Case No. 20180109-CA

In the Utah Court of Appeals

STATE OF UTAH,
Plaintiff/Appellee,

v.

STEVEN NORMAN POWELL,
Defendant/Appellant.

On appeal from the Third Judicial District Court, Salt Lake County, Honorable Mark Kouris, presiding
Defendant is incarcerated

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court pursuant to Utah Code Ann. §§ 77-18a-1(1)(a); 78A-4-103(2)(j); and Utah R. App. P. 3(a).

INTRODUCTION

Mr. Powell respectfully requests this Court to reverse his conviction based upon the legal insufficiency of the evidence and/or because of the involved due process violations. He alternatively seeks a new trial based on erroneous jury instructions.

STATEMENT OF ISSUES, PRESERVATION, AND STANDARD OF REVIEW

1. Whether the court erred in not granting Mr. Powell's motion for a directed verdict. Prior counsel preserved the issue by requesting "a motion for a directed verdict" and a general reference to the lack of surveillance store video footage or the lack of "additional information . . . that corroborates what these witnesses are alleged to have seen." R 491. To the extent that the issue was not preserved in the manner raised on appeal, Mr. Powell advances the argument under the ineffective assistance of counsel ("IAC"). "To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced thereby." *State v. Martinez*, 2015 UT App 193, ¶ 30, 357 P.3d 27, 33 (citation omitted).

> Ineffective assistance of counsel is thought of as an exception to preservation because a claim for ineffective assistance does not mature until after counsel makes an error. Thus, while it is not typical exception to preservation, it allows criminal defendants to attack their counsel's failure to effectively raise an issue below that would have resulted in a different outcome. Such a claim can be brought in a post-trial motion or on direct appeal.

State v. Johnson, 2017 UT 76,23,416 P.3d 443 (citation omitted). In regards to this Court's legal review of the sufficiency of the evidence:

> We may reverse a verdict "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that defendant committed the crime for which he or she was convicted." At the same time, a review of a sufficiency of the evidence argument may also present a threshold question of law—of the elements of the underlying offense. And on that question, of course, our review is non-deferential, as our interpretation of the terms of the criminal law is ours to make de novo.

State v. Bagnes, 322 P.3d 719 (Utah, 2014) (citations omitted).

2. Whether counsel's failure to object to the flawed jury instructions constituted deficient performance to the extent that it prejudiced Mr. Powell's right to a fair trial by inadequately and improperly instructing the jury on the elements of the offense. *See Mvers v. State,* 2004 UT 31, ¶ 20, 94 P.3d 211 ("The failure to instruct a jury with appropriate definitions and elements for the charged offense similarly amounted to deficient performance by counsel that fell below an objective standard of reasonableness to the prejudice of the defendant."). Since prior counsel did not preserve the issue, the issue is raised under the above IAC standards.

3. Whether counsel performed deficiently and prejudicially by failing to move to dismiss the case based on a due process violation for lost or destroyed evidence. *See State v. DeJesus,* 2017 UT 22, at ¶ 30 ("due process clause requires the State to preserve exculpatory evidence from loss or destruction, . . ."). Since prior counsel did not preserve the issue, the issue is raised under the above IAC standards. In addition, questions of law

are reviewed under a correction of law standard.

4. Whether, pursuant to Rule 23B, this Court should remand the case to the trial court for the entry of non-speculative findings of fact in furtherance of an ineffective assistance of counsel claim. *See* Utah R. App. P. 23B. Mr. Powell's motion, memorandum, and affidavit were filed as separate companion pleadings to the filing of this brief.

STATEMENT OF THE CASE

On December 21, 2015 the State filed an Information, charging Steven Norman Powell with two counts of Lewdness with prior offense, two third degree felonies, in violation of Utah Code Ann. § 76-9-702(2)(b). R. 1-6. On October 3, 2017, the jury found him guilty on both counts. R. 176-177. On January 8, 2018, the court sentenced him, *inter alia*, to two concurrent terms of 0 - 5 years in prison. R. 220-222. Mr. Powell's appeal followed. R. 223-228

STATEMENT OF FACTS

The statement of the facts are more fully stated in the body of the briefs, with the Points therein factually incorporating and cross-referencing essentially the other sections of the brief. In addition, Mr. Powell submitted separately other facts through his affidavit in support of his motion for a Rule 23B hearing.

SUMMARY OF THE ARGUMENT

The elements in the jury instructions failed to properly and legally define the crime

of Lewdness. Elements 3.a. and 3.b., which were listed as alternative options for the jury to select, incorrectly allowed them to *not* make a factually finding on the element of age – an essential ingredient of the offense. The elements instructions also failed to list the "attempt" language therein, which corresponds to the "intentional" or specific intent mens rea necessary for the crime. Appellate opinions interpreting the meaning of lewdness or analogous situations require the defendant's mental state to be "lascivious," which was absent from the circumstances here. A showing of "irregular indulgence of lust" did not apply to Mr. Powell, a handicapped person incapable of an erection and who was viewed covering himself up – the complete opposite of a flasher or flaunter of his private areas.

Prior counsel was similarly deficient for not moving to dismiss the case based on the State's failure to keep critical video surveillance footage of the involved incidents. The lost or destroyed DVD evidence provided an independent depiction of what had actually occurred in the two stores. Through their notes to the court, it was evident that the jurors had not necessarily accepted at face value the State witnesses' claims that Mr. Powell had exposed himself. The jurors' notes asked details that only the store DVD could have provided.

Mr. Powell additionally and separately filed a Rule 23B motion, memorandum, and affidavit in furtherance of his request for a remanded proceeding in order for the trial court to enter non-speculative findings of fact for subsequent argument on appeal.

ARGUMENT

POINT I. PRIOR COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE JURY INSTRUCTIONS

The jury instructions on lewdness, Instructions 18 & 19, did not accurately nor completely excerpt the statute's language for lewdness into the court's instructions. Instruction 18 read in pertinent part:

> STEVEN NORMAN POWELL is charged in Counts 1 with Lewdness occurring between October 1, 2014 through October 31, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. STEVEN NORMAN POWELL;
>
> 2. Intentionally, knowingly, or recklessly performed any of the following acts:
>
> a. An act of sexual intercourse or sodomy;
>
> b. Exposed his genitals, buttocks, anus, or his pubic area;
>
> c. Masturbated; or
>
> d. Any other act of lewdness
>
> 3. And did so
>
> a. In a public place or
>
> b. Under circumstances which the defendant should have known would likely cause affront or alarm to another 14 years of age or older.

R 198-199; Addenda (for Instructions 18 & 19, the elements and language are essentially identical except for the listed offense date. A copy of the jury instructions are contained

in the Addenda). For comparison and review, the lewdness statute reads in pertinent part:

> (1) A person is guilty of lewdness if the person under circumstances not amounting to rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, sexual abuse of a minor, unlawful sexual conduct with a 16- or 17-year-old, custodial sexual relations or misconduct under Section 76-5-412 or 76-5-413, or an attempt to commit any of these offenses, performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older:
>
> (a) an act of sexual intercourse or sodomy;
>
> (b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;
>
> (c) masturbates; or
>
> (d) any other act of lewdness.

Utah Code Ann. § 76-9-702(1).

As more fully set forth below, counsel performed ineffectively by not objecting to the elements instructions on lewdness and by failing to insert the required legal standards into the instructions to the jury. *See Myers v. State,* 2004 UT 31, ¶ 20, 94 P.3d 211 ("The failure to instruct a jury with appropriate definitions and elements for the charged offense similarly amounted to deficient performance by counsel that fell below an objective standard of reasonableness to the prejudice of the defendant.").

A. The Elements Instructions Omitted the Element of Age and the Jury was Improperly Relieved of its Duty to Factually Find that the Act Involved a Person "14 Years of Age or Older"

Element 3 of Instruction 18 was incorrect. 3.a and 3.b should not have been listed

in the alternative. R 198-199. If, as allowed in the case at bar, the jury deliberated and factually found that the alleged act occurred at Walmart, "a public place," *see id.*, the jurors may have reached such a verdict *without* finding the age element. Age matters under the statute.

Age should have been included as a mandatory element in the Instructions (and not as an optional element that was listed in the alternative). The 14 years of age demarcation is not superfluous language. "14 years of age or older" is statutory language expressly contained in the Lewdness statute, *see* Utah Code Ann. § 76-9-702(1), but expressly omitted in the Lewdness involving a child statute. Utah Code Ann. § 76-9-702.5. As a distinguishing element, "under 14 years of age" applies to lewdness involving a child and that statute imposes greater penalties for the same acts of lewdness when a child was involved. *Compare* Utah Code Ann. § 76-9-702(1) (lewdness is generally a class B misdemeanor if an act of sexual intercourse is performed "in the presence of another who is 14 years of age or older") *with* Utah Code Ann. § 76-9-702.5 (lewdness involving a child is generally a class A misdemeanor if the same act [of sexual intercourse] is performed "in the presence of a child who is under 14 years of age").

"If a fact was by law essential to the penalty, it was an element of the offense." *Alleyne v. United States,* 133 S. Ct. 2151, 2154 (2013); *id.* at 2155 ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constituted an 'element' or 'ingredient' of the charged offenses"); *id.* at 2165

(Sotomayor, J., concurring) ("a legislature may not remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed").

In Mr. Powell's case, the statute allowed the jury to convict him without finding that he performed a lewd act "in the presence of another who is 14 years of age or older." Under the flawed options available in the Instructions, the jury may have found that he recklessly performed any other act of lewdness in a public place. R 198-99. The jury was allowed to ignore the element of age under the flawed alternative options, listed as a choice between element 3.a or 3.b. The necessary age element, which had to be factually found here by the jury to be "a person 14 years of age or older," distinguished the adult lewdness charge from the same act, which if performed "in the presence of a child who is under 14 years of age," would have been a lewdness involving a child charge. Due to the absence of a mandatory finding on the element concerning age, the Instructions were impermissibly flawed.

Since the jury did not necessarily and mandatorily have to make a factual finding on the element of age, it would be improper to speculate on what the jurors' decision-making process may have been or may not have been. Having an alternative option, which was erroneous and unlawful, was not a permissible option for the jury to consider. "Because of the erroneous instruction, there is no way of knowing [which interpretation] the jury found" *State v. Pearson,* 1999 UT App 220, ¶ 13; *Hedgpeth v. Pulido*, 555 U.S.

57, 58 (2008) (per curiam) (“[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one”); *Francis v. Franklin*, 471 U.S. 307, 322 (1985) ("Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict"); *see Pearson,* 1999 UT App 220, ¶ 12 (citations omitted) (failure to incorporate an instruction that accurately states the law is prejudicial “[b]ecause ‘[t]he general rule is that an accurate instruction upon the basic elements is essential’ [and] ‘failure to provide such an instruction is reversible error that can never be considered harmless’”); *State v. O'Bannon,* 2012 UT App 71 ("[a]n error is prejudicial if it tends to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advise[s] the jury on the law").

Due to counsel’s ineffective and prejudicial performance in not objecting to and correcting the elements Instructions, Mr. Powell requests a new trial with properly worded jury instructions. *See Mvers v. State,* 2004 UT 31, ¶ 20, 94 P.3d 211 (“The failure to instruct a jury with appropriate definitions and elements for the charged offense similarly amounted to deficient performance by counsel that fell below an objective standard of reasonableness to the prejudice of the defendant.”).

B. A Jury Instruction May Not Define A Crime In A Manner Different Than The Legislative Enactments

The above comparison between the words in the court's Instructions and the statutory language reveal additional errors. The statutory clause, "or an attempt to commit any of these offenses," was part of the plain language of the lewdness statute but not part of the court's element Instructions. R 198-99; *cf.* Utah Code Ann. § 76-9-702(1). Without the statutory "or an attempt to commit any of these offenses" clause, the specific intent requirement was omitted from the court's Instructions. At the very least, the court's Instructions did not track the statutory language nor did it accord relevant caselaw interpretations.

When a charge involves an "attempt" – like the word's inclusion in the lewdness statute – an "attempt to commit any of these offenses" encompasses a specific intent requirement that may not be coupled with a "reckless" standard of proof. *State v. Norman*, 580 P.2d 237 (Utah 1978) ("An attempt to commit a crime is an act done with the intent to commit that crime. . . ."). In other words, a higher mental state like "intentionally" is required when the attempt statute is used, not recklessly as it was improperly listed as an alternative mens rea in Mr. Powell's case. *State v. Vigil*, 842 P.2d 843 (Utah 1992) (where the court held that the attempt statute required the mental state of "intent" notwithstanding the State's arguments to allow lesser mens rea standards; "the word "intent" as used in paragraph (2) of the attempt statute should be read to mean 'conscious objective or desire[;]' This meaning of the word 'intent' obviously is

distinguishable from knowledge of the proscribed conduct or result [or reckless]").

In Mr. Powell's elements' Instructions, the jury was allowed to convict him with an inapplicable lesser mental state. *See* R 198-99 (element 2 of the Instructions asked the jury to find, in the alternative, any one of three mental states: "Intentionally, knowingly, or recklessly performed any of the following acts"). Pursuant to a statute – which a court Instruction or counsel may not disregard – the higher mental state of "intentionally" was the only corresponding mens rea for an attempted crime. *Vigil*, 842 P.2d 843; *State v Casey*, 2003 UT 55, ¶ 33 (amended opinion) (citation omitted) ("in a prosecution for criminal attempt, where alternative culpable mental states will satisfy the target offense, but only one is compatible with the attempt statute, the incompatible element must be omitted from the jury instructions").

Counsel performed ineffectively and in a prejudicial manner when they failed to impose a specific intent requirement into the court's Instructions. Even in the alternative, allowing the jury to find a lesser mental state like knowingly or recklessly for a specific intent crime fell short of the statutory mens rea requirement for an attempt offense. *See id.; Mvers v. State,* 2004 UT 31, ¶ 20, 94 P.3d 211 ("The failure to instruct a jury with appropriate definitions and elements for the charged offense similarly amounted to deficient performance by counsel that fell below an objective standard of reasonableness to the prejudice of the defendant."); *see generally* Points I, II, and III (to avoid repetition, each Point within the brief is cross-referenced with other Points herein to the extent that

they apply).

C. The Specific Intent Requirement is Consistent With Relevant Authority and Applicable Case Law

In addition to the requirement of not excluding the plain language of a statute from the court's instructions to the jury, prior counsel should have specifically requested the attempt language from the lewdness statute as a lesser included instruction. Doing so would have more appropriately put the mens rea element in synch with a companion statute, Lewdness involving a child, Utah Code Ann. § 76-9-702.5, and appellate opinions on the issue relating to the legal insufficiency of the evidence.

1. A "Reckless" Mental State Does Not Apply to the Involved Charge

The prohibitions contained in the Lewdness involving a child statute are similar to, and in some instances identical with, the prohibitions in the Lewdness statute. Utah Code Ann. §§ 76-9-702; 76-9-702.5. Significantly, the legislative protections are greater when a child is "under 14 years of age." For persons "14 years of age or older" lewdness applies only to a public place, Utah Code Ann. § 76-9-702, but when a child is "under 14 years of age," the same acts of lewdness applies to private places and to specified circumstances not amounting to sexual exploitation of a child:

> (1) A person is guilty of lewdness involving a child if the person under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, sexual abuse of a child, aggravated sexual abuse of a child, or an attempt to commit any of those offenses, intentionally or knowingly does any of the following to, or in the presence of, a child who is under 14 years of age:
>
> (a) performs an act of sexual intercourse or sodomy;

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area:

(i) in a public place; or

(ii) in a private place:

(A) under circumstances the person should know will likely cause affront or alarm; or

(B) with the intent to arouse or gratify the sexual desire of the actor or the child;

(c) masturbates;

(d) under circumstances not amounting to sexual exploitation of a child under Section 76-5b-201, causes a child under the age of 14 years to expose his or her genitals, anus, or breast, if female, to the actor, with the intent to arouse or gratify the sexual desire of the actor or the child; or

(e) performs any other act of lewdness.

Utah Code Ann. § 76-9-702.5(1) (emphasis added).

For the mens rea, "intentionally or knowingly" is the mental state for the Lewdness involving a child statute. *Id.* Conspicuously absent is the "recklessly" mental state when a child "under 14 years of age" is involved. When a defendant engages in inappropriate conduct with younger children (under 14 years), more severe sanctions come into play. *Compare* Utah Code Ann. (lewdness is generally a class B misdemeanor if an act of sexual intercourse is performed "in the presence of another who is 14 years of age or older") *with* Utah Code Ann. § 76-9-702.5 (lewdness involving a child is generally a class A misdemeanor if the same act [of sexual intercourse] is performed "in the presence of a child who is under 14 years of age").

Under the Lewdness involving a child statute, a defendant who "recklessly" engages in unlawful statutory conduct with a child under 14 years of age is not criminally liable. Only when a defendant "intentionally or knowingly" engages in unlawful statutory conduct with a child under 14 years of age does he become criminally responsible. Utah Code Ann. § 76-9-702.5.

Due to the greater protections inherent in a statute involving our youngest children, it makes little sense to punish a defendant who "recklessly" engages in unlawful statutory conduct with an adult or a person "14 years of age or older," *see* R 198-99 (Instructions 18 & 19), but to *not* punish a defendant who "recklessly" engages in the same unlawful statutory conduct with a child *under* "14 years of age." Utah Code Ann. § 76-9-702.5. Arguably the inverse should be true. The lesser culpable mens rea of "recklessly" should apply when a child under 14 years of age is involved and the defendant recklessly engages in lewd behavior. But since the Lewdness involving a child statute does not prohibit "reckless" lewd acts with a child under 14 years of age, the more general and lesser protected Lewdness statute involving adults or persons 14 years of age cannot prohibit the same "reckless" lewd act.

In Mr. Powell's case, the "intentionally or knowingly" mental states from the Lewdness involving a child companion statute should have been the applicable mens rea for situations like his that involves adults or persons "14 years of age or older." At a minimum, the more culpable mens rea of "intentionally or knowingly" should have been

the only mental states contained in the court's Instructions, albeit Mr. Powell continues to maintain that "intentionally" or a specific intent was the one and only applicable mental state for his elements instruction due to existing case law. *See generally* Points I-III.

Prior counsel performed ineffectively and prejudicially when they failed to correct the elements instructions by inserting the "intentionally or knowingly" mental states from the Lewdness involving a child companion statute into the applicable Lewdness instructions for Mr. Powell's case. *See Mvers v. State,* 2004 UT 31, ¶ 20, 94 P.3d 211 ("The failure to instruct a jury with appropriate definitions and elements for the charged offense similarly amounted to deficient performance by counsel that fell below an objective standard of reasonableness to the prejudice of the defendant.").

2. The Lesser Included Offense Should Have Been Requested

In *State v. Baker*, 671 P.2d 152 (Utah 1983), the court noted the test for determining the applicability of a lesser included offense including examining whether (i) the statutory elements of greater and lesser included offenses overlap . . . and (ii) the evidence provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Baker*, 671 P.2d at 159.

As noted previously, the statutory elements of the greater and lesser included attempt offense are set forth in the plain language of the Lewdness statute. Utah Code Ann. § 76-9-702(1). In addition, by definition an attempt to complete a greater offense or the completed offense constitutes a lesser offense. *Cf.* Utah Code Ann. § 76-4-101(3)(a)

("A defense to the offense of attempt does not arise . . . because the offense attempted was actually committed").

The evidence provides a rational basis for a verdict acquitting him of the lewdness charge and convicting him of attempted lewdness. *See* Points I-III. With no overt "flashing" misconduct, the evidence does not rise to the stereotypical trench-coat flasher or streaker situation. Intentionally opening-up-the-coat behavior for anyone and everyone to see was not the situation in the case at bar. The jury may have instead considered his clothing situation (pants not buttoned all the way up or his mesh material otherwise covering his genitals) as "engag[ing[in conduct constituting a substantial step toward commission of the crime" and that he either "intend[ed] to commit the crime" or "when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result." Utah Code Ann. § 76-4-101(3)(a) (attempt statute). Mr. Powell did not dramatize, gesticulate, imitate, or even simulate an act of lewdness. *State v. Piep*, 2004 UT App 7, ¶ 9.

The jury also struggled with the State witnesses' testimony. The jurors' notes revealed that despite the witnesses' testimony, the jury still asked about the video as they wanted to know the amount of recorded footage time or the angles from which the video "would've showed whether the defendant was exposed or not?" R 483-84. The questions posed by the jury occurred *after* Anastasia Rasmussen and Jennifer Holdaway had already both testified about him being exposed. Not content with the two prosecution witnesses'

prior and completed testimony, the jury asked the investigating officer who had watched the video,"How many minutes approximately of surveillance video from ShopKo were from an angle that would've showed whether the defendant was exposed or not?" R 483-84. The jury's questions reflected the importance of the video and the prejudicial impact of the footage not being preserved to answer the uncertainties lingering in the juror's minds.

Following all of the State's testimonial presentation about the exposure, the jurors continued to ask about how long the video was or wouldn't the video have shown whether the defendant was exposed. R 484. Even after they heard the officer testify about Mr. Powell's purported admissions (albeit distinguished on cross-examination as referring to his thrill seeking incidents in the past), the jury continued to probe for more evidentiary details or independent corroboration from the video itself. R 484.

In another note to the court, the jurors asked a question that each store video surveillance footage would have been able to answer: "Distance [of witnesses] to defendant when penis viewed at Wal-Mart and ShopKo, one of these was from behind him, clarify, including distance." R 451. The jurors' question was at the close of the testimony by Jennifer Holdaway, the only other eyewitness at the scene. Thus, the second of two witnesses had both claimed to have seen his penis, but the jurors' note indicated that they were still questioning whether to believe them or the extent of the exposure. The note was not just for a single store incident, it addressed the witness' viewing of the

penis at both WalMart and ShopKo. The jurors' note twice referred to "distance," which is often a key factor in determining the level of certainty or the likelihood of being (in)correct in any identification process.

Prior counsel performed ineffectively and prejudicially by failing by use the attempt language from the lewdness statute as a basis for a lesser included instruction, which would have more appropriately put the mens rea element in synch with the companion statute, Lewdness involving a child, Utah Code Ann. § 76-9-702.5, and authoritative case law.

3. Lewdness Should Have Been Defined as Lasciviousness and the "Common-law Sense of the Irregular Indulgence of Lust" Amounted to Insufficient Evidence for a Conviction

In line with the above issues, if the mens rea was not intentional or a specific intent offense, counsel performed ineffectively in not expressly requesting the court to instruct the jury on the definition of lewdness as defined by case law. In *State v. Bagnes,* 2014 UT 4, the supreme court "reject[ed] the broad notion of lewdness generally encompassing any act of impropriety. We interpret the statute instead to partake of a narrower notion of lewdness marked by lasciviousness—in the common-law sense of the irregular indulgence of lust." *Id.* at ¶ 22. For the jury in Mr. Powell's case, the prosecution emphasized his thrill-seeking attitude in connection with past allegations of exposure. Even if true, however, key differences exist between the irregular indulgence of lust and thrill-seeking. The sexual component relating to the irregular indulgence of lust is

nothing but a 34 year old distant memory to a paralyzed man in a wheelchair who cannot maintain an erection. R 461. Moreover, in addition to the lust versus thrill distinction:

> A defendant's internal lust for sexual gratification alone is insufficient to establish lewdness. The threshold question is whether the defendant's conduct consisted of a lascivious act amounting to the virtual exposure of his private parts. Absent any indication of that, the private realization of a fetishized sexual fantasy alone would not make his conduct criminal. Finding no evidence of lascivious, virtual exposure, we reverse Bagnes's convictions for lewdness involving a child.

Bagnes, 2014 UT 4, at ¶ 28. Trying to cover himself up was not a lascivious act by Mr. Powell. Sexual gratification was not sought and it couldn't exist due to his handicap. At worse, it was thrill-seeking.

In light of *Bagnes,* the "intentionally" mental state was applicable and the lesser mental states were not. It would be impossible for a defendant to engage "recklessly" in the "irregular indulgence of lust." *Id.* at ¶ 22. Indulgence equates with intentional behavior, particularly when it is "irregular indulgence" and even more so when it is the "irregular indulgence of lust." Reckless and knowing mental states would both be inapposite to the "irregular indulgence of lust."

"To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced thereby." *State v. Martinez*, 2015 UT App 193, ¶ 30, 357 P.3d 27, 33 (citation omitted). Prior counsel should have brought the *Bagnes* definitions to the attention of the trial court in order to properly instruct the jury on the narrow definition of lewdness; they should have submitted the "intentional" mental state as the one and only mens rea for the charged

offense, and they needed to use the *Bagnes* definitions to buttress the motion for a directed verdict. Counsel's inaction and failure to effectively perform prejudiced Mr. Powell's case.

POINT II. THE COURT ERRED IN NOT GRANTING THE DIRECTED VERDICT

A. Background

In the context of the wide-ranging perceptions of our sexual mores, *see Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (in the obscenity case, the Justice's "I know it when I see it" phrase has evolved into a makeshift definition), a prosecutor's or jury's "first-blush" determination of alleged factual conduct falling under a sexual offense statute does not necessarily make it so. As noted by our supreme court:

> Our Victorian past is well behind us. We no longer live in a society where our style conventions and social mores clamor for head-to-toe cover-up. The opposite is closer to the truth. Right or wrong, our society roundly tolerates—and often encourages— ever-less sartorial coverage of the human body. Whether at the gym, the pool, the beach, or even the public square, we routinely encounter those who would flaunt or manifest their (heretofore) private parts, including their pubic regions. And depictions of these sorts of "exhibitions" are peppered across the pages of our mainstream magazines, catalogs, newspapers, etc. (in print and online). Purveyors of this material would hardly expect to face criminal charges for child pornography or sexual exploitation. And if they were so charged, they could undoubtedly maintain strong constitutional defenses under the Free Speech and Due Process Clauses. We therefore reject a broad conception of exhibition in the sense of mere flaunting or manifesting. To avoid the overbreadth and vagueness problems noted above, we construe the term instead in its more narrow sense of making the pubic region visible to public perception.

State v. Bagnes, 322 P.3d 719, 726-27 ¶¶ 36-38 (Utah, 2014) (footnote omitted); *id.* at ¶ 33 ("As with lewdness, 'exhibition' is defined to encompass a range of meanings . . .

[a]nd again, a range of contextual cues point in favor of a more limited conception of this statutory term"). The narrow or limited interpretation of the statutory elements in the case at bar extend to both a person's actions and his intent.

As reflected below, prior counsel performed ineffectively in failing to apply the narrow standards to Mr. Powell's non-lascivious circumstances. Such legal standards, which were not addressed with the trial court, should have been part of counsel's prior performance and advocacy. Due to the prejudicial nature of the errors, counsel rendered deficient performance.

B. Actions That Appear to Satisfy the Plain Language of the Statute May Be Inadequate Evidence Under Case Law's Narrow Interpretations

The trial court denied Mr. Powell's motion for a directed verdict, R 491, although Mr. Powell submits that on the underlying threshold question of law regarding the elements of the offense, this Court's non-deferential review should reach an opposite conclusion.

> We may reverse a verdict "only when the evidence, so viewed, is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that defendant committed the crime for which he or she was convicted." At the same time, a review of a sufficiency of the evidence argument may also present a threshold question of law—of the elements of the underlying offense. And on that question, of course, our review is non-deferential, as our interpretation of the terms of the criminal law is ours to make de novo.

State v. Bagnes, 322 P.3d 719 (Utah, 2014) (citations omitted). The sufficiency of the evidence did not fulfill the threshold question of law.

1. Apparent Facial Validity or Seemingly Prima Facie Fulfillment of the Statute May Not Be Enough

Due to the narrow or limited nature of case law interpretations, what actions appear sufficient at first-blush as being proscribed by the statute may require a deeper analysis. *State v. Serpente*, 768 P.2d 994, 995 (Utah Ct.App.1989) ("In order to give the statute the implementation which will fulfill its purpose, reason and intention sometimes prevail over technically applied literalness"). For example, while inappropriate behavior is not to be condoned, the plain language of the forcible sexual abuse statute was found to not apply to a juvenile who invited "the complainant to commit an act or oral sex upon him [and] he forcibly rubbed his hand along her buttocks." *State in Interest of LGW*, 641 P.2d 127, 131 (Utah 1982). Under the plain language of the statute, such factually indecent misconduct seemed to constitute a crime:

> A person commits forcible sexual abuse if, under circumstances not amounting to rape or sodomy, or attempted rape or sodomy, the actor touches the anus or any part of the genitals of another, *or otherwise takes indecent liberties with* another, ... 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.

LGW, 641 P.2d at 129 (quoting Utah Code Ann. 76-5-404) (emphasis added by the court)). The juvenile's conduct did not amount to the greater listed offenses, yet he certainly took indecent liberties with the complainant through his vulgar words and his unwanted rubbing along her buttocks. But the appellate court held otherwise:

> Construing the term "indecent liberties" in § 76-5-404, this Court held that the brief touching of clothed breasts did not constitute the felony of forcible sexual

> abuse. "Indecent liberties" included only "conduct of the same magnitude of gravity" as touching "the anus or genitals of another... ." Under that precedent and principle, we hold that the touching involved in this case did not constitute the felony of "taking indecent liberties" as defined in § 76-5-404. If the brief touching of a clothed breast does not constitute that crime, as we held in J.L.S., supra, we are unable to see how the brief touching of a clothed buttocks is any more felonious.

State in Interest of LGW, 641 P.2d 127 (Utah 1982) (construing *In State in re J.L.S.*, 610 P.2d 1294 (Utah 1980)). What appears factually befitting of the statute may not be, as a legal perspective often differs from an emotional perspective.

2. Salacious Material in a Book, Which Portrays Sexually Explicit Acts Listed in the Lewdness Statute, Is Not Lewd As a Matter of Law

In another case, *State v. Piep,* 2004 UT App 7, 84 P.3d 850 (Utah App., 2004), the opinion considered whether a father who had provided his child with the book, "Sex Q and A," which "had photographs of 'naked people doing bad things," amounted to an act of lewdness. The trial court there (and the State) "reasoned that the material was lewd because it was salacious which, according to the dictionary definition, means 'arousing or appealing to sexual desire or imagination.' Essentially, the [lower] court determined that showing the book to J.W. [a minor] was an act of lewdness because the book portrayed acts listed in the lewdness statute." *Piep*, 2004 UT App 7, ¶ 9; *see also id.* at ¶ 10 ("the lewdness statute . . . is strikingly similar to the lewdness involving a child statute").

> The statute on lewdness involving a child states, in pertinent part: (1) A person is guilty of lewdness involving a child if the person ... intentionally or knowingly does any of the following to, or in the presence of a child who is under 14 years of age: (a) performs an act of sexual intercourse or sodomy; (b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the

> anus, or the pubic area...; (c) masturbates; (d) under circumstances not amounting to sexual exploitation of a child under Section 76-5a-3, causes a child under the age of 14 years to expose his or her genitals, anus, or breast, if female, to the actor, with the intent to arouse or gratify the sexual desire of the actor or the child; or (e) performs any other act of lewdness.

Piep, 2004 UT App 7, ¶ 8 (quoting Utah Code Ann. § 76-9-702.5(1).

The book in *Piep*, "Sex Q and A," is extremely graphic. In the eyes of the fact-finder at trial, there seemed to be ample evidence of lewdness. A public online preview of the book (i.e. on the website of the online retailer, Amazon, which previewed pages from the book, including frequently asked questions and answers) were unquestionably graphic: "How important is nipple stimulation during sex?"; "Should I wait for my girlfriend to have an orgasm before I ejaculate?"; and "My husband uses a vibrator to make me orgasm. Could this prevent me from climaxing normally?" The online pictures within the book, also for public preview, "exposes . . . the female breast below the top of the areola [and] the buttocks, . . ." In short, the book's explicit sexual content and pictures amply supported the lewdness element, as set forth in the plain language of the statute.

Nevertheless, this Court "fail[ed] to see how showing J.W. a book is a sexual act covered by the statute. The contents of the book may well appeal to sexual desire or imagination; but Piep did not dramatize, gesticulate, imitate, or even simulate the acts covered in the book." *Piep*, 2004 UT App 7, ¶ 9. Mr. Powell similarly did not dramatize, gesticulate, imitate, or even simulate an act of lewdness.

Importantly, in *Piep* the crime of lewdness did not apply to the book's graphic content and pictures, which fell under the language of the lewdness statute (i.e. "exposes . . . the female breast below the top of the areola, the buttocks, . . .") and was available to a child under 14 years of age for examination or reading by the minor at his or her leisure and convenience. Whatever social mores underlay the legislature's lewdness statute were eviscerated by the explicit content within the book. The book itself, "Sex Q and A," detailed even more graphic sexual descriptions and pictures than the public preview available through Amazon. The availability of the sexually explicit content to a child seemed particularly concerning.

Substance over form should similarly apply to Mr. Powell's non-lascivious situation. If lewdness does not apply, as a matter of law, to a circumstance where a child under 14 may examine at his or her leisure a book's sexually explicit questions and answers (and pictures), then lewdness is even more inapplicable where an adult struggles to catch Mr. Powell in the act of exposure, but can't do so even momentarily with a photograph. *See* Exhibit 1 (rather than trying to expose himself to others in a blatant flashing or opening-of-the-trench-coat type exhibition, the photograph by the prosecution witness showed Mr. Powell trying to cover up and conceal himself). The distinctions in substance overcome the form arguments to the contrary (e.g. child victim in *Piep* versus adults in Mr. Powell's case; a child's leisurely ability to review the book in *Piep* versus an adult's momentary glance with Powell and pursuit of him (not his pursuit of the victims);

the sexually explicit content or pictures in *Piep* did not have to be concealed versus Powell tried to avoid exposure as he immediately attempted to cover himself up from approaching members of the public).

If, on his lap as Mr. Powell was seated in his wheelchair in the store, he had opened a page of the book, Sex Q and A, (or any medical book) to a picture of a penis or a breast, such a graphic and clear literary (yet actual) photograph of genitalia or a breast would seem to be in violation of the lewdness statute (i.e. "exposes his or her genitals, the female breast below the top of the areola, the buttocks. . . ."). However, just like a medical student who has an anatomy textbook open to a chapter on reproduction, the lewdness statute would not subject him or her for such an exposure or exhibition of private parts. *Piep*, 2004 UT App 7, ¶ 9 ("We fail to see how showing J.W. a book is a sexual act covered by the statute"). Such conduct would be obviously inappropriate, but not necessarily illegal. *Id.*

3. "Exposure" Is Not Any and All Exposure

In *State v. Serpente*, 768 P.2d 994 (Utah App.1989), students testified that a disgruntled parent, Ms. Serpente, had flashed or mooned a teacher by raising her dress above her buttocks. *Id.* In determining whether such an act satisfied the lewdness standard, the opinion initially rejected the State's attempt to adopt a broad definition of the term "exposes," to include conduct that "directs public attention" to one's genitals or private parts.

> We interpret the term "exposes" as it appears in § 76-9-702.5, according to its "plain meaning," because there is nothing within the context of the legislation which justifies a different interpretation. We turn to Webster's Third New Int'l Dictionary (unabridged) 802 (1986), wherein "expose" is defined as "to deprive of shelter, protection, or care ... to lay open to view, to lay bare."
>
> Substituting one of the definitions set forth above for the term "exposes" as it appears in § 76-9-702.5, the statute would read: "A person is guilty of lewdness involving a child if the person [makes bare] his or her genitals or private parts." Furthermore, after a thorough review of cases interpreting indecent exposure statutes, we are unable to find a single case where a conviction of indecent exposure did not involve at least partial nudity. Thus, we hold that the phrase "exposes his or her genitals or private parts" under § 76-9-702.5, is limited to instances involving at least partial nudity.
>
> The State urges this Court to adopt a more expansive definition of the term "exposes," to include conduct that "directs public attention" to one's genitals or private parts. This we are unwilling to do. Given contemporary fashion designs and revealing swimwear, the State's definition might well subject many unsuspecting citizens to criminal prosecution for unlawful exposure. Ms. Serpente's lifting of her dress revealed no bare skin.

Serpente, 768 P.2d 994, 997 (footnotes omitted).

In the case at bar, unlike Ms. Serpente's lifting of her clothing, the prosecution witnesses' testimony indicated that Mr. Powell had tried to cover himself up. This was the opposite of a "flasher" type situation. *See* R 439 (as explained by a State witness, "My speculation was that he grabbed the pants and was clearly looking at us and trying to cover something when he took the -- when we took the picture"); R 407-08 ("my impression is that I think he sees us and recognizes us from Wal-Mart, and is clearly covering himself because he doesn't want pictures of what he's doing"); Exhibit 1. In contrast to the above definition of expose ("to deprive of shelter, protection, or care . . . to

lay open to view, to lay bare"), Mr. Powell tried to shelter his private area, to protect against its exposure, and to keep his genitals closed from view when the witnesses were near by. He was doing the opposite of what was needed by the statute for exposure.

Mr. Powell may have failed the "directs-public-attention" to onself standard by being in a wheelchair (which in and of itself draws attention to himself due to his handicap and not blending in with the walking or standing crowd around him), as he had his pants unbuttoned or not buttoned to the top, and had a mesh cover over his pant area, but this Court has already rejected such a expansive "directs-public-attention" standard. *Serpente*, 768 P.2d at 997.

Moreover, being "exposed" does not necessarily mean being completely exposed. *See id.* As the prosecution witness' testimony revealed, "nothing" did not necessarily mean nothing.

> Q. [State:] Okay. So you see him coming towards you, and nothing covering.
>
> A. [Ms. Rasmussen] Yep.
>
> Q. Tell me a little bit more about that.
>
> A. What I did see was, like, almost like fishnet stockings that you wear for maybe a costume, that's what was down there. Very see-through, but, like, holes – like, not just his zipper down, but, like, full-on nothing covering down there.
>
> Q. Okay. So you keep saying down there.
>
> A. Okay.
>
> Q. I know it's uncomfortable. I'm going to need you to be --

A. Covering his genitals.

Q. Covering his genitals.

A. Yep.

Q. Okay. So were you able to see his penis?

A. Yes.

Q. Okay. So you mentioned a little bit about the -- almost, like, stocking-like material.

A. Yeah.

Q. Do you remember what else he was wearing?

A. I remember it was, like, a plaid shirt, a baseball cap and jeans.

R 396-97. Her description of "fishnet stockings" is consistent with the other witness' description of "black mesh covering his [penis.]" R 433. Both women said that black mesh or fishnet was covering his genitals, R 397, 433, but mesh is not nothing.

In 1977, Cheryl Tiegs, wore a mesh or fishnet swimsuit for Sports Illustrated, https://www.vanityfair.com/style/photos/2010/05/sports-illustrated-slideshow-201005#2 which caused an uproar because the see-through material showed the nipples on the model's breasts. Even though Sports Illustrated is a national publication who had rewarded Ms. Tiegs' revealing pose with the sought-after cover page of its magazine, many subscribers and the public were morally outraged. *Cf. State v. Bagnes*, 322 P.3d 719, 726-27 ¶¶ 36-38 (Utah, 2014) ("we routinely encounter those who would flaunt or manifest their (heretofore) private parts, including their pubic regions. And depictions of

these sorts of 'exhibitions' are peppered across the pages of our mainstream magazines, catalogs, newspapers, etc. (in print and online). Purveyors of this material would hardly expect to face criminal charges for child pornography or sexual exploitation"); *id.* ("We therefore reject a broad conception of exhibition in the sense of mere flaunting or manifesting").

Without entering that fray, a key distinction should be noted. The model, Cheryl Tiegs, willingly exposed herself whereas Mr. Powell did not. Time after time, the witnesses said he tried to cover himself up. The State's photograph similarly showed the same act of concealment. *See* Exhibit 1.

And just as importantly, Mr. Powell's Rule 23B factual affidavit indicated that unlike the gaping see-through holes in Ms. Tiegs' swimsuit, Walmart employees checked out Mr. Powell's mesh material at the scene and determined that his clothing situation did not constitute a problem for exposure. *See* Rule 23B Steven Powell Affidavit. In response to the witnesses' complaints, security confronted and questioned Mr. Powell, they checked him out, and they let him go. *Id.*

Hence, notwithstanding the State's emphasis at trial on his past thrill-seeking attitude that being naked underneath was exciting to him, the thought of being naked underneath in public was still a thrill-seeking thought. *State v. Hawker,* 2016 UT App 123, at § 14 ("The State's argument, at first glance, appears to comport with the plain language of the statute. But such a reading of the statute would create an anomaly by

criminalizing an intent to engage in noncriminal behavior"); *see also* Rule 23B Steven Powell Affidavit (through the Rule 23B proceedings, Mr. Powell moves to suppress his prior statements to the officer).

The actual act or performance of exposing himself, *see Serpente*, 768 P.2d at 997 ("to deprive of shelter, protection, or care . . . to lay open to view, to lay bare"), was not established nor even apparent when a Walmart employee earlier interacted with Mr. Powell (before the State witnesses had complained) nor later when Walmart security confronted him in response to and after the State witnesses had complained. *See* Rule 23B Steven Powell Affidavit. Significantly, at Walmart there were no confrontations between Mr. Powell and the State witnesses, which means that Walmart employees would have confronted Powell without him receiving advance notice or absent the opportunity to cover up his groin area. Catching him in the act did not occur because he had not done anything wrong and he did not need to hurriedly cover himself because he had not been exposed during his entire time in Walmart. *See* Rule 23B Steven Powell Affidavit.

Mr. Powell stated that he was using a catheter, which is consistent with something – not nothing – precluding his penis from being exposed. R 467 ("He previously indicated to the officer that "his catheter became kinked, and that he was trying to unkink it so he wouldn't end up wetting his pants"); R 467 ("He wrote that he didn't think anyone actually viewed him doing it, but that he could be wrong"). Even for the more blatant exposure allegation, at trial one witness said that she "saw him without his pants

and a mesh [was] covering over them [his penis]." R 445. A male with his pants unbuttoned is frown upon in the context of the prim-and-proper witness perception of a standard dress code. Opened pants, coupled together with a mesh cover over the groin area, suggested a penis underneath whether it was visible or not. *State v. Bagnes*, 2014 UT 4, at ¶17 ("a statutory standard turning on subjective assessments of general impropriety would implicate constitutional concerns. The specific problem here is one of vagueness [noting that [u]ncertainties about the perimeters of the common-law definition of lewdness have . . . resulted in some lewdness statutes being held void for vagueness]"); 2014 UT 4, at ¶26 ("If virtual exposure is the question, we cannot deem the public display of a diaper to qualify unless we are prepared to also criminalize a range of other clothing that is much less opaque and far less obscuring [such as certain swimwear, or even athletic or workout attire]. The difference between the former and the latter is social acceptability—not lasciviousness in the form of virtual exposure")

4. Mr. Powell's Inability to Perform Precludes His Lewdness Conviction

Not only was Mr. Powell's inability to have an erection inconsistent with his intent to expose himself, his flaccid state is also at odds with the accompanying subsections of the statute. *State v. Serpente*, 768 P.2d 994, 997 (Utah Ct.App.1989) (applying the doctrine of ejusdem generis to the phrase "any other act of gross lewdness" because the phrase "derive[s] its definition from the context in which it appears"); *In re A.T.*, 2001 UT 82 at ¶¶ 8 & 12, 34 P.3d 228 (the doctrine restricts that general term, or "catchall phrase

at the end of a statutory list of more specific proscribed acts,", to "include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent.").

In *State v. Hawker,* 2016 UT App 123, the opinion construed a statute involving terms similar to the ones in Mr. Powell's case including the scope of the definitions relating to sexual intercourse, sodomy, and masturbation:

> Like the lewdness statute in Serpente, the sexual solicitation statute must be read to prohibit receiving or agreeing to receive payment for acts that are of the same sort, or "of equal magnitude." The list set forth [in a cross-referenced statute] includes sexual intercourse, which requires two people to be jointly engaged in the conduct, and sexual contact between "the genitals of one person and the mouth or anus of another person" —again, necessarily a two-person activity. Neither of these categories of conduct involves one person acting and another person watching. In other words, for these types of sexual activity to be prohibited under [the statute], "with" must mean that the other person is joining in the activity and not merely there as company or a very small audience. Construing like terms together, "with" must mean the same when applied to masturbation. It is therefore not enough, under [the statute], that someone agrees to masturbate on her own for a fee while another person is present. Because this is precisely what Defendant agreed to do, her agreement did not violate [the statute]

State v. Hawker, 2016 UT App 123, at ¶ 13.

Since the statutory companion provisions there pertained to sexual activities involving two-people, the act of masturbation – a one-person activity that the defendant agreed to do on her own for a fee while another person was present – did not violate a statute that prohibited her from "agree[ing] to commit that sexual activity *with another person* for a fee." *Id.* at ¶ 10 (emphasis in original). Masturbating for a person who would watch but not participate was a one-person activity and not a statutory violation,

whereas masturbating *with* another person who would actively participate was a two-person activity that was against the law. *Hawker,* 2016 UT App 123

The same type of narrow distinction exists in Mr. Powell's case. In order to be found guilty of lewdness, the defendant must perform an act, which is contrary to a quadriplegic's inability to "perform" with an un-erect penis. Utah Code Ann. § 76-9-702(1)(a), (c), (d). In addition to the "exposure" statutory subsection, the meaning of which has been narrowed by case law, *see generally* Points I-III*,* the lewdness statute requires a person to perform, or attempt to perform "an act of sexual intercourse or sodomy"; masturbation; or "any other act of lewdness." Utah Code Ann. § 76-9-702(1)(a), (c), (d). A quadriplegic cannot perform sexually, period. His lack of an erection eliminates his ability to perform in a like exposed manner of a person performing an act of sexual intercourse or a person performing an act of masturbation. The trench coat flasher statutorily "performs" by openly exposing himself in violation of the lewdness statute, which is also in line with a performer openly having sex. However, the concealment behavior by Mr. Powell is contrary to the exposure requirement or to perform the act of exposure. *Id.; compare Piep*, 2004 UT App 7, ¶ 9 (like Mr. Piep, Mr. Powell did not dramatize, gesticulate, imitate, or even simulate the acts covered in the book"); *State v. Bagnes*, 322 P.3d 719, 727 ¶ 38 ("We therefore reject a broad conception of exhibition in the sense of mere flaunting or manifesting. To avoid the overbreadth and vagueness problems noted above, we construe the term instead in its more narrow sense

of making the pubic region visible to public perception").

POINT III. COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO DISMISS THE CASE BASED ON LOST OR DESTROYED EVIDENCE

In *State v. DeJesus,* 2017 UT 22, the high court reaffirmed a state constitutional principle "that the due process clause requires the State to preserve exculpatory evidence from loss or destruction, . . ." *Id.* at ¶ 30. The burden rests with the prosecution to preserve exculpatory evidence like videotapes or surveillance DVD's from loss or destruction. *Id.* The *DeJesus* opinion found that the State's loss of video footage of the involved altercation (which constituted the basis of the charged assault offense) warranted a dismissal of Ms. DeJesus' case.

In *DeJesus,* "the State charged Ms. DeJesus with one count of assault under Utah Code section 76-5-102.5, which provides that '[a]ny prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.'" 2017 UT 22, ¶ 9. The victim, Correctional Officer Hansen, testified first-hand that inmate Lissette DeJesus' had intentionally kicked him or assaulted him during his shift at the prison. When the officer had tried to break-up a fight between DeJesus and another inmate, "Ms. DeJesus kicked Officer Hansen twice—once in the abdomen and once in the thigh." 2017 UT 22, ¶¶ 4-5. The officer's testimony to the jury about being personally kicked (twice) by DeJesus in a non-accidental manner was enough to sway the jury (who convicted DeJesus), yet the supreme court "reverse[d] the district court's denial of Ms. DeJesus's motion to dismiss and remand[ed] for that court to enter an order of dismissal."

2017 UT 22, ¶ 55. "[T]he State's failure to preserve the [prison's surveillance video] footage is a severe violation of Ms. DeJesus's right to a fair trial and dismissal is an appropriate remedy." *Id.* at ¶ 54. The same result should have occurred in Mr. Powell's case.

The applicable test, which was previously set forth in *State v. Tiedemann*, 2007 UT 49, ¶¶ 44–45, was reaffirmed in *DeJesus:* "[O]nce 'a defendant has shown a reasonable probability that lost or destroyed evidence would be exculpatory,' the defendant has established that a due process violation occurred." *DeJesus*, 2017 UT 22, ¶ 45 (quoting *State v. Tiedemann*, 2007 UT 49, ¶ 44, 162 P.3d 1106)). Once the reasonable probability threshold has been satisfied, to determine the seriousness of the due process violation and to fashion the appropriate remedy, courts must balance both: (1) the culpability of the State in the loss or destruction of the evidence and (2) the prejudice to the defendant as a result of the missing evidence. *DeJesus,* 2017 UT 22, ¶ 45; *State v. Tiedemann*, 2007 UT 49, ¶¶ 44–45.

A. The "Reasonable Probability" Standard Is A Low Threshold

Unlike the federal standard, which required the defendant to show "bad faith" on the part of the police to preserve potentially useful evidence, Utah's state constitutional due process analysis expressly rejected the federal bad faith requirement. *DeJesus,* 2017 UT 22, ¶ 24-25; *id.* at ¶ 31("rejecting this demanding bad-faith standard"). Instead, Utah law imposed an admittedly "low threshold" for showing a reasonable probability that lost

or destroyed evidence would be exculpatory.

> Although a "reasonable probability" standard defies a precise definition or quantifiable value, we have described it as "a probability sufficient to undermine confidence in the outcome." And though it is more than a "mere possibility," it falls "substantially short of the 'more probable than not'" standard. Ultimately, in order to satisfy the reasonable probability standard in the lost evidence context, a defendant must make some proffer as to the lost evidence and its claimed benefit. So long as that proffer is not pure speculation or wholly incredible, the standard will be satisfied.

DeJesus, 2017 UT 22, ¶ 39 (footnotes omitted). Importantly, defendants do *not* have to establish that the lost or destroyed evidence was in fact exculpatory. Indeed the *DeJesus* opinion corrected the trial court's determination to the contrary.

> Our review of the district court's determination that Ms. DeJesus failed to satisfy the threshold reasonable probability requirement leads us to conclude that the court applied a more stringent standard than the one we just articulated. The court stated that "[t]here must be something in the evidence before the court . . . that shows the court there is some reasonable basis on which to believe the recording would show what defendant claims." This standard suggests that defendants must provide evidence that the lost or destroyed evidence was in fact exculpatory. This is too high of a burden given both the reasonable probability standard articulated in *Tiedemann* and the fact that, in many lost evidence cases, there may be little extrinsic, corroborating evidence. Defendants will likely never be able to fully establish exactly what the evidence would have shown. Instead, all a defendant must show is that there is a reasonable probability the evidence would have been exculpatory.

DeJesus, 2017 UT 22, ¶ 40 (emphasis added). The duty falls squarely on the prosecution:

> it is usually inappropriate to permit the State to undermine a defendant's claim that there is a reasonable probability that lost evidence would have been exculpatory by having the State describe what the evidence actually showed. The reasonable probability threshold inquiry does not involve a balancing of evidence to determine which side's story about the lost evidence is more believable and whether the evidence was in reality inculpatory or exculpatory; it focuses entirely and solely on whether the defendant can show a *reasonable probability* that the evidence would

> have been exculpatory. If we were to hold otherwise, the State would be incentivized to destroy relevant evidence and later claim that the evidence would have only supported its own version of the events. It is the State's duty to preserve relevant evidence, and it cannot escape that duty—or the consequences of its breach of that duty—simply by putting on evidence as to what the lost evidence would have shown.

DeJesus, 2017 UT 22, ¶ 44 n. 62 (emphasis added).

B. Mr. Powell's Circumstances Satisfied The "Reasonable Probability" Standard

Mr. Powell's prior counsel performed ineffectively in not moving to dismiss his case pursuant to *DeJesus* and *Tiedemann*. "To succeed on a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the defendant was prejudiced thereby." *State v. Martinez*, 2015 UT App 193, ¶ 30, 357 P.3d 27, 33 (citation omitted).

The lost evidence and its claimed benefit in Mr. Powell's case is quite similar to the *DeJesus* case. Unlike a tiny "mom-and-pop" corner neighborhood store with scant resources for security, Walmart and Shopko are established "brick-and-mortar" stores with sophisticated security surveillance systems in place from above and at multiple angles from within the store. Their video technology is especially good, as monitoring acts of theft – and catching defendants in the act – is part of recorded evidence in misdemeanor and felony cases (and for other incidents like slip-and-fall civil actions) in courtrooms across the nation. Shoplifting is not an isolated nor infrequent act and numerous cameras from within the ceilings of the store are used to catch people who

don't want to be seen. Mr. Powell's case went beyond the more likely dated prison surveillance footage system in *DeJesus.*

In Mr. Powell's case, the store's video footage could even be converted to photographic still shots. Moreover, the store surveillance was able to zoom in to identify the man's face by his goatee and mustache while he was seated in a handicapped wheelchair and to also enlarge and enhance the clarity of the photograph of his van in the distant parking lot to the point where the investigating officer could track it down by identifying its make and model. *See* Exhibits 2 & 3; R 460.

The benefit of the surveillance footage is apparent given the involved time period that he remained exposed and the roaming nature of a partially naked man traipsing about the store in his wheelchair. With him being in numerous sections of the store – his naked mid-section apparently continuously exposed for the entire duration – at least some store surveillance footage during a 10 minute (to 30 minute) period of time would have captured his exposed state at one angle or another for at least a second or more. The surveillance time period may have extended upwards to a half hour.

> Q: Okay. And once you came into contact with – or once you became aware of Mr. Powell and then the picture was taken, how long did all of that take?
>
> A: Oh, I would say no more than a half hour.

R 443.

At Walmart the prosecution witness, Anastasia Rasmussen, testified that she was "going down to the makeup section . . . and saw him [Powell] coming out of the women's

clothing . . . section between all the clothes, he was coming out into the main section." R 395-96. "When I [Anastasia] look over, nothing covering his genital area." R 396. She leaves the area to get her stepmom and aunt. In their attempt to relocate him, he moved passed the women's clothing and was now in the jewelry section. R. 399. "[H]e was still exposed." R 400. The "whole thing took, from [Anastasia] first noticing Mr. Powell to then bringing [her] . . . stepmom and aunt . . . [p]robably five, 10 minutes." R 416.

In Anastasia's own words, Mr. Powell was in the main section of the store and he was rolling his wheelchair in areas of high video surveillance including the jewelry section. This case is not about shoplifters who concealed themselves in a nook or cranny of the store or who hid in a bathroom to stuff merchandise down their pants. The witnesses said Mr. Powell was out in the open in main sections of a busy store while his exposed body parts also remained "out in the open." Five, ten, or thirty minutes of video surveillance footage would have recorded a relevant one second frame or captured a single photographic snapshot of his exposed state from at least one vantage point as he wheelchaired himself from open area to open area within the store. *See DeJesus,* 2017 UT 22, ¶ 39 ("a defendant must make some proffer as to the lost evidence and its claimed benefit. So long as that proffer is not pure speculation or wholly incredible, the standard will be satisfied").

The timeline in Shopko was similar. Anastasia Rasmussen was in the children's clothing area in Shopko and claimed that she "saw his penis from that vantage point, [like

20 feet away]." R 419. Anastasia went to get her aunt and brothers. Upon their return about "10 minutes" later, Powell was then in the men's department. R 420. He was still exposed, she testified, because when they photographed him he tried to cover his genitals. R 420. Ten minutes of continuously playing video surveillance footage would have recorded at least one second or one angle of his unaltered exposed nakedness as he moved from one department to other sections within the store. For the video footage in both Walmart and Shopko, the reasonable probability standard was satisfied. *Id; DeJesus,* 2017 UT 22, ¶ 40 ("in many lost evidence cases, there may be little extrinsic, corroborating evidence. Defendants will likely never be able to fully establish exactly what the evidence would have shown"); *id.* at ¶ 44 n. 62 ("It is the State's duty to preserve relevant evidence, and it cannot escape that duty").

C. The Culpability of the State in the Loss or Destruction of the Evidence

At Walmart in October of 2014, R 80, immediately after Ms. Rasmussen saw Mr. Powell, she (and her friends or family who were with her) complained to Walmart employees, and looked for a supervisor, a manager, or a security officer. R 415; R 431 ("I [Jennifer Holdaway] wanted to alert people – you know, alert the people at Walmart so that something could be done"). Walmart told Mr. Powell to leave the store and they escorted him out. R 417; R 434; *cf.* 442 (in Shopko, he just left the store). Jennifer Holdaway reported the incident to law enforcement by email and through social media on "the Facebook website of the West Valley PD." R 447.

The prosecution witnesses' reporting of the incident to Shopko and Walmart was undisputed. At the time, however, nothing was done at either store. *Compare DeJesus,* 2017 UT 22 at ¶ 48 ("it is very difficult, if not impossible, for this court to understand why prison personnel would not, with full knowledge that a claimed assault had occurred by an inmate against a guard, maintain a recording of that event"). Like the prison personnel who failed to maintain a recording of that event in *DeJesus*, it is difficult, if not impossible to understand in Mr. Powell's situation why Walmart, with full knowledge that a claimed exposure (or alleged lewd statutory violation) had occurred, would not maintain a recording of that event. (Shopko did keep a recording, but the officer lost or destroyed it *after* viewing the footage). *But see* Rule 23B, Steve Powell Affidavit (Walmart security confronted him at the scene, determined there was no wrongdoing, and let him go).

Like the surveillance system at the prison in *DeJesus*, the cameras and video at Walmart were recording for a specific reason, with an emphasis on capturing any wrongdoing for future litigation. Differences in opinion or contradictory perceptions about what did or did not occur may be independently countered or objectively corroborated by an unbiased video. *See DeJesus,* 2017 UT 22, ¶ 48 ("If the recording showed exactly as [the Officer] said, certainly it would seem to this court that common sense would indicate that recording would be retained . . . ."). The defendant cannot maintain the surveillance footage for the store. Only the store or police can do so. *Id.* at

¶ 44 n. 62 ("It is the State's duty to preserve relevant evidence, and it cannot escape that duty"); R 417 (no Walmart management ever followed up with the witnesses, nor did Shopko management immediately do so [until contacted by police], even though the prosecution witnesses had taken a picture of him covering himself up and Shopko had the video at their disposal. R 421, 441).

In addition to the independent duty of the store to maintain the video – upon being notified of the incident, with such a report occurring at both Walmart and Shopko, R 415, 431, 434 – the police may not similarly shirk a duty to investigate when the officer knows, "They [stores] only keep it [video footage] for about 30 days." R 458, 470 (Officer acknowledged that he "Might've been" able to obtain surveillance footage of the Wal-Mart incident if he had started the investigation sooner). For the reporting of crimes, the witnesses used Facebook (and other social media) to report the incident the very next day to the police. R 422 ("The next day, my aunt and my stepmom emailed the police department").

Only the police department can control how they respond to the report of a crime on their social media platform. Here, the involved officer did not actively investigate the two store incidents until about nine or ten months after they had been reported. R 468-69. Obtaining long delayed and untimely witness statements after such an extended period of time was also directly attributable to police inaction. The witnesses' faded memories and their inability to recall a now dated perception of the incident would have been counter-

balanced substantially with the store video surveillance footage.

The police additionally bear the burden for not having an immediate screening or filtering process in how and when they respond to a citizen's online report of a crime. *See* Utah Code Ann. § 53-13-103(1)(a). Officers have a Facebook page on their police website for the specific purpose of receiving *and responding to* a witness' complaint about a crime – but for the police to then do nothing with such incoming information about a crime for nine or ten months is inexcusable. A citizen's filed complaint about a criminal offense on a law enforcement website carries a police need for immediate action in a way dissimilar to a social media posting of a FYI memorable family event. As a entity or officer "whose primary and principal duties consist of the prevention and detection of crime and the enforcement of criminal statutes[,]" *see id.*, some minimal police investigation to preserve potential evidence for future use was required upon receipt or almost immediately, given what the police know about the video retention period. R 458 (where the officer acknowledged, "some businesses will hold on to surveillance forever, and other businesses will hold on to it for like 48 hours or 72 hours. Kind of the going rate is about 30 days"). Investigative efforts need not have been fully completed in such a time period, but an initial quick police inquiry would have enabled them to preserve the video. Given the proliferation of video, audio, and/or photographs captured on the phones of witnesses, but not necessarily retained by them or a service provider after extended durations (i.e. deletions or material is recorded over itself after 30

days), substantial culpability rests with the State in the loss or destruction of the evidence for not immediately acting within 30 days to preserve such vital evidence.

D. The Prejudice to the Defendant as a Result of the Missing Evidence

In *DeJesus,* the high court agreed with the district court's reluctance to accept the officer's blanket statement on what the video recording would have shown – had it not been destroyed.

> "If the recording showed exactly as [Officer] Hansen said, certainly it would seem to this court that common sense would indicate that recording would be retained . . . . The motivation, frankly, to destroy or fail to preserve such a recording would come if the recording supported some other factual situation than the one [Officer] Hansen describes." Thus, there may have been some motivation by the State to permit the footage to be recorded over and lost. Indeed, the court stated that "it is very difficult, if not impossible, for this court to understand why prison personnel would not, with full knowledge that a claimed assault had occurred by an inmate against a guard, maintain a recording of that event."

DeJesus, 2017 UT 22, ¶ 48.

The officer in *DeJesus* claimed that Lissette DeJesus "looked directly at [him] and then kicked [him]" "in [the] lower . . . abdomen and . . . in [the] . . . right thigh." *Id.* at ¶ 8. The officer also testified that when he watched the surveillance footage immediately after Ms. DeJesus had kicked him, the footage corroborated an intentional assault against him and not an accidental kick that was intended for another inmate. The officer's sworn testimony was that her two kicks were purposefully directed at him and only him. *Id.* at ¶ 11. Significantly, the officer's testimony, which was believed by the jury, was not enough to uphold the conviction nor did it deter the high court from reversing and

ordering the district court on remand to dismiss the case. *Id.* at ¶ 54.

In Mr. Powell's case, the officer's loss or destruction of the video was more egregious. Detective Jason Vincent did more than once view the surveillance video at Shopko. He actually collected the video for repeated views and photographic extraction. R 458 ("They [Shopko] pulled surveillance, and I was able to collect some of that"). Indeed, the officer extracted still photographs from the video footage in preparation for trial. The officer captured Mr. Powell at the precise time, in the same attire, and at the very department in the store where he was accused of wrongdoing. *See* Exhibits 2 &3 (the exhibits are still photographs from the video). But the same officer simultaneously and conveniently failed to retain the video in its entirety for presentation to the jury (or to produce it before trial for examination by the defense). The officer selectively and subjectively corroborated his own account of what was in the video, thus avoiding an unbiased objective account through the video itself, which would have been a complete and continuously filmed recording of Mr. Powell while he was in the store.

The officer's lack of credibility is almost facially obvious, as he – a policeman trained to observe wrongdoing – claimed that there "could've been, like, shoplifting taking place" and he would not have noticed it during his examination of the video because his sole purpose was watching the video to see if Mr. Powell had exposed himself. R 483. His response was in the context of a jury question, which merely queried the officer about the video depiction (as opposed to relying on the prosecution witnesses'

testimony) as to whether the witnesses were close enough to Mr. Powell to get a good look at how or if he was in fact exposed. The officer could have simply responded, I didn't preserve the video or I don't recall. He similarly contended that he didn't know the approximate amount of minutes that he had observed Mr. Powell on surveillance video (i.e. the amount of time and the number of angles from which the surveillance video could have determined whether he was exposed or not), R 483-84 – which goes to the heart of why the officer's statements do not suffice nor can they substitute for the jury's ability to rely on the video itself. *Compare DeJesus,* 2017 UT 22, ¶ 48 ("The motivation, frankly, to destroy or fail to preserve such a recording would come if the recording supported some other factual situation than the one [the officer] describes. Thus, there may have been some motivation by the State to permit the footage to be recorded over and lost.").

The officer's loss or destruction of the Shopko video was thus more glaring than the lost video in *DeJesus* (which warranted a dismissal). Aside from officer's ability to physically obtain the Shopko video at the onset of his investigation, the Walmart and Shopko incidents were handled quite symmetrically by Anastasia Rasmussen and her mother, Jennifer Holdaway (two of the prosecution witnesses). With little hesitation, the witnesses reported the incidents and there was ample time for each and every store video surveillance footage to be preserved.

The jurors, themselves, asked about the video as they wanted to know the amount

of recorded footage time or the angles from which the video "would've showed whether the defendant was exposed or not?" R 483-84. The questions posed by the jury occurred *after* Anastasia Rasmussen and Jennifer Holdaway had already both testified. Not content with the two prosecution witnesses' prior and completed testimony, the jury asked the investigating officer who had watched the video,"How many minutes approximately of surveillance video from ShopKo were from an angle that would've showed whether the defendant was exposed or not?" R 483-84. The jury's questions reflected the importance of the video and the prejudicial impact of the footage not being preserved to answer the uncertainties lingering in the juror's minds. *DeJesus,* 2017 UT 22, ¶ 53 ("The surveillance footage would have changed the entire nature of the case, . . . Indeed, we can conceive of no other evidence that would be as helpful or probative than an actual video recording of the events. Nor can we think of other evidence that can serve as an adequate replacement").

The timing of the jury's questions, which took place at the end of the State's case-in-chief or after its last witness had testified (third of three witnesses), R 484, equally reflects that the prosecution witnesses' testimony was not necessarily definitive nor accepted at face value by the jury. At the point in time when the State was ending its presentation of evidence, the jury still thought the video was important and that the completed testimony had holes in it.

Following all of the State's testimonial presentation, the jurors continued to ask

about how long the video was or wouldn't the video have shown whether the defendant was exposed. R 484. Even after they heard the officer testify about Mr. Powell's purported admissions (albeit distinguished on cross-examination as referring to his thrill seeking incidents in the past), the jury continued to probe for more evidentiary details or independent corroboration from the video itself. R 484.

In another note to the court, the jurors asked a question that each store video surveillance footage would have been able to answer: "Distance [of witnesses] to defendant when penis viewed at Wal-Mart and ShopKo, one of these was from behind him, clarify, including distance." R 451. The jurors' question was at the close of the testimony by Jennifer Holdaway, the only other eyewitness at the scene. Hence, the second of two witnesses had both claimed to have seen his penis, but the jurors' note indicated that they were still questioning whether to believe them or the extent of the exposure. The note was not just for a single store incident, it addressed the witness' viewing of the penis at both Wal-Mart and ShopKo. The jurors' note twice referred to "distance," which is often a key factor in determining the level of certainty or the likelihood of being (in)correct in any identification process. *See* MUJI CR404(1)(c) Eyewitness Identification [Long instruction] ("Many factors affect the accuracy of identification . . . you should consider . . . the distance between the witness and that person").

Thus, while the prosecution witness' testimonial identification and claimed

certainty in seeing that Mr. Powell had exposed himself should have been enough, the jurors' note twice asked about distance. Ms. Rasmussen said, "I was within arm's reach" when she came up from behind him, R 446, yet the jurors' note wanted objective confirmation through the video.

The video from both stores would have given the jurors the answers to their questions for both occasions. For each store, the video also would have objectively shown the distance between the parties during their time in the store (for identification accuracy), the involved angles for viewing, and a host of other factors including whether or not he was exposed. *Id.* (most of the factors set forth in the entire Long instruction would have been covered by the video footage from both Wal-Mart and ShopKo). Prior counsel performed ineffectively and prejudicially in not moving to dismiss the case. *DeJesus,* 2017 UT 22, ¶ 54 ("given the indisputably central role a video recording of the incident would play, we cannot say that the loss of the evidence had only a negligible impact on Ms. DeJesus's right to a fundamentally fair trial").

Mr. Powell disputes the detective's subjective interpretations as to what the officer believed Mr. Powell's meant to say or how Powell's statements were interpreted or perceived by the officer. The officer's interview with Steve Powell was not recorded, nor were *Miranda* protections extended to him. In order to address such issues, his Rule 23B motion, memorandum, and affidavit were separately filed for this Court's consideration.

CONCLUSION

Mr. Powell respectfully requests this Court to hold that prior counsel was ineffective in not moving to dismiss his case based on the State's due process violation for losing or destroying critical video store surveillance footage. Alternatively, counsel performed ineffectively in not moving to dismiss the matter based on governing case law concerning the sufficiency of the evidence, particularly the lascivious type of mens rea requirement that was lacking in the case at bar. In addition, counsel should have objected to the flawed jury instructions on the incorrectly listed elements of the offense, which necessitates a new trial.

DATED this 8th day of February, 2019.

/s/ Ronald Fujino
Attorney for Mr. Powell

CERTIFICATE OF SERVICE

I certify that on February 8, 2019, a true copy of the forgoing Brief of Appellant was served upon counsel of record at:

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

X 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 within 7 days.

/s/ Ron Fujino

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,795 words, excluding the table of contents table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

X 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/ Ron Fujino
RONALD FUJINO

ADDENDUM

JURY INSTRUCTIONS

THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

State of Utah, Plaintiff,	:	**JURY INSTRUCTIONS**
Steven Norman Powell, Defendant.	:	Case No. 151913515

This Jury is hereby charged with the law that applies to this case in the following instructions, numbered 1 through 21, inclusive.

Dated this 3rd day of October, 2017.

STATE OF UTAH THIRD DISTRICT COURT SALT LAKE CITY

Honorable Mark S. Kouris
Third District Court

Instruction No. 1

Members of the jury, you now have all the evidence. Three things remain to be done: First, I will give you additional instructions that you will follow in deciding this case. Second, the lawyers will give their closing arguments. The prosecutor will go first, then the defense. Because the prosecution has the burden of proof, the prosecutor may give a rebuttal. Finally, you will go to the jury room to discuss and decide the case.

Instruction No. 2

As jurors you will decide whether the defendant is guilty or not guilty. You must base your decision only on the evidence. Evidence usually consists of the testimony and exhibits presented at trial. Testimony is what witnesses say under oath. Exhibits are things like documents, photographs, or other physical objects. The fact that the defendant has been accused of a crime and brought to trial is not evidence. What the lawyers say is not evidence. For example, their opening statements and closing arguments are not evidence.

Instruction No. 3

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

Instruction No. 4

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

Instruction No. 5

Remember, the fact that the defendant is charged with a crime is not evidence of guilt. The law presumes that the defendant is not guilty of the crime(s) charged. This presumption persists unless the prosecution's evidence convinces you beyond a reasonable doubt that the defendant is guilty.

Instruction No. 6

The prosecution has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the prosecution's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

Instruction No. 7

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other. Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained. Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained. Before you can find the defendant guilty of any charge, there must be enough evidence - direct, circumstantial, or some of both - to convince you of the defendant's guilt beyond a reasonable doubt. It is up to you to decide.

Instruction No. 8

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

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

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

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

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

Instruction No. 9

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

Instruction No. 10

A person accused of a crime may choose whether or not to testify. In this case the defendant chose not to testify. Do not hold that choice against the defendant. Do not try to guess why the defendant chose not to testify. Do not consider it in your deliberations. Decide the case only on the basis of the evidence. The defendant does not have to prove that he or she is not guilty. The prosecution must prove the defendant's guilt beyond a reasonable doubt.

Instruction No. 11

A person cannot be found guilty of a criminal offense unless that person's conduct is prohibited by law, AND at the time the conduct occurred, the defendant demonstrated a particular mental state specified by law. "Conduct" can mean both an "act" OR the failure to act when the law requires a person to act. An "act" is a voluntary movement of the body and it can include speech. As to the "mental state" requirement, the prosecution must prove that at the time the defendant acted, he/she did so with a particular mental state. For each offense, the law defines what kind of mental state the defendant had to have, if any. For some crimes the defendant must have acted "intentionally" or "knowingly." For other crimes it is enough that the defendant acted "recklessly," with "criminal negligence," or with some other specified mental state. Later I will instruct you on the specific conduct and mental state that the prosecution must prove before the defendant can be found guilty of the crime(s) charged.

Instruction No. 12

The law requires that the prosecutor prove beyond a reasonable doubt that the defendant acted with a particular mental state. Ordinarily, there is no way that a defendant's mental state can be proved directly, because no one can tell what another person is thinking. A defendant's mental state can be proved indirectly from the surrounding facts and circumstances. This includes things like what the defendant said, what the defendant did, and any other evidence that shows what was in the defendant's mind.

Instruction No. 13

A person acts "intentionally" or "with intent" when it is his/her conscious objective is to engage in a certain conduct or cause a certain result.

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

A person acts "recklessly" when he/she is aware of a substantial and unjustifiable risk that certain circumstances exist relating to his/her conduct, consciously disregards the risk, and acts anyway. The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

A person acts with criminal negligence when he/she should be aware that his/her conduct creates a substantial and unjustifiable risk that a particular result will occur. The nature and extent of the risk must be of such a magnitude that failing to perceive it is a gross deviation from what an ordinary person would perceive in that situation.

The concepts of "recklessness" and "criminal negligence" are similar in that both require the presence of a substantial and unjustifiable risk. They differ in that it is reckless to act if one *is aware* of the risk, while it is criminally negligent to act if one *should be aware* of the risk. In either event, the behavior must be a gross deviation from what an ordinary person would do under the same circumstances.

Instruction No. 14

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

Instruction No. 15

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

Instruction No. 16

Unless these instructions give a definition, you should give all words their usual and ordinary meaning.

INSTRUCTION NO. 17

"Any other act of lewdness" includes acts of the same general kind, class, character, or nature as the enumerated conduct of public intercourse, sodomy, exposure of the genitals or buttocks, or masturbation.

"Sodomy" includes any sexual act involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.

INSTRUCTION NO. 18

STEVEN NORMAN POWELL is charged in Counts1 with Lewdness occurring between October 1, 2014 through October 31, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. STEVEN NORMAN POWELL;
2. Intentionally, knowingly, or recklessly performed any of the following acts:
    a. An act of sexual intercourse or sodomy;
    b. Exposed his genitals, buttocks, anus, or his pubic area;
    c. Masturbated; or
    d. Any other act of lewdness
3. And did so
    a. In a public place or
    b. Under circumstances which the defendant should have known would likely cause affront or alarm to another 14 years of age or older.

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

INSTRUCTION NO. 19

STEVEN NORMAN POWELL is charged in Count 2 with Lewdness occurring on November 28, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

4. STEVEN NORMAN POWELL;
5. Intentionally, knowingly, or recklessly performed any of the following acts:
    a. An act of sexual intercourse or sodomy;
    b. Exposed his genitals, buttocks, anus, or his pubic area;
    c. Masturbated; or
    d. Any other act of lewdness
6. And did so
    a. In a public place or
    b. Under circumstances which the defendant should have known would likely cause affront or alarm to another 14 years of age or older.

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

Instruction No. 20

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach a unanimous agreement on a verdict. Listen carefully and respectfully to each other's views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence. Try to reach unanimous agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own. Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found "guilty" or "not guilty." In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment as to whether the evidence presented by the prosecutor proved each charge beyond a reasonable doubt.

Instruction No. 21

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury. For each offense, the verdict form will have two blanks—one for "guilty" and the other for "not guilty." The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision. In filling out the form, the foreperson needs to make sure that only one blank is marked for each charge.