jury was instructed as to what a "health professional" means in Instruction 43, but was never instructed, among other things, what it means to "conceal" or use the "element of surprise" in order to vitiate one's consent. Nor was it explained to the jury what it meant to act "under the guise" of providing treatment in such a manner where "B.C. could not reasonably be expected to have expressed resistance" which might vitiate consent. The point being: the jury was given a number of factors to consider in determining one of the most important elements in the case – consent or lack thereof – and they were given these factors with absolutely no definition of important terms or any other guiding principles. This failure amounts to reversible error.

B. THE INSTRUCTIONS PERMITTED HEATH TO BE CONVICTED OF OFFENSES FOR WHICH HE DID NOT HAVE NOTICE, WAS NOT BOUND OVER, AND HAD NO ABILITY TO DEFEND AGAINST

"Article I, section 12 of the Utah Constitution provides that every criminal defendant has a right to know 'the nature and cause of the accusation against him.'" *State v. Burnett*, 712 P.2d 260, 261-62 (Utah 1985). "This entitles the accused to be charged with a specific crime, so that he can know the particulars of the alleged wrongful conduct and can adequately prepare his defense."*Id*. (citing authority). *See also, State v. Bush*, 2001 UT App 10, ¶14, 47 P.3d 69. Rule 4 of the Utah Rules of Criminal Procedure protects these rights by requiring an indictment or information setting forth the offense and supporting facts. *See* Utah R. Crim P. 4. In order to thereafter secure a conviction, the prosecution has to prove the offenses at trial "substantially as charged." *Burnett*, 712 P.2d at 262.

Additionally, Article I, §§ 12 and 13 of the Utah Constitution, as well as Rules 7(h)-(k) of the Utah Rules of Criminal Procedure, guarantee a criminal defendant the right to a preliminary hearing and those processes afforded to it. The preliminary hearing is an essential step in the criminal process and a defendant cannot be tried and convicted for an offense distinct from that upon which he was bound-over from a preliminary hearing. *See, e.g., State v. Jensen*, 96 P. 1085, 1087 (Utah 1908). The Utah Supreme Court spoke to this issue in *State v. Ortega,* 751 P.2d 1138 (Utah 1988). Under *Ortega*, a trial court reviews the evidence presented at trial to ensure it conforms to the evidence presented at the preliminary hearing for bind-over. *See id.* at 1141.

The court's bindover on the charges for which Heath was convicted at trial includes the following relevant findings:

> . . . the Court finds probable cause to believe that the defendant committed each of the charged offenses. The defendant contends that B.C. consented to massage treatment in the hip and groin area and therefore, consented to defendant's touching the clitoris and vaginal area.
>
> Viewing the facts in the light most favorable to the State, *[B.C.] consented to chiropractic treatment* but [did not] consent[] to be touched *in the sexual manner* . . . described.

(TR1424) (emphasis added).

The court made the specific findings:

> . . . the evidence established that on November 3rd, 2012, the defendant rubbed [B.C.] directly between her legs, right on her clitoris and vaginal area. The touching was intentional and occurred under circumstances the defendant knew or should have known would likely cause affront or alarm.
>
> On November 24th , 2012, the defendant engaged in the same conduct, constantly rubbing over her pants, right over her vaginal and clitoral area. Defendant stopped this touching when interrupted by [B.C.'S] sister, who entered the room.[28]
>
> On December 1st, 2012, the defendant engaged in the same conduct, again, in [B.C.'s] words: Rubbing me between my legs, over my vaginal and clitoral area with one hand; however, on this occasion, the *sexual touching* escalates. The defendant, again in [B.C.'s] words, put his hand in my underwear and massaged my pubic mound right next to my vagina and on my bare skin.[29]

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[28] The court did not make the finding that "the touching was intentional and occurred under circumstances the defendant knew or should have known would likely cause affront or alarm." Utah Code § 76-9-702.1.

[29] The court did not make the finding that "the touching was intentional and occurred under circumstances the defendant knew or should have known would likely cause affront or alarm." Utah Code § 76-9-702.1.

> On December 8, 2012, the defendant again put his hand in her underwear, touched her clitoris with his finger. She described that he touched the outer labia and then extended one of his fingers out and touched her bare clitoris . . . Object rape requires proof that the defendant, without the victim's consent, caused the penetration, however slight, of the *genital opening* of another by any foreign object, including a part of the human body. Viewing the facts in the light most favorable to the State, *the touching of the clitoris with an extended finger is sufficient evidence of slight penetration* and satisfies each element of the object rape statute.[30]

(TR1425-26) (emphasis added).

As bound over, all of the charges Heath faced involving B.C. dealt with *touching for sexual purposes* and *touching of the genitals*. Therefore, it was not permissible to allow the jury at trial to consider guilt for touches to any other body part or for any other purpose. The jury instructions allowed this very thing to happen in multiple respects.

First, the instructions allowed the jury to convict for Sexual Battery based upon the gluteal massage and *gluteal* touches, an offense different from which Heath was bound over. Specifically, Instructions 32, 33, and 34, allowed the jury to convict Heath of Sexual Battery if they found he "intentionally touched, whether or not through clothing" the anus or buttocks under circumstances Heath "knew or should have known would likely cause affront or alarm" to B.C. (R610-12). This Instruction thereby allowed the jury to consider Heath's intention performance of deep tissue massages on B.C.'s buttocks, which they could construe to cause affront or alarm since B.C. testified she was uncomfortable the first time she received the gluteal massage. However, this particular

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[30] The court did not make a bind-over finding as to Forcible Sex Abuse. Nor did the court make a specific finding as to intent, but in any event, the findings were all in the vernacular of a sexual touch of the genitals.

variant of Sexual Battery for gluteal massages was not the offense for which Heath was specifically bound over, which was rubbing B.C. "directly between her legs, right on her clitoris and vaginal area." The gluteal massage was on at least one juror's mind, who sent the question to the court: "I need some clarification on if touching the glutes is part of the alleged crime or if its in regards to specifically touching the vagina." The court responded: "Will be addressed in jury instructions." (R3041). The instructions thereafter allowed the jury to convict based upon buttocks touches, a crime for which Heath was not charged, bound-over, or had any reason to believe he needed to defend against.

Second, the instructions allowed the jury to convict Heath for felonious Forcible Sex Abuse for performing *painful* treatments, an offense, again, for which Heath was not charged, bound-over, or had any reason to believe he needed to defend against. On this point, Instruction 35 instructed the jury they could find Heath guilty of Forcible Sex Abuse if he touched the buttocks or even the skin of B.C.'s breast, with the intent to cause "bodily pain." (R613). But, pain was part and parcel to the treatment. That these specific touches to the buttocks and chest area occurred, and that the treatment caused bodily pain, was undisputed. Thus, the jury was allowed to convict Heath of a second degree felony for an offense clearly not contemplated by the parties or the court, and one for which Heath was not put on notice.

Third, the consent instructions were similarly problematic and allowed the jury to base a finding of guilt upon variations of non-consent for which Heath did not have notice, for which he was not bound over, and for which he could not defend against.

Although the court's finding of non-consent at the preliminary hearing as well as the State's theory of non-consent is not entirely clear, it appears the State sought to establish legal non-consent under Utah Code § 76-5-406(12) which provides a touch is without consent if: 1) the actor is a health care professional; 2) "the act is committed under the guise of providing professional diagnosis, counseling, or treatment"; and 3) "at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate . . . treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested." *Id*. In addition to the fact that this specific non-consent provision was not adequately defined for the jury, because this seems to be the theory of non-consent at issue, the jury should not have been instructed as it was in Instruction 38, as to the other numerous theories of non-consent, or told that they were not limited in any way in their consideration. (R616).[31]

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[31] The problem with instructing the jury in this manner is two-fold. First, a court "has a duty to instruct the jury on the law applicable to the facts of the case," *Potter*, 627 P.2d at 78, and "instructions must bear a relationship to evidence reflected in the record." *State v. Pacheco*, 495 P.2d 808, 808 (Utah 1972). Courts recognize that it may constitute prejudicial error to give an instruction if there is no supporting evidence thereof. *E.g, State v. Howland*, 761 P.2d 579, 581 (Utah App. 1988); *State v. McCardell*, 652 P.2d 942, 945 (Utah 1982). Here, there was no evidence to support the list of situations given to the jury in Instruction 38 which might vitiate consent. As a result, the jury was likely misled.

Second, and what presents the most harm, is that the jury was allowed to consider "anything" and were told they were not limited in the circumstances which they might consider. This clearly allowed the jury to consider elements for which Heath had no notice, for which he was not bound over, and against which he had no ability to defend. It is true that under Utah law the jury may find an act is without consent for a variety of reasons, whether enumerated by statute or falling outside the list. *See* Utah Code § 76-5-406; *State v. Thompson*, 2014 UT App 14, ¶ 90, 318 P.3d 1221, 1251. However, instructing the jurors on that law, in this case, violated Heath's constitutional rights to notice and was prejudicial especially where he was only charged, given notice of, and

C. THE JURY WAS ERRONEOUSLY INSTRUCTED AS TO MENS REA

The State is required to prove, beyond a reasonable doubt, the "culpable mental state required." Utah Code § 76-1-501(2)(b). Failure to properly instruct as to the required mens rea is reversible error. *See Bird*, 2015 UT 7, ¶ 14.

With regard to the counts of Object Rape and Forcible Sex Abuse, the jury was instructed in Instructions 35 and 36 that it was required to find that:

1. Dale Heath;
2. Intentionally, knowingly, or recklessly;
   Engaged in the proscribed touch;
3. Without B.C.'s consent;
4. *Dale Heath acted with intent, knowledge or recklessness that B.C. did not consent*;
5. Did so with the requisite specific intent to arouse or gratify sexual desire; and
6. B.C. was 14 years of age or older.

(R613-14) (paraphrased and emphasis added).

Here, the jury was erroneously instructed that the applicable mens rea was knowing, intentional, or reckless *with regard to consent*. The problem surfaces since Utah Code § 76-5-406 sets forth when an act is statutorily without consent, and in doing so, also sets forth the applicable mens rea associated with that particular mode of vitiating of consent. For example, a touch is without consent when "the *actor knows* the victim is unconscious, unaware that the act is occurring, or physically unable to resist." Utah Code § 76-5-406(5) (emphasis added). So, if the State seeks to proceed on this variation of statutory non-consent, the State must prove the defendant's knowledge. Similarly, a

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bound over (even in the slightest way) on a specific theory and particulars of non-consent.

touch is also without consent if "the actor *intentionally impaired the power of the victim* to appraise or control his or her conduct by administering any substance without the victim's knowledge." *Id*.(8) (emphasis added). So, if the State seeks to proceed on this prong, it again must prove an intentional mens rea and that the defendant intentionally acted to administer an impairing substance.

Assuming that the State sought to prove Heath vitiated B.C. consent under the "guise of treatment" prong set forth in § 76-5-406(12), among other showings, the State was required to establish two mindsets – first, that Heath committed the act "under the guise of providing professional diagnosis, counseling, or treatment," which equates to an intentional mens rea; and second, show the victim "reasonably believed" the act was for medically or professionally appropriate treatment and that "resistance by the victim could not reasonably be expected to have been manifested." *Id*. The State clearly did not make these showings here.

The simple takeaway: it was error to instruct the jury they needed only find "Dale Heath acted with intent, knowledge or recklessness that [B.C] did not consent" because the State's mens rea burden was much more complicated than that. Here, assuming the State proceeded on the "guise of treatment" prong, the State's showing of non-consent required a finding of an intentional act for a specific purpose, and in addition, specific findings concerning the mindset of the alleged victim.

D. THIS COURT SHOULD REVIEW THE JURY INSTRUCTION ERRORS FOR PLAIN ERROR, MANIFEST INJUSTICE, AND/OR IAC

Trial counsel did not object to the instruction errors raised here, and at times,

offered the erroneous instruction. Despite failures in preservation, this Court should nevertheless review for plain error, manifest injustice,[32] and/or IAC.

First, the trial court plainly erred and failed in its duty to provide correct instructions to the jury. *See State v. Low*, 2008 UT 58, ¶27, 192 P.3d 867 (court has duty to instruct jury on relevant law); *Ontiveros*, 835 P.2d at 205 (same). The instructional errors detailed above all concern well-established legal principles and the plain reading of the relevant statutes that should have been obvious to the trial court. Given the circumstances, the court should have been aware an error was being committed. There is just no question the court knew its responsibilities to properly instruct the jury on all necessary elements of a crime, including the applicable mental states and relevant definitional principles for the jury.

Additionally, trial counsel rendered IAC in failing to ensure the jury was properly instructed. Initially, by failing to pose objections on these issues, trial counsel undermined preservation of the claims. Courts also regularly acknowledge that proposing, stipulating to, or failing to object to erroneous or ambiguous jury instructions may constitute deficient performance underlying an IAC claim.[33] Here, trial counsel

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[32] Rule 19(e) of the Utah Rules of Criminal Procedure finds that instructional errors not properly objected to may be considered on appeal "to avoid a manifest injustice." In most cases, "manifest injustice" is synonymous with the "plain error" standard. *E.g., Apodaca*, 2018 UT App 131, n.14; *Alinas*, 2007 UT 83, ¶ 10.

[33] *E.g., State v. Lewis*, 2014 UT App 241, ¶1, 337 P.3d 1053 (reversing conviction in finding "trial counsel was ineffective for failing to object to flawed jury instructions"); *State v. Ekstrom*, 2013 UT App 271, 316 P.3d 435 (trial counsel's failure to challenge absence of jury instruction prejudiced defendant and constituted ineffective assistance of

misapprehended several favorable legal doctrines applicable to this case and thereby failed to ensure the jury was not misled by inapplicable instructions, but instead fully and clearly instructed. Trial counsel also failed to ensure Heath was tried in fair proceedings, and only upon those crimes and upon those facts for which Heath was given notice, bound over by preliminary hearing, and defended against. Rather than tactical, trial counsels' failures likely resulted from a failure to apprehend the consent and intent issues rather than from any reasoned decision. In any event, there is simply no reasonable tactical decision that justifies allowing a defendant to face trial and be convicted upon inaccurate, confusing, and prejudicial instructions.

Critically, the jury instruction errors were prejudicial. The instructions were incomplete, legally inaccurate, and confusing, as demonstrated by the multiple jury questions. The instructional problems resulted in the failure to clearly, completely, and accurately instruct the jury on the necessary law and elements required before a man's liberty might be taken away. Further, Heath was fundamentally entitled to fair notice and a fair opportunity to defend – something which simply cannot occur when a jury is allowed to convict upon evidence, theories, or elements that change at trial. These errors mandate a new trial before a properly instructed jury.

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counsel); *Moritzsky*, 771 P.2d at 692.

III.
THE COURT'S ERRONEOUS ADMISSION OF ABUNDANT AND IRRELEVANT "BAD ACTS EVIDENCE AND ADMISSIONS" RESULTED IN A FUNDAMENTALLY UNFAIR TRIAL

Relevant Facts

Prior to trial, cross-motions in limine and a number of other motions were filed regarding the admissibility of a variety of bad acts evidence and purported admissions made by Heath. (R195-98,220-82,304-77,383-92,396-419). This evidence was sought to be admitted, or excluded, under a variety of rules of evidence or other theories and will be referred to here collectively as "bad acts evidence and admissions."

Specifically, the State sought to admit evidence concerning allegations made by J.T. and E.B.; statements made by Heath to Officer Sorenson during an interview on June 29, 2011; a DOPL letter to Heath issued July 11, 2011; two interviews with Heath conducted by Lieutenant Adams on February 26 and 28 of 2013; and DOPL probation and reprimand orders. (R222-225,399). The State sought to admit this evidence at trial for the following reasons:

> The evidence of Defendant's abuse of other patients is admissible under rule 404(b) to show intent and to rebut the defense of incidental or accidental touching and under the doctrine of chances.
>
> The DOPL order and the interviews by Lt. Adams and Officer Sorensen are admissible to show that Defendant was on notice to explain treatments in sensitive areas and to require shielding. In addition, the DOPL report and the interviews are admissible for defendant's admissions made therein (to incidental touching) . . .

(R226).

The matter was briefed and argued, and on December 30, 2016, the district court issued a "Ruling and Order" regarding the Rule 404(b) motions in limine. (R396-419). Relevant here, the court found the evidence relating to the prior allegations made by J.T. and E.B. were admissible at trial under the doctrine of chances to prove mens rea. (R417). The evidence relating to J.T.'s allegations and Heath's purported admissions made to police and in the DOPL letter also evidenced the non-character purpose of showing absence of mistake or accident, a theory unrelated to the doctrine of chances. (R418). The court found the evidence was "highly probative of absence of mistake or accident" and that the "probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially where a limiting instruction is available." (*Id*.; *also* R444).

Additionally, the State gave notice of expert witness Dr. Steven Baker for the anticipated purpose of testifying to, among other things, the obvious principle that proper medical treatment did not require contact with the vagina, labia, or clitoris, and while incidental contact with the genitals may occur, precautions should be taken to avoid such contact. (R133-34). In response, Heath's trial counsel gave expert notice of Dr. James Edwards and Ivan Thompson who were anticipated to testify, in addition to other standard of care opinions contained in their reports, that during deep tissue massage patients can become convinced a particular area is being stimulated when, in fact, the doctor is actually working in a different area of the body. Such is especially true with very sensitive areas of the body, like the pubic area. (R140-88). Both parties sought to

exclude parts of the opposing experts' testimonies. (R285-94,474-90;448-53). Oral argument was held and the court granted in part and denied in part each of the expert's opinions respectively. (*E.g*. R528-36,546-48,595-97).

Also on the eve of trial, trial counsel noted the court's 404(b) ruling did not specifically mention the 2014 DOPL stipulation and order and a subsequent interview Heath had with DOPL in the civil setting. (TR1663-65). Trial counsel moved to exclude this evidence under a variety of reasons including the *Garrity* doctrine and violation of the Fifth Amendment right against self-incrimination.[34] (TR1664-88). The court considered the issues at trial and ultimately denied the defense motion, allowing the evidence to be presented to the jury. (*E.g.*, TR1688-95,1701-03,2005-26).

While some of the court's legal rulings admitting or excluding the evidence was legally erroneous, the overriding issue is that the trial became sidetracked with irrelevant and prejudicial evidence. The trial became one not focused upon the interactions between Heath and B.C. and the determination of whether any crime was committed, but rather, exemplified the quintessential trial-within-a-trial problems, distracting the jury from the true issues in the case.

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[34] *See Garrity v. New Jersey*, 385 U.S. 493 (1967). *Garrity* held, in regards to a public employee, that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." 385 U.S. at 500.

Argument

A. THE COURT ERRED IN ADMITTING BAD ACTS EVIDENCE AND ADMISSIONS FOR THE PURPOSE OF ESTABLISHING "MENS REA"

Utah courts "rigorously appl[y] the rule that evidence of a defendant's prior crimes or bad acts is not admissible to show criminal propensity in a criminal case." *State v. Wareham*, 772 P.2d 960, 963 (Utah 1989). "Such evidence may be admitted only if the evidence has a very high degree of probativeness with respect to a particular element of the crime charged and will not otherwise result in undue prejudice." *Id*. This is so because "[o]ur criminal justice system is concerned with whether a defendant committed a particular criminal act, not whether the defendant is an unregenerate person who has failed in the past to adhere to the various customs and laws of our society." *Id.* at 964. Indeed, it is fundamental in our law that a person may be criminally convicted only for his acts, and not because of general character or a proclivity to commit bad acts. *See State v. Saunders*, 1999 UT 59, ¶15, 992 P.2d 951.

Under Rule 404(b), Utah courts analyze such evidence under one of two analytical frameworks: (1) a traditional 404(b) analysis, or (2) the doctrine of chances. Under a traditional analysis, the determination as to whether such evidence is admissible involves a three-part inquiry: first, the court considers whether the evidence has been "offered for a genuine, noncharacter purpose"; second, the court considers whether the evidence is relevant to the noncharacter purpose; and third, the court considers whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. *E.g.*,

Rackham, 2016 UT App 167, ¶14. A special application of rule 404(b) is the doctrine of chances. *See State v. Lowther*, 2017 UT 34, ¶ 32, 398 P.3d 1032. "The doctrine of chances is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over." *State v. Lopez*, 2018 UT 5, ¶50, 417 P.3d 116 (quoting *State v. Verde*, 2012 UT 60, ¶47, 296 P.3d 673) (internal quotations omitted). For evidence to be admitted under the doctrine of chances, it must meet four foundational requirements: materiality, similarity, independence, and frequency. *Lopez*, 2018 UT 5, ¶54. The admissibility of evidence under the doctrine of chances applies only when all four foundational requirements are satisfied. *See Lowther*, 2017 UT 34, ¶¶32,40 n.66.

Evidence that passes muster under Rule 404(b) (whether under a traditional analysis or under the doctrine of chances) must next be analyzed under Rule 402 and then Rule 403. *See id.*, ¶32 (doctrine of chances); *State v. Reece*, 2015 UT 45, ¶57, 349 P.3d 712 (traditional analysis). Under Rules 401 and 402, "Bad acts evidence, like all evidence, must be relevant or it is inadmissible." *State v. Nelson-Waggoner*, 2000 UT 59, ¶26, 6 P.3d 1120. Under well-established case law, unless the other acts "evidence tends to prove some fact that is material to the crime charged – other than the defendant's propensity to commit crime – it is irrelevant and should be excluded by the court pursuant to rule 402." *Id.* Finally, under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the

following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403.

Here, the court's admission of abundant irrelevant evidence under various rules, including Rules 404(b), 402 and 403, allowed a substantial amount of irrelevant information to be presented to the jury despite the proffered purposes posed in pretrial hearings. As a result, most of the Rule 403 concerns were realized during trial as the presentation of an abundance of irrelevant information confused the issues, wasted time, presented cumulative evidence, and resulted in unfair prejudice.

1. The Court Erroneously Admitted Accusations from J.T. and E.B under the Doctrine of Chances because the State Failed to Prove Requisite Frequency

One of the four required elements of admission of prior acts evidence is frequency. Frequency means a defendant has "been accused" of the act "more frequently than the typical person endures . . . accidentally.'" *Lopez*, 2018 UT 5, ¶57 (quoting *Verde*, 2012 UT 60, ¶61). The elements of "similarity and frequency, interact with each other to become a safeguard against the doctrine of chances becoming a work-around for the admission of otherwise improper propensity evidence." *Id*. "For doctrine of chances purposes, frequency does not mean just how many times a prior act has occurred, but whether '[t]he defendant [has] been accused of the crime . . . more frequently than the typical person endures such losses accidentally.'" *Id*. (emphasis and citation omitted). "Similarity assumes importance in this inquiry because a district court could logically

conclude that the more similarities repeated events share, the less likely they are to occur frequently by accident." *Id*.

Assuming for argument there was sufficient similarity in the reports made by J.T. and E.B. in that Heath made improper contact with their vaginal areas during adductor or lower back treatments, it must not be forgotten that the court was addressing *two* accusations – two accusations in a career spanning nearly thirty years, over 4,000 patients, and 10s-of-thousands of these very same treatments. Heath has used the same treatment methods over the past thirty-one years. (TR2585). He treated almost 4,400 patients – 3,400 in Utah and 1,000 in California. (TR2586). He performed over 80,000 treatments over his career; 50-60,000 dealing with lower back pain; 20-30,000 dealing with inner thigh and adductor muscle treatment. (TR2799). By 2012, other than the complaints made relevant to this prosecution, no allegations of the nature posed here had ever been levied. (TR2799-2800;R305,¶5). The State's showing of frequency was further undercut by its inability to indicate how many patients Heath treated during the relevant time frame these women reported. In the five years before the prosecution, there was only one report, with the others being late reports of purported past recollections.

Surely, *two allegations* in relation to the mass number of patients and similar treatment does not suffice to meet the frequency element required under the doctrine of chances. The State failed to meet its burden under the frequency prong and the court's admittance of the evidence did nothing more than allow what Rule 404(b) was intended to prohibit.

2. The Court Erroneously Admitted the Bad Acts Evidence and Admissions to Prove "Mens Rea"

With regard to J.T. and E.B., the court admitted their allegations under the doctrine of chances to prove mens rea, but found their testimony inadmissible to prove actus reas. (R415-17). The court also admitted the other bad acts evidence and purported admissions made by Heath to show an "absence of mistake or accident" in the touch. Similarly, the "standard of care" expert evidence and the DOPL documents was allowed to establish "absence of mistake or accident" in the touch since, under the State's theory, Heath was put on notice that inappropriate contact might occur and he should have taken steps to remedy it. Beyond an overall problem of true relevance,[35] a more fundamental issue arose at trial. The admission of this evidence was based upon the State's purpose to establish "absence of mistake or accident." This purpose, however, impermissibly over-broadened at trial to allow the jury to consider the evidence to infer specific intent– i.e., the intent to touch for sexual gratification.

As noted, the court allowed the evidence to show absence of mistake or accident (R403-04), and specifically with regard to the E.B. and J.T. allegations under the doctrine of chances, to show "mens rea." (R415-18). As to the charges of Object Rape and Forcible Sex Abuse, the State is required to prove both a general mens rea for the

[35] For example, how is testimony that Heath allegedly breached standard of care protocol in record-keeping at all relevant to whether, on the dates alleged, he touched B.C. without consent and for a sexual purpose? Indeed, Instruction 46 told the jury "violation of the standard of care is not an element of any offense which the State must prove." (R624). This evidence was irrelevant.

commission of the act (here, that the improper touch occurred intentionally, knowingly, or recklessly), as well as prove the defendant held the specific intent to arouse or gratify sexual desire. By permitting the State to present the bad acts evidence to prove "mens rea," the court conflated the general intent to commit the act and the specific intent to cause the result.[36] However, while the bad acts evidence might serve as relevant evidence to counter a claim of mistake or accident for the touch (for which the intentional, knowing, or reckless states of mind apply), this evidence has absolutely no bearing on or relevance to the specific intent requirement of establishing an intent to arouse or gratify sexual desire. The limiting instructions given to the jury likewise makes no distinction between the general and specific intent requirements, and only ambiguously instructs the jury that they may consider the evidence "as evidence of Dale Heath's *mental state* at the time he treated B.C" (R625, Instruction 47 as to DOPL Action); or they may consider the evidence "for the limited purpose of determining whether Dale Heath *acted with the mental state* specified by law." (R628-29, J.T. and E.B. limiting instructions).

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[36] The error is seen by the court's statement:

> In this case, the State offers the uncharged acts of Defendant . . . to prove that (1) Defendant committed the actus reus of sexual battery, forcible sexual abuse, and object rape; and (2) Defendant committed these acts, not by mistake or accident incidental to treatment, but rather with the required mens rea (intentionally, knowingly, recklessly or with intent to arouse or gratify sexual desire).

(R416-17).

In sum, the court found that the proffered bad acts evidence and admissions were relevant to counter a claim of mistake or accident. The court erred in allowing the State to admit this evidence for other reasons, and in particular, for failing to strictly limit the jury's consideration to this purpose.

3. The Instructions Failed to Require the Jury to Find the Allegations Concerning J.T. and E.B. Were In Fact Committed

In addition to the faulty limiting instructions just noted, the jury was never asked in the first instance to make the foundational factual determination that the conduct alleged by J.T. and E.B. was actually committed.

As noted, pretrial hearings were held as to the "prior acts" evidence alleged by J.T. and E.B. Once a party demonstrates it is offering bad acts evidence for a proper, non-character purpose, the party must next demonstrate the evidence is actually relevant to that avowed purpose. *See Reece*, 2015 UT 45, ¶64. Depending on the case, analysis under Rule 402 might involve the issue of conditional relevance. *See id.*; *State v. Lucero*, 2014 UT 15, ¶18, 328 P.3d 841, *abrogated on other grounds by Thornton*, 2017 UT 9. "When the relevance of evidence depends on whether a fact exists, proof must be introduced to support a finding that the fact does exist." Utah R. Evid. 104(b). In the context of bad acts evidence, "when the relevancy of a prior crime or bad act hinges on 'whether a fact exists,' the prior act is only admissible if the trial court determines that 'the jury could reasonably find' the factual condition fulfilled 'by a preponderance of the evidence.'" *Reece*, 2015 UT 45, ¶ 64 (citations omitted); *also Lucero*, 2014 UT 15, ¶20.

In dealing with such evidence, the jury's role is "to decide whether the 'condition of fact' is fulfilled and to ultimately view the evidence as credible," and the court's role is "to decide whether there is sufficient evidence upon which the jury could make such a determination." *Lucero*, 2014 UT 15, ¶19. Here, the district court made its finding of conditional relelvance. (R400-01). The jury was never asked, however, to make its finding and decide whether the allegations made by J.T. and E.B. in fact occurred, before they were then limited in their consideration as instructed by the limiting instructions.

B. THE ADMISSION OF ABUNDANT IRRELEVANT EVIDENCE TURNED THE JURY'S FOCUS AWAY FROM THE TRUE ISSUES OF THE CASE

District courts are generally afforded a great deal of discretion in determining whether to admit or exclude evidence. *See Martin*, 2017 UT 63, ¶18. Thus, as long as the district court did not make an error of law, this Court will not reverse unless the decision "is beyond the limits of reasonability."*Id*. But when the admission of evidence is highly attenuated from the facts of the case at issue, is offered by biased witnesses, and subjects the jury to time-consuming trials within a trial on peripheral issues that are only minimally relevant, such evidence should be excluded. *See State v. Miranda*, 2017 UT App 203, ¶42, 407 P.3d 1033, *cert. denied*, 417 P.3d 581 (Utah 2018).

Subjecting a jury to a time-consuming trial within a trial on peripheral issues that are only minimally relevant, if relevant at all, certainly describes the trial here. The critical factual issue for the jury in this case was the credibility of Heath, who admitted to treating muscles in sensitive areas but who denied having touched B.C.'s genital area on

any occasion or for any purpose, and the credibility of B.C., who testified to having felt uncomfortable, having felt a brief contact with her clitoris, and who testified as to having become sexually aroused. The jury, therefore, should have ben required to decide the issue of guilt or innocence solely on the basis of the demeanor and testimony of Heath and B.C. "In this context, the governing evidentiary and procedural rules designed to enable a trier of fact to sort out truth from falsehood [should have been] applied with punctiliousness to avoid factual error and injustice." *Saunders*, 1999 UT 59, ¶14. Instead, but for the testimony of B.C. herself, the State's entire case had absolutely nothing to do with whether or not, on the specific dates charged, Heath not only intentionally, knowingly or recklessly *improperly touched* B.C. in the sensitive areas (as opposed to touching for proper treatment or accidentally), but that he did so *without her consent*, and he did so with *the specific intent to arouse sexual desires*. The State ignored what this case was about, and instead, this case became about anything other than those elements.

As so eloquently pointed out by trial counsel, the State's case became about the gracilis muscle, and the Psoas attachment in the inner thigh, and the inguinal ligament (TR2680-82); about Heath breaching "standard of care procedures" in losing or maintaining incomplete medical records (TR2861); about the truly undisputed principle that a medical professional violates standard of care procedures when they inappropriately touch a patient (TR2863); about "blocking" and the State's theory that somehow Heath was guilty because he did not instruct patients to put their hands over their vaginal areas even though clothed (*Id*.); about "draping" and the State's theory that somehow Heath

was guilty because he did not add an additional layer of draping over clothed patients (*Id*.); about the State's theory that somehow Heath was guilty for even treating in sensitive areas, even though all experts agreed treatment in such areas is entirely appropriate (TR2864-65); about the propriety of non-medically trained chaperones (TR2865); about the asserted failure by Heath to take "extra precautions" (TR2865); and about Heath's encounters with DOPL and his mischaracterized "admissions" of inappropriate patient contact, even though Heath always maintained no inappropriate touching ever occurred. (TR2866). This case also became about allegations made by two other women – one who made inconsistent statements which resulted in no charges being filed, and the other making incredible allegations of impropriety when a chaperone was present during the entire treatment. (TR2867). Because the court allowed an over-abundance of extraneous evidence and testimony to be presented, this case ultimately became about everything and anything except for the only relevant issues in the case – whether or not, on the specific dates charged, Heath intentionally, knowingly or recklessly *improperly touched* B.C., whether he did so *without her consent*, and whether he did so with *the specific intent to arouse sexual desires*.

Allowing the case to go so far afield prejudiced Heath.[37] The majority of the State's case was irrelevant to the elements of the charges at issue. The strength of the

[37] In determining whether a court's error is harmless, this Court considers several factors including, the importance of the complained of evidence to the prosecution's case, whether that evidence was cumulative, and the overall strength of the prosecution's case. *See Miranda*, 2017 UT App 203, ¶44 (citing authority).

State's case was weak and as demonstrated in Point I, the State failed to meet its burden to prove these charges beyond a reasonable doubt. But to remedy the significant weaknesses in its case, the State resorted to distraction with innuendo and speculation. The tactic was not only inappropriate,[38] but forced trial counsel and Heath to expend significant resources and trial time responding. Consequently, because the district court allowed this case to go so far afield, this Court should remand for a fair and just trial of the issues.

IV.
CUMULATIVE ERROR

If this Court determines that the errors set forth herein do not individually warrant reversal, this Court should nevertheless find the cumulative effect of all such errors do. *See State v. Kohl*, 2000 UT 35, ¶25, 999 P.2d 7.

The cumulative-error analysis allows this Court to consider all identified errors, as well as any errors it assumes may have occurred. *See State v. Jones*, 2015 UT 19, ¶74, 345 P.3d 1195. The Court may then vacate the convictions and order a new trial if the cumulative effect of several errors undermines confidence that a fair trial was had. *See Dunn*, 850 P.2d at 1229; *State v. Martinez-Castellanos*, 2017 UT App 13, ¶79, 389 P.3d

[38] Indeed, argument as to the alleged prior conduct pervaded the State's closing argument, which violated the fundamental principle that "a prosecutor may never argue or suggest to the finder of fact, either directly or indirectly, that a defendant should be convicted because of his criminal character or that he was guilty of the crime charged because he acted in accord with a criminal propensity shown by such evidence. This is true regardless of whether that evidence was properly or erroneously admitted." *Saunders*, 1999 UT 59, ¶25.

432 (aggregating errors and reversing because counsel was ineffective in several respects).

Here, Heath first and foremost asserts that because the State failed to meet its evidentiary burdens, all convictions must be vacated and retrial barred by double jeopardy. Absent that relief, numerous errors were made justifying a new trial. The jury was not completely and accurately instructed in a number of material aspects. The court also allowed irrelevant and prejudicial evidence to pervade the trial which misdirected the jury from the true facts of the case; error which may also be remedied through a new trial. While each error raised herein independently justifies, at least, a new trial, the cumulative effect of the many errors should certainly undermine this Court's confidence in these proceedings and warrant remedy.

CONCLUSION

Based on the foregoing, this Court should find the State failed to present sufficient evidence to sustain each of Heath's five convictions and vacate each. Alternatively, this Court should order retrial before a properly instructed jury in a trial where the evidence admitted speaks to the true issues of the case.

CLAIM FOR ATTORNEY'S FEES

There are no claims for attorney's fees in this criminal appeal.

DATED this 6th day of August, 2018.

/s/ *Ann Marie Taliaferro*

_____

ANN MARIE TALIAFERRO
Attorney for Appellant Dale Heath

CERTIFICATE OF COMPLIANCE

This brief DOES NOT comply with the type-volume limitation of Utah R. App. P. 24(f)(1). Appellant has filed a motion for enlargement of the word limitation which was granted August 6, 2018..

I, Ann Marie Taliaferro, certify that this brief contains 22,083 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 also certify that this brief has been prepared in a proportionally spaced font using WordPerfect X6 in Times New Roman 13 point.

I also certify that this brief contains no non-public information in compliance with the non-public information requirements of Utah R. App. P. 21(g).

/s/ *Ann Marie Taliaferro*

_____

ANN MARIE TALIAFERRO
Attorney for Appellant Dale Heath

CERTIFICATE OF DELIVERY

I hereby certify that on the 6th day of August, 2018, a true and correct copy of the foregoing OPENING BRIEF OF APPELLANT was mailed, postage prepaid, emailed, or hand-delivered to:

Assistant Attorney General
Criminal Appeals Division
160 East 300 South, 6th Floor,
Salt Lake City, Utah 84111

/s/ *Ann Marie Taliaferro*
_____
ANN MARIE TALIAFERRO
Attorney for Appellant Dale Heath

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ADDENDA

ADDENDUM
A

Court's Oral Denial of the Motion to Arrest Judgment

opinions to establish that, none of which was in trial. I think we just have to remember regardless of what happens generally in cases, we're talking about what happened inside this courtroom for those three or four days. And during that time, regardless of what may happen in other cases, there was no evidence of penetration and there was no evidence that Dr. Heath acted with the intent to sexually gratify.

All the State has to rest upon is, we don't have to worry about proving that element, your Honor, because everyone knows that's the case, everyone knows you can't touch a clitoris without penetration. I didn't have to ask that question. Everyone knows that there's no reason for a licensed chiropractor to have his hands in that area, I didn't need to ask questions about that. And our position, your Honor, is he didn't ask the questions and why that is, we don't know, but for this Court, it should be because the evidence wasn't there.

Thank you.

THE COURT: Thank you, Mr. Anderson.

Counsel, if you'll be patient, I'd like to just review my notes and then I'll rule on the motion. Court's in recess.

THE BAILIFF: All rise.

(Recess)

THE COURT: Be seated.

We will go back on the record in the matter of State of Utah vs. Heath. Mr. Heath is present, together with his counsel, the State's attorney is present.

Counsel, thank you for your arguments this morning and for the ex--very helpful briefing with respect to this issue.

After jury trial, defendant was convicted on three counts of sexual battery, one count of forcible sexual abuse and one count of object rape.

After reading the Utah Court of Appeals decision in State vs. Patterson, this Court on its own motion, requested briefing on whether judgment should be arrested on the object rape conviction. The issue presented was whether a reasonable jury, after having the testimony presented, could find beyond a reasonable doubt, that defendant caused the penetration, however slight, of the victim's genital opening.

After the Court on its own motion, requested briefing on this issue, the defendant moved to arrest judgment on the same ground. Defendant also moved to arrest judgment on the forcible sexual abuse conviction arguing that the State had failed to prove that the defendant acted with the intent to arouse or gratify the sexual desire of any person.

Having carefully considered the briefing and oral arguments, the Court now enters the following ruling: When reviewing a challenge to the sufficiency of the evidence, the

court reviews the evidence and all inferences that may reasonably be drawn from it in the light most favorable to the jury's verdict.

The Court vacates the conviction 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.

To conduct this analysis, the Court reviews the elements of the relevant statute. It then considers the evidence presented to the jury to determine whether the evidence of every element of the crime was adduced at trial.

Here, the defendant was charged with object rape. A person is guilty of object rape when the person, without the victim's consent, causes the penetration, however slight, of the genital opening of another person who is 14 years of age or older, by any foreign object, including a part of the human body, other than the mouth or genitals, with the intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person.

The Utah Supreme Court has held that penetration in this context means entry between the outer folds of the labia as held in State vs. Simmons.

The defendant contends that the State did not present evidence that he caused such penetration.

To determine whether sufficient evidence was presented, the Court must scrutinize the testimony elicited at trial and because the Court reviews the evidence in the light most favorable to the jury's verdict, the Court relies primarily here on the victim's account of hat happened to her as well as the State's expert testimony demonstrating that there was no medical purpose for the touching at issue, which testimony the jury apparently credited.

With respect to the testimony elicited at trial, during the December--the December 1 visit, the victim testified that the defendant put his hand down the front of her pants and under her underwear and massaged her groin in a circular motion on the left side of her vagina. She testified, I remember his fingers going in a circular motion which would move my outer lip of my vagina over.

The following exchange occurred:

Question: Did he actually touch your labia?

Answer: He touched my labia majora.

Question: Okay.

Answer: The outer lip.

Question: When you say labia majora, what do you--what does that mean to you?

Answer: To me, that means the soft skin that's the starting of the vagina but not the--not the inner--not the opening, not the clit.

Question: Okay. Just on the outside?

Answer: Uh-huh (affirmative).

The victim further testified that as--that on the December 8th visit, the defendant placed his hand down her pants under her underwear and performed a massage of her groin to the side of her genitals. She--specifically, she stated this time, he was still doing the circular motions and he was having his fingers right on the outer lip of my vagina, moving it around and around and around.

Then I remember clearly feeling him move his finger, just one, over, and it touched me right on my clitoris, right in the middle of my vagina on my skin and I flinched. I flinched and then he moved his finger away.

The victim demonstrates for the jury on a demonstrative exhibit where the defendant had touched her. She testified that he reached his finger over and touched her clitoris. Then the following exchange took place:

Question: How long was his finger on your clitoris?

Answer: Only a second.

Question: Okay.

Answer: Because I flinched and then he moved it back.

Question: Okay. Thank you. When he touched your clitoris, do you know--do you know how many fingers he touched your clitoris with?

Answer: I only felt one.
Question: Again, how long did that last when he touched your clitoris?
Answer: Only a second.
Question: Again, this was underneath the clothing?
Answer: Yeah.
Question: How long did it last on December 8th, when he touched your labia majora?
Answer: That was longer, I don't know how many times--how many minutes it was but it was a few minutes that he was touching--that--I'm sorry--it was a few minutes that he was doing this massage.
Question: When he touched your clitoris, did he have to--did his fingers have to go beyond the labia majora to touch your clitoris?
Answer: Yeah.
Question: Do you remember that?
Answer: I do. What I--what I remember is I remember feeling his finger come over like this.
Question: And you're demonstrating a pinkie finger come out from his other fingers; is that right?
Answer: Well, I don't know which hand that was because my eyes were closed but I thought it was his right hand.
Question: Did you feel it actually touch your

clitoris?

Answer: I did.

Question: Did you feel it actually go beyond your labia majora?

Answer: I felt that.

Question: Do you remember that?

Answer: I remember that.

The Court concludes that a reasonable jury after having this testimony could find beyond a reasonable doubt that the defendant caused the penetration, however slight, of the victim's genital opening, meaning his fingers entered between the outer folds of her labia. Indeed, the testimony explicitly establishes that the defendant penetrated her when taken in context.

With this explicit testimony given, in this Court's view, this is not a case which the Court must decide whether the jury drew permissible inferences or engaged in impermissible speculation. No inferences were required. The victim expressly testified that she felt the defendant's fingers go beyond her labia majora to touch her clitoris. This touching was different from the defendant's massaging of the outer folds of her labia and caused her to flinch.

This is not a case in which the victim's testimony may plausibly be interpreted as describing either a penetrative or non-penetrative scenario. Therefore, the Court

need not determine whether two interpretations--whether two interpretations are equally consistent.

Finally, the Court need no address the anatomical location of the clitoris generally, as the victim testified that to touch her clitoris required the defendant's fingers to go beyond the labia majora.

Even if this were a case in which the victim's testimony may plausibly be interpreted as describing either a penetrative or non-penetrative scenario, in this Court's view, the two interpretations are not equally consistent. Taken in context, the interpretation demonstrating penetration is far more consistent with the testimony elicited at trial. Here, the victim distinguished between the touching of her labia majora, which occurred for several minutes, and the momentary touching of the clitoris, which importantly, caused her to flinch and the--and caused the defendant to move his fingers back. The victim testified that this touching required the defendant's fingers to go beyond her labia majora.

Considering these evidentiary facts adduced at trial, they are far more persuasive of a penetration scenario than the facts set forth in Patterson, which were sufficient.

Finally, turning to the second issue, the Court finds that a reasonable jury, after hearing the testimony presented, could have concluded that the defendant touched the victim with the intent to arouse or gratify either his own

sexual desire or that of the victim's. The nature, duration and progression of the touching described by the victim all give rise to a reasonable inference about the defendant's intent to gratify sexual desire. The touching caused the victim to experience or--orgasm. It had no medical purpose and the jury credited that testimony.

For these reasons, the Court declines to arrest judgment on its own motion and denies the defendant's motion to arrest judgment.

Counsel, do you need some time to get your materials together for sentencing or are you ready to begin?

MR. McBRIDE: The State's ready.

MR. ANDERSON: We're ready, too, your Honor.

THE COURT: Very good.

If you'll come up to the podium.

Mr. Anderson, did the defendant receive a copy of the pre-sentence report?

MR. ANDERSON: Counsel did.

THE COURT: Very good.

Has he had an opportunity to review it?

MR. ANDERSON: We have reviewed it as counsel, we've gone through it (inaudible)

THE COURT: Does he need time to do that?

MR. ANDERSON: I think we're prepared to move forward, your Honor.

ADDENDUM B

Closing Jury Instructions

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. DALE HARLAND HEATH, Defendant.	**CLOSING JURY INSTRUCTIONS** Case No. 151402675 Judge Derek P. Pullan

The following Closing Jury Instructions were approved by the Court this 14th day of September, 2017.

JUDGE DEREK P. PULLAN

Instruction No. 13

Closing Roadmap.
Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal.

Finally, you will go to the jury room to discuss and decide the case.

Instruction No. 14

Usual and Ordinary Meanings Instruction.
Unless these instructions give a definition, you should give all words their usual and ordinary meanings.

Instruction No. 15

Jury Deliberations.
In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

Instruction No. 16

Foreperson Selection and Duties.

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.

Instruction No. 17

Juror Duties.

You have two main duties as jurors.

The first is to decide from the evidence what the facts are. Deciding what the facts are is your job, not mine.

The second duty is to take the law I give you in the instructions, apply it to the facts, and decide if the prosecution has proved the defendant guilty beyond a reasonable doubt.

You are bound by your oath to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions I gave you before trial, any instructions I may have given you during the trial, and these instructions. All the instructions are important, and you should consider them as a whole. The order in which the instructions are given does not mean that some instructions are more important than others. Whether any particular instruction applies may depend upon what you decide are the true facts of the case. If an instruction applies only to facts or circumstances you find do not exist, you may disregard that instruction.

Perform your duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way. You must also not let yourselves be influenced by public opinion.

Instruction No. 18

Do Not Consider Punishment.

In making your decision, do not consider what punishment could result from a verdict of guilty. Your duty is to decide if the defendant is guilty beyond a reasonable doubt. Punishment is not relevant to whether the defendant is guilty or not guilty.

Instruction No. 19

Closing Arguments.

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

Instruction No. 20

Legal Rulings.

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

- if I sustained an objection,
- if I did not accept evidence offered by one side or the other, or
- if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

Instruction No. 21

Judicial Neutrality.

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

Instruction No. 22

Evidence-Closing.
You must base your decision only on the evidence that you saw and heard here in court.

Evidence includes:
what the witnesses said while they were testifying under oath; and
any exhibits admitted into evidence.
Nothing else is evidence. The lawyers statements and arguments are not evidence. Their objections are not evidence. My legal rulings and comments, if any, are not evidence.

In reaching a verdict, consider all the evidence as I have defined it here, and nothing else. You may also draw all reasonable inferences from that evidence.

Instruction No. 23

Direct/Circumstantial Evidence.
Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

Before you can find the defendant guilty of any charge, there must be enough evidence—direct, circumstantial, or some of both—to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

Instruction No. 24

Witness Credibility.

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?
- Was there anything about the way the witness testified that made the testimony more or less believable?
- Has the witness been convicted of a felony?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

Instruction No. 25

Law Enforcement Officer's Testimony.

You have heard the testimony of a law enforcement officer. The fact that a witness is employed in law enforcement does not mean that his or her testimony deserves more or less consideration than that of any other witness. It is up to you to give any witness's testimony whatever weight you think it deserves.

Instruction No. 26

Presumption of Innocence-Closing.

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crime(s) charged. The presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but is an essential part of the law and is binding upon the jury. This presumption is a humane provision of the law intended, so far as human agency is capable, to guard against the danger of an innocent person being unjustly punished. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

Instruction No. 27

Reasonable Doubt-Closing.

As I instructed you before, proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If the evidence leaves you firmly convinced that the defendant is guilty of the crime charged, you must find the defendant "guilty." On the other hand, if there is a real possibility that he is not guilty, you must give the defendant the benefit of the doubt and return a verdict of "not guilty."

Instruction No. 28

Inferring the Required Mental State.

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state.

Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking.

A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

Instruction No. 29

Offense Requires Conduct and Mental State.

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law.

"Conduct" can mean both an "act" or the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech.

As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted (or failed to act), he did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state.

Later I will instruct you on the specific conduct and mental state that the prosecution must prove before the defendant can be found guilty of the crime(s) charged.

Instruction No. 30

Defendant Testifying. The defendant testified at trial. Another instruction mentions some things for you to think about in weighing testimony. Consider those same things in weighing the defendant's testimony. Don't reject the defendant's testimony merely because he or she is accused of a crime.

INSTRUCTION NO. 31

CR402 Separate Consideration of Multiple Crimes

The defendant has been charged with more than one crime. It is your duty to consider each charge separately. For each crime charged, consider all of the evidence related to that charge. Decide whether the prosecution has presented proof beyond a reasonable doubt that the defendant is guilty of that particular crime. Your verdict on one charge does not determine your verdict on any other charge.

INSTRUCTION NO. 32

DALE HEATH is charged in Count 1with committing sexual battery on or about November 3, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. DALE HEATH;
2. intentionally touched, whether or not through clothing, the anus, buttocks, or any part of the genitals, or breast of Brianna Cootey; and
3. DALE HEATH'S conduct was under circumstances he knew or should have known would likely cause affront or alarm to Brianna Cootey.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 33

DALE HEATH is charged in Count 2with committing sexual battery on or about November 24, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. DALE HEATH;
2. intentionally touched, whether or not through clothing, the anus, buttocks, or any part of the genitals, or breast of Brianna Cootey; and
3. DALE HEATH'S conduct was under circumstances he knew or should have known would likely cause affront or alarm to Brianna Cootey.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 34

DALE HEATH is charged in Count 3with committing sexual battery on or about December 1, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. DALE HEATH;
2. intentionally touched, whether or not through clothing, the anus, buttocks, or any part of the genitals, or breast of Brianna Cootey; and
3. DALE HEATH'S conduct was under circumstances he knew or should have known would likely cause affront or alarm to Brianna Cootey.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 35

DALE HEATH is charged in Count 4 with committing Forcible Sexual Abuse on or about December 8, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. DALE HEATH;

2. Intentionally, knowingly, or recklessly:

    a. touched the skin of Brianna Cootey's anus, buttocks, or genitals; or

    b. touched the skin of Brianna Cootey's breast; or

    c. took indecent liberties with Brianna Cootey; or

    d. caused a person to take indecent liberties with DALE HEATH or another;

3. Without Brianna Cootey's consent;

4. DALE HEATH acted with intent, knowledge or recklessness that Brianna Cootey did not consent;

5. Did so with the intent to:

    a. cause substantial emotional or bodily pain to any person, or

    b. arouse or gratify the sexual desire of any person; and

6. Brianna Cootey was 14 years of age or older at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 36

DALE HEATH is charged in Count 5 with committing Object Rape on or about December 8, 2012. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. DALE HEATH;
2. Intentionally, knowingly, or recklessly caused the penetration, however slight, of Brianna Cootey's genital or anal opening, by any object or substance other than the mouth or genitals;
3. Without Brianna Cootey's consent;
4. DALE HEATH acted with intent, knowledge or recklessness that Brianna Cootey did not consent;
5. Did so with the intent to:
   a. arouse or gratify the sexual desire of any person; and
6. Brianna Cootey was 14 years of age or older at the time of the conduct.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.

INSTRUCTION NO. 37

Time not an element

The State has alleged that the defendant committed the charged offense "on or about" certain dates. The exact date is not an element of the offense which the State must prove beyond a reasonable doubt.

INSTRUCTION NO. 38

Consent

DALE HEATH has been charged with forcible sexual abuse and object rape. The prosecution must prove beyond a reasonable doubt that Brianna Cootey not consent to the alleged sexual conduct. The alleged sexual conduct is without consent of Brianna Cootey under any, all, or a combination of the following circumstances:

Brianna Cootey expressed lack of consent through words or conduct;

DALE HEATH overcame Brianna Cootey through the application of physical force or violence;

DALE HEATH overcame the Brianna Cootey through concealment or by the element of surprise;

DALE HEATH coerced Brianna Cootey to submit by threatening immediate or future retaliation against Brianna Cootey or any person, and Brianna Cootey thought at the time that Dale Heath had the ability to carry out the threat;

DALE HEATH knew Brianna Cootey was unconscious, unaware that the act was occurring, or was physically unable to resist;

DALE HEATH knew that as a result of mental illness or defect, or for any other reason Brianna Cootey was incapable at the time of the act of either understanding the nature of the act or of resisting it;

DALE HEATH intentionally impaired Brianna Cootey's power to understand or control Brianna Cootey's conduct by giving her a substance without her knowledge;

DALE HEATH was a health professional or religious counselor who committed the act under the guise of providing professional diagnosis, counseling or treatment, and at the time of the act Brianna Cootey reasonably believed the act was for professionally appropriate reasons, so that Brianna Cootey could not reasonably be expected to have expressed resistance.

In deciding lack of consent, you are not limited to the circumstances listed above. You may also apply the common, ordinary meaning of consent to all of the facts and circumstances of this case.

INSTRUCTION NO. 39
CR214 Motive

A defendant's "mental state" is not the same as "motive." Motive is why a person does something. Motive is not an element of the crimes charged in this case. As a result, the prosecutor does not have to prove why the defendant acted.

However, a motive or lack of motive may help you determine if the defendant did what he is charged with doing. It may also help you determine what his mental state was at the time.

INSTRUCTION NO. 40

CR302A Intentional as to Conduct or as to Result

A person acts "intentionally" or "with intent" when his conscious objective is to:

engage in certain conduct; or

cause a certain result.

INSTRUCTION NO. 41

CR303B Knowledge as to Result

A person acts "knowingly" or "with knowledge" when the person is aware that his conduct is reasonably certain to cause a particular result.

"Conduct" means either an act or an omission.

INSTRUCTION NO. 42

CR304C Reckless as to Circumstances Surrounding Conduct

A person acts "recklessly" when he is aware of a substantial and unjustifiable risk that certain circumstances exist relating to his conduct, but he consciously disregards the risk and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

INSTRUCTION NO. 43
CR1601 Health Professional

"Health professional" means an individual who is licensed or who holds himself or herself out to be licensed, or who otherwise provides professional physical or mental health services, diagnosis, treatment, or counseling including, but not limited to, a physician, osteopathic physician, nurse, dentist, physical therapist, chiropractor, mental health therapist, social service worker, clinical social worker, certified social worker, marriage and family therapist, professional counselor, psychiatrist, psychologist, psychiatric mental health nurse specialist, or substance abuse counselor

INSTRUCTION NO. 44
CR1601 Indecent Liberties

"Indecent liberties" is defined as conduct that is as serious as touching under clothing the anus, buttocks, or genitals of a person or the breast of a female.

In deciding whether conduct amounts to indecent liberties, use your judgment and common sense. You may consider such factors as: (1) the duration of the conduct, (2) the intrusiveness of the conduct against Brianna Cootey's person, (3) whether Brianna Cootey requested that the conduct stop, (4) whether the conduct stopped upon request, (5) the relationship between Brianna Cootey and the defendant, (6) Brianna Cootey's age, (7) whether Brianna Cootey was forced or coerced to participate, and any other factors you consider relevant.

The fact that touching may have occurred over clothing does not preclude a finding that the conduct amounted to indecent

INSTRUCTION NO. 45

CR401 Fact Versus Expert Witnesses.

There are two types of witnesses: fact witnesses and expert witnesses. Usually a fact witness can testify only about facts that (he) (she) can see, hear, touch, taste or smell. An expert witness has scientific, technical or other special knowledge that allows the witness to give an opinion. An expert's knowledge can come from training, education, experience or skill. Experts can testify about facts, and they can give their opinions in their area of expertise.

You may have to weigh one expert's opinion against another's. In weighing the opinions of experts, you may look at their qualifications, the reasoning process the experts used, and the overall credibility of their testimony. You may also look at things like bias, consistency, and reputation.

Use your common sense in evaluating all witnesses, including expert witnesses. You do not have to accept an expert's opinion. You may accept it all, reject it all, or accept part and reject part. Give it whatever weight you think it deserves.

INSTRUCTION NO. 46

Standard of Care

You have heard evidence regarding the standard of care for chiropractic physicians. Testimony on the standard of care may have been conflicting. You decide what weight to give such testimony. Violation of the standard of care is not an element of any offense which the State must prove. You decide what weight, if any, to give to evidence regarding the standard of care.

INSTRUCTION NO. 47

DOPL Action

You have heard evidence of statements made by Dale Heath during proceedings before the Utah Division of Occupational and Professional Licensing (DOPL). You may only consider this evidence for two purposes: (1) as evidence of statements made by Dale Heath; and (2) as evidence of Dale Heath's mental state at the time he treated Brianna Cootey. Any decision by DOPL to take action or not to take action against Dale Heath's license is not relevant to your determination of guilt for the offenses charged in this case.

INSTRUCTION NO. 48

CR411 404(b) Instruction – 2011 Police Interview

You have heard evidence of a 2011 interview of Dale Heath conducted by the Orem Police Department before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether the acts charged in this case were mistaken or accidental. This evidence has not been admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 49
CR411 404(b) Instruction – 2011 DOPL Letter

You have heard evidence of a 2011 letter issued to Dale Heath by the Utah Division of Occupational and Professional Licensing before the acts charged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether the acts charged in this case were mistaken or accidental. This evidence has not been admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 50

[Josie Tobiason—Rule 404(b)]

Each crime charged involves both an act prohibited by law and a corresponding mental state specified by law.

You have heard testimony from Josie Tobiason about treatments she received from Dale Heath in 2011 before the crimes alleged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether Dale Heath acted with the mental state specified by law. However, you may not consider this evidence for the purpose of determining whether Dale Heath committed the act prohibited by law—the unlawful touching of Joy Cootey.

This evidence is not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. 51

[Emily Bean—Rule 404(b)]

Each crime charged involves both an act prohibited by law and a corresponding mental state specified by law.

You have heard testimony from Emily Bean about treatments she received from Dale Heath in 2015 after the crimes alleged in this case. You may consider this evidence, if at all, for the limited purpose of determining whether Dale Heath acted with the mental state specified by law. However, you may not consider this evidence for the purpose of determining whether Dale Heath committed the act prohibited by law—the unlawful touching of Joy Cootey.

This evidence is not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crimes charged in this case, and for those crimes only. You may not convict a person simply because you believe he may have committed some other act at another time.

INSTRUCTION NO. ____

You have heard evidence of actions that the Utah Division of Occupational and Professional Licensing (DOPL) took against Dale Heath. You may only consider this evidence for two purposes: (1) as evidence of statements made by Dale Heath; and (2) as evidence of Dale Heath's mental state at the time he treated Brianna Cootey. However, you cannot consider this evidence for the purpose of determining whether Dale Heath committed the acts charged in this case.

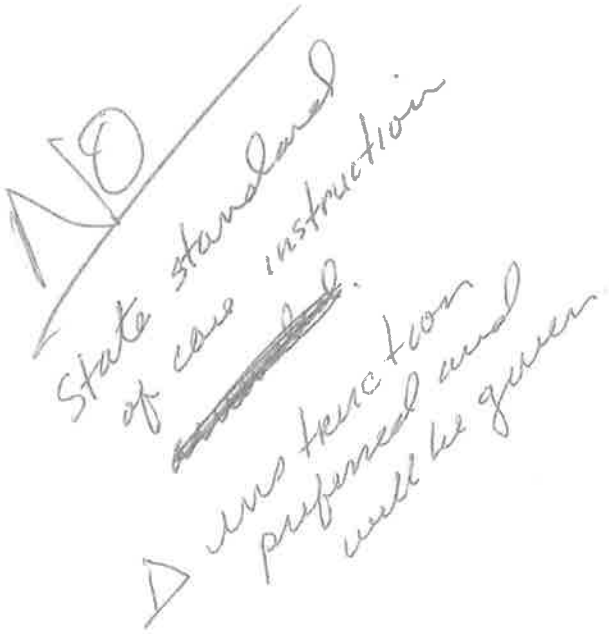
NO

Alternate instruction addressing.

INSTRUCTION NO. ____

Standard of Care

You have heard evidence regarding the standard of care for chiropractic physicians. Testimony on the standard of care may have been conflicting. You decide what weight to give such testimony. Violation of the standard of care may be evidence of guilt or it may not be evidence of guilt. Violation of the standard of care is not an element of any offense which the State must prove. You decide what weight, if any, to give to evidence regarding the standard of care.



IN THE FOURTH JUDICIAL DISTRICT
UTAH COUNTY STATE OF UTAH

STATE OF UTAH,	*	
	*	VERDICT
Plaintiff,	*	
v.	*	Case No. 151402675
	*	
DALE HEATH,	*	Judge PULLAN
	*	
Defendant.	*	

We, the Jury impaneled in the above entitled case, find the Defendant:

As to Count 1: SEXUAL BATTERY

[✓] Guilty as charged in the Information.

[ ] Not Guilty.

As to Count 2: SEXUAL BATTERY

[✓] Guilty as charged in the Information.

[ ] Not Guilty.

As to Count 3: SEXUAL BATTERY

[✓] Guilty as charged in the Information.

[ ] Not Guilty.

As to Count 4: FORCIBLE SEXUAL ABUSE

[✓] Guilty as charged in the Information.

[ ] Not Guilty.

//

//

// (continued on page 2)

As to Count 5: OBJECT RAPE

[✓] Guilty as charged in the Information.

[ ] Not Guilty.

DATED this 21 day of September, 2017.

Katie King

JURY FOREPERSON

(Note: Check one box only as to each count)

ADDENDUM
C

Ruling and Order on
Cross Motions in Limine
Related to Rule 404(b) Evidence

IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. DALE HEATH, Defendant.	**RULING AND ORDER ON CROSS MOTIONS IN LIMINE RELATED TO RULE 404(B) EVIDENCE** Case No. 151402675 Judge Derek P. Pullan

Defendant Dale Heath is a chiropractor charged with seven counts of sexual misconduct against two patients. The first five charges—three counts of sexual battery, one count of forcible sexual abuse, and one count of object rape—relate to patient B.C. The sixth and seventh charges—two counts of sexual battery—relate to patient E.B. The Court granted Defendant's motion to sever the counts. Those involving B.C. will be tried first.

The State moves in limine to admit other crimes, wrongs, or acts in both trials. Defendant moves to exclude this evidence.

Having carefully considered the briefing and oral arguments, the Court now enters the following:

RULING

The Other Crimes, Wrongs, or Acts

The State moves to admit into evidence the following other crimes, wrongs, or acts set forth in chronological order:

1. **K.W.** Defendant treated K.W. two times between January 21 and February 1, 2005. K.W. will testify that on the first visit, Defendant massaged her breast tissue during treatment, but did not touch her nipple. He also massaged her lower abdomen. On the second visit, Defendant massaged her lower abdomen during treatment, progressing lower and lower until his hand went under her jeans and underwear and touched her pubic hair. K.W. stopped him. K.W. reported these events to her fiancé and her California doctor. Eleven years passed. In 2016, K.W. googled Defendant's name. From media sources, she learned that abuse allegations were pending against him. She read a couple of news stories, and then contacted police through the phone number provided.
2. **J.T.** Defendant treated J.T. one time in June 2011. During that visit, Defendant rubbed J.T.'s vaginal area and clitoris over the clothing. J.T. reported this event to police on June 23, 2011.
3. **Police Interview No. 1**. On June 29, 2011, Officer Sorenson contacted Defendant about J.T.'s complaint. When asked if he touched J.T.'s vagina during treatment, the Defendant responded that he did not think so, and if he did, it was unintentional and incidental to treatment. J.T. had reported that other chiropractors have patients hold their own hand over sensitive areas to avoid contact with these areas during treatment. When Officer Sorenson explained this to Defendant, Defendant responded that the practice might be a good idea in the future. State's Ex. 7.
4. **Division of Occupational and Professional Licensing ("DOPL") Letter**. On July 11, 2011, DOPL issued a letter of concern to Defendant. The letter described J.T.'s accusation and Defendant's denial of misconduct. The letter concludes: "Please be

aware that future problems in this area of concern may result in formal disciplinary action by the division. Also be aware that if other improprieties are brought to our attention, we may reopen our investigation and take action as may be appropriate." State's Ex. 8.

5. **V.J.** Defendant treated V.J. three or four times between 2011 and 2012. On the first visit, Defendant unclasped V.J.'s bra and told her to remove it before treatment. On her fourth visit, Defendant told her that he needed to massage her full front torso, including her breasts. V.J. refused. Defendant told her to speak with her husband about it because that is the treatment Defendant recommended. V.J. did not report these events until September 2015.

6. **B.C.** Defendant treated B.C. seven times between October and December 2012. On November 3, Defendant rubbed B.C.'s vaginal area and clitoris over the clothing. During the treatment, her gown was raised exposing one breast. On November 24, Defendant again rubbed B.C.'s vaginal area and clitoris over the clothing. On December 1, Defendant did this again, but this time placed his hand under B.C.'s underwear and massaged her pubic mound. On December 8, during treatment Defendant placed his hand under B.C.'s underwear. He touched her clitoris and vagina and digitally penetrated her. B.C. reported these events to police in January 2013. The State seeks to admit the events involving B.C. in the trial of charges related to E.B.

7. **Police Interview No. 2**. On February 26, 2013, Lieutenant Adams interviewed Defendant regarding B.C.'s complaint. Defendant stated that if there was inappropriate contact, that was not his intention. He acknowledged having some experience with accusations of this type—referring to J.T.'s prior complaint. Defendant said if he had problems touching his female patients for his own sexual gratification, it would have

been raised a long time ago. Two days later, Lieutenant Adams spoke to Defendant on the telephone. Defendant explained that if any touching occurred it was incidental to treatment. He said he needed to do something different to avoid this type of problem.

8. **DOPL Stipulated Order**. In September 2014, Defendant stipulated to entry of an Order revoking his license, and suspending the revocation subject to conditions. In the Order, Defendant acknowledged that two female patients (J.T. and B.C.) alleged inappropriate touching. Defendant denied this but admitted that he "incidentally touched areas which caused [these] patients concern."

9. **A.W.**[1] Defendant treated A.W. between February 6 and March 6, 2015 in exchange for office work provided to him. She had more than one visit during which Defendant would "occasionally work on [her] chest." A.W. did not report this until April 2015.

10. **E.B.** Defendant treated E.B. four times between February 17 and February 24, 2015. During the first visit, Defendant massaged above her breasts over the clothing causing breast-shaking that was uncomfortable. The same thing occurred on her second visit. On her third visit, Defendant brushed up against her labia a few times, something that seemed unintentional to E.B. because Defendant was working the area really fast. On her fourth visit, the same thing happened but this time Defendant stimulated her clitoris for 10–15 seconds causing her to become sexually aroused. E.B. described this as "blatant rubbing and touching of my labia and clitoral area." E.B. reported these events in March 2015 after speaking to her mother and a friend, and after reading on DOPL's webpage that Defendant was on probation due to complaints of inappropriate touching by female

[1] At oral argument, the State withdrew its motion to admit other crimes, wrongs, or acts alleged to have been committed against A.W.

patients. The State seeks to admit the events involving E.B. in the trial of charges related to B.C.

Summary of Arguments

The State contends that Defendant's acts against other patients, the police interviews, the DOPL Letter, and the DOPL Stipulated Order are admissible for the non-character purposes of proving intent and absence of mistake or accident. The State further argues that under the doctrine of chances the other acts are admissible to prove both the actus reus and mens rea of each offense.

Defendant moves to exclude this evidence. He contends that the State has failed to prove by a preponderance of the evidence that Defendant committed the alleged acts against his other patients. Therefore, the alleged acts are irrelevant. In the alternative, Defendant contends that the acts are not offered for a proper non-character purpose, and any probative value would be substantially outweighed by the danger of unfair prejudice. Finally, Defendant contends that the State has failed to establish the foundational prerequisites to admitting evidence under a doctrine of chances theory.

Conclusions of Law

Conditional Relevance Under Utah R. Evid. 104(b)

An issue of conditional relevance arises any time the State seeks to admit other crimes, wrongs, or acts against the accused. The relevance of the other acts depends on whether other facts exist—specifically, the fact that the other acts occurred, and the fact that the accused was the actor. *State v. Lucero*, 2014 UT 15, ¶ 19. If the other acts did not happen or the defendant did not commit them, the other acts are irrelevant. *Id.* ¶ 23.

Rue 104(b) of the Utah Rules of Evidence provides: "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." The analysis is set forth in *Lucero*. There, the Utah Supreme Court held:

> Although it is the province of the jury under rule 104(b) to decide whether the "condition of fact" is fulfilled and to ultimately view the evidence as credible, it is the duty of the court to decide whether there is sufficient evidence upon which the jury could make such a determination. In *Huddleston v. United States*, the Supreme Court described the court's role in this situation and stated that to determin[e] whether the Government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact ... by a preponderance of the evidence.
>
> We agree with the Supreme Court's reasoning and interpret Utah Rule of Evidence 104 to require a judge to admit evidence when it determines that the jury could reasonably find matters of conditional fact by a preponderance of the evidence. In the context of Rule 404(b), "similar act evidence is relevant only if the jury can reasonably conclude [by a preponderance of the evidence] that [1] the act occurred and that [2] the defendant was the actor."

Lucero, 2014 UT 15, ¶ 19.

In light of all the evidence, a reasonable jury could find by a preponderance of the evidence that Defendant committed the other acts against his patients K.W., J.T., V.J., B.C., A.W., and E.B. Each woman reported her experience to the police providing a detailed description of the treatment provided by Defendant and his inappropriate touching. Defendant admitted in the Stipulated Order that he incidentally touched both J.T. and B.C. in areas that caused both patients concern.

Admission of Other Crimes, Wrongs, or Acts under Rule 404(b)

Other crimes, wrongs, or acts are not admissible to prove Defendant's bad character and that he acted consistent with that bad character on a particular occasion. Utah R. Evid. 404(b)(1) ("evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character"). Evidence of other acts may be admissible for a non-character purpose, including proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident." *Id.*

To admit evidence of the other acts, the Court must conclude that (1) the other acts are offered for a proper non-character purpose; (2) the other acts are relevant; and (3) the probative value of the other acts is not substantially outweighed by the danger of unfair prejudice. *State v. Labrum*, 2014 UT App 5, ¶ 19.

The difficulty in applying Rule 404(b) "springs from the fact that evidence of prior bad acts often will yield dual inferences—and thus betray both a permissible purpose and an improper one." *State v. Verde*, 2012 UT 60, ¶ 16. Accordingly:

> [W]hen prior misconduct evidence is presented under rule 404(b), the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. And even if the evidence may sustain both proper and improper inferences under rule 404(b), the court should balance the two against each other under rule 403, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose. Such weighing is essential to preserve the integrity of rule 404(b). Without it, evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character—so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule.

Verde, 2012 UT 60, ¶ 18.

Non-Character Purpose—Intent

The State moves to admit the acts Defendant committed against his other patients in order to prove intent. Standing alone—without the non-character inference drawn under the doctrine of chances—the State's theory is grounded in the very propensity reasoning Rule 404(b) prohibits. In effect, the State contends that because Defendant intentionally touched other patients for sexual gratification, he is more likely to have touched B.C. and E.B. for the same reason. In other words, Defendant has a propensity to use treatment as guise for sexual assault, and he acted in conformance with that propensity on a particular occasion.

To the extent the State's motion rests on this inference, the motion is denied.

Non-Character Purpose—Absence of Mistake or Accident

The Trial Involving B.C.

In his statements to police and DOPL regarding treatment of B.C., Defendant asserted the defense of mistake or accident. He claimed that if he did touch B.C.'s vaginal area, the touching was unintended and incidental to chiropractic treatment.[2] Rebutting this claim is a proper non-character purpose for which prior bad acts may be admitted.

More than a year before treating B.C., Defendant learned through a police interview and the DOPL Letter of Concern that J.T. had lodged a complaint against him for non-consensual sexual touching during treatment. He also learned that any future improprieties in this area of concern may result in formal discipline. Finally, he learned that asking patients to cover themselves during treatment of sensitive areas was a practice used by other chiropractors to

[2] The State is permitted to offer these admissions in its case in chief. Utah R. Evid. 801(d)(2)(A).

avoid allegations of inappropriate touching. These events would have placed Defendant in a state of hyper-vigilance such that an accident or mistake in touching B.C.'s vaginal area and clitoris was less likely.

J.T.'s testimony is unnecessary to prove absence of mistake or accident. To rebut the defense of incidental touching the State need only prove that Defendant was placed on notice of J.T.'s complaint. It is notice of her complaint—whether true or not—that placed Defendant in a state of vigilance and made a subsequent mistake less likely.

The K.W. and V.J. incidents are not admissible to prove absence of mistake or accident. These incidents—while earlier in time to the events involving B.C.—were not reported until 2015. The State has presented no evidence suggesting that Defendant knew about K.W.'s and V.J.'s complaints before then.

The incidents involving A.W. and E.B. are inadmissible to show absence of mistake or accident in treating B.C. Defendant treated A.W. and E.B. in 2015. Both women reported the misconduct in 2015. These events could not have made Defendant more cautious four years earlier when he was treating B.C.

The Trial Involving E.B.

For the same reasons set out above, Police Interview No. 1 and the DOPL Letter of Concern are admissible to show absence of mistake or accident in treating E.B.

Police Interview No. 2 in 2013 and the DOPL Stipulated Order in 2014 are also admissible to show absence of mistake or accident in treating E.B. in 2015. From these additional events, Defendant learned that B.C. had made allegations of non-consensual sexual touching during chiropractic treatment. He knew that his license had been placed on probationary status due to B.C.'s and J.T.'s complaints. He expressed that he must alter his

practice to avoid similar allegations in the future, and in fact agreed to do so as part of the DOPL Stipulated Order. These events would have placed Defendant in a state of hyper-vigilance, making a mistake in touching E.B. in 2015 less likely. Again, it is unnecessary for J.T. and B.C. to testify. To rebut Defendant's claim of accidental touching incident to treatment, the State need only prove that Defendant was on notice of J.T.'s and B.C.'s complaints.

The testimony of K.W. and V.J. is inadmissible to prove absence of mistake or accident. The incidents involving them were not reported until after E.B. was treated in February 2015. The State has produced no evidence suggesting that Defendant knew about K.W.'s or V.J.'s complaints before then. Therefore, these other acts could not have made Defendant more cautious in treating E.B.

The same is true for the incident involving A.W. She did not report until April 2015, weeks after E.B.'s last treatment. There is no evidence before the Court suggesting that Defendant knew of A.W.'s complaints before treating E.B. Moreover, the State has withdrawn its motion to admit the events involving A.W.

The Doctrine of Chances—Generally

Uncharged bad acts may be admitted under a doctrine of chances theory. The doctrine is a theory of logical relevance that "rests on the objective improbability of the same rare misfortune befalling one individual over and over." *Verde*, 2012 UT 60, ¶ 47 (citing Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: People v. Ewoldt Revisited*, 29 U.C. Davis L. Rev. 355, 388 (1996). In the words of the Utah Supreme Court:

> As the number of improbable occurrences increases, the probability of coincidence decreases, and the likelihood that the defendant committed one or more of the actions increases. An

> innocent person may be falsely accused or suffer an unfortunate accident, but when *several independent accusations arise* or *multiple similar "accidents" occur*, the objective probability that the accused innocently suffered such unfortunate coincidences decreases. At some point "[t]he fortuitous coincidence becomes too abnormal, bizarre, implausible, unusual, or objectively improbable to be believed."

Verde, 2012 UT 60, ¶ 49 (emphasis added) (quoting *State v. Johns*, 301 Or. 535, 725 P.2d 312, 322–23 (1986))

The Doctrine of Chances—An Inferential Chain to Prove Actus Reus and Mens Rea

The doctrine of chances is a chain of inferences by which the finder of fact may conclude that the accused committed the *actus reus* of the charged offense, or that the accused acted with the required *mens rea*. The chain of inference differs based on the purpose for which the uncharged acts are offered.

Utah cases hold that the State may rely on the doctrine of chances to rebut the defense that the complaining witness is fabricating her testimony. When used in this way, the doctrine is a chain of inferences by which the jury can conclude that the accused committed the actus reus of the charged offense. Professor Imwinkelried described the chain of inferences in this way:

Item of Evidence	Intermediate Inference	Ultimate Inference
The accused's uncharged acts	The objective improbability of so many losses befalling the accused accidentally	The accused committed the actus reus of the charged offense

Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf The Character Evidence Prohibition*, 51 Ohio St. L. J. 575, 588 (1990).

Examples of Utah cases in which the doctrine of chances is used to infer a criminal *actus reus* include *Verde*, 2012 UT 60, ¶ 46 (remanding case to trial court to determine whether prior acts of sexual assault were admissible to rebut defendant's claim that the alleged victim had fabricated the facts underlying the charged offense); *State v. Rackham*, 2016 UT App 167, 381 P.3d 1161 (prior incidents of inappropriate touching of female relatives offered to prove *actus reus* by rebutting defense of fabrication in prosecution for sexual battery); *State v. Bradley*, 2002 UT App 348, ¶ 28 (admitting evidence of prior, independent allegation of sexual assault to rebut defense of fabrication); *State v. Nelson-Waggoner*, 2000 UT 59, ¶ 25, *explained in Verde*, 2012 UT 60, ¶ 53 (admitting under doctrine of chances reasoning prior rape allegations as probative of whether accused engaged in nonconsensual sex with the alleged victim).

Utah cases also hold that the doctrine of chances may be used to rebut a claim of mistake or accident. When used in this way, the doctrine again constitutes an inferential chain, but with different intermediate and ultimate inferences:

Item of Evidence	Intermediate Inference	Ultimate Inference
The accused's uncharged acts	The objective improbability of the accused's innocent involvement in so many incidents.	The accused acted with the required mens rea.

Imwinkelried, *supra*, at 588. As the Utah Court of Appeals explained, "Under the doctrine of chances, 'the inference of mens rea arises from the implausibility of the defendant's claim of successive similar innocent acts." *State v. Labrum*, 2014 UT App 5, ¶ 30 (quoting Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 5.08).

Examples of the doctrine of chances being used to prove mens rea include *State v. Lomu*, 2014 UT App. 41 (admitting highly similar convenience store robbery to prove that the accused

intended to commit aggravate robbery not retail theft on the date of the charged offense); *State v. Marchet*, 2014 UT App 147, 330 P.3d 138, *cert. denied*, 341 P.3d 253 (Utah 2014), and *cert. denied*, 135 S. Ct. 2331, 191 L. Ed. 2d 994 (2015) (using doctrine of chances reasoning to admit prior, similar allegations or rape for the purpose of proving intent to engage in non-consensual sex and to rebut claim of accident or mistake); *State v. Lowther*, 2015 UT App 180, 356 P.3d 173, *cert. granted*, 364 P.3d 48 (Utah 2015) (admitting testimony of three other women who claimed the defendant raped them to prove defendant's intent to engage in non-consensual intercourse with alleged victim).

The Doctrine of Chances—Establishing Foundation

While "propensity inferences do not pollute" doctrine of chances reasoning, the jury may misuse the evidence by drawing an intermediate inference about the bad character of the accused. *Verde*, 2012 UT 60, ¶ 50. This character-based reasoning is precisely what Rules 404(a) and 404(b)(1) prohibit. As the Supreme Court warned in *Verde*:

> A charge of fabrication is insufficient by itself to open the door to evidence of any and all prior bad acts. As with other questions arising under Rule 404(b), care and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts, and to limit the factfinder's use of the evidence to the uses allowed by rule.

2012 UT 60, ¶ 55.

Twenty-four years before *Verde*, Professor Imwinkelried pronounced the same warning:

> In theory, there is a distinction between character reasoning and the use of the doctrine of chances to establish the actus reus. However, in practice the distinction can be a thin, difficult line for the jurors to draw. . . . [T]he lax application of the doctrine of chances can eviscerate the character evidence prohibition. Just as every true crime includes a mens rea, an actus reus is an essential element of each true crime. If uncharged misconduct becomes

> routinely admissible to prove actus reus, there will be little left of the [character evidence] prohibition. . . .

Imwinkelried, *supra*, at 588. The same risk of misuse for a character-based inference exists when the State uses the doctrine of chances to prove mens rea. Professor Imwinkelried continues:

> This [doctrine of chances] theory can easily be abused. [I]ntent is an essential element of every true crime. Whenever the prosecutor has evidence of an uncharged crime similar to the charged offense, the prosecutor can attempt to invoke [the] doctrine of chances; the prosecutor can always argue that a similar uncharged crime triggers the doctrine of chances and is, therefore, logically relevant on a noncharacter theory both to disprove accident and thereby to prove mens rea.

Id. at 595.

To avoid abuse of the doctrine of chances, trial courts must carefully and precisely enforce four foundational prerequisites: (1) materiality—"the issue for which the uncharged conduct is offered must be in bona fide dispute;" (2) similarity—"each uncharged incident must be roughly similar to the charged crime;" (3) independence—each uncharged incident must be independent of the others, the probative value resting "on the improbability of chance repetition of the same event;" and (4) frequency—the defendant "must have been accused of the same crime or suffered an unusual loss more frequently than the typical person endures such losses accidently." *Verde*, 2012 UT 60, ¶¶ 57–62.

As to the second factor, there must be "some significant similarity between the charged and uncharged incidents to suggest a decreased likelihood of coincidence—and thus an increased probability that the defendant committed all such acts." *Id.* ¶ 58. "The more similar, detailed, and distinctive the various accusations, the greater is the likelihood that they are not the result of

independent imaginative invention." *Id.* Ultimately, the similarity must be "sufficient to dispel any realistic possibility of independent invention." *Id.*

When the uncharged incidents are few, a higher degree of similarity is required. As the Utah Court of Appeals explained:

> To begin, we note that the commission of a crime on two occasions in a specific manner is certainly less compelling than the commission of the same crime a half a dozen or more times. So in considering the probative value of other acts, courts should properly have in mind the principle that the fewer the incidents there are, the more similarities between the crimes there must be.

Lomu, 2014 UT App 41, ¶ 32.

In applying the frequency factor, the judge must "define the correct relative frequency." Imwinkelried, *supra*, at 597. The relevant frequency differs based on the purpose for which the doctrine of chances is being employed. Professor Imwinkelried explains:

> The requirements for the two applications of the doctrine of chances—[to prove actus reus and to prove mens rea]—differ in kind because the application determines the nature of the frequency the judge must analyze. When the prosecutor invites the court to apply the doctrine to prove the actus reus, the focus is on the frequency of a particular type of loss—the death of a child in a person's custody or the fire at a person's building. In contrast, when the prosecutor asks the court to employ the doctrine to establish mens rea, the relevant frequency is the incidence of the accused's personal involvement in a type of event—the discharge of a weapon in Wigmore's hypothetical[3], the possession of

[3] Wigmore's hypothetical is as follows: "If A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim . . . as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (i.e. as a probability, perhaps not as a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small; or (to put it in another way) because inadvertence or accident is only an abnormal or occasional explanation for the discharge of a gun at a given object, and therefore the recurrence of a similar result (i.e. discharge towards the same object A) excludes the fair possibility of such an abnormal cause and points out the cause as probably a more natural and usual one, i.e., a deliberate discharge at A. In short, similar results do not usually occur through abnormal causes; and the recurrence of a similar result . . . tends (increasingly with each instance) to negative . . . inadvertence . . . or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal,

> contraband drugs, or the receipt of stolen property. To intelligently decide whether the prosecutor's evidence exceeds the objective improbability threshold, the judge must define the correct relative frequency.

Id.

To prove the relative frequency of a particular event, the State may rely on statistical data. This data is more likely to be available "when the question is the occurrence of the actus reus" because "there are many empirical studies documenting the incidence of social losses." *Id.* But "it is far more difficult to find the relevant frequency data when the question is the existence of mens rea." On this point, Professor Imwinkelried writes:

> There may be little or no data on such questions as how often the typical citizen is likely to be found in possession of contraband drugs or stolen property. The judge is more likely to have to rely on her common sense and knowledge of human experience. The extent of the judge's pertinent knowledge may be an intuitive belief that the inadvertent possession of illicit drugs or stolen property is probably a "once in a lifetime" experience for an innocent person. Thus, there is ordinarily more conjecture when the prosecutor invokes the doctrine of chances to prove mens rea—all the more reason, of course, to employ the doctrine cautiously. . . . If after weighing the foundational testimony, the judge believes that it would be speculative to find that the prosecution has attained the probability threshold, the judge should exclude the uncharged misconduct evidence.

Id. at 597–98.

The Doctrine of Chances as Applied to this Case

In this case, the State offers the uncharged acts of Defendant against K.W., J.T., V.J., B.C., A.W. and E.B. to prove that (1) Defendant committed the *actus reus* of sexual battery, forcible sexual abuse, and object rape; and (2) Defendant committed these acts, not by mistake or

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i.e., criminal, intent accompanying such an act; and the force of each additional instance will vary in each kind of offense according to the probability that the act could be repeated, within a limited time and under given circumstances, with an innocent intent." Imwinkelried, *supra*, at 594.

accident incidental to treatment, but rather with the required mens rea (intentionally, knowingly, recklessly, or with intent to arouse or gratify sexual desire).

The Trial Involving B.C.

- *Materiality*

Whether Defendant touched the genitals of B.C. and digitally penetrated her are facts in bona fide dispute. In Police Interview No. 2, Defendant states that "if" there was touching, it was incidental to treatment. Thus, by his own statements Defendant placed his commission of the *actus reus* in question.

Whether Defendant committed the actus reus of each offense intentionally, knowingly, or recklessly and with intent to arouse or gratify sexual desire is in bona fide dispute. As explained, in his statements to police and DOPL regarding treatment of B.C., Defendant asserted the defense of mistake or accident. He claimed that if he did touch B.C.'s vaginal area, the touching was unintended and incidental to chiropractic treatment. By these statements, Defendant has placed *mens rea* in dispute. Rebutting Defendant's claimed mental state is material.

For these reasons, the Court concludes that the materiality factor has been satisfied.

- *Similarity*

The incidents involving K.W. (to the extent it involved touching of the pubic region), J.T., and E.B. are sufficiently similar to suggest a decreased likelihood of coincidence. Each woman was a patient of Defendant. Each describes Defendant touching their vaginal area during the course of treatment. Defendant did not ask any of them to cover sensitive areas during treatment to avoid his inadvertently touching these areas.

The incidents involving V.J. and A.W. are not roughly similar. V.J. describes Defendant unclasping her bra and telling her to remove it prior to treatment. She also states that he

recommended massage of her front torso including her breasts, which treatment V.J. declined. A.W. states that Defendant would occasionally work on her chest during treatment. The only similarity that could be claimed between these events and B.C.'s experience is that B.C.'s breast was exposed one time during treatment. This is not sufficient to satisfy the similarity component of foundation.

- *Independence*

There is no evidence that K.W., J.T., and E.B. colluded with each other. In that sense, their reports are independent. However, collusion is only one way in which independence may be compromised. For example, if a complainant learns the facts alleged by three other complaining witnesses through media reports or other sources, proving the independence of that complainant's subsequent report may prove difficult.

The incident involving K.W. occurred in 2005. She did not report until 2016 after googling Defendant's name and reading news stories about Defendant's pending case. The content of the news stories she read is unknown. As the proponent of the evidence, the State has the burden of proving that K.W.'s complaint was independent of the media content to which she was exposed. The State has failed to meet that burden.

The incident involving J.T. is independent. She was treated in June 2011 and reported Defendant's conduct days later.

E.B. reported in 2015 after searching for Defendant on DOPL's website. From that search, she learned that Defendant was on probation following complaints of inappropriate touching from two other female patients. For E.B.—in contrast to K.W.—the content of the information to which she was exposed is known. It lacked sufficient detail to undermine the independence of E.B.'s report.

For these reasons, the Court concludes that the independence factor has been proved as to J.T. and E.B., but not as to K.W..

- *Frequency*

As explained, the State offers the prior incidents involving J.T. and E.B. to prove that Defendant committed the *actus reus*. Here, the question is the frequency with which chiropractors are falsely accused of inappropriate touching during treatment. Some data on this question may well be kept by DOPL or other institutions. The State has not produced any such data, choosing instead to rely on the court's common sense and knowledge of human experience to prove probability.

The difficulty is that the frequency with which chiropractors are falsely accused of sexual assault during treatment is not commonly known. Any conclusion about Defendant's experience exceeding the incidence of sexual assault allegations in the eligible chiropractor population would be nothing more than conjecture.

The State offers the incidents involving J.T. and E.B. to prove that Defendant had the requisite *mens rea*. Here, the question is the frequency of the *Defendant's* involvement in a type of event—the accidental touching of his patients' genitals. As the number of these events increase, the likelihood that they occurred by mistake or accident decreases. The frequency with which such accidental touchings occur will not be the subject of data compilations. Again, the State relies upon common sense and general knowledge of human experience to prove probability.

For the average person, the mistaken touching of another's genitals would be a once in a lifetime event, and the court could reasonably rely on common sense to reach that conclusion. However, Defendant is a chiropractor whose work routinely involves the consensual touching of

the clothed and unclothed human body, including areas close to the genitals. For the eligible population to which Defendant belongs, the frequency of unintended touching may be markedly higher than for a person in the general population.

However, at trial the State intends to offer evidence that the standard of care for chiropractors is to ask the patient to cover her genitals during care. If applied, this standard of care would entirely eliminate incidental contact between the chiropractor's hands and the patient's genitalia during treatment—making chiropractors an eligible population indistinct from people generally.

While only two other incidents remain—those involving J.T. and E.B.—these incidents are highly similar to the charged offenses. Certainly, a repeated mistake is less likely when the accidental touching of both J.T., E.B., and B.C. was focused on the clitoris and caused sexual arousal.

Considering the totality of the facts and circumstances, the Court concludes that: (1) to the extent the State offers the J.T. and E.B. incidents to prove *actus reus*, the State has failed to prove the foundational requirement of frequency; and (2) to the extent that the State offers the J.T. and E.B. incidents to prove *mens rea*, the State has satisfied the frequency requirement.

Accordingly, the J.T. and E.B. incidents are admissible under a doctrine of chances theory to prove *mens rea*, but inadmissible to prove *actus reus*. Under a doctrine of chances theory, the fact that the incidents actually occurred—not the mere allegation of misconduct—is relevant. Therefore, J.T. and E.B. will be permitted to testify.

The Trial Involving E.B.

- *Materiality*

Less is known about how Defendant will defend against the charges involving E.B. Assuming Defendant claims that the incidents did not occur, or that they happened by mistake or accident, then the State has satisfied the materiality element of foundation. Again, the State offers the other acts involving K.W., J.T., V.J., B.C., and A.W. to prove: (1) *actus reus*—rebutting a claim that the E.B. incident did not occur; and (2) *mens rea*—rebutting a claim of accident or mistake.

- *Similarity*

For the reasons set forth above, the incidents involving K.W. (to the extent that it involves genital touching), J.T., and B.C. are sufficiently similar to meet the foundational requirement. However—as conceded by the State—admission of evidence that Defendant digitally penetrated B.C. would be unfairly prejudicial.

For the reasons set forth above, the incidents involving V.J. and A.W. lack sufficient similarity to the charged offense. As to these incidents, the State has failed to meets its burden to show similarity.

- *Independence*

For the reasons set forth above, the State has failed to prove that K.W.'s report was independent of the media content to which she was exposed.

The State has proved the independence of B.C.'s report. There is no evidence that she colluded with E.B. or others. She was treated between October and December 2012. She reported in January 2013.

For the reasons set forth above, the State has proved that the J.T. report was independent.

- *Frequency*

As explained, the State offers the prior incidents involving J.T. and B.C. to prove that Defendant committed the *actus reus*. For the reasons set forth above, the State has failed to prove the foundational element of frequency.

The State offers the prior incidents involving J.T. and B.C. to prove that the Defendant acted with the required *mens rea*. For the reasons set forth above, the Court concludes that the State has proved the foundational element of frequency.

Accordingly, the J.T. and B.C. incidents are admissible under a doctrine of chances theory to prove *mens rea*, but inadmissible to prove *actus reus*. Under a doctrine of chances theory, the fact that the incidents occurred—not the mere allegation of misconduct—is relevant. Therefore, J.T. and B.C. will be permitted to testify.

Rule 403 Balancing

Relevant evidence admissible for a non-character purpose may still be excluded if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Utah R. Evid. 403.

The four foundational requirements for admission under the doctrine of chances are "considered within the context of a rule 403 balancing analysis." *Verde*, 2012 UT 60, ¶ 57. These factors inform the ultimate inquiry—whether improper inferences predominate, substantially outweighing the probative value of objective improbability. Having weighed the four foundational factors, the Court concludes that the probative value of the incidents involving J.T., B.C., and E.B. to prove *mens rea* is not substantially outweighed by the danger of unfair prejudice, especially where a limiting instruction is available. *See* MUJI 2d CR411. However—

as the State concedes—in the trial involving E.B., the admission of evidence that Defendant digitally penetrated B.C. would be unfairly prejudicial.

In the trial involving B.C., the State moves to admit the J.T. allegations, Police Interview No. 1, and the DOPL letter to show absence of mistake or accident. This theory is unrelated to objective improbability. As explained, these events are highly probative of absence of mistake or accident. That probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially where a limiting instruction is available.

In the trial involving E.B., the State moves to admit the J.T. allegations, Police Interview No. 1, the DOPL Letter of Concern, the B.C. allegations, Police Interview No. 2, and the DOPL Stipulated Order to prove absence of mistake or accident. Again, this theory is unrelated to objective improbability. As explained, these events are highly probative of absence of mistake or accident. Except as explained in this section, that probative value is not substantially outweighed by the danger of unfair prejudice or confusion of the issues, especially where a limiting instruction is available.

ORDER

For the foregoing reasons, the Court: (1) grants in part the State's motion in limine; and (2) grants in part Defendant's motion in limine.

DATED this 22 day of December, 2016.

JUDGE DEREK P. PULLAN
Fourth District Court

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151402675 by the method and on the date specified.

MANUAL EMAIL: CARL N ANDERSON carl@amplawut.com
MANUAL EMAIL: RICHARD M MATHESON rmatheson@amplawut.com
MANUAL EMAIL: RYAN B MCBRIDE ryanm@utahcounty.gov
MANUAL EMAIL: CHRISTINE G SCOTT christines@utahcounty.gov

Date: 12/30/2016 /s/ MYKEL DALLEY

Deputy Court Clerk

ADDENDUM
D

Sentence, Judgment and Commitment

The Order of the Court is stated below:
Dated: January 11, 2018 11:51:05 AM
/s/ DEREK P PULLAN
District Court Judge

4TH DISTRICT COURT - PROVO
UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151402675 FS
DALE HARLAND HEATH,	:	Judge: DEREK P PULLAN
Defendant.	:	Date: January 9, 2018
Custody: Utah County Jail		

PRESENT
Clerk: mykeld
Prosecutor: MCBRIDE, RYAN B
Defendant Present
The defendant is in the custody of the Utah County Jail
Defendant's Attorney(s): ANDERSON, CARL N

DEFENDANT INFORMATION
Date of birth: July 28, 1959
Audio
Tape Number: 301 Tape Count: 8:43-10:18

CHARGES
1. SEXUAL BATTERY - Class A Misdemeanor
   - Disposition: 09/21/2017 Guilty
2. SEXUAL BATTERY - Class A Misdemeanor
   - Disposition: 09/21/2017 Guilty
3. SEXUAL BATTERY - Class A Misdemeanor
   - Disposition: 09/21/2017 Guilty
4. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony
   - Disposition: 09/21/2017 Guilty
5. OBJECT RAPE - 1st Degree Felony
   - Disposition: 09/21/2017 Guilty

HEARING

This matter comes before the court for Oral Arguments on the defendant's Motion to Arrest Judgment.

Mr Anderson addresses the motion. Mr McBride responds. Mr Anderson replies. The court is in recess.

9:06 - Court resumes. The court reads it's ruling into the record, declines to arrest judgement on the courts own motion and denies the defendant's Motion to Arrest Judgment.

9:29 - Counsel argue sentencing.

9:52 - Court is in recess.

10:08 - Court resumes, proceeds to sentence the defendant.

SENTENCE PRISON
Based on the defendant's conviction of SEXUAL BATTERY a Class A Misdemeanor, the defendant is sentenced to an indeterminate term of not to exceed one year in the Utah State Prison.

Based on the defendant's conviction of SEXUAL BATTERY a Class A Misdemeanor, the defendant is sentenced to an indeterminate term of not to exceed one year in the Utah State Prison.

Based on the defendant's conviction of SEXUAL BATTERY a Class A Misdemeanor, the defendant is sentenced to an indeterminate term of not to exceed one year in the Utah State 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.

Based on the defendant's conviction of OBJECT RAPE a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the UTAH County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Counts are to run concurrent with each other.

SENTENCE FINE

Charge # 1
Fine: $500.00
Suspended: $0.00
Surcharge: $254.21
Due: $500.00

Charge # 2
Fine: $500.00
Suspended: $0.00
Surcharge: $254.21
Due: $500.00

Charge # 3
Fine: $500.00
Suspended: $0.00
Surcharge: $254.21
Due: $500.00

Charge # 4
Fine: $500.00
Suspended: $0.00
Surcharge: $254.21
Due: $500.00

Charge # 5
Fine: $500.00
Suspended: $0.00
Surcharge: $254.21

Due: $500.00

Total Fine: $2500.00
Total Suspended: $0
Total Surcharge: $1271.05
Total Principal Due: $2500.00
Plus Interest

Defendant is to pay a fine of 2500.00 which includes the surcharge. Interest may increase the final amount due.

Defendant is informed of time to appeal sentence.

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

Case No: 151402675 Date: Jan 09, 2018

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 151402675 by the method and on the date specified.

EMAIL: UTAH COUNTY JAIL jailrecords@utahcounty.gov
EMAIL: UTAH STATE PRISON UDC-Records@utah.gov

Date: 01/11/2018 /s/ MYKEL DALLEY

Deputy Court Clerk

ADDENDUM
E

Relevant Statutes

Utah Code § 76-5-402.2 (Object Rape)
Utah Code § 76-5-404 (Forcible Sexual Abuse)
Utah Code § 76-9-702.1 (Sexual Battery)

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-402.2

§ 76-5-402.2. Object rape

Currentness

(1) A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is a first degree felony, punishable by a term of imprisonment of:

(a) except as provided in Subsection (1)(b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection (1)(c) or (2), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the object rape the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the object rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the object rape, the defendant was previously convicted of a grievous sexual offense.

(2) If, when imposing a sentence under Subsection (1)(b), a court finds that a lesser term than the term described in Subsection (1)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

(3) The provisions of Subsection (2) do not apply when a person is sentenced under Subsection (1)(a) or (c).

(4) Imprisonment under Subsection (1)(b), (1)(c), or (2) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1983, c. 88, § 19; Laws 1984, c. 18, § 8; Laws 2007, c. 339, § 14, eff. April 30, 2007; Laws 2008, c. 340, § 1, eff. May 5, 2008; Laws 2013, c. 81, § 6, eff. May 14, 2013.

Notes of Decisions (11)

U.C.A. 1953 § 76-5-402.2, UT ST § 76-5-402.2
Current with the 2018 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-404

§ 76-5-404. Forcible sexual abuse

Effective: May 8, 2018
Currentness

(1) An individual 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, pubic area, 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 the intent to arouse or gratify the sexual desire of any individual, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is:

(a) except as provided in Subsection (2)(b), a felony of the second degree, punishable by a term of imprisonment of not less than one year nor more than 15 years; or

(b) except as provided in Subsection (3), a felony of the first degree, punishable by a term of imprisonment for 15 years and which may be for life, if the trier of fact finds that during the course of the commission of the forcible sexual abuse the defendant caused serious bodily injury to another.

(3) If, when imposing a sentence under Subsection (2)(b), a court finds that a lesser term than the term described in Subsection (2)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

(4) Imprisonment under Subsection (2)(b) or (3) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-404; Laws 1977, c. 86, § 3; Laws 1979, c. 73, § 4; Laws 1983, c. 88, § 23; Laws 1984, c. 18, § 9; Laws 2007, c. 339, § 18, eff. April 30, 2007; Laws 2010, c. 218, § 37, eff. May 11, 2010; Laws 2018, c. 192, § 3, eff. May 8, 2018.

Notes of Decisions (109)

U.C.A. 1953 § 76-5-404, UT ST § 76-5-404
Current with the 2018 General Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 9. Offenses Against Public Order and Decency
Part 7. Miscellaneous Provisions

U.C.A. 1953 § 76-9-702.1

§ 76-9-702.1. Sexual battery

Currentness

(1) A person is guilty of sexual battery if the person, under circumstances not amounting to an offense under Subsection (2), intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched.

(2) Offenses referred to in Subsection (1) are:

(a) rape, Section 76-5-402;

(b) rape of a child, Section 76-5-402.1;

(c) object rape, Section 76-5-402.2;

(d) object rape of a child, Section 76-5-402.3;

(e) forcible sodomy, Subsection 76-5-403(2);

(f) sodomy on a child, Section 76-5-403.1;

(g) forcible sexual abuse, Section 76-5-404;

(h) sexual abuse of a child, Subsection 76-5-404.1(2);

(i) aggravated sexual abuse of a child, Subsection 76-5-404.1(4);

(j) aggravated sexual assault, Section 76-5-405; and

(k) an attempt to commit any offense under this Subsection (2).

(3) Sexual battery is a class A misdemeanor.

(4) For purposes of Subsection 77-41-102(17) only, a plea of guilty or nolo contendere to a charge under this section that is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction. This Subsection (4) also applies if the charge under this section has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

Credits

Laws 2012, c. 303, § 4, eff. May 8, 2012; Laws 2013, c. 278, § 68, eff. May 14, 2013; Laws 2015, c. 210, § 5, eff. May 12, 2015.

Notes of Decisions (5)

U.C.A. 1953 § 76-9-702.1, UT ST § 76-9-702.1
Current with the 2018 General Session.

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