PUBLIC

20180076-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee/Plaintiff,
v.
DALE HARLAND HEATH,
Appellant/Defendant.

REPLY BRIEF OF APPELLANT

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

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APPELLANT IS INCARCERATED * ORAL ARGUMENT IS REQUESTED**

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REPLY BRIEF OF APPELLANT

Appellant Dale Heath ("Heath") replies to the State's Brief of Appellee ("StateBr"). Heath does not waive or abandon any argument raised in his Opening Brief ("HeathBr") not further addressed here.

ARGUMENT

I.
THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF OBJECT RAPE

A. Insufficient Evidence of Penetration of the "Genital Opening"

1. Insufficient Evidence

To be clear – It is the plain language and statutory construction of specific terms of Utah's object rape statute at issue here; not caselaw's definition of "penetration."

Heath's argument is simple. Utah's object rape statute requires penetration of the "*genital or anal opening* of another person." Utah Code § 76-5-402.2 (emphasis and underline added). To constitute object rape not involving a child,[1] the statute requires that

[1] A distinction exists between child and non-child offenses since "penetration" in child rape and object rape cases occurs from simple "touching". *Accord State v. Gray*,

enumerated anatomical structures be penetrated. In employing standard rules of statutory construction,[2] the term *opening* means an *anatomical hole or orifice*. (HeathBr:nn.21,22). Simply, a hole is required to be penetrated. The statutory term "anal opening" means the anus – the anus being the specified anatomical hole. Read in context with the surrounding provisions, then, the term "genital opening" means the vaginal opening – the vaginal opening being the specified anatomical hole. (HeathBr:30-33).

Under *any* interpretation, the clitoris itself is neither an anatomical hole nor an opening and therefore is not a "genital opening" as that term is contemplated by the object rape statute. With this in mind, interpreting the meaning of "genital opening" in context with the entire statutory scheme demonstrates that touching the clitoris does not amount to object rape. To interpret the term "genital opening" in any way other than to mean the "vaginal opening" would lead to constitutional issues of vagueness and would nullify any distinction between the crime of object rape and the other sex offenses proscribed under Utah law. (HeathBr:31-32).[3] Indeed, the State itself defines the clitoris and the

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2015 UT App 106, ¶29, 349 P.3d 806.

[2] Contrary to the State's characterization that Heath "strains to analogize" the term genital opening to the term anal opening, Heath merely applies standard rules of statutory construction. *E.g.*, *State v. Souza*, 846 P.2d 1313, 1317 (Utah App. 1993). Courts do not interpret statutory terms in isolation, but determines the meaning of the text in the context of the structure and language of the statutory scheme. *E.g.*, *Colosimo v. Gateway Cmty. Church*, 2018 UT 26, ¶51, 424 P.3d 866; *GeoMetWatch Corp. v. Utah State Univ. Research Found.*, 2018 UT 50, ¶¶25-29, 428 P.3d 1066.

[3] The Court also has an obligation to harmonize inconsistencies within and between statutes. *E.g.,State v. Moreno*, 2009 UT 15, ¶10, 203 P.3d 1000; *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 2004 UT 37, ¶20, 94 P.3d 234. To do so, courts

surrounding labia as external *female genitalia*. (StateBr:40-41). So, even under the State's own defining principles, inappropriate touching of the clitoris, or even inappropriate touching of the skin and folds surrounding the clitoris and the vulva, might amount to touching "*any part of the genitals* of another person" which is an element of the misdemeanor crime of sexual battery,[4] or might amount to touching the "*pubic area,* or *any part of the genitals* of another" necessary to the crime of forcible sexual abuse,[5] but the touching of the clitoris or the surrounding skin and folds does not amount to object rape because *only genitals have been touched* but *no opening has been penetrated*. Again, to interpret the phrase "genital opening" in any other manner other than the "vaginal opening" would vitiate any distinction between the crime of object rape and the other sex offenses. The State fails to address this argument.[6]

The State's focus on the term "penetration" misses the point. (StateBr:38-43). Heath has always acknowledged that an oversight exists in Utah caselaw where in

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frequently restrict or enlarge the ordinary meaning of words. *See State v. Pay*, 146 P. 300, 304 (1915). The Court's duty is to interpret the language so as to afford each provision a meaningful purpose and a meaningful distinction. Sometimes, the only thing capable of saving vague phrases from constitutional infirmity is a clear meaning engrafted onto the statute through judicial decisions. *See State v. Ray*, 2017 UT App 78, ¶16, 397 P.3d 817, *cert. granted*, 406 P.3d 250 (Utah 2017); *State v. Lewis*, 2014 UT App 241, ¶11, 337 P.3d 1053.

[4] Utah Code § 76-9-702.1.

[5] Utah Code § 76-5-404.

[6] The State also fails to address Heath's contention that the rule of lenity applies to require any ambiguity found to be interpreted in Heath's favor. (HeathBr:32).

defining "penetration" in sexual assault cases, Utah courts have overlooked the specific anatomical structure required to be penetrated by the relevant statute. (HeathBr:28-29). Although *Simmons* was a rape of a child case, and although *Simmons* did not analyze the specific statutory requirement of penetrating the genital or anal opening, Utah courts, as the State does now and as the district court did below, cite the *Simmons* definition of penetration without any statutory analysis of the plain language of the object rape statute which requires penetration of enumerated anatomy. *See State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988). In fact, the State contends *State v. Patterson* is dispositive. (StateBr: 38-39). Although it is true that *Patterson* was guided by the *Simmons* language defining penetration to mean "entry between the outer folds of the labia," *Patterson*, 2017 UT App 194, ¶¶3,10, the *Patterson* court ultimately concluded, on the facts before it, that the jury could draw the reasonable inference that "penetration however slight" occurred as necessary to the object rape charge where the victim testified defendant used two fingers to separate her labia; where after the victim repeatedly asked defendant to stop he "moved his fingers back"; and where the victim testified "[i]t really hurt. I had never felt anything like that before." *Patterson*, 2017 UT App 194, ¶¶10,16. So, although the *Patterson* Court was indeed guided by the *Simmons*' definition of penetration, the facts of *Patterson* actually support a finding of penetration of the vaginal opening that Heath advances here.[7]

[7] Evidence of penetration of the *vaginal opening* was also sufficient in other cases which accepted without analysis the *Simmons* definition of penetration. *E.g., State v. Waldoch*, 2016 UT App 56, ¶4, 370 P.3d 580 (evidence sufficient where defendant put

2. The Issue Was Preserved

Admittedly, "[w]hen a party fails to raise and argue an issue in the trial court, it has failed to preserve the issue, and an appellate court will not typically reach that issue absent a valid exception to preservation." *State v. Johnson*, 2017 UT 76, ¶15, 416 P.3d 443 (citing authority). This requirement holds true for all claims including insufficient evidence claims. *See State v. Marquina*, 2018 UT App 219, ¶42; *State v. Holgate*, 2000 UT 74, ¶16, 10 P.3d 346. An issue is preserved when presented "in such a way that the court has an opportunity to rule on it." *Johnson*, 2017 UT 76, ¶15 (cleaned up). To provide the court with this opportunity, the issue must be specifically raised, in a timely manner, and supported by evidence and relevant legal authority. *See id.* (citing authority). The State claims this issue was not preserved. (StateBr:25,29-32). The State is wrong.

First, the propriety of basing a conviction for object rape on the mere touch of the clitoris was fully presented to the district court. During trial, trial counsel moved to dismiss the object rape count arguing that the touch of the clitoris could not amount to both object rape and forcible sex abuse. (R2462-2463). In response, the State asserted there were two separate acts and the touch of the clitoris amounted to "penetration of the genital opening." (R2463). Although initially titling it a merger argument, the district court itself actually considered this to be a motion to dismiss the object rape count "on the

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finger into victim's vagina; "kept sticking his finger inside"; where victim emphasized he "did penetrate me with his fingers"; and where physician's assistant testified victim reported vaginal penetration); *State v. Peterson*, 2015 UT App 129, ¶¶4-5, 351 P.3d 812 (testimony defendant put finger "*in* her private" sufficient because child "referring to her *vaginal opening*").

ground that penetration had not been demonstrated." (R2962;R2967). Thus, the issue "was sufficiently raised to a level of consciousness before the trial court," and thereby preserved. *Marquina*, 2018 UT App 219, ¶42.

Second, on its own initiative, the district court asked the parties to brief a motion to arrest judgment, concerned that the State had not presented evidence of penetration. (R2960-2967;R2996). Trial counsel briefed the issues with supporting evidence and relevant legal authority and specifically asserted the State did not present sufficient evidence of the required penetration of the genital opening. To contend this issue has not been preserved for appellate review even though the court itself raised the motion is unavailing. *Accord Hollenbach v. Salt Lake City Corp*., 2016 UT App 64, ¶6, 372 P.3d 55 (citing authority for proposition that where district court itself raises and then resolves issue, "it obviously had an opportunity to rule on the issue" which "satisfies the basic purpose of the preservation rule."); *Helf v. Chevron U.S.A. Inc.*, 2015 UT 81, ¶42, 361 P.3d 63 (same); *Kell v. State*, 2012 UT 25, ¶11, 285 P.3d 1133 (district court's own decision "to take up the question . . . conclusively over[comes] any objection that the issue was not preserved for appeal"). *Also United States v. Carleo*, 576 F.2d 846, 851 (10th Cir. 1978) (where judge on own motion raised objection and where counsel filed timely but unsuccessful motion for new trial on same ground, appellate court will resolve issue on merits).

Finally, a sufficiency of the evidence claim is one type of claim properly preserved by a post-trial motion. While Utah courts have held some objections must be made earlier

in proceedings and require a contemporaneous objection,[8] "[t]he trial court can reach a sufficiency claim at various stages of criminal proceedings without preconditions" and "it is neither uncommon nor inappropriate to challenge the sufficiency of the evidence in the context of a post-trial motion." *State v. Rudolph*, 2000 UT App 155, ¶21 n.3, 3 P.3d 192. This makes sense because in order to overturn a conviction based on insufficient evidence, a court reviews the totality of the evidence to determine if it is insufficient to support a conviction. *See State v. Winfield*, 2006 UT 4, ¶26, 128 P.3d 1171. This standard presupposes a verdict. A sufficiency of the evidence claim is therefore properly raised by a post-trial motion as was done here.

B. Insufficient Evidence of Intent to Arouse or Gratify Sexual Desire

1. Insufficient Evidence

Heath has demonstrated that the State failed to present evidence of Heath's specific intent to arouse or gratify sexual desire. (HeathBr:33-35). Accepting the facts as true that during a treatment, while Heath was working in the groin area (which experts find appropriate), Heath touched B.C.'s clitoris with his pinky finger for a fleeting nanosecond which stopped when she flinched; where *neither Heath nor B.C.* ever gave any outward indication something was wrong; where *both* acted normal; where *neither one* ever said anything that would suggest either was sexually aroused; and where *neither*

[8] *E.g., State v. Larrabee*, 2013 UT 70, ¶15, 321 P.3d 1136 (improper argument); *State v. Fullerton*, 2018 UT 49, ¶46, 428 P.3d 1052 (admission of evidence); *State v. Cantu*, 750 P.2d 591, 594 (Utah 1988) (jury instructions); *Matter of Discipline of Steffensen*, 2018 UT 53, ¶25, 428 P.3d 1104 (expert testimony).

one ever said anything of a sexual nature; the requisite intent may not be reasonably inferred from either Heath's action or from the surrounding circumstances. Though the jury may have rejected Heath's testimony that the touch to B.C.'s clitoris did not happen, the mere finding the touch occurred does not allow the jury to then speculate, based upon zero evidence, that the touch occurred with the specific intent to satisfy sexual desire.

The State contends, however, that "plenty of evidence" exists from which a jury may reasonably infer intent. (StateBr:45-47). The State cites B.C.'s testimony that the touch to her clitoris occurred; evidence that the experts and Heath himself acknowledge there is no therapeutic reason for such a touch to occur (from which Heath contended that if such a touch did occur it was accidental); uncontested testimony that such a touch should be avoided through draping and blocking techniques; and another uncontested contention that the clitoris is a sensitive sexual organ. (StateBr:46-47). But again, evidence that a touch should not occur and should be avoided does nothing to establish *why* the touch did occur if it happened. Because other reasons exist for why such a touch could occur, including by accident, evidence of the touch alone simply does not suffice. *See State v. Whitaker*, 2016 UT App 104, ¶17, 374 P.3d 56.

Consequently, the State's basic premise that the jury could "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" is wrong. (StateBr:48). The premise is faulty because it is based entirely on the speculative foundation that Heath intentionally and purposefully reached over and

touched B.C's clitoris, where there is no evidence of that. And even assuming for argument that the jury discounted Heath's credibility and his claim that no touch occurred or that if it did, it was an accident, additional evidence beyond credibility is still required from which the elements of a charge may be reasonably inferred beyond a reasonable doubt. *See id.* Discounting the credibility of a witness does not supplant evidence. Nothing else was presented here, however, to show that this touch occurred purposefully, and crucially, nothing else was presented that shows this touch occurred with the specific intent to arouse or satisfy sexual desire.

2. This Court Should Review for Plain Error or IAC

This Court should review this issue for plain error or ineffective assistance of counsel ("IAC"). (HeathBr:33,n.23,44-47).

Plain Error

To establish plain error, Heath must show: (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. To establish plain error specifically based on insufficient evidence, a defendant must demonstrate that the insufficiency is so fundamental that the trial court erred in submitting the case to the jury. (HeathBr:44 (citing authority)). Heath has met his burden.

First, the error involving the lack of specific intent evidence has been detailed at length, and Heath has demonstrated that there was insufficient evidence of the requisite mens rea. (HeathBr:33-35; *supra* Point I(b)(1)).

Second, the error should have been obvious to the trial court. The State's burden to present sufficient evidence to establish each element beyond a reasonable doubt is clear. *E.g., State v. Black*, 2015 UT App 30, ¶17, 344 P.3d 644; *State v. Strieby*, 790 P.2d 98, 101 (Utah App. 1990). The law is also clear that specific intent is a requisite element of the crime of object rape. *E.g*., Utah Code § 76-5-402.2. The law is clear that more than a touch alone is required to establish intent for sexual gratification. *See Whitaker*, 2016 UT App 104, ¶17. And the law is clear that speculation does not fill the void of actual evidence. *E.g., State v. Cristobal*, 2010 UT App 228, ¶10, 238 P.3d 1096. In light of the evidence presented that the pinky-touch of B.C's clitoris was fleeting and ended immediately upon a flinch, B.C's testimony that Heath never acted "sexually", B.C.'s testimony that she never even advised Heath that the touch occurred, and B.C's admission that she never gave any outward indication that anything was wrong or that she was sexually aroused (*e.g*., TR1202,1215-18,1231, 1239-40), the insufficiency of evidence as to the specific intent element is obvious and is an example of "a fundamental insufficiency" because the State presented *no evidence* other than the touch alone to support the essential specific intent element of this criminal charge. *See State v. Prater*, 2017 UT 13, ¶28, 392 P.3d 398 (example of obvious and fundamental insufficiency is case in which State presents no evidence to support essential element of charge); *Holgate*, 2000 UT 74, ¶15 (trial court shall grant relief when evidentiary defect is apparent).

Finally, the failure to present sufficient evidence on a required element is harmful because the conviction cannot stand. Not only does a finding of insufficient evidence

require that this conviction be vacated, but it also requires dismissal with prejudice due to double jeopardy. *E.g.*, *State v. Steed*, 2014 UT 16, ¶55 and n.62, 325 P.3d 87 (quoting authority).

IAC

To establish IAC, a defendant must show trial counsel's performance was deficient in that it "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Here, trial counsel performed deficiently in failing to recognize the State's failure to present sufficient evidence of specific intent, and as a result, trial counsel not only failed to hold the State to its substantial burden to prove each element beyond a reasonable doubt, but failed to preserve the issue. (HeathBr:45-47). The failure to raise beneficial objections and arguments has been found by Utah courts to constitute deficient performance underlying an IAC claim. This is so because when a defense lawyer fails to assert beneficial arguments or current law, this constitutes objectively deficient performance which will not be excused with hypothetical tactical reasons. *E.g., State v. Moritzsky*, 771 P.2d 688, 692 (Utah App. 1989). Here, trial counsel clearly knew of the duty to raise insufficiency claims. Thus, counsel's failure on this ground appears to be an oversight rather than any reasonable tactical decision.

Counsel's deficient performance was also prejudicial. Not only did counsel's failures undermine preservation of this issue, but had the issue been raised, the motion

should have been granted. As explained at length, there was no evidence offered of specific intent beyond evidence of the touch alone – again, a fleeting instantaneous touch of the clitoris which ended, by B.C's own account, the moment B.C. flinched. Not only does evidence of the touch alone not suffice to establish the requisite intent to sexually gratify the sexual desire of any person, *see Whitaker*, 2016 UT App 104, ¶17, but there are other reasons why such a touch could occur if it did, including accidentally. This Court should therefore find trial counsel rendered IAC in failing to challenge the object rape conviction on this ground since the evidence presented was not sufficient to support this conviction. *Cf., State v. Reyes*, 2000 UT App 310, *1 (unpublished memorandum decision) (claim that counsel ineffective for failing to make motion for directed verdict succeeds only if evidence insufficient to support conviction).

II.
THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF FORCIBLE SEX ABUSE

A. Insufficient Evidence of Intent to Arouse or Gratify Sexual Desire

Heath does not now submit further substantive briefing on this point. (HeathBr:35-37). Heath incorporates the points and authorities set forth in Point I(a)(2), *supra*, to the State's argument that this insufficiency issue was not preserved by raising it in a post-verdict motion. (StateBr:25-37).

B. Insufficient Evidence of Non-Consent and Mens Rea as to Non-Consent

1. Insufficient Evidence

The State's evidence is devoid of proof that B.C. expressed a lack of consent in

any manner. Rather, the evidence shows B.C. acted completely under her own free will. B.C. repeatedly and voluntarily returned for treatments even after she claims to have been inappropriately touched. (*e.g.*, TR1202-03,1241-42,1245). B.C. acknowledges she never gave any outward or verbal indication that anything was wrong, even though Heath would regularly ask if she was all right. (TR1204-05,1218-1219,1250-51). B.C. acknowledges Heath never said anything of a sexual nature or exhibited any behavior to suggest he was sexually aroused. (TR1231). Heath never restrained or threatened her in any manner. (TR1241). And from Heath's point of view, there was nothing that led Heath to believe B.C. was uncomfortable with the treatments or the areas treated. (TR2681-83). B.C. never refused any treatment; never told Heath to stop; never pulled away; never blocked his hands or moved them away; and never expressed she was uncomfortable. Indeed, B.C. never told Heath that the touches to her genital area even occurred or that she had been sexually stimulated.

This same evidence also fails to demonstrate any plausible statutory theory of nonconsent, including the "guise of providing professional treatment" provision. *See* Utah Code § 76-5-406(12). It is undisputed Heath met the definition of a "health care professional."(StateBr:51). Assuming without conceding that Heath's responses to B.C.'s questions about the treatment in her groin area amounted to a "guise" (*Id*.), and also assuming without conceding that it was in fact reasonable for B.C. to believe the purported touches she alleges were part of treatment (*Id*:52), more is required to establish non-consent. The statute also requires a showing that resistance could not reasonably be

expected to have been manifested – a requirement the State failed to meet. B.C. was an adult. (TR1171). She had taken an anatomy class, expressed she wanted to be informed about the human body, and asked Heath to use medical terminology with her in describing muscles and the treatments. Heath complied. (TR1207). B.C. voluntarily set up and attended nine appointments, several after she claimed to have been inappropriately touched. (TR1202-03,1241-42,1245). B.C. acknowledges Heath would regularly inquire if she was all right, to which she never manifested discomfort or resistance. (TR1204-05,1218-19,1250-51). B.C. had plenty of opportunity to alert or tell someone of her concerns, including Heath. Or, she could have chosen simply not to return for a further appointment. Under the circumstances, *some resistance* is reasonably expected to have been manifested to demonstrate B.C.'s non-consent, but none was.

Finally, the State failed to present evidence of Heath's mens rea as to any purported lack of consent. These same facts apply and describe the circumstances of which Heath was aware. Heath was aware B.C. repeatedly returned for treatments. Heath was aware B.C. never refused a treatment and was part of the decision making process. Heath was aware that during treatments, B.C. never told him to stop, never pulled away, and never blocked his hands or moved them. Heath was not aware, however, that any inappropriate touch had in fact occurred because B.C. never told him. Without having been informed in any manner – whether by verbal or non-verbal cues – Heath could not have acted recklessly with regard to them.

2. This Court Should Review for Plain Error or IAC

This Court should review for plain error or IAC. (HeathBr:38,n.25,44-47).

Plain Error

First, an error occurred and the lack of evidence concerning the elements of non-consent and Heath's mens rea as to non-consent has been detailed at length. (HeathBr:11-23,38-40; *supra* Point II(b)(1)).

Second, the error should have been obvious to the trial court. Again, the law is clear as to the State's burden to present sufficient evidence to establish each element of a charge beyond a reasonable doubt, including the independent elements of non-consent and the defendant's mens rea concerning non-consent. *E.g.*, *State v. Barela*, 2015 UT 22, ¶26, 349 P.3d 676. In light of the evidence that B.C. was an adult who acted completely under her own free will, who repeatedly and voluntarily returned for treatments, who never refused any treatment, who never told Heath to stop, never pulled away, never blocked Heath's hands or moved them away, who never expressed she was uncomfortable, and who never showed any form of verbal or physical resistance in any manner under circumstances where it was reasonable for her to do so, the insufficiency of evidence as to these consent elements are obvious and exemplify "a fundamental insufficiency" because the State presented no evidence. *See Prater*, 2017 UT 13, ¶28.

Finally, the failure to present sufficient evidence on a required element is clearly harmful because the conviction cannot stand and requires that the conviction be vacated with prejudice. *E.g., Steed*, 2014 UT 16, ¶55 and n.62.

IAC

For similar reasons, this Court should review for and find IAC. Trial counsel performed deficiently and not only failed to hold the State to its burden to prove each element beyond a reasonable doubt, but failed to preserve the issue for later review if necessary. (HeathBr:45-47). The failure to raise beneficial objections and arguments will not be excused with hypothetical tactical reasons. *E.g., Moritzsky*, 771 P.2d at 692. Here, trial counsel clearly knew of the duty to raise claims of insufficient evidence, but counsel's oversight in this regard resulted in Heath's conviction despite the prosecution's failure to meet their burden. This Court should find this amounted to an objectively deficient oversight.

Trial counsel's deficient performance was also prejudicial. Not only did counsel's failure to object undermine preservation of this meritorious issue, but had these issues regarding non-consent been raised, the motion should have been granted. Accordingly, this Court should find trial counsel rendered ineffective assistance in failing to challenge the forcible sex abuse conviction on these grounds. *E.g., Reyes*, 2000 UT App 310, *1.

III.
THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE OF SEXUAL BATTERY

A. Insufficient Evidence of Mens Rea

Heath does not now submit further briefing on this point. (HeathBr:40-43).

B. This Court Should Review for Plain Error or IAC

This Court should review for plain error or IAC. (HeathBr:40,n.26,44-47).

Plain Error

Like the other insufficiency claims raised, Heath showed an error occurred, and the lack of evidence concerning the required mens rea for sexual battery has been previously detailed at length. (HeathBr:11-23,40-43).

The error should have been obvious to the trial court. The State's burden to present sufficient evidence to establish each element of a charge beyond a reasonable doubt is clear. *E.g., Black*, 2015 UT App 30, ¶17. The requirement that the State establish Heath's knowledge that his behavior would "likely cause affront or alarm to the person touched" is also clear. Of note, evidence which supports this specific knowledge element consists of the victim's reaction to the actions. *See State v. Rackham*, 2016 UT App 167, ¶¶19, 21, 381 P.3d 1161. Here, in light of the evidence that B.C. was an adult, educated somewhat in anatomy, who acted completely under her own free will, who repeatedly and voluntarily returned for treatments, who never refused any treatment, who never told Heath to stop, who never said no, who never pulled away, who never blocked Heath's hands or moved them away, who never expressed she was uncomfortable, and who never showed any form of verbal or physical resistance in any manner under circumstances where she could have, the insufficiency of evidence as to Heath's knowledge that his behavior would "likely cause affront or alarm"is obvious and exemplifies "a fundamental insufficiency" because the State presented no evidence on an essential element of the crime. *See Prater*, 2017 UT 13, ¶28.

Finally, the failure to present sufficient evidence on a required element is clearly harmful because the conviction cannot stand and requires that the conviction be vacated with prejudice. *E.g., Steed*, 2014 UT 16, ¶55 and n.62.

IAC

For similar reasons, this Court should reverse based upon IAC. Trial counsel performed deficiently in not only failing to hold the State to its burden to prove each element beyond a reasonable doubt, but failed to preserve the issue for later review if necessary. (HeathBr:45-47). Such failure to raise beneficial arguments will not be excused with hypothetical tactical reasons. *E.g., Moritzsky*, 771 P.2d at 692.

Trial counsels' deficient performance was also prejudicial. Counsels' failure to object undermined preservation of this specific issue, but had this issue been raised, the motion should have been granted for the reasons detailed. Accordingly, this Court should find that trial counsel rendered ineffective assistance in failing to challenge the Sexual Battery for the grounds stated on appeal.

IV.
THE COURT SHOULD GRANT A NEW TRIAL DUE TO INCOMPLETE AND ERRONEOUS JURY INSTRUCTIONS

Heath raises on appeal jury instruction issues not raised below. (HeathBr:47-60, and n.27). Counsel for Appellant acknowledges she overlooked the fact that when the court inquired whether either party took "any exception to the court's proposed closing instructions", trial counsel expressed: "Other than the statements we've already argued, your Honor, no." (TR2561). This representation admittedly renders the instruction issues

now raised "invited error" which precludes plain error review by this Court. *E.g., State v. Crespo*, 2017 UT App 219, 409 P.3d 99, *cert. denied*, 417 P.3d 575 (Utah 2018). These errors may nevertheless be reviewed for IAC. *See State v. Parkinson*, 2018 UT App 62, ¶8, 427 P.3d 246, *cert. denied*, 429 P.3d 462 (Utah 2018).

In reviewing instructional errors for IAC, this Court considers whether trial counsel provided constitutionally ineffective assistance by proposing or stipulating to faulty jury instructions or otherwise failing to ensure the jury was completely and accurately instructed. *See id.* In determining prejudice, the Court considers the totality of the evidence and assesses whether the jury could reasonably have found the facts in Heath's favor such that a failure to instruct the jury properly undermines confidence in the verdict. *E.g.*, *State v. Garcia*, 2017 UT 53, ¶42, 424 P.3d 171.

A. IAC for Failing to Ensure Jury Was Instructed on Essential Terms and Phrases

Providing an instruction as to the meaning of essential terms and phrases is critical, especially those that relate to essential elements of the offense because without this knowledge the jury does not know what conduct constitutes the prohibited act in the legal sense. *E.g., Ray*, 2017 UT App 78, ¶19; *Lewis*, 2014 UT App 241, ¶15; *also State v. Ekstrom*, 2013 UT App 271, ¶15, 316 P.3d 435 (instruction defining term necessary when term "has a technical legal meaning"). In the context of failing to instruct as to the meaning of indecent liberties, this Court explained the definition of "indecent liberties" is as much an element of the offense of forcible sexual abuse as the enumerated acts

themselves. *Ray*, 2017 UT App 78, ¶11. Therefore, because the failure to instruct as to the elements of an offense would constitute reversible error, the failure to request an instruction explaining the meaning of an element also constitutes objectively unreasonable assistance by counsel. *Id*. ¶19. Trial counsel's performance is also deficient when counsel fails to act to remove ambiguity between jury instructions. *See Ekstrom*, 2013 UT App 271, ¶15.

Deficient Performance

First, trial counsel failed to ensure the jury was properly instructed as to essential sexual assault terms regarding genitalia. (HeathBr:48-50). Instructions 32-34 instructed the jury as to the elements of Sexual Battery and used the specific terms: "anus, buttocks, or any part of the genitals." The jury was never instructed as to the meaning of the phrase or "*any part of the genitals*." (R610-12). Instruction 35 instructed the jury as to the elements of Forcible Sex Abuse, using the terms: "anus, buttocks, or genitals" and "indecent liberties." (R613). Instruction 44 further defines the term "indecent liberties" and speaks of conduct as serious as touching the "anus, buttocks, or genitals." The jury was never instructed as to the meaning of the term "*genitals*." (R622;TR2206). And, Instruction 36 instructed the jury as to the elements of Object Rape and uses the terms "penetration" and "genital or anal opening." The jury was never instructed as to the meaning of "*genital or anal opening*."[9] (R614). Not one of these specific and essential

[9] Trial counsel did not object to the sexual battery or forcible sex abuse instructions. The court ordered the object rape instruction to be amended to reflect only the "intent to arouse or gratify sexual desire" language. Trial counsel did not request the

terms or phrases was further defined or explained. As noted, providing an instruction as to the meaning of essential terms and phrases is critical, especially those that relate to essential elements of an offense because without this knowledge, the jury does not know what conduct constitutes the prohibited act in the legal sense. *E.g., Ray*, 2017 UT App 78, ¶19. This principle holds true here because the proscribed touches to "any part of the genitals", the "genitals", and the "genital opening" are all elements of the various counts, but use similar and overlapping terminology that was never defined or distinguished. The failure to distinguish the essential elements between all the charges constitutes objectively unreasonable performance by counsel here, especially when some jurors expressed confusion.

Similarly, the jury was not instructed on essential "consent" terms and phrases. (HeathBr:51,57-58). Instruction 38 set forth a number of ways in which consent is vitiated and uses several specific terms and phrases. (R616). The jury was instructed as to what constitutes a "health professional" (R621), but was never instructed what it means for one to act "under the guise" of providing treatment, or when "B.C. could not reasonably be expected to have expressed resistance."[10] Consequently, trial counsel allowed the jury to consider one of the most important elements in the case – consent or lack thereof – with absolutely no definition of important terms or any other guiding principles.

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same amendment to the forcible sex abuse instruction. (TR2199-2202).

[10] Trial counsel proposed the instructions at issue. (TR2217-18).

Prejudice

But for these instructional failures, there is a reasonable probability that the verdict would have been more favorable.

First, with particular regard to the object rape and forcible sex abuse charges, the evidence viewed in the light most favorable to the verdict showed that during the December 8th treatment, Heath massaged in a circular motion down the front of B.C.'s underpants and his fingers touched the outer lip of the vagina. (TR1202). B.C. described this same massage in a previous treatment as the "soft skin that's the starting of the vagina, but . . . not the opening, not the clit" but the skin "just on the outside." (TR1199-1200). Without clear definition of the anatomical terms at issue, the touching of the outer lip of B.C.'s vagina could amount to touching "any part of the genitals" which would constitute only misdemeanor sexual battery, just as it could meet the element of touching "genitals" necessary to a forcible sex abuse finding. B.C. also testified she remembers feeling one finger touch "right on my clitoris", she flinched, and Heath moved his finger away. (*Id.*; *also* R1289-90). Again, without definitions of the various genital terms at issue, the fleeting touch of the clitoris amounts to touching "any part of the genitals" which would constitute a misdemeanor, or could be a touch of the "genitals" necessary for a forcible sex abuse finding. As argued above, however, touching the clitoris cannot be deemed penetration of the "genital opening." In any event, the wholesale failure to define necessary elements (the proscribed touches to specified anatomy) and the resultant failure to distinguish similar terms used between offenses was prejudicial, even more so

because the jury signified a lack of understanding to critical concepts necessary to perform their duties. (HeathBr:49-51). Because a different verdict would have resulted from jury instructions containing the necessary definitions for each count (with Heath's touches amounting to, at most, misdemeanor offenses for touching *a part of the genitals*), this Court should find prejudice ensued from trial counsel's failure to ensure the jury was accurately and completely instructed.

Prejudice likewise resulted from the failure to instruct as to essential consent terms. As noted, the State failed to present any evidence of a lack of consent in-fact. And before they could find B.C.'s consent was vitiated as a matter of law under the "guise of treatment" provision in § 76-5-406(12), the jurors were required to make a number of findings. Although the jury was instructed as to the term "health professional", they were not instructed as to any other element of this particular prong of the non-consent statute. The failure to do so led the jury to believe that if a health care professional simply touches a sensitive area, even if it is found to be "under the guise" of treatment, then the touch alone suffices. This is not so, and the jury must also find that the victim reasonably believed the touch was for medical treatment, and crucially, that resistance could not have reasonably been manifested. As detailed at length previously, even assuming there was sufficient evidence that Heath acted with the intent to satisfy sexual desires (which there was not), and even assuming there was evidence that Heath purposely acted "under a guise" of medical treatment in order to touch sexually (which there was not), resistance by B.C. under these circumstances could have been reasonably

manifested, but was not. Consequently, a different verdict would likely have resulted had the jury been given correct instructions as to non-consent and prejudice thereby resulted from trial counsel's failures to ensure the jury was accurately and completely instructed.

B. IAC for Permitting Heath to Be Convicted of Offenses for Which He Did Not Have Notice and Against Which He Had No Ability to Defend

Federal and statue constitutional provisions, statutes, and rules work together to ensure that a defendant is afforded his due process right to know "the nature and cause of the accusation against him" and "to sufficient time to prepare adequately for trial." *State v. Bush*, 2001 UT App 10, ¶14, 47 P.3d 69; *also State v. Burnett*, 712 P.2d 260, 261-62 (Utah 1985). Among these rights is the preliminary hearing, which is an essential step in the criminal process and a defendant cannot be tried and convicted for an offense distinct from that upon which he was bound-over from a preliminary hearing. *E.g., State v. Ortega,* 751 P.2d 1138, 1139-40 (Utah 1988); *State v. Jensen*, 96 P. 1085, 1087 (Utah 1908). Nor may a defendant face conviction upon a different theory of the offense if the defendant was not "adequately notified of the theory being used and given ample time to prepare a defense to the charge." *Bush*, 2001 UT App 10, ¶16. When this occurs the defendant is deprived of his right to know the "nature of the accusation against him and an opportunity to assail the sufficiency of the complaint." *Id*. ¶27.

Deficient Performance

Trial counsel not only failed to object, but offered some instructions which permitted the jury to consider guilt upon elements of offenses for which Heath did not

have notice, was not bound over, and against which he had no ability to defend. (HeathBr:52-56).

First, trial counsel posed no objections to the three sexual battery elements instructions. (Tr2199-2200). Instructions 32, 33, and 34, instructed the jury they could find guilt if they found Heath intentionally touched, whether or not through clothing, the buttocks, under circumstances Heath "knew or should have known would likely cause affront or alarm" to B.C. (R610-12). Even though Heath was specifically bound over and given notice that these sexual battery counts were based upon his purported acts of rubbing B.C. "directly between her legs, right on her clitoris and vaginal area", these instructions allowed the jury to convict Heath for Sexual Battery based upon the *gluteal* massage and *gluteal* touches during treatment, which B.C. indicated made her feel uncomfortable.

Similarly, Instruction 35 instructed the jury they could find Heath guilty of Forcible Sex Abuse if he touched the buttocks or even the skin of B.C.'s breast, with the intent to cause "bodily pain." (R613). But, pain was part and parcel to the treatment. Nevertheless, the instructions allowed the jury to convict Heath of a second degree felony for an offense clearly not contemplated by the parties or the court. Rather, Heath had been on notice that all charges he faced and would be required to defend against involved touching of the genitals for a sexual purpose. (HeathBr:53). Trial counsel did not object to the "bodily pain" language in th forcible sex abuse instruction, although he should have been put on notice of the issue since the court itself requested that the "same language be

removed from the Object Rape instruction. The bodily pain language was just as inapplicable to the count of forcible sex abuse and dealt with the same date of treatment. (TR2200-02).

Finally, the State sought to establish legal non-consent under Utah Code § 76-5-406(12). As such, trial counsel should not have proposed the instruction allowing the jury to be instructed as to other inapplicable theories of non-consent, including allowing the jury to be instructed they were not limited in any way in their consideration. (R616; TR2202-05). Indeed, allowing a jury to consider "anything" clearly allowed the jury to consider elements for which Heath had no notice, for which he was not bound over, and against which he had no ability to defend.

Prejudice

Heath was given notice, and was bound over, for his alleged acts of *touching for sexual purposes* and *touching of the genitals*. (TR1424-26). These are the particulars upon which Heath based his defense and set about refuting at trial. However, the jury was allowed to consider guilt for other particulars – specifically, touches to other statutorily proscribed body part and for any other purpose – to which Heath posed no defense.

Additionally, Heath was given some notice that the form of non-consent at issue was that he improperly touched "under the guise of treatment." (R3-5;TR1424). It was upon this basis, as well as the fact that B.C. never expressed non-consent, that Heath based his defense. However, the jury was allowed to consider guilt for any innumerable

form of non-consent that came to mind. Allowing the jury to consider "anything" however, rendered it impossible to pose a defense to the infinite unknown.

CONCLUSION

This Court should vacate each of Heath's five convictions due to insufficient evidence. Alternatively, this Court should order a new trial.

RESPECTFULLY SUBMITTED this 15th day of February 2019.

/s/ *Ann Marie Taliaferro*

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ANN MARIE TALIAFERRO
Attorney for Appellant Dale Heath

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(g)(1), I, Ann Marie Taliaferro, certify that this brief contains **6,987 words**, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

In compliance with the typeface requirements of Utah R. App. P. 27(b), I also certify that this brief has been prepared in a proportionally spaced font using WordPerfect X6 in Times New Roman 13 point.

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

/s/ *Ann Marie Taliaferro*

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CERTIFICATE OF DELIVERY

I hereby certify that on the 15th day of February, 2019, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed, postage prepaid, emailed, or hand-delivered to:

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