Case No. 20180076-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

DALE HARLAND HEATH,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for object rape, forcible sexual abuse, and three counts of sexual battery, in the Fourth Judicial District, Utah County, the Honorable Derek Pullan presiding

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INTRODUCTION

Suffering from severe lower back pain resulting from a bicycle accident, 20-year-old BC decided to seek treatment from defendant Dr. Dale Heath, who was recommended to her by her mother. In all, she visited him nine times from October through December. She began to experience improvement through her first four visits, but the visits were otherwise uneventful. That all changed in November.

During her first visit in November, Heath added a new massage of her inner thigh. But while performing that massage with one hand, he began rubbing right on her vagina over her clothing. BC opened her eyes and asked what he was doing. Heath said he was working her psoas muscle and

continued to rub her vagina for a few minutes. BC experienced an orgasm as a result. BC was confused and cried the whole way home. In a lot of pain and convincing herself that nothing really happened, she returned three weeks later. But once again, Heath began rubbing right over her clitoral or vaginal area. She again asked what he was doing. This time Heath claimed he was working her griscilis muscle and continued to rub her vaginal area for a few minutes. Again, she experienced an orgasm. Convinced that something was wrong with her and that she must be imagining it all, BC returned a week later. This time, Heath put his hands beneath her underpants in the front and moved his fingers in a circular motion right on her labia majora. She cried all the way home, but continued to rationalize away Heath's actions.

BC convinced herself once again that Heath was not sexually abusing her and she returned for treatment on December 8, 2012. But again, he rubbed the outer lip of her vagina, moving it around and around with his fingers, for a few minutes. He then moved one of his fingers over, "beyond her labia majora," and "touched her right on her clitoris right in the middle of her vagina on her skin." She flinched and he quit.

Dr. Heath denied that he touched her clitoris, and denied touching her labia, unless it was incidental or accidental to his therapy of BC's inner thigh. But the circumstances surrounding the touching, and its duration in

particular, suggested that the touching was more than accidental or incidental; it was done with the intent to arouse or gratify sexual desire. Even Dr. Heath conceded that touching the clitoris could not be accidental or incidental to BC's therapy. And the State's expert witness testified that there was no reason to touch the labia, even incidentally, and that measures could be taken to prevent any such incidental touching.

As further proof of sexual intent, the State introduced evidence that two other patients had similar experiences with Heath. In June 2011, Heath rubbed over JT's vaginal area, back and forth for 5 to 10 seconds, sexually stimulating her clitoris. In 2015, he did the same during treatment of EB.

Heath was charged and convicted of object rape and forcible sexual abuse in connection with his treatment of BC on December 8, 2012 and three counts of sexual battery in connection with his treatment of BC during the prior three visits. On appeal, he contends that the evidence was insufficient to support his five convictions. None of his challenges were preserved during trial and he must therefore show an obvious and fundamental deficiency in the evidence. He did file a motion to arrest judgment following the verdict, challenging the evidence of penetration for object rape and sexual intent for forcible sexual abuse. But that post-verdict challenge to the sufficiency of the evidence was too late to preserve his sufficiency challenge.

The evidence was, in any case, more than sufficient to support each conviction. Heath himself acknowledged that there was no clinical reason to touch BC's clitoris during her treatment, either intentionally or incidentally. The State's expert also testified that there was no clinical reason to touch the vaginal area during the treatments, even incidentally or accidentally. Moreover, the touching that occurred in this case lasted for minutes, not seconds, belying any claim that the touching was incidental or accidental. Finally, the evidence was more than sufficient to support a jury finding of penetration for object rape where BC testified that Heath's finger went beyond her labia and touched her clitoris right in the middle of her vagina.

Heath also challenges the jury instructions, claiming that they were either incomplete or improper. Heath concedes that trial counsel preserved none of these challenges and in fact offered or agreed to some of the challenged instructions. The instructions that counsel offered or agreed to cannot be reviewed even for plain error. And because Heath does not identify which instructions fall into that category, he has not met his appellate burden of showing plain error. He also fails to meet the high burden of showing that counsel was ineffective.

Finally, Heath argues that the evidence of sexual abuse against JT and EB was improperly admitted under rules 403. The district court ruled that it

was admissible under a doctrine of chances theory to show mens rea, i.e., that Heath acted with an intent to arouse or gratify sexual desire rather than accidentally. Heath argues, however, that the frequency foundational requirement was not met by claims of inappropriate conduct from two other patients, among the more than 4,000 patients he has treated. The district court correctly admitted the evidence. The frequency component of the doctrine of chances does not depend on comparing it to the universe of events. The point is that the more times he does the same or a similar thing, the less likely it is that the one at issue is a mistake. The State's evidence showed that there is no clinical reason to touch a patient's vaginal area while treating even inner thigh muscles, and that appropriate precautions can and should be taken to avoid doing so. Yet JT and EB both testified that Dr. Heath massaged them directly over the vaginal area and stimulated them sexually. The odds that BC falsely accused him of doing so with sexual intent once is greatly reduced where he did the same thing to two others.

STATEMENT OF THE ISSUES

1. Was the evidence sufficient to support Heath's convictions for object rape, forcible sexual abuse, and sexual battery?

Standard of Review. When reviewing a challenge to the sufficiency of the evidence supporting a jury verdict, this Court views "the evidence and all

reasonable inferences drawn therefrom in a light most favorable to the verdict." *State v. Steed*, 2014 UT 16, ¶15, 325 P.3d 87 (cleaned up). The Court will "reverse a jury verdict only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *Id.* (cleaned up).

An unpreserved challenge to the sufficiency of the evidence is reviewed for plain error, and the Court will not reverse absent an evidentiary deficiency that is "obvious and fundamental." *State v. Holgate*, 2000 UT 74, ¶¶11-12,17, 10 P.3d 346.

2. Was counsel ineffective for not objecting to the jury instructions, or not requesting additional instructions?

Standard of Review. A claim of ineffective assistance of counsel raised for the first time on appeal is a question of law, *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162, but "[j]udicial scrutiny of counsel's performance [is] highly deferential," *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

3. Was other-acts evidence that Defendant sexually stimulated two other patients by massaging them in the vaginal area properly admitted to show that he did so to arouse or gratify sexual desire when he did the same to BC?

Standard of Review. A trial court's decision to admit or exclude evidence under rules 403 and 404(b) is reviewed for an abuse of discretion. *State v. Thornton*, 2017 UT 9, ¶56, 391 P.3d 1016.

STATEMENT OF THE CASE

A. Summary of relevant facts.

In the latter months of 2012, twenty-year-old BC began visiting Dr. Dale Heath—a licensed chiropractor specializing in deep massage therapy—for treatment of her upper and lower back. R1170-71,1178,1184,1191-92,1197. BC had been in several motor vehicle accidents since she was a teenager and was involved in a bicycle accident earlier in 2012. R1166-68. The motor vehicle accidents were still causing lingering back pain. R1166. The biking accident caused prolonged lower back pain she had never before experienced. After that accident, she could only stand for a few minutes, her lower back was constantly "burning and throbbing, mostly on [her] left side," and she had considerable difficulty sleeping. R1168,1170-72.

BC had received some massage therapy for her pain but it did not provide lasting relief. R1168-70. Her mother recommended that she see Dr. Heath—her chiropractor—and BC began seeing him in October 2012. R1172-73. In all, BC saw Heath nine times from October to December. R1184-1203. Over the course of that span, Heath gradually added different massage

therapies, performing them in a relatively consistent order: first, he massaged her upper and lower back; next, he massaged the gluteal muscles of her buttocks underneath her underwear ("glute" massage); he then turned her over and massaged her upper chest over her clothing; next, he massaged her bare stomach to work her psoas muscle; and he concluded by doing an adjustment—popping her back and neck. R1175-76,1180-82,1202,1223-27. The massages were intense and painful, so BC would generally close her eyes during the sessions, opening them periodically. R1187,1190,1204,1230,2813.

BC had no complaints with the work Heath was doing during her October visits. The glute massage made her "feel a little uncomfortable"—it "was a little deep in her underpants." R1180-81.[1] And she was comfortable with the chest massage, having seen Heath perform it on her mother. R1175,1182-83. Her feelings changed in November and December.

– Count 1 –
Sexual Battery on November 3, 2012

Without explanation, Heath added a new massage during her visit on November 3, 2012. As BC lay on her back, he began rubbing her "inner [right] thigh, very deep, very painfully … as with all the other massages." R1184-89,

[1] In lieu of brackets and for ease of reading, when quoting BC's testimony, the State substitutes, as appropriate, the words "her" and "she" for "my," "me," and "I."

2811. But that was not all. While massaging her inner thigh with one hand, Heath moved his other hand "right over her vaginal area" and began "going up and down, back and forth, right over the seam of her yoga pants, right on her vagina." R1185,1189-90,1234-35. BC "opened her eyes for a moment," noticed that the lights were off, and asked, "What are you doing?" R1185,1189. That's all she could manage to say." R1189. It was a moment in time "burned" in her mind. R1185-86.

Heath told BC "that he was doing some type of psoas attachment massage." R1189,1207. BC "didn't know" what that was, and she did not know what treatment was necessary to relieve her symptoms. R1189,1206. So she "just closed her eyes and just waited for it to be over at that point." R1189. She felt "scared" and "confused" and did "not really understand why he was touching her there." R1190.

Heath rubbed BC's vaginal area for several minutes and, as a result, she had an orgasm—something she did not want to happen. R1189-90. She said nothing about it and Heath acted "like nothing was wrong, like nothing was different. He didn't say anything to her." R1189-90. He concluded the visit with a back adjustment, as he always did, and BC paid for the visit and drove home. R1191. BC said nothing to Heath about it because she "didn't

really want to believe that it had happened, so she tried to explain it away" in her own mind. R1191.

BC "cr[ied] the whole way home." R1191.

– Count 2 –
Sexual Battery on November 24, 2012

Three weeks later, on November 24, 2012, BC returned for another visit with Heath. R1192. She went back because she was "in a lot of pain" and she "wanted to pretend like everything was fine." R1192. As she later explained at trial, "I didn't really want to believe that it had happened." R1192. BC's mother and sister came with her to the appointment. R1192,1233, 1244. Although BC did not ask her mother to join her while being treated, BC was hopeful that she would. R1192-93,1244-45. She was disappointed when her mother chose to wait in the lobby. R1193. In an effort to protect herself, BC made an audio recording of her visit with Heath that day. *See* R1193.

As in the prior visit, Heath first massaged her upper back, lower back, and buttocks, after which he massaged her chest, stomach, and inner right thigh. R1193. And like before, as he rubbed her thigh, Heath also rubbed "with [his] other hand right over [BC's] clitoral or vaginal area." R1193,1195. Once again, BC asked, "What are you doing?" R1195. This time, Heath claimed he was treating her "gricilis muscle." R1195,1207. BC "felt

paralyzed." R1195. She "felt really frozen and confused." R1195. But again, she said nothing because she "was too afraid." R1195.

Heath continued to rub her vaginal area and BC "did climax again." R1195. Heath rubbed BC's vaginal area for a "few minutes," until BC's sister came into the office. R1195. When she did, Heath "mov[ed] his hand away from [BC's] vagina," began massaging her thigh "with two hands," and talked to BC's sister. R1195-96,1235. Heath finished by performing a back adjustment. R1196.

– Count 3 –
Sexual Battery on December 1, 2012

After the two November visits with Heath, BC did "a lot of talking to herself, a lot of convincing herself that everything was fine." R1196. She "just wanted to not believe that it was happening." R1196. She "didn't want to believe that a doctor would prey on her pain and use the treatment as a means to manipulate her and trick her into letting him touch her inappropriately." R1196-97. BC explained, "I tried to say it must be something wrong with me. Maybe I'm perceiving this wrong. Maybe I just imagined it. Everything's fine. Just go back." R1197. So she did, visiting him again for treatment on December 1, 2012. R1197-98.

During this visit, Heath performed a "stomach massage, which was routine," but this time it was different—it "was the first time that he had put

his hands in her underpants, not just in the back, but in the front." R1198-99. While standing just to the left of BC, Heath moved his fingers "down past her waist into her underpants" and they "kept going down and down and down and down and down." R1199. BC said nothing—she "was just frozen" as Heath's fingers "stopped right on the left side of her vagina right where … her leg starts," and as he then moved his fingers "in a circular motion" and put his fingers "on her labia majora," moving the "outer lip of her vagina over." R1199-1201,1212-14,1243-44.

When BC left Heath's office, she "cried on the way home again." R1201. But as before, she tried rationalizing his actions, thinking to herself, "Well, …, if he's really abusing you, he would touch your vagina skin-to-skin, under the underwear and not just over it." R1201-02,1238-39. But "unfortunately," BC returned a week later and "that's what happened in the next visit." R1202.

– Counts 4 & 5 –
Forcible Sexual Abuse and Object Rape on December 8, 2012

Having convinced herself that Heath was not sexually abusing her, BC visited Heath yet again on December 8, 2018. *See* R1202. This time, during the abdominal massage, he went "very deep into [her] underpants down the front." R1202. He "was still doing the circular motions," with "his fingers right on the outer lip of [her] vagina, moving it around and around and around." R1202. As before, he massaged the labia for a few minutes. R1215.

And then Heath did something more—"one of his fingers reach[ed] over," going "beyond the labia majora," and "touched her right on her clitoris right in the middle of her vagina on her skin." R1202,1214-16,1240. When he did, BC "flinched" and Heath then "moved his finger away." R1202,1215.

Final Appointment on December 15th

Despite the sexual assaults, BC returned for another appointment a week later. RR1203. She asked herself why she kept coming back—"one of the biggest questions she's [since] had to work through with her therapist." R1203. She still had a lot of back pain and "didn't know where else to go," so she visited him again but "decided she wasn't going to stay for the whole time." R1203. She set a timer on her phone to sound an alarm one-half hour after the appointment began and when it sounded, she left—before Heath had a chance to begin the abdominal massage. R1203. She never returned again. R1203.

* * *

BC had done nothing to suggest that she was sexually interested in Heath. R1219. Heath never asked for her consent to perform a pelvic exam; and she never consented to him rubbing her vaginal area or touching her genitals. R1237-38,1249-50. Before the abuse, BC had not thought about what she would do in the event she were sexually assaulted and, in retrospect, she

did not respond to Heath's abuse as she thought she would have. R1217. She was "just frozen," feeling "paralyzed," and she "didn't say or do anything." R1218. BC had "wanted to trust" Heath, and she "did trust him," and his treatment was helping her. R1192. As BC later explained at trial, she "wish[ed] that she would have been brave enough to say no right away, but she wasn't." R1217-18.

Reporting the Abuse

BC went to Germany for Christmas and the New Year holidays. R1216. When she returned, BC "took a day or two to gather her courage," and then told her mother about the abuse as soon as she could. R1216-17. BC had told no one before because she felt that if she "said it out loud then it meant it was real and it really happened, and she didn't want to believe it." R1217. But when she returned home, she "couldn't pretend anymore like what had happened was just in her imagination." R1217.

Evidence of Intent

Heath denied that he ever touched BC's clitoris, and he denied that he touched her labia, and claimed that any possible touching was incidental or accidental. To prove his intent to arouse or gratify sexual desire (sexual intent), the State elicited the testimony of BC. Heath had explained to BC his massage treatments for her back and stomach, and as he performed those

massages asked her if she was okay with the pain level. R1204-05,1251. But Heath never discussed treating BC's "private areas," did not ask her to tell him if she was uncomfortable while he was rubbing her vaginal area, and never took any additional steps to protect her vaginal area (like covering her private area with a towel or her hands). R1204-05,1251. Although he may have been treating BC's muscles with one hand, BC made clear at trial that "his other hand was not treating her." R1252.

Also, to prove sexual intent, rather than accident as Heath claimed, the State introduced evidence that he had inappropriately touched two other women: JT in 2011 and EB in 2015.

Massaging JT's vaginal area. On the referral of a friend, JT met with Heath in June 2011 for treatment of sciatic pain that radiated down her leg. R2079. In that visit, Heath first worked her gluteal muscles and the attachments in the back. R2084. He then turned her over and worked "very high" in her groin. R2084. Then, as he worked at the top of her pubic bone, Heath "put his fist right where her clitoris is and started "grinding back and forth in [her] crotch," stimulating her sexually. R2084,2087-88,2119-20. JT opened her eyes to see what was happening and she saw that Dr. Heath's head was tilted back slightly, his eyes were closed, and he had a strange look on his face, as if he was "enjoying what he was doing." R2088,2092. JT said to Heath,

"[S]top, we're done." R2086-88,2119-20. By that time, he had massaged her crotch for five to ten seconds. R2087,2114.

As an experienced massage therapist, JT knew this was "an area you don't need to be working" because there are no muscles that attach there. R2084,2089,2111. And she knew that a therapist could reach the attachments at the top of the pubic bone "without touching anywhere in the crotch area." R2112. Moreover, she had been treated in her thigh muscles many times and no one had ever touched her labia or clitoris before. R2112-13,2123.

JT thereafter paid Heath and scheduled another visit, but with no intention of keeping the appointment. R2093,2116. She did not confront Heath because she was just "trying to process" what happened, was scared, and "just really wanted to leave." R2092-93. She did not know why she scheduled an appointment—which she never kept—other than she "didn't want him to think that [she] was on to anything" and "just wanted to get out of there as soon as possible." R2093,2115. A few days later, JT reported the incident to the Department of Professional Licensing (DOPL) and to police. R2094.

After interviewing Heath—where he denied any wrongdoing—DOPL declined to investigate the matter further, but issued what is known as a "letter of concern." SE5. The letter explained that its decision not to investigate further was in part based on his "representation to [the DOPL] investigator

that [he] would … examine and adjust [his] practices." SE5. The letter closed by indicating that any future problems could "result in formal disciplinary action" and that "if other improprieties" were brought to DOPL's attention, it could "reopen [its] investigation" of JT's complaint and "take action as may be appropriate." SE5.

Massaging EB's vaginal area. In February 2015, EB was treated four times by Dr. Heath for back spasms and a hip injury. R2314-16. The first two visits were uneventful—he massaged her upper back, neck, and chest area, and he never inappropriately touched her. R2318-20. The third and fourth visits were different.

During her third visit, he also worked her hip, "because it had gotten extremely painful and flared up." R2321-22. To address the hip problem, Heath had EB lay on her back and he "used a tool and his hands to massage her hip joint and her thigh muscle and upper inner thigh area." R2322. He went "back and forth between those … muscles and sections" and did a "really, really deep massage … pushing really quickly and aggressively." R2322. During that massage, he rubbed up against her labia once or twice very briefly, but EB disregarded it as unintentional. R2322,2329-31.

On EB's fourth visit, Heath again worked her hip joint and massaged her thigh muscles, as he had in the prior visit. R2326. But this time, "he rubbed

up against her labia a lot more firmly than [he had on] the third visit … more than once," and a lot more consistently. R2326,2331-32. After some 10 minutes, Heath switched hands and he touched her labia "a lot more firmly and frequently," and at another point, "he was rubbing up against her pubic area and then actually directly over her clitoral area as well for about ten or fifteen seconds." R2326. This massage was arousing, "directly stimulat[ed] the clitoral area for a period of ten, 15 seconds." R2331,2333.

It took EB a moment to process what Heath was doing. R2333. But it was apparent to EB that it "was completely intentional, there was no excuse for it" because "you can avoid touching someone's vagina." R2327. EB had received massages for her hip injury before, but had never been touched in the labia and clitoris areas. R2327-28. EB did not protest, but thought to herself, "this has to be over soon, this has to be over soon, but [she] really didn't get past that." R2333. EB did not tell Heath to stop or say anything else." R2327,2347-48,2353. Heath then massaged down EB's thigh and hip joint for a minute and the session ended. R2333. EB never consented to Dr. Heath touching her genitals. R2352-53. And he never told EB that he would be working in a sensitive area or that he might touch any sensitive areas. R2339.

EB excused herself to the restroom, where she went and composed herself—she was shaking and in shock trying to process what happened. R2333-

34. Afterwards, EB did not confront Heath about what he had done, explaining at trial that she "had this really weird feeling that she didn't want him to know that she knew what he had done," even though "in hindsight, it was really obvious." R2336-37. She "just wanted to get out of there." R2337. EB did not schedule another appointment. R2334. After EB left Dr. Heath's office, she telephoned her mother and told her that Heath was a pervert and she would never return. R2334. She also spoke with a friend who was a physical therapist, after which she filed a complaint with DOPL and reported the incident to police. R2334-35,2350.

Although a chaperone was present during EB's visits with Heath, there were times during the visits that the chaperone was turned around typing on the computer. R2324,2359-60.

B. Summary of proceedings and disposition of the court.

In September 2015, the State charged Heath with committing sexual crimes against BC in 2012 and EB in 2015. R1-5. The charges with respect to the two victims were thereafter severed and the State filed an amended information in this case charging Heath with five sexual offenses against BC: one count of object rape, a first degree felony, in violation of Utah Code Ann. §76-5-402.2 (Westlaw, 2018); one count of forcible sexual abuse, in violation of Utah Code Ann. §76-5-404 (Westlaw, 2018), a second degree felony; and three

counts of sexual battery, in violation of Utah Code Ann. §76-9-702.1 (Westlaw, 2018), all class A misdemeanors. R191-94,378-79,549-52.[2]

Pretrial ruling on other-acts evidence. Heath moved to exclude other-acts evidence under evidence rules 404(b) and 403, including testimony from EB and JT. R195-98. The State cross-moved to admit the testimony to prove both *actus reus* and intent. R220-82. In a written order, the district court ruled that the testimony of both EB and JT was "admissible under a doctrine of chances theory to prove *mens rea*," but not to prove *actus reus*. R411-15.

Consistent with its 404(b) ruling, the court instructed the jury at trial that it could consider the other-acts evidence, "if at all, for the limited purpose of determining whether Dale Heath acted with the mental state required by law." R628-29. The instructions continued that the other-acts evidence was "not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait." R628-29. The instructions also explained that "the defendant is on trial for the crimes charged in this case, and for those crimes only," and instructed the jury that it "may not convict a person simply because [it] believe[s] he may have committed some other act at another time." R628-29.

[2] Count 8 charging Heath with making a written false statement was also severed from the other charges. R379.

Trial and conviction. Heath was tried before a jury in September 2017. R566-71,592-94,635-39. After a four-day trial, the jury found Heath guilty of all five counts as charged. R632-33.

Motion to arrest judgment. Before sentencing, Heath filed a motion to arrest judgment alleging that the evidence was insufficient to support a jury finding of penetration for object rape and of intent to arouse or gratify sexual desire for forcible sexual abuse. R1271-86. After hearing argument, the district court denied the motion. R2979-3003. The court ruled that BC's testimony "explicitly establish[ed] that the defendant penetrated her when taken in context." R3001. It explained that "[n]o inferences were required" for the jury's finding where BC "expressly testified that she felt the defendant's finger go beyond her labia majora to touch her clitoris" and that the "touching was different from the defendant's massaging of the outer folds of her labia and caused her to flinch." R3001-02. The court also ruled that the jury could reasonably infer an intent to arouse or gratify sexual desire for forcible sexual abuse given "[t]he nature, duration and progression of the touching described by the victim." R3002-03.

Sentencing. After denying the motion to arrest judgment, the district court sentenced Heath to concurrent prison terms of five years to life for object rape, one to fifteen years for forcible sexual abuse, and up to one year for

each sexual battery offense. R1385-88. Defendant timely appealed and the Utah Supreme Court transferred the appeal to this Court for disposition. R1392-93,1397-98.

SUMMARY OF ARGUMENT

Insufficiency of the evidence. Heath argues that the evidence was insufficient to support his five convictions. None of his challenges were preserved during trial and he must therefore show an obvious and fundamental deficiency in the evidence. He filed a motion to arrest judgment following the verdict, challenging the evidence of penetration for object rape and sexual intent for forcible sexual abuse. But that post-verdict challenge to the sufficiency of the evidence was too late to preserve his sufficiency challenge. He needed to make that challenge during trial.

The evidence was, in any case, more than sufficient to support each conviction. Heath himself acknowledged that there was no clinical reason to touch BC's clitoris during her treatment, either intentionally or incidentally. The State's expert also testified that there was no clinical reason to touch the vaginal area during the treatments, even incidentally or accidentally. Moreover, the touching that occurred in this case lasted for minutes, not seconds, belying any claim that the touching was incidental or accidental. Finally, the evidence was more than sufficient to support a jury finding of penetration for

object rape where BC testified that Heath's finger went beyond her labia and touched her clitoris right in the middle of her vagina.

Jury instructions. Heath also challenges the jury instructions, claiming that they were either incomplete or improper. Heath concedes that trial counsel preserved none of these challenges and in fact offered or agreed to some of the challenged instructions. The instructions that counsel offered or agreed to cannot be reviewed even for plain error. And because Heath does not identify which instructions fall into that category, he has not met his appellate burden of showing plain error. He also fails to meet the high burden of showing that counsel was ineffective.

Other-acts evidence. Finally, Heath argues that the evidence of sexual abuse against JT and EB was improperly admitted under rule 404. The district court ruled that it was admissible under a doctrine of chances theory to show mens rea, i.e., that Heath acted with an intent to arouse or gratify sexual desire rather than accidentally. Heath argues, however, that the frequency foundational requirement was not met by claims of inappropriate conduct from two other patients, among the more than 4,000 patients he has treated. The district court correctly admitted the evidence. The frequency component of the doctrine of chances does not depend on comparing it to the universe of

events. The point is that the more times he does the same or a similar thing, the less likely it is that the one at issue is a mistake.

The State's evidence showed that there is no clinical reason to touch a patient's vaginal area while treating even inner thigh muscles, and that appropriate precautions can and should be taken to avoid doing so. Yet JT and EB both testified that Dr. Heath massaged them directly over the vaginal area and stimulated them sexually. The odds that BC falsely accused him of doing so with sexual intent once is greatly reduced where he did the same thing to two others.

ARGUMENT

I.

The evidence was sufficient to support all five of Heath's convictions.

Heath contends that the evidence was insufficient to support the jury's verdict on all five counts. Aplt.Br. 11-47. But because he did not preserve this claim by moving for a directed verdict during trial, the Court may review for plain error only.

A. A defendant must overcome a high burden to prevail on a claim that the evidence supporting a jury verdict was insufficient, and when the claim is unpreserved, he must show an obvious and fundamental evidentiary insufficiency.

When reviewing an appellate claim that the evidence was insufficient to support a jury verdict, this Court must give "substantial deference to the jury verdict." *State v. Ashcraft*, 2015 UT 5, ¶18, 349 P.3d 664. This is so because appellate judges are not present at trial. The jury thus stands in a "superior position … to evaluate and weigh the evidence and assess the credibility and accuracy of witnesses' recollections." *Drake v. Industrial Commission*, 939 P.2d 177, 181 (Utah 1997) (citing *State v. Pena*, 869 P.2d 932, 936 (Utah 1994)). But there is another, more fundamental, reason, which applies to sufficiency review by both trial and appellate courts: "under the constitutional guarantee of trial by jury, it is for the jury to weigh the evidence and pass upon its credibility," not a reviewing court. *King v. Union Pacific Railroad Co.*, 117 Utah 40,

212 P.2d 692, 696-97 (1949); *accord State v. Howell*, 649 P.2d 91, 97 (Utah 1982) ("It is within the exclusive province of the jury to judge the credibility of the witness and the weight of the evidence.").

Given its highly deferential standard of review, this Court must "view the evidence and all reasonable inferences drawn therefrom in a light most favorable to the verdict." *Steed*, 2014 UT 16, ¶15 (cleaned up). This means that the Court must "resolve 'conflicts in the evidence in favor of the jury verdict.'" *State v. Prater*, 2017 UT 13, ¶32, 392 P.3d 398 (*State v. Workman*, 852 P.2d 981, 984 (Utah 1993)). This principle applies with equal force to reasonable inferences—the Court must resolve conflicting inferences in favor of the verdict. *Ashcraft*, 2015 UT 5, ¶24 (holding that under deferential standard of review, court "yields deference to all reasonable inferences supporting the jury's verdict).

Heath, however, relies on *State v. Cristobal*, 2010 UT App 228, ¶16, 238 P.3d 1096, which stands for a different proposition. Aplt.Br. 34-35,37. In *Cristobal*, this Court held that a plausible inference favorable to the State is mere speculation if there is an equally plausible, contrary inference:

> 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.[3] And in *State v. Patterson*, the Court similarly held that "'an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof.'" 2017 UT App 194, ¶14, 407 P.3d 1002 (quoting *United States v. Finnerty*, 470 F.2d 78, 81 (3rd Cir. 1972)).

This Court should disavow the *Cristobal*/*Patterson* more-probable-inference standard because it directly conflicts with the Utah Supreme Court's holding in *Ashcraft*. There, the Supreme Court held that when assessing the inferences drawn by the jury, the question "is not whether some other (innocent) inference might have been reasonable. It is simply *whether the inference adopted by the jury was sustainable*" by the evidence. *Ashcraft*, 2015 UT 5, ¶27 (emphasis added). And merely because the fact that the Court "can identify an 'equally' plausible alternative inference is not nearly enough to set [a] verdict aside." *Id.* at ¶25.

[3] The Court has repeated this language in several criminal cases since. *See Salt Lake City v. Gallegos*, 2015 UT App 78, ¶10, 347 P.3d 842 (same); *Salt Lake City v. Howe*, 2016 UT App 219, ¶11, 387 P.3d 562 (same); *In re W.E.M.*, 2016 UT App 250, ¶25, 391 P.3d 352 (same); *State v. Yazzie*, 2017 UT App 138, ¶17, 402 P.3d 165 (same). It has also relied on this language in two civil cases. *See Nau v. Safeco Insurance Co. of Illinois*, 2017 UT App 44, ¶14, 392 P.3d 993 (same); *Hall v. Peterson*, 2017 UT App 226, ¶34, 409 P.3d 133 (same).

In sum, under its deferential standard of review, this Court must view the evidence in the light most favorable to the jury verdict, together with all inferences supporting the verdict, so long as those inferences are reasonable, i.e., the inferences drawn from the evidence "have a basis in logic and reasonable human experience." *Holgate*, 2000 UT 74, ¶21 (cleaned up). And this is true even if "some other (innocent) inference might have been reasonable." *Id.* at ¶27. It is not the Court's business to choose between reasonable inferences—that is the jury's work.

To prevail on a preserved claim of insufficient evidence, a defendant must show that "no evidence existed from which a reasonable jury could find [guilt] beyond a reasonable doubt." *State v. Gonzalez*, 2015 UT 10, ¶27, 345 P.3d 1168. Stated another way, a jury verdict will be affirmed unless "there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." *United States v. Boesen*, 491 F.3d 852, 855 (8th Cir. 2007) (cleaned up). This is a "high burden." *State v. Alires*, 2018 UT App 173, ¶16, 873 Utah Adv. Rep. 4.

And as great as the burden is to establish insufficiency of the evidence on a preserved claim, it is even greater when the insufficiency challenge was not preserved in the trial court. Like any other claim, an insufficiency challenge is subject to the rules of preservation. *State v. Holgate*, 2000 UT 74, ¶¶11-

12, 10 P.3d 346. A defendant who does not properly preserve a challenge to evidence sufficiency cannot prevail on appeal unless he shows plain error. *Id.* at ¶11. In other words, a defendant must not only meet the high burden of showing that the evidence was insufficient, but must also demonstrate that the evidentiary insufficiency was "so obvious and fundamental" that it was incumbent on the trial court to sua sponte dismiss the charge. *Id.* at ¶17. "An example is the case in which the State presents *no* evidence to support an essential element of a criminal charge." *Id.*

B. Heath must show plain error because he did not adequately preserve his appellate challenges to the sufficiency of the evidence supporting his convictions.

Heath did not move for a directed verdict after the State rested or at the conclusion of all the evidence. R2461-67,2814.[4] Instead, he filed a motion to arrest judgment after the jury returned its verdict—almost two months after the jury verdict. R1271-86. That motion did not preserve his challenges to the sufficiency of the evidence.

[4] Heath contends that he moved to dismiss the object rape charge for insufficient evidence at the close of the State's case in chief. Aplt.Br. 2 (citing R2462-65,2962). Not so. The only motion counsel made at the close of the State's case in chief was Heath's claim that the forcible sexual abuse charge be merged with the object rape charge, alleging that the touching of the labia was incidental to touching of the clitoris. R2462-65. The district court denied the motion and Heath has not challenged that ruling on appeal.

1. Heath's post-verdict challenge to the evidence's sufficiency was untimely and thus did not preserve his insufficiency challenge.

To preserve an issue for appeal, a party must make an objection in the trial court that is (1) timely, (2) specific, and (3) supported by evidence or relevant legal authority. *Boyle v. Christensen*, 2011 UT 20, ¶14, 251 P.3d 810. Two important policy reasons underlie the preservation rule and its timeliness, specificity, and analysis requirements. First, the rule promotes judicial economy by affording "the trial court an opportunity to address the claimed error, and if appropriate, correct it." *State v. Larabee*, 2013 UT 70, ¶15, 321 P.3d 1136 (cleaned up). Second, the rule encourages fairness by "prevent[ing] defendants from foregoing an objection with the strategy of enhancing the defendant's chances of acquittal and then, if the strategy fails … claiming on appeal that the court should reverse." *Id.* (cleaned up). The preservation rule "applies to *every claim*," *id.* including challenges to the sufficiency of the evidence supporting a jury verdict, *Holgate*, 2000 UT 74, ¶¶11-12.

In *Larabee*, the Utah Supreme Court held that a defendant's post-verdict motion to arrest judgment alleging prosecutorial misconduct "hardly counts as a timely objection." 2013 UT 70, ¶16. Likewise, a defendant's post-verdict motion to arrest judgment alleging insufficiency of the evidence will not suffice because it deprives the court any opportunity to correct the problem. The

Utah Supreme Court recently reaffirmed and emphasized that an "objection that *could have been raised at trial cannot be preserved in a post-trial motion*." *State v. Fullerton*, 2018 UT 49, ¶49 n.15, 428 P.3d 1052 (emphasis added). Because Heath could have challenged the sufficiency of the evidence at trial but didn't, his challenge to the evidence in his post-verdict motion to arrest judgment was untimely and did not preserve his sufficiency challenge.[5]

Under rule 17, Utah R. Crim. P., Heath had an opportunity to challenge the sufficiency of evidence during trial in a directed-verdict motion, when any alleged evidentiary deficiency could have been addressed:

> At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Utah R. Crim. P. 17(p). But Heath did not move for a directed verdict at the close of the State's case in chief or at the close of all the evidence. Had Heath moved for a directed verdict at trial, the prosecutor "might properly and with

[5] In *State v. Rudolph*, this Court suggested that because a motion to arrest judgment is "not conditioned upon a prior motion challenging the sufficiency of the evidence," it satisfies the preservation requirements for appellate review. 2000 UT App 155, ¶21, 3 P.3d 192. This proposition is in direct conflict with *Larabee* and *Fullerton*.

little difficulty have moved to reopen and supply the missing evidence." *State v. Lawrence*, 120 Utah 2d 323, 326, 234 P.2d 600, 601 (1951) (emphasis added).[6]

Were this Court to create a general exception to the timeliness requirement for challenges to evidence sufficiency, it would undermine the core policies underlying the preservation rule. Not only would the trial court be deprived of the opportunity to address the issue in time to correct it, but defendants like Heath could forego "an objection with the strategy of enhancing [their] chances of acquittal and then, if that strategy fails … claiming on appeal that the court should reverse." *Larabee*, 2013 UT 70, ¶15 (cleaned up).

In sum, by waiting to challenge the evidence's sufficiency until after the verdict, Heath deprived the trial court of the "opportunity to address the claimed error, and … correct it." *Larabee*, 2013 UT 70, ¶15 (cleaned up). Heath must therefore show that any evidentiary deficiency was so obvious and fundamental that it required the trial court to sua sponte direct a verdict of

[6] Indeed, rule 17 implicitly contemplates such action where it does not require dismissal, but merely permits it. *See* Utah R. Crim. P. 17(¶) (providing that "court *may* issue an order" of dismissal "upon the ground that the evidence is not legally sufficient"). *Cf.* Utah R. Civ. P. 50, Advisory Comm. Notes (explaining that under rule 50—the civil rule counterpart to rule 17(p)—a court should "[i]n no event … enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact").

acquittal before the jury deliberated. *See Holgate*, 2000 UT 74, ¶17. He has not met that burden.

2. Even if a post-verdict motion to arrest judgment were sufficient to preserve a sufficiency challenge, Heath's motion preserved only his challenges to the evidence of penetration for object rape and specific intent for forcible sexual abuse.

As noted, preservation requires an objection that is specific. And to be specific, "the objection must present the issue to the court in such a way that the trial court has an opportunity to rule on that issue." *State v. Martin*, 2017 UT 63, ¶25, 423 P.3d 1254 (cleaned up). Heath limited his motion to arrest judgment to two specific claims. First, he argued that the evidence supporting his object-rape conviction was lacking because the object rape statute "requires penetration of … the vaginal … opening" and BC "never used" the term penetration in her testimony, and never described Heath "as touching anywhere "in" her vaginal area, instead using words such as 'near,' 'on the side'; 'on the outside'; and 'on.' " R1280-83. Second, he argued that the evidence supporting his forcible-sexual-abuse conviction was lacking because the State did not introduce evidence of intent to arouse or gratify sexual desire. R1283-86.

On appeal, Heath re-asserts his two motion-to-arrest-judgment sufficiency challenges. *See* Aplt.Br. 23-33,35-37. But for the first time on appeal,

Heath adds that (1) his object-rape conviction was not supported by sufficient evidence of an intent to arouse or gratify sexual desire, Aplt.Br. 33-35; (2) his forcible-sexual-abuse conviction was not supported by sufficient evidence of non-consent and his *mens rea* as to non-consent, Aplt.Br. 38-40; and (3) his sexual battery convictions were not supported by sufficient evidence that he knew his behavior would likely cause affront or alarm to the victim, Aplt.Br. 40-43.

None of these latter challenges were made in Heath's motion to arrest judgment or elsewhere in the trial court. *See* R1271-86,2461-67,2814. Thus, *at most*, Heath's motion to arrest judgment preserved his sufficiency challenge to the evidence of penetration for object rape, Aplt.Br. 23-33, and to the evidence of intent to arouse or gratify sexual desire for forcible sexual abuse, Aplt.Br. 35-37. By limiting his motion to arrest judgment to the issues of penetration for object rape and intent to arouse or gratify sexual desire for forcible sexual abuse, the trial court had no occasion, nor reason, to rule on the sufficiency of the evidence supporting other elements and offenses. As a result, Heath's challenges to the evidence of specific intent for object rape, non-consent for forcible sexual abuse, and the requisite knowledge for sexual battery were unpreserved.

Because these additional insufficiency claims were unpreserved, Heath must show that the trial court plainly erred in not sua sponte directing a verdict of acquittal based on those alleged deficiencies. *See State v. Nacey*, 2013 UT App 125, ¶2, 303 P.3d 1023 (requiring plain error showing where defendant did not allege in his directed-verdict motion that testimony was too unreliable to support attempted rape conviction); *State v. Cooper*, 2011 UT App 234, ¶, 261 P.3d 653 (requiring plain error showing where defendant "did not preserve the [insufficiency] issue that [he] now argues on appeal").

C. The evidence was more than sufficient to support Heath's convictions and Heath falls far short of showing an obvious and fundamental evidentiary deficiency.

For each of his claims, Heath makes an insufficiency-of-the-evidence argument as if it were preserved. *See* Aplt.Br. 24-33 (penetration to support object rape), 33-35 (specific intent to support object rape), 36-37 (specific intent to support forcible sexual abuse), 38-40 (non-consent to support forcible sexual abuse), 40-43 (requisite knowledge to support sexual battery). Following that 21-page argument, Heath notes that "some insufficiency grounds made herein were not raised previously" and asserts that "[i]nsofar as they were not, this Court may review for plain error and/or ineffective assistance of counsel." Aplt.Br. 44.

Heath then briefly explains the standard for plain error review. Pointing to his prior merits discussion, he concludes by baldly asserting, without analysis, that "[t]he insufficiency of the State's evidence on these essential elements should have been obvious and were so fundamental that the trial court erred in submitting the case to the jury." Aplt.Br. 45.

Heath makes a similar argument for ineffective assistance of counsel. After briefly setting out the ineffective assistance standard, he baldly asserts that "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" and that he suffered prejudice because motions challenging the evidence's sufficiency would "have been granted." Aplt.Br. 45-47.

These conclusory statements fall far short of meeting his appellate burden of showing either plain error or ineffective assistance of counsel. There is no analysis demonstrating that the alleged evidentiary deficiencies were obvious and fundamental, only a bald assertion. Nor is there any analysis explaining why all competent counsel should have recognized the alleged evidentiary deficiencies, again, only a bald assertion. Because Heath has not established "a sufficient argument for ruling in [his] favor," providing no "reasoned analysis of how [his cited] authority should apply" in this case, he has

failed to meet his burden of persuasion on appeal and the Court should affirm his convictions. *See Bank of America v. Adamson*, 2017 UT 2, ¶13, 391 P.3d 196.

In any event, a review of the evidence demonstrates that Heath's convictions were supported by ample evidence—there was no evidence insufficiency, let alone an obvious and fundamental insufficiency. And where there is no obvious insufficiency, counsel was not ineffective for not making a futile challenge. *See State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel.").

1. Ample evidence supported the jury finding of penetration for Heath's object rape conviction.

Heath claims that the evidence was insufficient to support his conviction for object rape, arguing that no evidence supported a finding that he penetrated the victim's genital opening. Aplt.Br. 25-33. But his argument depends on a statutory requirement that does not exist.

Under Utah Code section 76-5-402.2, object rape occurs where there is "penetration, however slight, of the genital … opening." Utah Code Ann. § 76-5-402.2(1) (Westlaw, 2018). BC testified that while massaging her abdominal muscles on December 8, 2012, Heath moved his fingers "deep into her underpants down the front," moved his fingers around and around "on the outer lip of her vagina" for a few minutes, and then "one of his fingers

reach[ed] over," going *beyond the labia majora*," and "touched her *right on her clitoris* right *in the middle of* her vagina on her skin." R1202,1214-16,1240 (emphasis added). This testimony was more than sufficient to support a jury finding that Heath "cause[d] the penetration, however slight, of the *genital* … opening." Utah Code Ann. § 76-5-402.2(1) (emphasis added).

Heath contends, however, that the term "genital opening" under the statute "means the 'vaginal opening,' " in which case touching of the clitoris would be insufficient. Aplt.Br. 30. His argument lacks merit. This Court's holding in *State v. Patterson*, 2017 UT App 194, 407 P.3d 1002, is dispositive. *Patterson* held that genital opening, as used in the object-rape statute, is *not* synonymous with vaginal opening: " 'Penetration' in this context means *entry between the outer folds of the labia*." *Id.* at ¶3 (cleaned up) (emphasis added).

In reaching its conclusion, *Patterson* relied on *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988). There, the Utah Supreme Court addressed a challenge to the sufficiency of evidence supporting a rape conviction. *Id.* Under Section 76-5-407, proof of "any sexual penetration, however slight, is sufficient" to satisfy the element of "sexual intercourse" under the rape statute. Utah Code

Ann. § 76-5-407(2) (Westlaw, 2000) (emphasis added).[7] The Supreme Court rejected the notion that sexual penetration means penetration of the vaginal opening:

> 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. However, *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*. Our decisions are entirely consistent with this proposition. We therefore declare it to be the definition of penetration under section 76-5-407.

Simmons, 759 P.2d at 1154 (emphases added). The *Simmons* decision thus suggests that "entry of the outer folds of the labia," however slight, is sufficient not only to prove rape, but also object rape, which has always required a showing of penetration of the genital opening.

It is true that the rape and object rape statutes use slightly different terminology. Whereas the element of sexual intercourse under the rape statute refers to "sexual penetration," Utah Code Ann. § 76-5-407(2), the object rape statute refers to "penetration of the genital … opening," Utah Code Ann.

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[7] The statute does not specifically refer to the element of sexual intercourse, but in stating that "any sexual penetration, however slight, is sufficient to constitute the offense" of rape, the statute can only be read as referring to that element.

§ 76-5-402.2(1). But that was true when *Patterson* and *Simmons* were decided. And contrary to Heath's claim on appeal, the plain meaning of the statutory text is consistent with this Court's holding in *Patterson*.

Heath has not shown otherwise. To argue that genital opening means vaginal opening, Heath strains to analogize the language to "anal opening." *See* Aplt.Br. 31-32. But the statute does not say vaginal opening. It says "genital" opening. And the medically accepted meaning of genital includes much more than the vagina.

The female genitalia include both "external genital organs and internal genital organs."[8] The internal genital organs consist of the vagina, uterus, fallopian tubes, and ovaries,[9] and the vaginal opening is the opening to those internal genital organs. The external genital organs, collectively referred to as the vulva, include "the mons pubis, labia majora, labia minora, Bartholin

[8] Merck Manual Consumer Version (Merck), *Overview of the Female Reproductive System*, located at https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/overview-of-the-female-reproductive-system (last visited December 4, 2018).

[9] Merck, *Female Internal Genital Organs*, located at https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-internal-genital-organs (last visited December 4, 2018).

glands, and clitoris."[10] The labia majora are "folds of tissue that *enclose and protect* the other external genital organs."[11] Thus, the opening to these genital organs, and thus to the internal genital organs as well, is through the labia majora.

If the legislature had meant vaginal opening it could have said so. Or if it meant internal genitals it could have said so. But it didn't. It said "genital" opening, and as shown, the female genitals begin at the labia. So when *Patterson* held that the genital opening is " 'between the outer folds of the labia,' " that holding was consistent with the medical understanding of female genitalia. 2017 UT App 194, ¶3 (quoting *Simmons*, 759 P.2d at 1154).[12]

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[10] Merck, *Female External Genital Organs*, located at https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-external-genital-organs (last visited December 4, 2018) (emphasis added).

[11] *Id.* (emphasis added).

[12] Other courts to address rape or object rape statutes have reached the same conclusion. *See, e.g., People v. Quintana*, 108 Cal. Rptr. 2d 235, 238 (Cal. App. 2001) (interpreting sexual penetration consistent with the "universal rule" in other jurisdictions to include penetration of the external genital organs); *State v. Tapia*, 347 P.3d 738, 742 (N.M. App. 2015) (holding that statute worded to "be inclusive of the 'broader sense of the female genitalia as opposed to just the vaginal canal' "); *Moore v. Commonwealth*, 491 S.E.2nd 739, 742 (Va. 1997) (holding that "penetration of any portion of the vulva, which encompasses the external parts of the female sex organs considered as a whole and includes, beginning with the outermost parts, the labia majora, labia minora, hymen, vaginal opening and vagina … is sufficient to establish the element of penetration").

BC's testimony was more than sufficient to prove penetration, however slight, of the "outer folds of [her] labia." *Patterson*, 2017 UT App 194, ¶3. She testified that one of Heath's fingers "reach[ed] over," going "beyond the labia majora," and "touched her *right on her clitoris* right in the middle of her vagina on her skin." R1202,1214-16,1240 (emphasis added). The clitoris is within the vulva, "located between the labia minora at their upper end."[13] And as discussed, the labia majora "enclose" the other external genital organs, which include both the labia minora and clitoris.[14] Heath, therefore, could not have reached her clitoris without getting passed the opening to her external genitals, i.e., "the outer folds of [her] labia." *Patterson*, 2017 UT App 194, ¶3.[15]

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[13] Merck, *Female External Genital Organs*, located at https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-external-genital-organs (last visited December 4, 2018) (emphasis added).

[14] *Id.*

[15] Other courts addressing a touch to the clitoris have reached the same conclusion. *See, e.g., State v. Lerman*, 408 P.3d 1008, 1010 (Mont. 2018) (recognizing that "common sense anatomy" teaches that "[t]he outer portions of the vulva necessarily are penetrated, however slightly, when the clitoris is touched"); *State v. Ludlum*, 281 S.E.2nd 159, 162 (N.C. 1981) (holding that because "the clitoris lies beneath both the outer and inner labia, then in order for … the clitoris to be stimulated, there must be some penetration of at least the outer labia"); *State v. Hernandez*, 874 N.W.2d 493, 500 (S.D. 2016) (holding that "even slight oral stimulation of the … clitoris is sufficient" to show intrusion into the genital opening); *Jett v. Commonwealth*, 510 S.E.2nd 747, 749 (Va. App. 1999) (holding that because "the clitoris lies within the labia majora … evidence of penetration or stimulation of the clitoris is sufficient to establish penetration of the labia majora").

Suggesting the possibility of an anatomical anomaly, Heath argues that absent "direct evidence at trial that *BC's* clitoris was contained wholly within and enveloped by her labia, any assumption that it was is pure speculation." Aplt.Br. 26 (emphasis added). This argument fails for two reasons. First, it is not speculation that BC's clitoris lies within the labia majora, but a reasonable inference based on basic human anatomy. *See Heslop v. Bear River Mutual Insurance Co.*, 2017 UT 5, ¶22, 390 P.3d 314 (holding that a reasonable inference "is a deduction as to the existence of a fact which human experience teaches us can reasonably and logically be drawn from proof of other facts"). Second, BC did not merely testify that Heath touched her clitoris, but she demonstrated where he touched on a diagram of the female genatilia and testified that his finger went "*beyond the labia majora*" and "touched her right on her clitoris right *in the middle of* her vagina on her skin." R1202,1214-16,1240 (emphasis added). This testimony described actual penetration, not simple touching. And it was more direct than the victim's testimony in *Patterson* which this Court held was sufficient to support a reasonable inference of penetration. *Patterson*, 2017 UT App 194, ¶¶15-19 (found it reasonable to infer penetration based on testimony that defendant tried to put his fingers up, that his fingers separated her labia, and that it was painful).

* * *

In sum, the evidence was more than sufficient to support the jury's finding of penetration—even assuming the issue was preserved. Certainly, there was no obvious evidentiary deficiency arising to plain error or ineffective assistance of counsel.

2. Ample evidence supported the jury finding of intent to arouse or gratify sexual desire for Heath's forcible sexual abuse and object rape convictions.

The object rape statute requires proof of "intent to arouse or gratify the sexual desire of any person." Utah Code Ann. § 76-5-402.2(1). The forcible sexual abuse statute also requires proof of "intent to arouse or gratify sexual desire." Utah Code Ann. § 76-5-404(1). Heath was charged for both offenses in connection with his treatment of BC on December 8, 2012. At trial, BC testified that Heath put his hand "very deep into her underpants down the front," put "his fingers right on the outer lip of her vagina, moving it around and around and around" for a few minutes, and then "reach[ed] over" with one finger, "beyond the labia majora," and "touched her right on her clitoris right in the middle of her vagina on her skin." R1202, 1214-16,1240. Heath denied any touching of BC's clitoris or labia, incidental or otherwise, and claimed that he never got closer than two or three inches from her vaginal opening. R2734,2682-86.

Heath argues that even though the jury credited BC's testimony of the touching, that testimony was insufficient to support a jury finding that he touched BC's labia majora and then her clitoris with the intent to arouse or gratify sexual desire. Aplt.Br. 33-37. He contends that because he treated BC in the same order he always did, "never gave any outward indication he was doing something wrong," "acted completely normal," "never said anything that would suggest he was being sexually aroused," and "never said anything of a sexual nature," the evidence was "wholly insufficient to establish [his] specific intent to arouse or gratify sexual desire." Aplt.Br. 33-34,37. Heath in fact claims that "zero evidence" supported such an inference. Aplt.Br. 34. That is far from true.

But merely because Heath's words and overt reactions to the inappropriate touching did not betray sexual gratification does not mean that the jury could not find the requisite intent. *See State v. Garcia-Mejia*, 2017 UT App 129, ¶30, 402 P.3d 82 (recognizing lack of any verbal or physical signs of arousal from defendant does not preclude finding of intent based on other circumstantial evidence). Indeed, "proof of a defendant's intent is rarely susceptible of direct proof." *State v. Murphy*, 617 P.2d 399, 402 (Utah 1980). Nor is it required. As this Court recently reiterated, intent "may be inferred from the actions of the defendant *or from surrounding circumstances*." *Garcia-Mejia*, 2017

UT App 129, ¶30 (emphasis added); *accord Holgate*, 2000 UT 74, ¶21 (recognizing that "intent can be proven by circumstantial evidence").

In deciding whether there is sufficient circumstantial evidence to support a finding of intent, the Court must determine "(1) whether the State presented 'any evidence' that [the defendant] possessed the requisite intent, and (2) whether the inferences that can be drawn from that evidence have a basis in logic and reasonable human experience sufficient to prove" that intent. *Holgate*, 2000 UT 74, ¶21 (cleaned up). Heath ignores the evidence and the reasonable inferences drawn therefrom. The State presented plenty of evidence, which in turn supported an inference of sexual intent.

First, BC testified that Heath put his fingers on top of her labia and "mov[ed] it around and around and around" for a few minutes. R1202,1215. Second, Heath himself testified that treatment of the inner thigh could only result in incidental or accidental contact with the labia, but the touching BC described was more than mere brief accidental or incidental touching. R2734. Third, the State's expert witness, Dr. Samuel Baker—chair for the American Chiropractic Association's ethics committee and president of the American Board of Forensic Professionals—testified that no reason exists for a chiropractor to touch directly over the pubic bone, or onto the lower portion of the pubic bone, because there are no muscles there. R2366,2389. Fourth, Dr. Baker

testified that it is not difficult to avoid contact with the genitals, even when working the muscles that attach to the top of the pubic bone. R2389-90. Fifth, Dr. Baker testified that even incidental touching of the labia should not occur—incidental contact with the genitals can and should be avoided through draping and blocking techniques (use of towels, patient covering private area with hand). R2389-90. Sixth, BC testified that Heath then reached over with one of his fingers and touched her clitoris—a genital organ that is sexually "very sensitive."[16] In fact, "the clitoris is usually the main player when it comes to the female orgasm." Medical News Today, *The Clitoris: What is there to know about this mystery organ?* (June 22, 2018), located at https://www.medicalnewstoday.com/articles/322235.php (last visited Dec. 6, 2018). Seventh, Heath himself testified that there is no reason to touch the clitoris for the chiropractic therapy he was providing BC. R2719-20,2734. And eighth, the State's expert testified likewise. R2397.

From the foregoing evidence, the jury could reasonably infer the intent to arouse or gratify sexual desire for both forcible sexual abuse and object rape.

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[16] Merck, *Female External Genital Organs*, located at https://www.merckmanuals.com/home/women-s-health-issues/biology-of-the-female-reproductive-system/female-external-genital-organs (last visited December 4, 2018).

The jury could reasonably infer that Heath's rubbing of his fingers "right on" the labia, which surround the clitoris, was not incidental to any treatment, but done with the intent to arouse or gratify sexual desire—especially because Heath massaged the labia not for a few seconds, but for a few minutes. That inference is buttressed by Dr. Baker's testimony that there is no reason to even incidentally touch the labia, that treatment can be easily done without incidental touching, and measures can and should be taken to prevent any incidental touching. And the inference that the touching was not innocent is further strengthened by DOPL's letter to Heath following JT's complaint admonishing him to adjust his practices to prevent future claims of inappropriate touching. *See* SE5.

The jury could also reasonably infer that when Heath reached over with his finger and touched BC's clitoris—the female genital organ most responsible for sexual pleasure—he did so with the intent to elicit its natural response. And that inference is further strengthened where both Heath and Dr. Baker testified that there is no reason to touch the clitoris when performing treatment, even accidentally.

Finally, the jury could infer that his massaging of BC's labia for a few minutes was an act of foreplay preceding his touching of the clitoris. And this inference would thus support the jury's finding that Heath acted with the

intent to arouse or gratify sexual desire when he both massaged BC's labia and touched her clitoris.

In sum, the inferences of sexual intent drawn from the evidence for both the object rape and forcible sexual abuse convictions were grounded in logic and human experience, thereby supporting the jury verdict.[17] And again, the evidence was more than sufficient to survive plain error review or an ineffective assistance of counsel claim.

3. Ample evidence supported the jury finding of non-consent for Heath's forcible sexual abuse conviction.

Heath also challenges his forcible-sexual-abuse conviction on the ground that the evidence was insufficient to support a jury finding that he lacked consent to rub her genitals (specifically, her labia majora) during her treatment on December 8, 2012. Aplt.Br. 38-39. He contends that the evidence is lacking because there was no testimony that "BC expressed a lack of consent" or otherwise resisted, and the evidence in fact established that she repeatedly returned for treatment without complaint. Aplt.Br. 38-39. Heath

[17] The evidence of sexual intent was sufficient even under the *Cristobal/Patterson* more-probable-inference standard. The evidence "more consistently described" an intent to arouse or gratify sexual desire than it did an accidental or incidental touching where the massaging of the labia occurred for a few minutes, both Heath and Dr. Baker testified that there would be no reason to touch the clitoris, even incidentally or accidentally, and, based on prior complaints to DOPL, Heath was on notice to take precautions to avoid such contact. *See Patterson*, 2017 UT App 194, ¶17.

further claims that there was no evidence supporting a finding that he acted recklessly as to BC's consent because she repeatedly returned for treatments, never did anything to suggest that she did not consent, and never told him she was sexually stimulated. Aplt.Br. 39-40. Heath's argument is meritless.

"As a general rule, … nonconsent … is a fact-sensitive, context-dependent question, decided on a case-by-case basis." *State v. Barela*, 2015 UT 22, ¶39, 349 P.3d 676. But Utah Code section 76-5-406 prescribes "exceptions to the general rule—as deeming certain circumstances beyond the case-by-case discretion of the factfinder." *Id.* at ¶40. As relevant here, "[a]n act of … forcible sexual abuse … is without consent" when:

> the actor is a health professional …, the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.

Utah Code Ann. § 76-5-406(12) (Westlaw, 2018). If the sexual conduct occurs under these circumstances, "as a matter of law, that 'abuse is without consent of the victim.' " *Barela*, 2015 UT 22, ¶41 (quoting Utah Code Ann. § 76-5-406). In other words, consent under these circumstances is "deemed substantively out of bounds as a matter of public policy." *Id.* at ¶38.

Without any analysis, Heath asserts that the State did not present evidence in support of this exception. Aplt.Br. 39. Heath's bald assertion falls far short of meeting his appellate burden to show an obvious and fundamental evidentiary deficiency. And indeed, the evidence was sufficient to support a jury finding of nonconsent based on the health professional exception. And it was far from being obviously and fundamentally deficient.

The testimony established that Dr. Heath was a licensed chiropractor and was additionally certified in chiropractic orthopedics. R2568-78. As a chiropractor, Dr. Heath thus qualified as a health professional under the statute. Utah Code Ann. § 76-5-406(12)(a) (specifically including chiropractors under the health professional umbrella). Moreover, the testimony established that the touching of BC's labia occurred "under the guise of providing professional … treatment." On the first two occasions when Dr. Heath rubbed BC's vaginal area over her clothes, she asked, "What are you doing?" R1185,1189,1195. The first time it happened, Heath claimed that he was working her psoas muscle, and the second time, he claimed he was working her griscilis muscle. R1189,1195,1207. In the ensuing massages, the contact was skin-to-skin, but again occurred while he was doing the abdominal and inner thigh massages. R1198-1202,1212-15,1243-44.

Moreover, the jury could reasonably conclude that it was reasonable for BC to believe it was part of the treatment, especially given Heath's status as a chiropractor who had helped her and her mother, and given his assurances that what he was doing was appropriate treatment. As BC explained at trial, she did not know what treatment was necessary. R1189,1206. And she did not want to believe that her health professional would be taking advantage of her. R1196-97. He was helping her and so she trusted him. R1192.

In sum, the foregoing evidence was more than sufficient to support the jury's finding that there was no consent to the inappropriate touching under the health professional exception. Simply put, the jury was right to conclude that Heath's sexual touching was out of bounds.

4. Ample evidence supported the jury finding that Heath was aware that his actions would cause affront or alarm for his sexual battery convictions.

Heath also claims that the evidence was insufficient to support his three convictions for sexual battery. Aplt.Br. 40-43. The sexual battery statute requires a showing that under the circumstances, the defendant "knows or should know" that the touching of the genitals "will likely cause affront or alarm to the person touched." Utah Code Ann. § 76-9-702.1 (Westlaw, 2018). On appeal, Heath argues that the evidence "fail[ed] to demonstrate in any manner" that he knew or should have known that his behavior was "likely

[to] cause affront or alarm" to BC. Aplt.Br. 40-43. This assertion simply ignores the evidence.

As shown, BC twice expressed her concern about what Dr. Heath was doing. When he first did the inner thigh massage with one hand and began massaging BC's vaginal area with the other, "going up and down, back and forth," BC immediately asked him, "What are you doing?" R1185,1189. And she asked him the same question when he did it on the next visit. R1195. Notwithstanding her expression of alarm, Heath massaged BC's vaginal area for several minutes thereafter. R1189-90,1195. And on the next visit, he did the same thing but beneath her underpants. R1199-1201.

On appeal, Heath suggests that when he explained that he was working her psoas and griscilis muscles, BC should have further questioned him—and only then would he know or should have known that it was likely to cause affront or alarm. Aplt.Br. 43. But Heath's own testimony belies this theory. Dr. Heath himself testified that there is no clinical reason to intentionally touch the labia when treating lower back pain. R2718. So if the jury believed that he did touch BC's genitals—which it apparently did—then he had to know that what he was doing would cause affront or alarm because even he knew it was not a legitimate part of treatment. And Dr. Baker testified that

there is no reason to work directly over the pubic bone, or onto the lower portion of the pubic bone, because there are no muscles there. R2366,2389.

Under the foregoing circumstances, the evidence was more than sufficient to sustain the jury's finding that Heath knew or should have known that massaging BC's vaginal area would cause affront or alarm. And again, any possible deficiency was far from obvious and fundamental—the showing Heath is required to make because he did not challenge the sufficiency of the evidence at trial. And also for that reason, counsel was not ineffective for not challenging the evidence. Accordingly, this claim also fails.

II.

Trial counsel was not ineffective for not objecting to the challenged jury instructions.

Heath contends that the district court improperly instructed the jury because, according to him:

(1) Instructions 32 through 34 did not define the term "genitals," "genital opening," or "penetration," Aplt.Br. 49;

(2) Instruction 38 discussing the element of consent did not explain essential terms regarding consent, e.g., what it means to overcome the victim "through concealment or by the element of surprise" or "under the guise of providing professional diagnosis, counseling or treatment," Aplt.Br. 51;

(3) Instructions 32 through 34 improperly allowed the jury to convict Heath for the three sexual battery offenses based on the gluteal massages even though he was bound over on those charges based on his rubbing of JC's clitoris and vaginal area, Aplt.Br. 54-55;

(4) Instruction 35 improperly allowed the jury to convict Heath for forcible sexual abuse based on the pain he necessarily caused during the gluteal massages even though he was bound over on that charge based on the rubbing of JC's genitals, Aplt.Br. 55;

(5) Instruction 38 discussing consent permitted the jury to convict Heath based on theories of non-consent other than the "health professional" theory, Aplt.Br. 55-56; and

(6) Instructions 35 and 36 improperly instructed the jury that the State was required to prove that he "acted with intent, knowledge *or recklessness* that BC did not consent, but variations of non-consent require a showing of knowledge or intent, Aplt.Br. 57-58.

A. Heath has not met his appellate burden to demonstrate that the trial court plainly erred in its instructions to the jury.

Heath admits that his trial attorney "did not object to the instruction errors raised here, and at times, offered the erroneous instruction." Aplt.Br. 58-59. He contends that "this Court should nevertheless review [the instructions] for plain error, manifest injustice, and/or IAC." Aplt.Br. 59. But Heath

does not identify which instructions he actually offered or agreed to and those to which he merely failed to object. This is a critical failure in overcoming his appellate burden to show plain error or manifest injustice.[18]

The law is well settled that plain error review is not even available "when counsel made an affirmative statement that led the court to commit the error." *State v. Ring*, 2018 UT 19, ¶20, 424 P.3d 845. So when his trial counsel either offered the instruction, affirmatively agreed to it, or expressly represented that he had no objection to it, he invited the error, and plain error is not available. *See State v. Hamilton*, 2003 UT 22, ¶54, 70 P.3d 111 (holding that appellate court will not review for manifest injustice an instruction that counsel "affirmatively represented to the court that he or she had no objection to").

But Heath does not tell the Court which of the challenged instructions he offered or agreed to. It is thus impossible for the Court to determine which of his challenges may be reviewed for plain error, that is, unless either the appellee or the Court itself examines the record and sorts that out for Heath.

As both this Court and the Utah Supreme Court have held many times, "a reviewing court is not simply a depository into which the appealing party

[18] The Utah Supreme Court has "interpreted" the "manifest injustice" exception under rule 19(e), Utah R. Crim. P., "as an invocation of the plain error exception." *State v. Rettig*, 2017 UT 83, ¶4, 416 P.3d 520. In other words, manifest injustice is synonymous with plain error. *Id.*

may dump the burden of argument and research." *State v. Martin*, 2017 UT 63, ¶66, 423 P.3d 1254 (cleaned up). The rules are unambiguous—the "appellant" must state in his argument "the contentions and reasons … with respect to the issues presented, *including the grounds for reviewing any issue not preserved in the trial court*, with citations to the authorities, statutes, *and parts of the record relied on*." Utah R. App. P. 24(a)(9) (emphasis added). By "not even tell[ing]" this Court which of the challenged instructions he offered or agreed to, Heath has improperly "sought to dump onto this court [or the appellee] the burden of scouring" the record for those instructions that, "in [the Court's] own self-guided view," were not offered or agreed to by the defense and thus subject to plain error review. *See Martin*, 2017 UT 63, ¶65. This Court "will not do this." *Id.* at ¶66.

Given his concession that counsel offered or agreed to at least some of the challenged instructions, but having failed to identify which instructions defense counsel offered or agreed to, Heath has failed to meet his appellate burden that his claims are entitled to plain error review.

B. Heath has not met his appellate burden to prove that it was unreasonable not to object to or to offer or agree to the instructions. Nor has he met his burden to prove that any error undermines confidence in the outcome.

Heath also claims that his counsel was ineffective for not objecting to the instructions, offering additional instructions, or offering or agreeing to

offending instructions. Aplt.Br. 59-60. Once again, rather than examining the instruction claims through the lens of ineffective assistance of counsel, Heath challenges the instructions as though he preserved those challenges, then concludes without analysis that counsel was ineffective.

Without referencing the particular instructions, Heath baldly asserts that counsel "misapprehended several favorable legal doctrines applicable to this case and thereby failed to ensure the jury was not misled by inapplicable instructions." Aplt.Br. 59-60. He then baldly asserts that counsel "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 the preliminary hearing, and defended against." Aplt.Br. 60. And finally, he asserts that counsel's alleged failures "likely resulted from a failure to apprehend the consent and intent issues" and that "no reasonable tactical decision" justifies counsel's decision to accept the instructions given. Aplt.Br. 60. Then, in one paragraph, Heath argues that he was prejudiced by counsel's alleged deficiencies because it resulted in "incomplete, legally inaccurate, and confusing" instructions, and it deprived him of fair notice to defend himself. Aplt.Br. 60. Moreover, his argument of plain error—a paragraph long—does no more than reference his previous arguments of error and baldly assert that those errors "all concern well-established legal principles and the plain reading of

the relevant statutes that should have been obvious to the trial court." Aplt.Br. 59.

In sum, because Heath did not adequately brief his ineffective-assistance-of-counsel claims regarding the instructions, he has failed to meet his appellate burden and this Court need not address his claims further. *See Adamson*, 2017 UT 2, ¶13.

In any event, Heath cannot prove ineffective assistance of counsel. To prove ineffective assistance of counsel, a defendant must prove two elements. "First, the defendant must show that counsel's performance was deficient," that is, "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "Second, the defendant must show that the deficient performance prejudiced the defense," that is, absent counsel's errors, "there is a reasonable probability … that the result of the proceeding would have been different." *Id*. at 687,694. The defendant must make "both showings." *Id*. at 687. Because a defendant must prove both, it is unnecessary "to address both components of the [ineffective assistance] inquiry if the defendant makes an insufficient showing on one." *Id*. at 697.

1. Counsel was not ineffective for not requesting instructions that defined "genitals," "genital openings," or "penetration."

Heath asserts that counsel should have asked for an instruction defining the terms "genitals," "genital openings," and "penetration." Aplt.Br. 48-51. He claims that "[w]hile the terms 'anus' or 'buttocks' might be common sense, the phrase 'any part of the genitals' needed further definition. Aplt.Br. 48-49. He argues that not defining genitals was critical because "it impacts whether the clitoris is considered 'genitals' or the 'genital opening.' " Aplt.Br. 49. He also contends that the instructions needed to draw a distinction between "genital opening" for object rape, "any part of the genitals" for sexual battery, and "genitals" for forcible sexual abuse. Aplt.Br. 49. He also claims that "penetration" needed to be defined because the State's "whole theory" was based on the touching of the clitoris. Aplt.Br. 49.

In support of his claim, Heath points to several questions posed by the jury during deliberations: (1) the jury's request to know whether touching the clitoris constitutes penetration, R3047; (2) the jury's request to review the diagram of the vagina, introduced as a demonstrative exhibit only, R3049; and the jury's question whether the definition of penetration would change based on the anatomy of the victim, R3051. Heath then cites to *State v. Couch*, 635 P.2d 89, 94-95 (Utah 1981), which held that "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." Aplt.Br. 50.

Couch does not support Heath's argument. The jury did not ask for the definitions of "genitals," "genital opening," or "penetration." Instead, they asked that the Court instruct them on the decision with which they were charged, i.e., whether touching the clitoris constitutes penetration. *See Erickson v. Sorensen*, 877 P.2d 144, 151 (Utah App. 1994) (holding that it is improper to instruct jury on how to resolve factual issue). The closest the jury came to asking for a definition is when they asked whether the definition of penetration changes depending on BC's anatomy. Of course, it doesn't, and again, it was for the jury to decide whether there was penetration given BC's anatomy. In sum, it cannot be said that counsel's decision not to request instructions defining genitals, genital opening, and penetration fell below an objective standard of reasonableness. Counsel's ineffective-assistance-of-counsel claim fails for that reason alone.

And Heath has not proved prejudice. As noted, his prejudice claim is a single paragraph that addresses his claims generally, appearing at the end of his argument. *See* Aplt.Br. 60. Heath does not specify how each instruction, or each omission of instructions, is prejudicial. However, it appears that

Heath is asserting that omission of the definitions is prejudicial because it "resulted in the failure to clearly, completely, and accurately instruct the jury on the necessary law and elements required …." Aplt.Br. 60. This is the sum of his argument. He does not explain how the terms should have been defined, nor how those definitions would have affected the outcome of trial. Accordingly, he has failed to meet his burden of proving prejudice.

And indeed, defining these terms would have been of no help to Heath. Had genitals been defined, the jury would have been instructed that the term includes the clitoris. Had the term "penetration" been defined, together with the term "genital opening," the jury would have been instructed that penetration of the genital opening "means entry between the outer folds of the labia." *Patterson*, 2017 UT App 194, ¶3. And given BC's testimony that Heath's finger went "beyond the labia" and touched her clitoris, R1215, there is no reasonable likelihood of a different outcome had the jury been instructed in greater detail on "genitals" and "penetration."[19]

[19] This lack of prejudice also uncovers a reasonable strategy for counsel's decision not to request the instructions given the jury's questions—the jury may have concluded that penetration of the vaginal opening is required, and that touching of the clitoris was insufficient. In other words, counsel had nothing to lose by not insisting on definitions. They would have only hurt his client's chances of acquittal.

2. Counsel was not ineffective for not requesting instructions to explain what it means to overcome the victim through concealment or the element of surprise or under the guise of providing professional treatment.

Heath also complains that Instruction 38, which set forth the statutory circumstances of nonconsent, did not explain certain terms, such as what it means to obtain consent "through concealment or by the element of surprise" or what it means to act "under the guise of providing professional diagnosis, counseling or treatment." Aplt.Br. 51. But Heath does not explain how those terms should have been defined nor how a proper definition of these terms was likely to result in a different outcome in light of all the evidence before the jury. *See* Aplt.Br. 51. In fact, he has not even explained why those terms so obviously needed explanation beyond their plain meaning that all reasonable counsel would have asked for the unidentified detail. Accordingly, he has failed to overcome the strong presumption that counsel acted reasonably, and he has failed to show prejudice.

3. Counsel was not ineffective for not objecting to instructions that allegedly included elements of legal theories for which Heath was not bound over or which were not supported by the evidence.

Heath also argues that several instructions erroneously included elements of legal theories for which he was not bound over for trial or which were not supported by the evidence. First, he complains that the elements

instructions for sexual battery (Inst. Nos. 32-34) include reference to unlawful touching of the buttocks. Aplt.Br. 54-55. He contends that even though he was not bound over based on his massages of BC's buttocks, the instructions allowed the jury to convict him of sexual battery based on her testimony that she was uncomfortable when Heath first massaged her buttocks. Aplt.Br. 54-55.

Second, Heath complains that the elements instruction for forcible sexual abuse (Inst. 35) included the alternative mens rea element of intent to cause substantial emotional or bodily pain. Aplt.Br. 55. He contends that even though he was bound over based on evidence that he massaged BC's labia with intent to arouse or gratify sexual desire, the instruction allowed the jury to convict him of forcible sexual abuse based on BC's testimony that the massages were very painful. Aplt.Br. 55.

Third, Heath complains that the instruction listing all of the statutory circumstances of nonconsent (Inst. 38) was improper because it permitted the jury to convict Heath based on theories of nonconsent that were not supported by the evidence other than the "health professional" theory. Aplt.Br. 55-56.

Heath cites to no authority, either in the record or case law, supporting his claims that the State was not entitled to pursue these theories or include

the challenged language in the instructions. Nor does he explain why including these theories might not have been reasonable trial strategy. Accordingly, he has not proved that it was unreasonable not to challenge them.

First, he has inadequately briefed his prejudice argument. Heath does no more than make the conclusory statements that the instructions were "incomplete, legally inaccurate, and confusing," resulting "in the failure to clearly, completely, and accurately instruct the jury," and that the instructions deprived him of the right to "fair notice" and "fair opportunity to defend." Aplt.Br. 60.

And there was no prejudice in any event. Just last year, this Court reiterated that "[t]here is 'no need to reverse a conviction even if there were erroneous instructions on one variation of a crime submitted to the jury where the evidence overwhelmingly supports a conviction under another variation.'" *State v. Reid*, 2018 UT App 146, ¶35, 427 P.3d 1261. (quoting *State v. Hummel*, 2017 UT 19, ¶83 n.30, 393 P.3d 314). As discussed, the evidence overwhelmingly supported the jury's findings that Heath knew or should have known that rubbing BC's vaginal area was likely to cause her affront or alarm, *supra*, at 52-54, that rubbing her labia on the skin on the December 8 visit was done with an intent to arouse or gratify sexual desire, *supra*, at 44-49, and that there was no consent for Heath's conduct under the health professional

exception, *supra*, at 49-52. "Given the ample evidence supporting" these variants, "there is no reasonable probability that the jury's verdict would have been different even if the arguably superfluous circumstances [and elements] had been excluded" from the instructions. *Reid*, 2018 UT App 146, ¶36.

4. Counsel was not ineffective for not objecting to the instructions that the State was required to prove that Heath acted intentionally, knowingly, or recklessly as to the victim's nonconsent.

Finally, Heath contends that Instructions 35 and 36 improperly instructed the jury that the State was required to prove that he "acted with intent, knowledge or recklessness that BC did not consent. Aplt.Br. 57-58. That is the law. *State v. Marchet*, 2009 UT App 262, ¶22, 219 P.3d 75. But Heath contends that it is not the law under some variations of statutory nonconsent and cites two examples never at issue here—where " 'the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist,' " and where "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.' " Aplt.Br. 57. (quoting Utah Code Ann. § 76-5-406(5) & (8)). Although the instruction identified these exceptions to the general rule of proving nonconsent, the State argued neither theory and no evidence was introduced supporting either theory. Counsel thus reasonably concluded that the instructions were harmless.

Heath argues, however, that the health professional exception to the general rule of proving nonconsent—upon which the State did proceed—required proof of two different mindsets, neither of which included recklessness. Aplt.Br. 58. As noted, the health professional provision states that the abuse is "without consent" when

> [1] the actor is a health 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 diagnosis, counseling or treatment to the extent that resistance by the victim could not reasonably be expected to be manifested.

Utah Code Ann. § 76-5-406(12). Heath baldly asserts that " 'under the guise of providing professional diagnosis, counseling, or treatment' … equates to an intentional mens rea." Aplt.Br. 58. But he cites to no authority, nor offers any analysis, supporting that assertion. Nor could he.

The "under the guise" language does not identify a corresponding mens rea. Accordingly, the applicable mens rea is intent, knowledge, or recklessness—just as described in the instruction. This is a matter of statutory construction as directed by statute, as reaffirmed by this Court this year: "Our legislature has provided that 'when the definition of a criminal offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal

responsibility.'" *State v. Newton*, 2018 UT App 194, ¶26, 876 Utah Adv. Rep. 40 (quoting Utah Code Ann. § 76-2-102 (Westlaw, 2018)).

Heath also contends that the intentional, knowing, or reckless instruction on nonconsent conflicts with the health professional exception's requirement that the victim "reasonably believed" that the touching was "professionally appropriate … to the extent that resistance by the victim could not reasonably be expected to be manifested." Utah Code Ann. § 76-5-406(12). Heath does not explain how this provision conflicts with the instruction's direction regarding the defendant's mens rea as to nonconsent. *See* Aplt.Br. 58. He thus fails again to show that counsel was deficient in not objecting to it. And indeed, the "reasonably believed" language goes to the victim's belief not the defendant's. Accordingly, the instruction on Heath's mens reas as to nonconsent in no way misled the jury.

In sum, any objection to the instructions regarding the necessary mens rea as to the victim's nonconsent would have been futile. Accordingly, Heath has failed to prove ineffective assistance of counsel. *See Newton*, 2018 UT App 194, ¶38 (holding that defendant cannot show ineffective assistance of counsel where "any objection to the instruction would have been futile").

III.

The trial court did not abuse its discretion in admitting the other-acts evidence to rebut Heath's claim that he did not inappropriately touch the victim.

In his final claim on appeal, Heath argues that the other-acts evidence, and in particular, the testimony of JT and EB that Dr. Heath also sexually abused them, was improperly admitted under evidence rules 403. This claim likewise fails.

The trial court admitted sexual abuse testimony by two of Dr. Heath's former patients—JT and EB—"under a doctrine of chances theory to prove *mens rea*." R415. Heath asks this Court to reverse, arguing that (1) admission of the testimony under the doctrine of chances was improper because the State failed to establish the foundational requirement of frequency, Aplt.Br. 66-67; and (2) admission of the testimony under the doctrine of chances was overbroad because it "conflated the general intent to commit the act and the specific intent to cause the result," Aplt.Br. 68-70. Heath also makes a third argument. He contends that admission of the testimony of JT and EB, as well as a plethora of other evidence (e.g., evidence explaining human muscles, chiropractor's standard of care, measures to prevent inappropriate touching, propriety of chaperones, and DOPL admonitions to take extra precautions) was all improperly admitted at trial because "[t]he jury should have been required to decide the issue of guilt or innocence solely on the basis of the

demeanor and testimony of Heath and BC." Aplt.Br. 72-71-74. Heath's claims lack merit.

A. Evidence that Heath was accused of sexually abusing two other women while providing chiropractic treatment satisfied the foundational requirement of frequency for admission under the doctrine of chances.

In *State v. Verde*, 2012 UT 60, 296 P.3d 673, the Court identified four foundational requirements for the admission of prior bad acts under the doctrine of chances: (1) "the issue for which the uncharged misconduct evidence is offered must be in bona fide dispute," (2) "each charged incident must be roughly similar to the charged crime," (3) "where the prior uncharged conduct is an accusation of sexual assault, each accusation must be independent of the others," and (4) "the defendant must have been accused of the crime or suffered an unusual loss more frequently than the typical person endures such losses accidentally." *Id.* at ¶¶ 57-61 (cleaned up).

Heath contends that the district court erred in finding sufficient frequency. Aplt.Br. 66-67. He contends that the existence of only two other incidents involving almost 4,400 patients in a span of nearly 30 years "does not suffice to meet the frequency element required under the doctrine of chances." Aplt.Br. 67. Of course, the relevant period is not 30 years, but between June 2011 when JT was abused, November and December 2012 when BC was abused, and February 2015 when EB was abused—a span of not quite

four years. Assuming a fairly equal distribution of patients over the years, he may have treated some 1,100 patients in that time.

But this is not the only consideration in making the frequency determination, i.e., the point at which it becomes sufficiently unlikely that Heath acted innocently but instead with sexual intent. As the Utah Supreme Court explained this year, "frequency does not mean just how many times a prior act has occurred, but whether the defendant has been accused of the crime or suffered an unusual loss more frequently than the typical person"—in this case, the typical chiropractor—"endures such losses accidentally." *State v. Lopez*, 2018 UT 5, ¶57, 417 P.3d 116 (cleaned up). "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 accidentally." *Id.*

As observed by the district court, the incidents involving JT and EB were "highly similar to the charged offenses" in this case. They did not allege brief or fleeting touching of the vaginal area. Instead, each involved focused rubbing directly over the pubic bone, specifically, over the clitoral area of the vulva, causing sexual stimulation. *See* R2084,2087-88,2119-20 (JT); R2326,2331-33 (EB).

Other factors may also bear on the frequency analysis, in this case, the professional standard of care expected of chiropractors. The State's expert, Dr. Baker, testified that that there is no reason for a chiropractor to touch directly over the pubic bone, or onto the lower portion of the pubic bone, because there are no muscles there. R2366,2389. He testified that it is thus not difficult to avoid contact with the genitals, even when working the muscles that attach to the top of the pubic bone. R2389-90. And he testified that even incidental touching of the labia should not occur because such contact can and should be avoided through draping and blocking techniques (use of towels, patient covering private area with hand). R2389-90. As explained by the district court, "this standard of care would entirely eliminate incidental contact between the chiropractor's hands and the patient's genitalia during treatment. R415.

Moreover, Dr. Heath himself maintained that his treatment would never require that his hands be closer than two or three inches from the vaginal opening, that any contact with the labia would be incidental, and that he would not expect a patient to be aroused from his treatment. R2662,2677,2734.

Given the foregoing, the chances that a patient would mistake a chiropractor's inadvertent touching over the clitoral area as an act done with sexual intent would be remote. But the "objective improbability of the same rare

misfortune befalling one individual" again, and then again, is so small that the jury could conclude that the touching was not accidental or incidental, but done with sexual intent.

B. The other-acts evidence was admissible to prove both absence of mistake or accident and specific intent to arouse or gratify sexual desire.

Heath also argues that the trial court improperly permitted the other-acts evidence to be introduced for the purpose of establishing specific intent to arouse or gratify sexual desire. Aplt.Br. 69. Heath asserts that the other-acts evidence was relevant "to counter a claim of mistake or accident for the touch (for which the intentional, knowing, or reckless states of mind apply)," but not to show specific intent to arouse or gratify sexual desire. Aplt.Br. 69. Heath, however, does not explain why, nor does he cite to any legal authority supporting that proposition. *See* Aplt.Br. 68-69. There is none.

This Court has recognized that other-acts evidence of prior sexual conduct is admissible to prove both sexual intent and absence of mistake or accident. *See State v. Von Niederhausern*, 2018 UT App 149, ¶¶21-22, 427 P.3d 1277 (sexual battery case). Indeed, absence of mistake or accident is merely the other side of the coin of intent. And in this case, as explained above, the other-acts evidence was indeed relevant to Heath's intent to arouse or gratify sexual desire.

C. The other-acts testimony and other evidence was highly probative of Heath's intent to arouse or gratify sexual desire.

Finally, Heath argues that "[t]he jury … should have been required to decide the issue of guilt or innocence solely on the basis of the demeanor and testimony of Heath and BC." Aplt.Br. 72. He contends that all of the other evidence was irrelevant and distracted the jury from its role in judging the credibility of Heath and BC—the testimony of JT and EB, and evidence relating to the various muscles in the body, the standard of care for chiropractors and the measures they are expected to take to ensure privacy, notice from DOPL to adjust his practice to ensure patient privacy, the use of trained chaperones, and the precautions Heath failed to take. Aplt.Br. 73-74. This claim is frivolous.

As discussed, the other-acts evidence was properly admitted under rule 404(b) to show absence of mistake or accident and Heath's specific intent to arouse or gratify sexual desire. Likewise, the standard of care expected of chiropractors, Heath's non-compliance with that standard, DOPL's admonition that he adjust his practice to ensure privacy, Heath's failure to take precautions, and evidence of the appropriate therapy for the muscles he treated

all made it more probable that Heath acted with sexual intent when he massaged BC's labia and touched her clitoris.[20]

CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Heath's convictions.

Respectfully submitted on December 14, 2018.

SEAN D. REYES
Utah Attorney General

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

[20] Heath also contends that the jury should have been instructed that it was required to find by a preponderance of the evidence the facts alleged by JT and EB. Aplt.Br. 70-71. This issue was not preserved and Heath does not argue plain error or ineffective assistance of counsel. *See id.* This Court should thus decline to address it. *See State v. Johnson*, 2017 UT 76, ¶15, 416 P.3d 443.

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 17,039 words (out of 22,083 words permitted pursuant to order dated August 6, 2018), excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

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

CERTIFICATE OF SERVICE

I certify that on December 14, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel by December 17, 2018.

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

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

/s/ *Jeffrey S. Gray*

ADDENDA

ADDENDUM A

- Utah Code Ann. § 76-5-402.2 (Westlaw, 2018) [Object rape]
- Utah Code Ann. § 76-5-404 (Westlaw, 2010) [Forcible sexual abuse]
- Utah Code Ann. § 76-5-406 (Westlaw, 2018) [Nonconsent]
- Utah Code Ann. § 76-9-702.1 (Westlas, 2018) [Sexual battery]

Utah Code Ann. § 76-5-402.2 (Westlaw, 2018). Object rape.

(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.

Utah Code Ann. § 76-5-404 (Westlaw, 2010). Forcible sexual abuse.

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(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.

Utah Code Ann. § 76-5-406 (Westlaw, 2018). Sexual offenses against the victim without consent of victim--Circumstances.

An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, forcible sodomy, attempted forcible sodomy, sodomy on a child, attempted sodomy on a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, aggravated sexual abuse of a child, attempted aggravated sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

(1) the victim expresses lack of consent through words or conduct;

(2) the actor overcomes the victim through the actual application of physical force or violence;

(3) the actor is able to overcome the victim through concealment or by the element of surprise;

(4)(a)(i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or

(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;

(b) as used in this Subsection (4), "to retaliate" includes threats of physical force, kidnapping, or extortion;

(5) the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist;

(6) the actor knows or reasonably should know that the victim has a mental disease or defect, which renders the victim unable to:

(a) appraise the nature of the act;

(b) resist the act;

(c) understand the possible consequences to the victim's health or safety; or

(d) appraise the nature of the relationship between the actor and the victim.

(7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse;

(8) 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;

(9) the victim is younger than 14 years of age;

(10) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Section 76-5-404.1;

(11) the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4); or

(12) the actor is a health professional or religious counselor, as those terms are defined in this Subsection (12), the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested; for purposes of this Subsection (12):

(a) “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; and

(b) “religious counselor” means a minister, priest, rabbi, bishop, or other recognized member of the clergy.

Utah Code Ann. § 76-9-702.1 (Westlaw, 2018). Sexual battery.

(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.

ADDENDUM B

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

(R396-418)

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