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UTAH APPELLATE COURTS

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Case No. 20180131-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

GILBERTO MARTINEZ,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for two counts of sodomy on a child, both first degree felonies, in the Fourth Judicial District, Utah County, the Honorable Darold McDade presiding

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INTRODUCTION

Defendant, who is in his thirties, first tried to date Child's mother. After Mother rebuffed Defendant's advances, he dated Child's grandmother, who is in her sixties. Defendant married Grandmother, thus, becoming Child's step-grandfather.

When Child was five years old, Defendant forced his penis into her mouth on two separate occasions. A jury convicted Defendant of two counts of sodomy on a child.

Following his trial, Defendant moved to arrest judgment, arguing that his trial counsel was ineffective for (1) not calling Grandmother or Defendant

to testify, and (2) not moving to suppress Defendant's police interview.[1] The trial court denied Defendant's motion, finding that trial counsel performed effectively.

Defendant lodges three challenges the trial court's ruling. Defendant argues that his counsel was ineffective for (1) not calling Grandmother to testify, (2) not ensuring that Defendant waived his right to testify and advising Defendant not to testify, and (3) not moving to suppress Defendant's police interview because the *Miranda* warnings were inadequate.

Defendant's ineffectiveness claims fail. On this record, Defendant has not shown that no competent counsel would have performed as counsel did here. Defendant has not shown that all reasonable counsel would have strategized differently about calling Grandmother or Defendant to testify and not interpreted Defendant's silence as a waiver of his right to testify. And despite the trial court's findings to the contrary, Defendant cannot show that all reasonable counsel would have strategized differently about his police interview. Nor can Defendant show prejudice. Defendant has not shown a

[1] Defendant's post-trial motion was captioned "motion to arrest judgment, or alternatively" for a new trial. R517. Because Defendant moved before sentencing, it appears his motion was to arrest judgment, and not for a new trial. *See* Utah R. Crim. Proc. 23, 24. Thus, the State refers to his motion as a motion to arrest judgment throughout its brief.

reasonable probability that the result of his trial would have been more favorable had either Grandmother or he testified or had his police interview been suppressed.

STATEMENT OF THE ISSUE

Did the trial court correctly deny Defendant's motion to arrest judgment claiming that trial counsel was ineffective for: (1) not calling Grandmother to testify; (2) not ensuring Defendant waived his right to testify or advising Defendant not to testify; and (3) not moving to suppress Defendant's police interview?

Standard of Review. When a defendant raises an ineffective assistance of counsel claim in a post-trial motion, this Court reviews the trial court's ruling as a mixed question of law and fact, reviewing factual findings for clear error and application of the law to the facts under a correctness standard. *State v. J.A.L.*, 2011 UT 27, ¶20, 262 P.3d 1; *see also State v. Burnside*, 2016 UT App 224, ¶18, 387 P.3d 570.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Defendant, who is in his thirties, married Child's grandmother, who is in her sixties, thus, becoming Child's step-grandfather. R259-62, 660. When

Child was five-year-old, Defendant forced his penis into Child's mouth on two occasions. R952,954-55.

1. Child moved in with Grandmother.

When Child was two years old, she moved with her mother and older brother to her grandmother's house. R247-48, *see R*256, 288. Grandmother's house was approximately 700 square feet in size, had two bedrooms, and one bathroom. R241,249-50,301,487. Grandmother slept in one bedroom, Mother and Child shared the other bedroom, and Brother slept on the couch in the living room. R250; Defense Exhibit (DE) 1.

At some point after the family moved, Defendant befriended Mother. R256. Defendant first tried to date Mother, but Mother—who is married to Child's father—rebuffed Defendant's advances. R255-56, 257. Defendant then dated Grandmother, who was "in her 60's." R259-62,660. Eventually, Defendant moved in with Grandmother, Mother, Brother, and Child—sleeping in Grandmother's room. R260,282. About a year later, Defendant and Grandmother married. R547.

2. Defendant sodomized Child.

Around the same time Defendant moved in, Child's behavior changed. R263-64,282-85. Child—who was now five years old and potty-trained since she was three—started bedwetting every night. R288,303. Child became

"very clingy" to Mother and "very afraid." R263. Child was afraid of being alone, panicky, had nightmares, headaches, stomachaches, and high fevers. *Id*. Child refused to eat. R264. Child told Mother that "she couldn't swallow, that she was afraid to swallow." R264. When Mother took Child to the doctor, the doctor "never found anything" wrong with Child except "a sore throat, like red throat, but no sign of infection or anything." R263. Mother initially suspected something had happened to Child at daycare, but after talking with the daycare staff her suspicion was dispelled. R265-67,284,288-92,303. Child's symptoms escalated, forcing Mother to quit her job to care for Child because Child "was going to end up in the hospital." R279.

Two months after quitting her job, in September 2016, Mother went to California to renew her passport, leaving Child with Grandmother and Defendant. R31,269. Mother left Child in Grandmother's care because she "trusted [her] mom." R268. While Mother was gone, Defendant sodomized Child twice. R271. Child did not disclose the abuse for about seven months. *See* R207-08 (Mother travelled from September 22-26, 2016); R192 (Child disclosed around March 29, 2017).

3. Child discloses Defendant's abuse to Mother.

Three months after Mother's trip to California, Mother, Child, and Brother went to Costa Rica for two months to visit Child's father. R211. While

in Costa Rica, Child's nightmares and bedwetting stopped. R267-68. But within a week of returning to Grandmother and Defendant's house, Child's bedwetting and nightmares returned. *Id*. Mother also noticed that Child's behavior towards Defendant changed. R264. Child hid when Defendant came home from work and no longer went into Grandmother and Defendant's bedroom to play. *Id.*

Mother suspected Child had been abused. R269. Mother told Child if "anybody had ever done anything bad to her that, you know, she could tell [her], that she doesn't need to be afraid to say stuff like that." R270. Child simply replied, "yeah, I know," and Mother "left it at that." *Id.*

The next day, Child approached Mother and told her "mommy, do you know that sometimes grownups do bad things." *Id.* Mother replied, "yeah, what do you mean, what kind of things?" and Child explained that "sometimes when [she] goes into [Grandmother] and [Defendant's] room, [Defendant] will play his games with [me]." *Id.* When Mother asked Child "what kind of games," Child shrugged her shoulders and did not want to talk about it anymore. *Id.* Mother "didn't pursue it," telling Child that they did not have to talk about it if Child did not want to. *Id.*

A "couple of days later," Mother asked Child if she wanted to talk about the games Defendant played with her and Child agreed. *Id*. Mother

asked Child if Defendant had ever shown Child his "private parts," and Child said, yes, then she became "shy" and did not want to talk about it. *Id*.

The next time Mother asked Child if she wanted to talk about Defendant's games, Child went into more detail. R271. Mother asked Child "what kind of things [Defendant] would do with his private parts." *Id.* Child said that on two occasions Defendant "put his thing in her mouth" when she was on the bed in Defendant and Grandmother's room. *Id*. Mother did not have any other conversations with Child about the abuse. *Id*. Mother took Child to her therapist and then reported the abuse to Child Protective Services. R271-72.

4. Child's CJC interview.

A case manager with Child Protective Services interviewed Child at the Children's Justice Center (CJC). R192. Child disclosed that when Mother travelled to California, Defendant put his "private parts" in her mouth on two separate occasions. R952,954-55.

The first time Defendant sodomized her, Child went into Defendant and Grandmother's room looking for Grandmother. R955. Defendant was asleep in bed. R256. Child sat on the bed waiting for Grandmother, but Grandmother was in the kitchen "cooking for like ten hours." R955-56. When Defendant woke up, he "put his private in [Child's] mouth." R956. Child

escaped, ran to her bedroom, "got so scared," and turned on the TV to "forget it." R956-57.

Child explained that Defendant's "private part" was something that "females don't have," that what happened "wouldn't be possible" without "the thing," that it was "longer" than a female private part, has a hole "that makes them go," and felt "soft" in her mouth. R958.

The second time Defendant sodomized Child was "exactly the same" as the first time except Defendant wore only a shirt and "white stuff were coming out [sic]." R960,964.[2] After explaining that "white stuff" came out, Child told the caseworker that "your brain makes you remember and stuff and [she] remember that [she] wasn't like that because [her] uncle doesn't drink milk or nothing," "he just drinks soda and water." R961. A few minutes later, Child clarified that when Defendant's penis was in her mouth that "white stuff comed out [sic]." R963. Child explained that she did not yell for help during the abuse because she "can't talk without [her] mouth." R966.

[2] During the CJC interview, Child said that Mother told her "sometimes white stuff comes out." R959. However, at trial, Mother testified that she never told Child that. R300.

And like the first episode, after Defendant sodomized her, Child escaped, ran to her room, "watched TV," and "forget [sic] it." R961. Child also explained that "this is kind of hard to remember." R962.

Child explained that she decided to tell Mother what happened because her friend Mia wanted to play at her house and she wanted to "keep nother girls safe." R967-68.

5. Police investigation.

After Child's CJC interview, Defendant was arrested. R275. Although Defendant understands "basic English," his primary language is Spanish. R344. Detective Adams, who does not speak Spanish, arrested Defendant along with a Spanish-speaking patrol officer. R441. The Spanish-speaking patrol officer told Defendant "there was an accusation" and the officers wanted to discuss it with Defendant. *Id*. The Spanish-speaking officer informed Defendant of his right to have an attorney and his right to remain silent. R558. Because the Spanish-speaking officer's Spanish was limited, Detective Lee, who is a native Spanish-speaker, took over the interview. R342-43. Lee informed Defendant of his Miranda rights in Spanish. R592. Defendant then agreed to speak with Lee. R345. .

When confronted with Child's disclosure, Defendant's first response was to downplay his interaction with the family in the house. R347.

Defendant "continued to try to disengage with the family," telling the detective that he "just goes to work, come[s] home, and then pretty much stays in his room watching TV." R349. Defendant told Lee that Child had "never been to [his] room, before." R347. Later in the interview, Defendant conceded that in the three or four years he lived with Child, Child had "maybe" been in his room "once or twice" when Grandmother was either in the kitchen or bathroom. R351,357. Defendant also told the detective that "every time that the kid is around him, either [Grandmother] or [Mother] are present." R348. Defendant admitted that Mother travelled to California leaving Child in Grandmother's care and that he was at the house during that time. R349-50, 369. Defendant also admitted that he played with Child, but claimed the play was limited to things like merely "like tossing a ball." R358.

B. Summary of proceedings and disposition of the court.

Defendant was charged with two counts of sodomy on a child, both first degree felonies. R2-3.

1. Trial.

At trial, Child's therapist, a licensed clinical social worker, testified as an expert in child sexual abuse. R422-28; *see also* R99. The most common behaviors that sexually abused children exhibit are extreme isolating behaviors, such as extreme clinginess, nightmares or difficulty sleeping at all,

bedwetting, difficulty focusing, extreme aggression or extreme passivity. R427. Children do not typically disclose all incidents of sexual abuse in a single session, but the details of the abuse come out over time. R429-30. It is common for children to delay disclosing sexual abuse. R430. And children sometimes recant because of fear or because the child believes that she has caused too many problems. R435.

In addition to presenting Child's videotaped CJC interview, Child testified. R139,308. Child initially liked Defendant and went into his room sometimes but her feelings changed when he started sexually abusing her. R317,326. When Mother went to California, Child played a game with Defendant in his room, then Defendant played "the bad game." R328. "[F]ive or six" times, Defendant laid Child on his bed and "put his private part into [her vagina]." R317,328-29,332. Defendant then put his penis in Child's mouth. R317. Sometimes "white stuff" went into Child's mouth. R334. Child felt "the white stuff" in her mouth "and it was gross." *Id.* If Defendant ejaculated in her mouth, sometimes Child would throw it up and other times she would wash out her mouth in the bathroom. *Id*. After Child would escape from Defendant, she would "hide in [her] room." R328,329.

Child described Defendant's penis as "kind of like a snake, most boys have it," "[i]t's like mostly to like pee," and "it was like, usually like on the

bottom, like on this side between the legs." R318-19. She also described Defendant's penis as "soft at first, weird too, kind of like the skin, like it felt like skins, it's not like normal skin, but it was like squishy stuff." R320.

After Defendant sexually abused her, Defendant told Child that it "was a secret." R329. Defendant also threatened to kill Mother if Child disclosed the abuse. R330.

Child explained that even though Grandmother and Brother were home when Defendant abused her, neither knew what Defendant was doing. *Id.* Child never yelled out to Grandmother and never told Brother. *Id.* Child also explained that she was "hiding the secret until" they moved out of Grandmother and Defendant's house. *Id.*

Defense. Defendant did not testify at trial. Counsel cross-examined each witness, exposing inconsistencies between Child's CJC interview and her trial testimony and trying to show that Child was coached. R317-19,332-33. Counsel cross-examined the caseworker on proper interview techniques and whether Mother's questioning of Child tainted Child's memory. R194-201. He also elicited testimony that Child's disclosure was "a little bit inconsistent." R199. Counsel cross-examined Child's therapist, eliciting testimony that children who were not sexually abused may exhibit the same behaviors of a sexually abused child, including bedwetting. R431-33.

In closing argument, counsel argued that Mother did not like Defendant, coached Child, both Child and Mother testified inconsistently, the police did not investigate, and even though Defendant was scared in his police interview, he was forthcoming. R476-89.

Verdict. The jury found Defendant guilty as charged. R502.

2. Motion to Arrest Judgment.

Represented by new counsel, Defendant moved to "arrest judgment/for a new trial," arguing that his trial counsel was ineffective for (1) not calling Grandmother as a witness; (2) not ensuring Defendant waived his right to testify and advising Defendant not to testify; and (3) not moving to suppress Defendant's police interview because the Miranda warnings were inadequate. R517. In support of his claims, Defendant attached a partial translation of Defendant's police interview; however, the English translated section was partially cut off. R551-58, 552, n.1; (attached as Addenda C). He also provided affidavits from Grandmother and himself. R543-550.

Grandmother averred that she would have contradicted much of child and Mother's testimony. R543-50, 705-06. However, Grandmother also would have testified, among other things, that after Defendant moved in, Child was treated for a rash near her vagina and Child's behavior toward Defendant

changed. R547. Her affidavit also stated that she spoke with trial counsel in preparation for trial and that she wanted to testify. R544.

Defendant averred that he told his trial counsel that he wanted to testify, but his counsel would not listen to him and advised him that he "should not testify." R709.

The State opposed Defendant's motion. R571.

At the evidentiary hearing, only trial counsel testified. R596. Counsel testified that he had been practicing law for two years and practiced "[e]xclusively criminal defense." R599. He testified that Defendant's case was his third child-sexual-assault case that year. R632. In his other two cases, counsel advised the defendants not testify, one case resulted in a not-guilty verdict and the other pleaded halfway through trial. R632,655-56.

Here, counsel reviewed and discussed the discovery with Defendant, R600-602; independently investigated the case, R603; translated all Spanish discovery, including, into English, R603-04; and had a Spanish-speaking legal assistant provide legal research, and help develop defense theories, R616.

Counsel testified that he researched potential *Miranda* issues and determined that any *Miranda* issue was not worth pursuing. R604.

Before trial, counsel met with Defendant "at least a dozen" times at the jail and again before each hearing. R605-06. "[Q]uite a while before trial,"

counsel discussed with Defendant his right to testify, and whether Grandmother would testify. R610-11.

Counsel initially thought Grandmother's testimony might be helpful because it could contradict Mother's testimony about Child's behavior and whether Defendant was ever alone with Child. R612,633,638-39,641. Counsel met with Grandmother almost weekly and again during the trial to review her potential testimony. R610-12, 635. On the last day of trial, counsel decided to not call Grandmother as a witness because it "would not be beneficial to the case." R612. When counsel informed Defendant that Grandmother would not testify, Defendant "was not happy." R613-17.

Counsel based his decision on several factors. R666. Counsel was concerned that the jury would find Grandmother "not credible" because her timelines were inconsistent, and she took "very strong positions" that counsel "personally found to be not credible." R612-13,645-46,665. Counsel believed that if he had doubts about Grandmother's credibility, a jury would too. R646,665. Grandmother's testimony would also contradict Defendant's testimony if Defendant chose to testify. R612,634,657,359,661. And counsel was concerned that Grandmother was biased because she was married to Defendant and her testimony would highlight the age discrepancy between them. R612,634,657,359,661. The age discrepancy was not presented directly

to the jury, but had Grandmother testified, it would have been. R660,665-67. Counsel was concerned that the jury would be affected by seeing Defendant, a "man in his 30s married to a woman in her 60s," and then question Defendant's sexual proclivities. R660. Counsel also noted that Grandmother was a "very emotional woman" who sobbed loudly through part of the trial. R634.

Counsel discussed "many times" with Defendant his right to testify and whether he should testify. R618. Counsel explained that he would give Defendant a recommendation about testifying after preparing a defense and seeing how the trial developed. R630-31. Counsel explained that the decision to testify "ultimately" belonged to Defendant. R618. Counsel also reviewed with Defendant what his potential testimony would be if he chose to testify. R620. Counsel never told Defendant that he could not testify and Defendant never demanded to testify. R655.

The day before the last day of trial, counsel, with the help of a translator, told Defendant that he "was leaning toward advising him not to take the stand at trial." R619. Defendant did not have "much of a reaction," he was not upset and did not protest. *Id.*

The next day at trial, counsel again advised Defendant not to testify. R619-20. Defendant again did not have much of a reaction, and did not complain or protest. R620.

Counsel advised Defendant not to testify because, after assessing the State's case, he believed that the State had not met its burden and Defendant would be found not guilty. R631,651-53,661-62. Counsel based his advice on the inconsistencies in Child's testimony and Child's having conceded facts helpful to the defense. R624,631,652-54. Counsel believed that Defendant's testimony would be more harmful than helpful because it "opened the door to hurtful things in the case," like statements Defendant made during his police interrogation. R622. Counsel also believed that Defendant's "strong positions would make him seem not credible." R622-23,627,630.

When advising a defendant about testifying, counsel also considers the defendant's mannerisms and how that defendant answers questions. R629-30. Counsel testified that Defendant had "issues" in that respect. *Id.*

Following the evidentiary hearing and oral argument, the trial court denied Defendant's motion. R886-92. Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the trial court found that trial counsel "acted within the reasonable standard of care" when he decided not to call either Grandmother or Defendant to testify. R887-888. Relying on *State v. Garcia*, 2017 UT 53, 424

P.3d 171, the court found that Defendant had not proven prejudice because neither Grandmother nor Defendant's testimony was reasonably likely to have changed the outcome of the trial. R888.[3]

However, the trial court found that trial counsel performed deficiently for not moving to suppress Defendant's police interview. R889. Relying on *State v. Millett*, 2015 UT App 187, 356 P.3d 700, the court found that both the police officer and detective gave Defendant constitutionally deficient *Miranda* warnings. R889-90. But the court found that Defendant was not prejudiced by counsel's error because "even if prior counsel timely filed a motion to suppress, and the police interview was excluded, it would likely not have changed the outcome of the case." R891. The court explained that Child was "a credible witness, and described in detail the events of the case, knowing that as a child she would unlikely to have acquired these specific details from other people around here." *Id.* The court also noted that because the State did not call the officers to testify during the preliminary hearing, their testimony was not essential to prove the case. *Id.*

[3] As Defendant acknowledges, the trial court did not specify which *State v. Garcia* it was referencing. The State agrees with Defendant that the trial court was referencing *State v. Garcia*, 2017 UT 53, 424 P.3d 171. *See* Br.Aplt. 46.

Thereafter, the trial court sentenced Defendant to two concurrent prison terms of twenty-five years to life. R721.

Defendant timely appeals. R726.

SUMMARY OF ARGUMENT

Defendant challenges the trial court's denial of his motion to arrest judgment, arguing in three separate claims that his counsel was ineffective.

Point I. Defendant argues that his counsel performed deficiently because he did not call Grandmother to testify and did not investigate what Grandmother's testimony would have been. Defendant argues that had Grandmother testified, there was a reasonable probability that he would have received a more favorable outcome. Defendant's claim fails. Defendant cannot prove that all reasonable counsel would have strategized differently about calling Grandmother to testify. Counsel testified that he did not call Grandmother as a witness because her potential testimony was not credible and would have harmed Defendant's case. That reason alone defeats Defendant's claim. Nor can Defendant prove prejudice because the evidence against Defendant was substantial and Grandmother's potential testimony was unlikely to have changed the evidentiary landscape.

Point II. Defendant argues that his counsel was ineffective because he advised Defendant not to testify and did not ensure that Defendant waived

his right to testify. Defendant's claims fail because he does not acknowledge—let alone challenge—the trial court's finding that counsel reasonably chose to advise Defendant not to testify, and Defendant had not proven prejudice.

Regardless, Defendant has not proven that his counsel performed deficiently for interpreting Defendant's silence as a waiver of his right to testify. Counsel testified that he interpreted Defendant's silence as a waiver based on his other interactions with Defendant. Defendant has not proven that counsel's advice that Defendant should not testify was deficient because counsel testified that Defendant's testimony would be more harmful than helpful to his cause. Nor can Defendant show prejudice because the evidence against him was substantial and his testimony was unlikely to help him.

Point III. The trial court found that counsel performed deficiently because he did not move to suppress Defendant's police interview. However, the trial court found that Defendant did not prove *Strickland*'s prejudice element, and therefore had not met his burden to prove that his counsel was ineffective.

On appeal, Defendant challenges the trial court's prejudice finding. Defendant's claim fails because he has not proven that his police interview so

altered the evidentiary picture that but for its admission there was a reasonable likelihood he would have received a more favorable result.

In any event, this Court can affirm on any ground apparent in the record. And here, the trial court erroneously found that counsel performed deficiently. The record does not show that all competent counsel would have moved to suppress Defendant's police interview.

ARGUMENT

I.

The trial court properly denied Defendant's motion to arrest judgment because Defendant failed to rebut the strong presumption that his trial counsel provided effective assistance.

Defendant argues that the trial court erred when it denied his motion to arrest judgment and found that trial counsel performed effectively. Br.Aplt.44-46. As mentioned, Defendant argues that his trial counsel was ineffective for: (1) not calling Grandmother to testify, Br.Aplt.36-44; (2) advising Defendant to not testify and not ensuring that Defendant waived his right to testify, Br.Aplt.51-53; and (3) not moving to suppress his police interview, Br.Aplt.49-51. Defendant's claims fail. On this record, Defendant cannot meet his heavy burden under *Strickland* to prove that his counsel was ineffective.

To show that his counsel was ineffective, Defendant must prove that his counsel performed deficiently and that he was prejudiced as a result. *See Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984); *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92. Defendant must prove both elements. *See Strickland*, 466 U.S. at 697. Under *Strickland*, it is never enough to "show that counsels' performance could have been better" or that it "might have contributed to [a] conviction." *State v. Tyler*, 850 P.2d 1250, 1258–59 (Utah 1993). Instead, Defendant must show "*actual unreasonable representation and actual prejudice*." *Id.* 1259 (emphasis in original). This standard is "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986). And "[s]urmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To show that his counsel performed deficiently, Defendant must show more than that there was no conceivable tactical basis for his counsel's actions. *Strickland* measures deficient performance by whether counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688. Thus, the determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

An evaluation of possible strategic reasons for counsel's decisions is relevant to a *Strickland* deficient-performance analysis, but it is not dispositive. Possible strategic explanations are relevant because *Strickland* recognizes that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Thus, to ensure counsel the flexibility to defend their clients in the way they believe is most effective, the *Strickland* standard "strongly presume[s]" that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Id.* 690.

Given this presumption, when conceivable tactical bases support trial counsel's actions, a defendant has not rebutted the strong presumption that his counsel performed reasonably. *See State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (explaining that defendant claiming ineffective assistance must show that "there was *no conceivable tactical basis* for counsel's actions") (cleaned up) (emphasis in original). The *Strickland* presumption of a sound strategy thus can be dispositive to the extent it is relied on to find that counsel's performance was reasonable.

But the lack of a considered strategic basis for counsel's performance cannot alone support a finding of deficient performance. Again, [t]he relevant

question is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. Therefore, counsel's performance is not deficient merely because a reviewing court cannot conceive of a tactical basis for counsel's performance.

Further, "reasonable" representation does not mean "best" representation. The purpose of the Sixth Amendment right to counsel "is not to improve the quality of legal representation.'" *Flores-Ortega*, 528 U.S. at 481 (quoting *Strickland*, 466 U.S. at 689). Rather, it is "'simply to ensure that criminal defendants receive a fair trial.'" *Id*. (quoting *Strickland*, 466 U.S. at 689). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Counsel may "focus[] on some issues to the exclusion of others." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "The Sixth Amendment," therefore, "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Id*. at 6; *accord Burt v. Titlow*, 571 U.S. 12, 24 (2013); *Strickland*, 466 U.S. at 689.

At bottom, then, counsel performs deficiently only when "no competent attorney" would have proceeded as counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011).

To prove prejudice, Defendant must prove "a reasonable probability" that but for counsel's performance, "the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* However, the "likelihood of a different result must be substantial, not just conceivable," *Richter*, 562 U.S. at 112. The defendant "has the difficult burden of showing…*actual prejudice*." *Tyler*, 850 P.2d at 1259 (cleaned up).

In assessing whether Defendant has carried his burden, this Court "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Defendant must show that any overlooked evidence or objections would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *Id.* 695-96.

A. Defendant has not proven that his counsel was ineffective for not calling Defendant's wife to testify or that his counsel was ineffective for allegedly not investigating Defendant's wife's testimony [4]

Defendant challenges the trial court's finding that counsel was effective, arguing that his counsel performed deficiently because he did not call Grandmother to testify and did not investigate what Grandmother's testimony would have been. Br.Aplt.43. He argues that but for counsel's alleged errors "the verdict would have been different" because Grandmother's testimony would have contradicted the State's witnesses. Br.Aplt.47. On this record, Defendant has not proven that the trial court's findings were clearly erroneous. Nor has he met his heavy burden to prove that his counsel was ineffective.

1. Defendant has not proven deficient performance.

Defendant cannot prove that his trial counsel performed deficiently for not calling Grandmother as a witness. Decisions about which witnesses to call, if any, are tactical decisions that are "generally left to the professional judgment of counsel." *Adams v. State*, 2005 UT 62, ¶25, 123 P.3d 400 (cleaned up); *see also State v. Curtis*, 2013 UT App 287, ¶33, 317 P.3d 968. "Counsel's conduct is not unreasonable when he chooses not to call potential witnesses

[4] This Point responds to Defendant's Points I.A-C. *See* Br.Aplt.34-48.

whom he deems to be inconsistent and lacking credibility." *State v. Griffin*, 2015 UT 18, ¶55, ---P.3d ---. That is the case here.

At the evidentiary hearing, counsel testified that he did not call Grandmother to testify because, in his opinion, she was not credible, her testimony "would not be beneficial to the case," and he was worried the jury would think she was "a liar." R612-13, 645-46, 665. Defendant has not shown that counsel's assessment was erroneous. He therefore cannot rebut *Strickland's* presumption that counsel's decision was sound trial strategy. *See Griffin*, 2015 UT 18, ¶55.

But counsel had additional reasons for not calling Grandmother to testify. Grandmother was biased—she was Defendant's wife—and was motivated to protect him. R661. Grandmother's answers to counsel's questions during her testimony preparation provided information that counsel did not want the jury to hear. R665. And her testimony would have contradicted Defendant's if Defendant had chosen to testify. R657,659. Contradictory testimony from Defendant's witnesses, even if that testimony may have contradicted a State's witness, would have been detrimental to Defendant's case.

Grandmother's presence on the witness stand would have also highlighted the extreme age difference between Defendant, who was in his

thirties, and Grandmother, who was in her sixties. R612,634,657,660-61. The discrepancy was not directly before the jury and counsel wanted to keep it that way. Counsel testified that when he conducted an informal poll, asking if Defendant's sodomy-on-a-child charges combined with the age difference between Grandmother and Defendant was problematic and raised questions about Defendant's sexual proclivities, he received "almost a unanimous yes." R660. It was reasonable for counsel to try to prevent the jury from thinking about Defendant's sexual proclivities or whether his sexual proclivities were outside of societal norms in a child sexual assault case.

Additionally, Grandmother was "very emotional," sobbing loudly in the courtroom during the trial. R660-61. Had Grandmother testified and cried throughout her testimony, that would not have benefited Defendant. Competent counsel could conclude that a sobbing witness unable to remain composed enough to answer questions will likely seem incredible and garner little favor with the jury. Competent counsel could further conclude that Grandmother's emotional state may have made her unpredictable. Concern about how Grandmother would react to the State's cross-examination would be reason enough for competent counsel not to call her as a witness.

Defendant also argues that counsel was unprepared and failed to investigate Grandmother's testimony. Br.Aplt.40,43-44. But the record refutes

his claim. Counsel testified that he met "almost on a weekly" with Grandmother and reviewed her potential testimony, including both his and Defendant's questions. R610-12,635. And Grandmother agreed. In her affidavit, she stated that she "spoke with [] Defendant's attorney in preparation for trial." R544.

Regardless, Defendant argues that the trial court erred when it denied his motion because "[n]either the State nor trial counsel were able to provide any evidence showing that [Grandmother's] testimony" would be harmed by cross-examination." Br.Aplt.45-46. But Defendant has things backwards. Neither the State nor trial counsel bear the heavy burden to show that counsel's assistance was effective. Rather, Defendant bears the burden on appeal, just as he did below, to rebut the strong presumption that his counsel performed reasonably and, if Defendant can make that showing, to then also prove prejudice. *Strickland*, 466 U.S. at 687-89, 694.

Defendant also argues that counsel was ineffective because he informed the jury during opening argument that Grandmother would testify, but then did not call her as a witness, deciding the night before the last day of trial to not call Grandmother. Br.Aplt.40,45. Neither counsel's opening remarks nor the timing of counsel's decision make him ineffective. And Defendant cites to no case stating otherwise. Indeed, counsel had a

conceivable tactical basis for discussing Grandmother's testimony in his opening statement. Counsel was thereby able to suggest to the jury the substance of Grandmother's testimony without subjecting her to cross-examination or worrying about the multitude of problems her testimony would have created for Defendant. *See Clark*, 2004 UT 25, ¶7 (when a conceivable tactical basis supports counsel's actions, defendant has not rebutted the strong presumption that counsel performed reasonably). Regardless, Defendant cites no controlling authority establishing that counsel must call a witness who he ultimately believes will harm the defense, merely because he initially planned to call the witness and mentioned the witness in his opening statement.

Thus, Defendant has not shown that no competent counsel would have proceeded as his counsel did here.

2. Defendant has not proven prejudice.

Defendant also challenges the trial court's finding that he did not prove prejudice. Br.Aplt.46-48. Defendant argues that the trial court's finding was incorrect because, first, its reliance on *State v. Garcia*, 2017 UT 53, 424 P.3d 171 was erroneous, and second, had Grandmother testified, there was a reasonable probability that Defendant would have received a more favorable outcome. *Id*. Defendant's claims lack merit.

Defendant argues that the trial court should not have relied on *State v. Garcia*, 2017 UT 53, 424 P.3d 171, because it discusses whether counsel was ineffective for approving an erroneous jury instruction, and is therefore inapplicable. *Id.* Although Defendant correctly characterizes the substance of the ineffectiveness claim in *Garcia*, Defendant is incorrect that *Garcia* is inapplicable to whether he satisfied *Strickland's* prejudice element.

In *Garcia,* the supreme court discussed the *Strickland* prejudice standard, explaining that claims of counsel's deficient performance are "subject to a general requirement that the defendant affirmatively prove prejudice." 2017 UT 53, ¶¶34-37. When the trial court ruled on Defendant's motion, *Garcia* was a new case, issued by the supreme court only five months earlier. *See id.* (*Garcia* was issued on August 23, 2017); R870 (trial court ruled January 29, 2018). Thus, the trial court properly relied on *Garcia's* recent articulation of the prejudice standard.

Defendant also cannot prove that the trial court erred when it found that Defendant failed to show a reasonable probability that Grandmother's testimony would have changed the outcome. R888. Defendant argues that the trial court was incorrect because Grandmother's testimony would have contradicted Child's and Mother's testimony, thus leading the jury to find Child or Mother not credible. Br.Aplt.48.

Defendant merely speculates that the jury would have credited Grandmother's testimony over Child and Mother's. Defendant ignores the substantial problems with Grandmother's possible testimony, including that counsel believed the jury would not find Grandmother credible. *See supra,* I.A.1.

Moreover, on this record, Defendant cannot prove that Grandmother's testimony would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *See Strickland*, 466 U.S. at 695-96. Child's behavior was consistent with the behavior of a sexual abuse victim. Child's therapist, an expert in child sexual abuse, testified that children who are sexually abused commonly exhibit extreme clinginess, nightmares, and bedwetting. R427. After Defendant moved in with Child, Child exhibited extreme behavior changes, including bedwetting, nightmares, loss of appetite, headaches, stomachaches, and high fevers. R263-64,288,303. Child's personality also changed. She became "very clingy" to Mother and "very afraid." R263. Child also acted differently around Defendant. She went from wanting to play in his bedroom to hiding from him. R264. But when Child was away from Defendant for two months, she stopped bedwetting and having nightmares. R267-68. And when Child

returned to Defendant's house, she started bedwetting and having nightmares again. *Id*.

Child's disclosure of the abuse was also typical of sexual abuse victims in general. The therapist further testified that a child typically discloses the details of the abuse over time. R433. A child may also build upon the original disclosure. *Id*. That is what Child did here.

Child first told Mother that when Mother was out-of-town, Defendant "put his thing in her mouth" on two occasions. R271. And Child told the caseworker the same thing. R952,954-55. Child never recanted but disclosed more abuse at trial. At trial, Child testified that five or six times, when her Mother was out-of-town, Defendant raped her and after raping her put his "private part" in her mouth. R317,328-29,332. Her trial testimony built on her prior disclosures.

Child's knowledge of male genitalia and sex was extensive, especially for a five-year-old. Child described Defendant's penis as "a snake," something "females don't have," and that a penis feels "soft," like skin but "it's not normal skin, but its like squishy skin." R318-20,333-34,411,958. Child also knew that "white stuff" sometimes comes out and described it as "gross." R334,963. When Defendant ejaculated in Child's mouth, she would either throw up or wash her mouth out. R334,963. There was no evidence that

Child gained this knowledge through any source other than the abuse she suffered at Defendant's hand.

Defendant contends that counsel's decision to not call Grandmother to testify prevented him from introducing evidence that Child may have learned adult themes from her Mother and that Child's nightmares were due to playing videogames. Br.Aplt.36-48. Defendant argues that Grandmother's testimony would have allowed him to also introduce evidence that Mother allegedly coached Child and that Mother allegedly lied about Child's behaviors changing. Finally, Defendant contends that Grandmother's testimony would have also allowed him to introduce that his story that he was never alone with Child and his theory that because Grandmother's house was small, Child's calls for help would have been heard. Br.Aplt.36-48. But the jury heard much of this evidence from other witnesses, yet, still found Defendant guilty.

The jury heard that Child claimed that Mother had told her about white stuff, R959; Mother initially thought Child was abused at daycare, R284; Child exhibited behavioral changes consistent with being sexually abused before she disclosed that Defendant abused her, R285; and Mother never saw any physical evidence of abuse, R290. The jury heard that Child played Zombie videogames, R314; and Mother did not like Defendant, believing that

he was "manipulating and controlling" Grandmother, R279. The jury also saw the size of Grandmother's house and the layout of the house, thus, it could have reasoned that had Child called for help, her calls would have been heard, Defense Exhibit 1.

And counsel argued in closing argument that Child's behavioral changes could be attributed to something other than sexual abuse, Child was coached, Defendant was not alone with Child on the dates of the abuse, and if Child called for help, her calls would have been heard. R476-89.

Indeed, the only evidence that Grandmother would have testified to that the jury did not hear was that (1) Child's behavior, particularly, the bedwetting, nightmares, and clinginess, were not new issues and (2) Child was treated for a rash near her vagina after Defendant moved in. R544-49. But Grandmother's potential testimony about Child's behavior was contradicted by Mother's testimony about the behavioral issues, the fact that Mother quit her job to care for Child, and the evidence that Mother took Child to a therapist because of the behavioral issues. R276,279. Moreover, Grandmother's testimony that Child went to a doctor for a rash near her vagina after Defendant moved in would have corroborated Child's testimony that Defendant raped her.

Because the jury heard much of the information that Grandmother would have testified to, and because the information it did not hear would not have been credible or helped Defendant's cause, Defendant cannot show that Grandmother's testimony would have created a reasonable likelihood of a more favorable result.

In sum, Defendant cannot show that the trial court erred when it denied his motion challenging counsel's strategic decision not to call Grandmother to testify.

B. Defendant has not proven that his counsel was ineffective for not ensuring Defendant waived his right to testify or advising him not to testify. [5]

Defendant argues that his counsel was ineffective because he advised Defendant not to testify and did not ensure that Defendant waived his right to testify. Br.Aplt.51-53. Defendant argues that his counsel performed deficiently because counsel "was unable to articulate a reasonable strategy for not allowing [Defendant] to testify," and, his counsel "failed to obtain [Defendant's] waiver of his right to testify." Br.Aplt. 52. Defendant argues that that had he testified, he would have received a more favorable outcome because Child's testimony was otherwise unrefuted. Br.Aplt.53.

[5] This Point responds to Defendant's Point II. *See* Br.Aplt.51-53.

As a threshold matter, Defendant does not acknowledge or challenge the trial court's findings below. The trial court found that counsel was not deficient for not calling Defendant as a witness and that Defendant had not proven prejudice. R886-88. Thus, Defendant's claim fails for that reason alone. *See State v. MacNeill*, 2017 UT App 48, ¶¶92-96 (MacNeill could not prove that the trial court erred when it denied his motion for a new trial because he did not challenge the trial court's factual findings); *see also Salazar v. Warden*, 852 P.2d 988, 992-93 (Utah 1993) (denying habeas relief based on alleged ineffective assistance and coerced plea where trial court found that Salazar understood rights and Salazar did not challenge factual findings).

In any event, Defendant has not proven that his counsel was ineffective. When "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," a court need not review the deficient performance element before examining the prejudice element. *Strickland*, 466 U.S. at 670. That is the case here. Defendant cannot prove prejudice because he offers no evidence as to what he would have testified to and how that testimony would have changed the evidentiary picture. Nor can he show that all reasonable counsel would have (1) advised him to testify, or (2) would not have interpreted his silence as a waiver of his right to testify.

1. Defendant has not proven prejudice.

To prevail, Defendant must show not only that he would have testified, but that his testimony would have so altered the evidentiary landscape that a more favorable outcome would be reasonably probable. *Strickland*, 466 U.S. at 695-96. Defendant cannot meet his burden on this record.

Defendant did not testify at the evidentiary hearing and his affidavit says only that he wanted to testify, but his counsel would not listen. R709. Defendant offers no evidence to as to what he would have testified to and how that testimony would have changed the evidentiary picture. Without such supporting evidence and analysis, Defendant cannot prove prejudice. *See State v. Arguelles*, 921 P.2d 439 (Utah 1996) (Arguelles did not prove he was prejudiced by his counsel's advice not testify because he did not proffer what his testimony would have been or provide any other evidence that would undermine the supreme court's confidence in his conviction). Indeed, "merely rephrasing that which must ultimately be shown to satisfy the second prong of the Strickland test" is "clearly insufficient to affirmatively demonstrate a reasonable probability that the trial result would have been different if counsel had not performed deficiently." *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993).

Defendant contends that if he had testified he "at least would have testified that he was innocent." Br.Aplt53. But this is mere speculation. No record evidence supports it. It is also insufficient even if it were not speculative. Defendant fails to explain how his mere assertion that he was innocent would have changed the evidentiary picture. At most, it suggests no more than the unremarkable truism that if the evidence were otherwise, then the result might have been otherwise. That is true of literally every case, but says nothing to advance his claim of prejudice here.

Given Defendant's lack of analysis, he has failed to carry his burden to prove prejudice. This Court may thus dispose of Defendant's claim on this ground alone. *See State v. Green*, 2005 UT 9,¶11, 108 P.3d 710 ("A brief [that] does not fully identify, analyze, and cite its legal arguments may be 'disregarded or stricken' by the court[.]") (cleaned up); Utah R. App. P. 24(a)(9).

Regardless, Defendant cannot prove prejudice on this record. The evidence against Defendant was substantial. *See supra*, I.A.2. Child testified—using details that she learned only by having experienced the sexual abuse—that Defendant sodomized her on two occasions. R317-330. Child's knowledge of sex and male genitalia was detailed and beyond what any five-

year-old ordinarily knows. R318-320,958. Her testimony was also consistent with her CJC interview and her disclosure to Mother. R271,957-68.

Other evidence supported Child's testimony. Mother testified that Child exhibited extreme behavioral changes and that those changes coincided with Defendant moving into the home. R263-64,282-85. Child's therapist also testified that those changes were consistent with a sexually-abused child. R278-79; 427-30.

Given this evidence, even if Defendant had testified that he was "innocent" as his brief speculates that he may have, Defendant's testimony would not have so changed the evidentiary landscape that a more favorable outcome would be reasonably probable. *Strickland*, 466 U.S. at 695-96.

2. Defendant has not proven deficient performance.

Defendant relies on an incorrect deficient performance standard. He argues that counsel was ineffective because counsel "was unable to articulate a reasonable strategy for not allowing [Defendant] to testify." Br.Aplt.51-52. This is not the *Strickland* deficient-performance standard. Defendant, not trial counsel below, bears the heavy burden to prove that no competent counsel would have proceeded as his did. *Strickland*, 466 U.S. at 687-89. Again, the question is not whether trial counsel can articulate a reasonable strategy for his strategic decisions. Rather, the determinative question is whether "no

competent attorney" would have proceeded as counsel did here. *See Premo*, 562 U.S. at 124.

Defendant cannot make that showing. Counsel properly interpreted Defendant's silence as a waiving his right to testify. *See United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993) (waiver of the right to testify can be inferred by defendant's silence) *cert. denied Joelson v. United States*, 516 U.S. 955 (1995); *United States v. Teague*, 953 F.2d 1525, 1535 (11th Cir. 1992) (counsel did not deprive Teague of his right to testify because she informed Teague of his right to testify, advised him not to testify, and Teague did not protest); *United States v. Edwards*, 897 F.2d 445 (9th Cir. 1990) (waiver of right to testify can be inferred by defendant's silence); *see also United States v. Williams*, 139 Fed. Appx. 974, 976 (10th Cir. 2005) (wavier can be inferred by defendant's inaction); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000) (same).

Counsel met with Defendant "many times" to discuss his right to testify. R618. Counsel explained the right to Defendant. R619. Counsel further explained that after he investigated and prepared the defense he would give advice about testifying, but "ultimately" the decision to testify would be Defendant's. R619.

When counsel told Defendant that he was not calling Grandmother as a witness, Defendant was "not happy." R613. But when counsel advised

Defendant not to testify, Defendant "did not have much of a reaction," he was not upset and did not protest. R619. Given that Defendant voiced his disagreement when counsel decided not to have Grandmother testify, it was reasonable for counsel to believe that if Defendant disagreed with his advice not to testify, he would have protested. Defendant did not. Thus, it was reasonable for counsel to take Defendant's silence and inaction as a waiver of his right. *See Williams*, 139 Fed. Appx at 976.

And Defendant's post-trial affidavit does not rebut the presumption of reasonable performance or the record showing that counsel in fact acted reasonably. *Bullock v. Carver*, 297 F.3d 1036,1046 (10th Cir. 2002) (counsel's actions are presumptively reasonable, and this presumption becomes "virtually unchallengeable" when counsel makes an adequately informed strategic choice). Defendant's affidavit states that he disagreed with his counsel's advice, not that his counsel prevented him from exercising his right to testify. *See* R709.

Counsel did not perform deficiently when he advised Defendant not to testify and did not call him to testify. Counsel does not perform deficiently when he chooses not to call potential witnesses whom he deems to be lacking credibility—even if that witness is the defendant. *Griffin*, 2015 UT 18, ¶55. Counsel testified that he believed that Defendant's "strong positions would

make him seem not credible." R627. Counsel did not need any other reason to advise Defendant not testify and not to call Defendant as a witness. But counsel had other reasons.

Counsel was concerned about Defendant's mannerisms and how he answered questions. R629-30. Although counsel did not explain the specific "issues" Defendant had, he did not need to. While the right to testify is ultimately Defendant's decision, advice about whether to testify is a tactical decision for counsel. *Webber*, 208 F.3d at 551. And it is "strongly presume[ed] that counsel "made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

Counsel's tactical decision to not call Defendant to testify allowed him to present Defendant's story and explain Defendant's police interview statements in closing argument without subjecting Defendant to cross-examination. And that is exactly what counsel did. In closing argument, counsel argued that Mother did not like Defendant, that she coached Child, that Child was inconsistent in her disclosure, that the police did not investigate, and that even though Defendant was scared in his police interview, he was forthcoming. R476-89. Defendant therefore cannot show that his counsel performed deficiently in advising Defendant not to testify. *See Clark*, 2004 UT 25, ¶7.

In sum, Defendant has not met his heavy burden to prove that his counsel was ineffective in handling his right to testify.

C. Defendant has not proven that his counsel was ineffective for not moving to suppress Defendant's police interview. [6]

The trial court found that counsel performed deficiently when he did not move to suppress Defendant's police interview. R889. However, the trial court found that Defendant did not prove *Strickland*'s prejudice element, thus, he had not met his burden to show that his counsel was ineffective. R889-91.

On appeal, Defendant challenges the trial court's prejudice finding, arguing that had his counsel moved to suppress the police interview, he would have received a more favorable result at trial. Br.Aplt.49-50.

The trial court properly found that Defendant had not proven prejudice because the evidence against him was substantial and the suppression of the police interview would not have changed the evidentiary landscape. This alone defeats Defendant's ineffective-assistance claim. *See Tyler*, 850 P.2d at 1258-59 (Defendant must show both "*actual unreasonable representation and actual prejudice.*") (emphasis in original). However, this Court can affirm for any reason apparent on the record. *Bailey v. Bayles*, 2002

[6] This Point responds to Defendant's Points I.C and I.D. *See* Br.Aplt.47-48, 49-51.

UT 58, ¶10, 52 P.3d 1158. Although the trial court properly ruled that Defendant was not prejudiced, it's conclusion that counsel performed deficiently was erroneous. The record shows that counsel's decision to not move to suppress Defendant's police interview was objectively reasonably. *See Strickland*, 466 U.S. at 689 (counsel is "strongly presumed" to exercise "reasonable professional judgment."). Thus, this Court should affirm because Defendant has failed to prove both prejudice and deficient performance.

1. Defendant has not proven prejudice.

As noted, Defendant challenges the trial court's finding that he did not prove prejudice. Br.Aplt. 49. He also argues that had his counsel moved to suppress his police interview, he would have received a more favorable outcome at trial. Br.Aplt.50-52. Defendant's claims lack merit.

The record supported the trial court's findings that Defendant did not prove prejudice because Child was a credible witness, described the events in detail, and was unlikely to have acquired the specific details of sex from other people. R891. As explained, the evidence against Defendant was substantial. *See supra*, I.A.2. As the trial court found, Child testified—with details she could have learned only from having been sexually abused—that Defendant sodomized her on two occasions. R271,891. Her testimony was consistent with her CJC interview and her disclosure to Mother. R271-

72,952,954-55. Child never recanted, but disclosed more abuse over time, disclosing at trial that Defendant also raped her. R317,328-29,332. The therapist testified that it is typical for an abused child to disclose abuse over time and build on the first disclosure. R317,328-29,332,429-30. And Child's knowledge of sex and male genitalia was detailed. R318-20,958.

Mother testified that Child exhibited extreme behavioral changes and that those changes coincided with Defendant moving into the home, including refusing to eat and being afraid to swallow. R264. Child stopped bedwetting and having nightmares when she was away from Defendant for two months. R267-68. However, within a week of Child returning to Defendant's house, she was bedwetting again, had nightmares, and was afraid of Defendant. R267-68,264. Child's therapist testified that Child's behavioral changes were consistent with a sexually-abused child. R422-28. This amounted to compelling evidence that Defendant sexually abused Child.

Defendant's interview did little to further the State's already compelling case. Defendant never admitted to abusing Child. He agreed that Mother had been out-of-town and that Grandmother had sole responsibility for caring for Child, but never admitted that he was alone with Child during the time when the abuse occurred. R369-371. At worst, he merely changed his

story from Child never being in his room, to Child having been in his room once or twice during the past three to four years. R351. This admission was not so significant that it necessarily demonstrated that Defendant was not credible. Defendant's police interview therefore did not significantly alter the evidentiary landscape.

Moreover, the jury never heard or saw the police interview. Detective Lee merely testified about the interview. R342-371. And Lee's recollection had to be refreshed several times by his report. R345,353,355. Thus, the jury was left to judge Lee's credibility. Counsel cross-examined Lee about his recollection, poking holes in Lee's ability to accurately remember the details of the interview and pointing out that Defendant was forthcoming. R359-365,371.

Given the already compelling evidence of guilt and the marginal utility of Defendant's interview for the State, the trial court properly found that Defendant had not proven that, had his police interview been excluded, there was a reasonable probability that he would have received a more favorable outcome. *See Strickland*, 466 U.S. at 695-96.

Defendant argues that the trial court erroneously found that he did not prove prejudice because his police interview "[d]estroy[ed]" his credibility. Br.Aplt.50-51. But as explained, Defendant made no admissions of significant

consequence during his interview. Thus, his interview hardly "destroyed" his credibility.

Defendant challenges the trial court's prejudice analysis, arguing that it was erroneous because it "did not analyze the effect" of the police interview on the jury." Br.Aplt.49. On the contrary, as explained, the trial court correctly found that given the relative insignificance of the interview to the State's already compelling case, its admission had little, if any impact on the jury's verdict. R891.

As part of its prejudice analysis, the trial court found that Detective Lee's trial testimony was not essential because he did not testify at the preliminary hearing. *Id*. Defendant challenges this finding as erroneous. Br.Aplt.49-50. Defendant is wrong. Given the context, the trial court was simply pointing out that Detective Lee's testimony about Defendant's interview was unnecessary for the State to prove its case because it was not required to secure a bindover. This was just another way to restate the overall insignificance of Defendant's police interview.

Defendant also argues that the trial court's finding that he did not prove prejudice was error because "the jury still had concerns about the State's case." Br.Aplt.50. In support, he cites to that the jury's request for the full police report during deliberations. Br.Aplt.50. But the jury's request is not

surprising. Detective Lee referenced his report at least seven times during his testimony and counsel cross-examined him on the accuracy of his report. R342-71. But neither the parties, nor the court, explained to the jury that it would not receive the police report during deliberations. Given the multiple references to the report, it was unsurprising that the jury would want to see it.

In sum, Defendant's police interview added little to the State's already compelling case. Defendant therefore cannot show that had counsel moved to suppress his police interview, he would have received a more favorable result.

2. The trial court erroneously found that all competent counsel would have concluded that Defendant did not receive a complete Miranda warning and therefore moved to suppress the interview.

The trial court found that trial counsel performed deficiently by not moving to suppress Defendant's police interview. R889-91. The trial court reasoned that counsel should have made that motion because the *Miranda* warnings Defendant received did not properly advise him of his right to an attorney or his right to remain silent. R889-90.

The trial court's conclusion is erroneous because the record does not show that all competent counsel would have concluded that Defendant received an incomplete *Miranda* warning. Counsel also had strategic reasons

to admit Defendant's police interview, even if the *Miranda* warning were incomplete.

Miranda requires that "[A suspect] must be warned prior to any questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). An officer is not required to give verbatim *Miranda* warnings, but must reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Florida v. Powell*, 559 U.S. 50, 60 (2010) (quoting *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)).

Indeed, the United States Supreme Court "has not dictated the words in which the essential information must be conveyed." *Id*.; *see also California v. Prysock*, 453 U.S. 355, 359 (1981) (per curiam) ("This Court has never indicated that the rigidity of *Miranda* extends to the precise formulation of the warnings given a criminal defendant." (internal quotation marks omitted)); *Rhode Island v. Innis*, 446 U.S. 291, 297 (1980) (safeguards against self-incrimination include "*Miranda* warnings . . . or their equivalent").

At trial, Lee testified that he *Mirandized* Defendant. R345,366,558,592. In his post-trial motion, Defendant attached a partial translation of his police

interview. R552. However, the English translation is cut-off, leaving only partial sentences. R552-58; (attached as Addenda C). Having failed to provide a complete record of the *Miranda* warning Defendant received, Defendant necessarily also failed to prove that all competent counsel would have concluded that the warning was incomplete. This is especially true where counsel testified that he researched the *Miranda* issue and decided that it was not worth pursuing. R604.

The record that Defendant does provide shows that a Spanish-speaking patrol officer initially told Defendant that he was detained, that he was accused of touching his step-granddaughter in a sexual way, that he could talk with the officers, and that he could have an attorney present. R552-53. The officer asked Defendant if he wanted to speak with him and Defendant said that he would wait for Detective Lee. R553.

Lee then took over the interview and gave Defendant what reasonably appears to be a complete *Miranda* warning. R556. Lee said: "Yep…ok…then Gilberto…ah, [page cuts off] your rights to you, right…[page cuts off] in case…anything you want [page cuts off] remain silent, any question [page cuts off] be used against you in a co [page cuts off] an attorney present while [page cuts off] one the state can provide [page cuts off] finished with your present." R556.

Defendant has not shown on this record that all competent attorneys would have concluded that Detective Lee inadequately *Mirandized* Defendant, especially where counsel would have presumably had access to the complete translation. From the portion of the translation that Defendant does provide, it reasonably appears that Detective Lee informs Defendant of his right to remain silent, that any statement he made could be used against him, and that he also had the right to an attorney and to have the state pay for an attorney if he could not afford one. R552-53,556.

Defendant has not provided a record showing that all competent counsel would have concluded that Detective Lee's *Miranda* warning was incomplete. Defendant "bears the burden of assuring the record is adequate" on a claim of ineffective assistance. *Litherland*, 2000 UT 76, ¶16. If "the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.* ¶17.

Absent a complete record of what Defendant was in fact told, Defendant cannot prove that all reasonable counsel would have recognized this warning to be inadequate. *Strickland's* presumption therefore stands unrebutted. *See Titlow*, 517 U.S. at 23 (there is a strong presumption that counsel" rendered "reasonable professional assistance."); *State v. Taylor*, 947

P.2d 681, 685 (Utah 1997) (the "strong presumption" is "that counsel's conduct falls within the wide range of reasonable professional assistance."). The trial court therefore erred in finding, on this record, that all competent counsel would have moved to suppress Defendant's police interview. *See Litherland*, 2000 UT 76, ¶16.

Counsel also had good reason not to move to suppress Defendant's statements, even if Defendant had proven that he received an incomplete *Miranda* warning. *See Clark*, 2004 UT 25, ¶7 (when a conceivable tactical basis supports counsel's actions, defendant has not rebutted the strong presumption that counsel performed reasonably); *see also State v. Simpson*, 2019 UT App 85, ¶¶20-25, ---P.3d --- (counsel had reasonable strategic reasons to not move to suppress Simpson's police interview). In closing argument, counsel presented Defendant's story to the jury without subjecting Defendant to cross-examination. R476-89. Counsel highlighted for the jury that Defendant was forthcoming about key facts, understood very little of the criminal justice system, was scared, and was taken advantage of by the police in his interview, all without subjecting Defendant to cross-examination. *Id*. This was a reasonable strategy given counsel's concerns that Defendant would not make a credible witness. The trial court therefore erroneously

concluded that counsel performed deficiently, even if Defendant had proven that his *Miranda* warning was incomplete.

In finding otherwise, the trial court relied on *State v. Millett*, 2015 UT App 187, 356 P.3d 700. In *Millett*, the detective informed Millett of his right to remain silent and warned Millett that anything he said might be used against him in a court of law, but he did not inform Millett that he had the right to an attorney or to have an attorney appointed for him. 2015 UT App 187, ¶12. *Millet* does not establish that all reasonable counsel would have recognized Defendant's *Miranda* warning as incomplete because again, Defendant has not proven the contents of the warning he actually received.

And from the record that he does provide, it appears that Defendant was informed of his right to an attorney—twice. R552-58. Both Detective Lee and the Spanish-speaking patrol officer told Defendant of that right. And that is all that was required. *Powell*, 559 U.S. at 60 (*Miranda* warning constitutionally sufficient because Powell was provided "the essential information" about his right to an attorney).

In sum, the trial court correctly concluded that Defendant did not prove prejudice. And this Court can affirm for that reason alone. However, the trial court's conclusion that counsel performed deficiently was erroneous. This Court can therefore affirm on the alternate basis that counsel's

performance was not deficient. Thus, Defendant's ineffective assistance claim fails because he has not—and cannot—meet either *Strickland* element.

CONCLUSION

For the forgoing reasons, the State asks that this Court affirm Defendant's convictions.

Respectfully submitted on May 17, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Lindsey Wheeler
LINDSEY WHEELER
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 11,070 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:

☑ 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/ Lindsey Wheeler
LINDSEY WHEELER
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on May 17, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

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

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

/s/ Melanie Kendrick

Addenda

Addendum A

Utah Code Annotated § 76-5-403.1 (West 2018)

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.
(2) Sodomy upon a child is a first degree felony punishable by a term of imprisonment of:
(a) except as provided in Subsections (2)(b) and (4), not less than 25 years and which may be for life; or
(b) life without parole, if the trier of fact finds that:
(i) during the course of the commission of the sodomy upon a child the defendant caused serious bodily injury to another; or
(ii) at the time of the commission of the sodomy upon a child, the defendant was previously convicted of a grievous sexual offense.
(3) Subsection (2)(b) does not apply if the defendant was younger than 18 years of age at the time of the offense.
(4)(a) When imposing a sentence under Subsection (2)(a) and (4)(b), a court may impose a term of imprisonment under Subsection (4)(b) if:
(i) it is a first time offense for the defendant under this section;
(ii) the defendant was younger than 21 years of age at the time of the offense; and
(iii) the court finds that a lesser term than the term described in Subsection (2)(a) is in the interests of justice under the facts and circumstances of the case, including the age of the victim, and states the reasons for this finding on the record.
(b) If the conditions of Subsection (4)(a) are met, the court may impose a term of imprisonment of not less than:
(i) 15 years and which may be for life;
(ii) 10 years and which may be for life; or
(iii) six years and which may be for life.
(5) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Addendum B

witnesses. Certainly the two we put forward, Velma and the defendant, that could've challenged these things. And given the information that was available to trial counsel, this should -- the jury should've had the chance to consider this evidence. And we believe the outcome would've been different.

Any other questions, Your Honor?

THE COURT: No, sir. Thank you.

MR. DODD: Thank you, Your Honor.

THE COURT: Thank you for your briefing, counsel, as well as your argument today, respect shown to one another, as well as the Court.

After carefully reviewing your briefs, as well as the transcript and the -- my memory of the evidentiary hearing that we had, here's what I come up with. Defendant argues the Court should arrest judgment, grant a new trial due to ineffective assistance of counsel. Specifically, defendant argues that counsel made three decisions that would warrant a dismissal based on ineffective assistance of counsel. The decision not to address possible violations of defendant's Miranda rights, the decision not to use testimony from Ms. Rasmussen, and the decision not to have the defendant take the stand in his own defense.

With regard to that, defendant further argues

that prior counsel failed to adequately investigate what Ms. Rasmussen's testimony would've been.

All right. With regard to the decisions not to call Velma Rasmussen and the defendant to testify during trial, the Court finds that prior counsel acted within the reasonable standard of care for a defense attorney. In Strickland versus Washington, U.S. Supreme Court held that in order to rule that a jury verdict should be dismissed or vacated due to ineffective assistance of counsel, it must be proven that the defendant's counsel was ineffective, and that defendant was prejudiced by relying on that assistance.

Regarding the first factor on the standard for ineffective assistance, the Supreme Court held, the Court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the Court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case.

At the same time, the Court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in

the exercise of reasonable professional judgment.

In the present case, prior counsel, Mr. Hakes, decided that it would be better not to call the defendant and Ms. Rasmussen to testify at trial. These were strategic decisions that could depend on numerous factors. In the evidentiary hearing on the matter, prior counsel indicated that after the state rested at trial, he did not believe that the testimony from Ms. Rasmussen or the defendant -- nor the defendant was necessary in order to avoid a conviction. In addition, any testimony by either would have been subject to cross examination, which could have potentially harmed the defendant's case. The Court finds that in light of the standards set by Strickland versus Washington, these decisions were reasonable under the circumstances.

Even if the Court were to find that prior counsel had acted unreasonably in light of the standards set forth in Strickland versus Washington, the Court finds that defendant has not affirmatively proved that testimony of Ms. Rasmussen and the defendant would have changed the outcome of the trial, and that's citing State versus Garcia.

With regard to the decision not to move to suppress the police interview. The same standard as used in Strickland versus Washington is used to determine

whether the failure of prior counsel to move to suppress the initial interview of the defendant with police sufficiently constitutes ineffective assistance of counsel so as to vacate the judgment or require a new trial.

In this case, the Court finds that prior counsel's decision not to move to suppress the statements of the defendant constituted ineffective assistance of counsel, but that there were -- the error was harmless, and would not have changed the outcome of the case. In State versus Millett, a Utah Appellate Court decision, police gave constitutionally deficient Miranda warnings to a defendant accused of forcible sodomy. In that case, the police officer said, you have the right to remain silent. Anything you say can and will be used against you in a court of law. You understand all that. Okay. You understand all of them, right? You're okay talking to me? Millett said, yes. The Court found that this Miranda warning was deficient, and that the failure of the attorneys to -- the attorney to move to suppress the information obtained in that interview constituted ineffective assistance of counsel.

The current matter is similar to Millett, but complicated by cultural and linguistic differences between the police and the defendant. The defendant in

this case was given his Miranda rights twice by police officers, with varying levels of proficiency in Spanish. The defendant argues that the first Miranda warning was deficient for the following reasons. One, instead of saying, you have the right to remain silent, the officer stated, you have your rights to talk or not to talk to us.

Two, the officer also stated, you only have to know that what you say can be used against yourself between the Court.

And three, the officer also failed to say that an attorney would be provided to him if he could not afford one.

Defendant argues that the second Miranda warning given by an officer, who was more fluent in Spanish, was also deficient, because instead of saying, you have a right to have an attorney present, the officer said, you are going to have the right to have an attorney present, implying that there was no need for an attorney at that moment, or that the right existed only in the future.

These statements, while more ambiguous than those addressed in Millett, were nonetheless deficient. The Court finds that the prior attorney should have moved to exclude these statements based on deficiencies in the Miranda statements issued by the police, and failure to

do so constituted ineffective assistance of counsel.

So after determining there was ineffective assistance of counsel, the Court must now determine whether the defendant was prejudiced, or whether the result would have been different if the police interviews had been excluded. Recently, in State versus Garcia, the Utah Supreme Court addressed the application of the prejudice prong. It stated, Strickland's requirement of a reasonable probability of a different outcome is a relatively high hurdle to overcome.

The Court finds that even if prior counsel timely filed a motion to suppress, and the police interview was excluded, it would likely not have changed the outcome of the case. The Court finds that at trial the victim was a credible witness, and described in detail the events of the case, knowing that as a child she would be unlikely to have acquired these specific details from other people around here. Also note that at the preliminary hearing, state declined to call the police officers who interviewed the defendant, indicating that their testimony was not essential to prove the elements of the case.

For these reasons, and noted the high bar set in Strickland versus Washington as interpreted by State versus Garcia, the Court finds despite the ineffective

assistance of counsel regarding the failure to move to suppress the police statements, there was not sufficient prejudice to the defendant so as to warrant vacating the judgment or granting a new trial. Therefore, I'm denying the motion to arrest judgment or alternatively motion for a new trial at this time.

I would ask you, Mr. Sturgill, to prepare findings and an order consistent with that, utilizing your briefing material. Get that to Mr. Dodd for approval and see where he might go with that.

Having said that, we're still at the sentencing phase, Mr. Dodd. So how long do you want?

MR. DODD: Your Honor, we have the PSI completed.

MR. STURGILL: Yeah. Could we just put it on next week's calendar, Judge?

THE COURT: We could do it next Monday, the 5th, 9:30.

MR. DODD: I believe so, Your Honor.

THE COURT: Okay. Let's do that. We'll put you on for February 5th at 9:30, Mr. Martinez, for sentencing, and as soon as you get that order prepared, Mr. Sturgill, Mr. Dodd can approve that and we'll see where we need to go.

MR. STURGILL: Yes, Your Honor.

Addendum C

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
1	8:31:45	OF 1	asi que de, de, de este momento no estás arrestado
2	8.31.50	OF 2	real quick, let's download the pictures, let me take the phone just for now...do you have anything in your pockets?
3	8:31:59	OF 1	No tiene algo en las bolsas....o nada así?
4	8:32:08	OF 2	Ok. So just explain to him that we got uh... did you already tell him we have a detective coming through that will speak fluent spanish... so I think we'll have to...
5	8:32:20	OF 1	Está hablando de un detectivo que, que va a venir...
6	8:32:23	Gilberto	mmm
7	8:32:25	OF 2	...explain to him...
8	8:32:26	OF 1	...en unos 10 minutos o algo así
9	8:32:30	OF 2	just to explain to him the reason why is to, to give him his opportunity if he choses to, but make sure he does understand his rights, that now he, he is in our custody here, not to be spoken to...
10	8:32:41	OF 1	he, he is not arrested, he is detained, I understand, so...
11	8:32:46	OF 2	Ok...but with him been detained, we're still about to interview him...
12	8:32:49	OF 1	Yeah
13	8:32:50	OF 2	...we...can you advise him of his full Miranda rights?
14	8:32:52	OF 1	Oh, yeah...
15	8:32:54	OF 2	Can you do that?
16	8:32:55	OF 1	We'll have Miguel do the same thing
17	8:32:57	OF 2	That's right
18	8:32:58	OF 1	Yo voy a a explicar algunas cosas ahorita y el detectivo que viene va a hacer lo mismo
19	8:33:07	Gilberto	mmm
20	8:32:09	OF 1	Asi que, como le pedí, no estás arrestado de este momento, estás detendido, ok?... y con eso tienes sus derechos de hablar o no hablar con nosotros, solamente tienes que saber que lo que digas puede ser usado contra tigo entre la corte. Así que tienes un derecho a tener un abogado presente pero de entre cuestiones o de cualquier momento, si quieres que vengas un, un abogado puedes ser aquí. O si no quieres hablar con nosotros, es un derecho tuyo, a, hacerlo igual, ok?
21	8:33:59	Gilberto	mmm
22	8:34:00	OF 1	y yo,yo, la verdad, no, no voy a...
23	8:34:02		(TN: Gilberto and OF 1 speaking at the same time)
24	8:34:03	Gilberto	Disculpe...yo quiero saber....Cuál es el motivo por el que estoy aquí?
25	8:34:08	OF 1	ok...yo puedo explicar esto
26	8:34:10	Gilberto	mmm
27	8:34:10	OF 1	porque ...lo que pasa es que...como yo no soy detectivo y yo no tengo la reporte yo no sé, no...

LINE	TIME CODE	SPEAKER	ENGLIS
1	8:31:45	OF 1	so, so, of (?) this time you'
2	8.31.50	OF 2	real quick, let's download t now...do you have anythin
3	8:31:59	OF 1	You don't have anything in
4	8:32:08	OF 2	Ok. So just explain to him t have a detective coming th think we'll have to...
5	8:32:20	OF 1	he is talking about a detect
6	8:32:23	Gilberto	mmm
7	8:32:25	OF 2	...explain to him...
8	8:32:26	OF 1	...in like 10 minutes or som
9	8:32:30	OF 2	just to explain to him the r opportunity if he choses to rights, that now he, he is in
10	8:32:41	OF 1	he, he is not arrested, he is
11	8:32:46	OF 2	Ok...but with him been det
12	8:32:49	OF 1	Yeah
13	8:32:50	OF 2	...we...can you advise him o
14	8:32:52	OF 1	Oh, yeah...
15	8:32:54	OF 2	Can you do that?
16	8:32:55	OF 1	We'll have Miguel do the s
17	8:32:57	OF 2	That's right
18	8:32:58	OF 1	I'm going to explain some t is coming will do the same
19	8:33:07	Gilberto	mmm
20	8:32:09	OF 1	So, as I asked (?) you, of (? detained, ok?...and with th talk with us, you only have against yourself (?) betwee an attorney present but be want an, an attorney to co talk with us, it is your right,
21	8:33:59	Gilberto	mmm
22	8:34:00	OF 1	and I, I, the truth is, I'm no
23	8:34:02		(TN: Gilberto and OF 1 spea
24	8:34:03	Gilberto	I'm sorry...I want to know..
25	8:34:08	OF 1	ok...I can explain this...
26	8:34:10	Gilberto	mmm
27	8:34:10	OF 1	because...what happens is don't have the report I don

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
28	8:34:20	Gilberto	...Pero...
29	8:34:20	OF 1	...No sé mucho de lo que esta pasando...
30	8:34:23	Gilberto	(TN: unintelligible)
31	8:34:23	OF 1	por eso, pero lo que pasó es que había un reporte, que está acusando que, que tú estabas tocando al... daughter or grand-daughter?
32	8:34:42	OF 2	His grand-daughter, step grand-daughter
33	8:34:47	OF 1	ok...Do you understand that?...
34	8:34:47	OF 2	(TN: unintelligible)
35	8:34:50	OF 1	Step grand-daughter , estabas tocando...
36	8:34:50	Gilberto	...estaba tocando, sí...
37	8:34:54	OF 1	...y en una forma sexual...
38	8:34:56	Gilberto	... oh!, en una forma sexual...mmm,
39	8:34:58	OF 1	por eso estamos aquí... (silencio)...y es...
40	8:35:12	OF 2	....it's probably...
41	8:35:12	OF 1	...por eso que...
42	8:35:14	OF 2	...10 or 15 minutes before he gets here
43	8:35:15	OF 1	ok
44	8:35:17	OF 2	Do you wish to speak with us? With the other detective? And me?
45	8:35:20	OF 1	dice que que el otro detectivo va a llegar en como 10, 15 minutos y queremos fijar si, si quieres hablar con nosotros como policías
46	8:35:33	Gilberto	no, voy a esperar que llegue el otro detective...
47	8:35:35	OF 1	ok...
48	8:35:36	Gilberto	...porque...
49	8:35:37	OF 1	pero si quieres hablar un poco mejor sobre eso para saber un poco mejor lo que esta pasando en el caso...
50	8:35:45	Gilberto	...pues es que me sorprende...
51	8:35:46	OF 1	...y hablar sobre...
52	8:35:47	Gilberto	...yo también estoy sorprendido...
53	8:35:48	OF 1	sí
54	8:35:49	Gilberto	me entiende?
55	8:35:49	OF 1	si
56	8:35:53	Gilberto	que...es un acusación muy grave, es algo muy peligroso...
57	8:35:55	OF 1	sí...
58	8:35:57	Gilberto	por eso, me entiende?...como le digo yo, yo me sujeto a las manos de ustedes...(TN:unintelligible)...que ustedes son los que tienen el reporte y todo eso, no?, pero pues, qué puedo hacer?, no puedo hacer nada, me entiende?...mejor esteeee...pueees, que pase lo que tenga que pasar y luego así que, que sea Dios el que decida que, que me, que me tiene para mí, me entiende?

LINE	TIME CODE	SPEAKER	ENGLISH
28	8:34:20	Gilberto	...but...
29	8:34:20	OF 1	...I don't know much of wha
30	8:34:23	Gilberto	(TN: unintelligible)
31	8:34:23	OF 1	...that's why, but what happ accusing that, that you wer daughter?
32	8:34:42	OF 2	His grand daughter, step gr
33	8:34:47	OF 1	ok...Do you understand tha
34	8:34:47	OF 2	(TN: unintelligible)
35	8:34:50	OF 1	Step grand daughter, you w
36	8:34:50	Gilberto	...was touching, yes...
37	8:34:54	OF 1	...in a sexual way...
38	8:34:56	Gilberto	...oh!, in a sexual way...mm
39	8:34:58	OF 1	that's why we are here...(sil
40	8:35:12	OF 2	it's probably...
41	8:35:12	OF 1	....why that...
42	8:35:14	OF 2	...10 or 15 minutes before h
43	8:35:15	OF 1	ok
44	8:35:17	OF 2	Do you wish to speak with
45	8:35:20	OF 1	he says that the other dete and want to see if, if you w
46	8:35:33	Gilberto	no, I'm going to wait until t
47	8:35:35	OF 1	ok...
48	8:35:36	Gilberto	...because...
49	8:35:37	OF 1	but if you want to talk a litt about what is going on with
50	8:35:45	Gilberto	...well, I am shocked...
51	8:35:46	OF 1	...and talk about...
52	8:35:47	Gilberto	...and I'm shocked...
53	8:35:48	OF 1	yes
54	8:35:49	Gilberto	...do you understand me?
55	8:35:49	OF 1	yes
56	8:35:53	Gilberto	that...it a verys serious accu
57	8:35:55	OF 1	yes...
58	8:35:57	Gilberto	that's why, do you underst hands...(TN:unintelligible).. report and all that, right?, I can do, do you understand where they may and then, has in store for me, do you

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
59	8:36:21	OF 1	si, si...
60	8:36:23	Gilberto	como le digo es algo muy, muy serio...
61	8:36:25	OF 1	si, es algo muy grave...
62	8:36:26	Gilberto	muy muy grave y...y ya ha pasado en otros casos de mis amigos que han pasado...que han tenido eso...que...hace poco, creo que fue hace casi un año un amigo mío, igual, para ese caso, no sé como estuvo muy el caso...ejem...que dice que abusó de sus hijas, tambien que las tocó ahí por eso...
63	8:36:49	OF 1	ah sí?
64	8:36:49	Gilberto	el señor estuvo arrestado y...creo que...que...seeee...hasta se mató, se asesinó...
65	8:36:58	OF 1	en serio?
66	8:36:59	Gilberto	aha...para mí que no es cierto
67	8:37:03	OF 2	I'm gonna hold this...so you just can't, can't use it...(TN:unintelligible)...
68	8:37:05	OF 1	(TN:unintelligible)... que no llamas a alguien más de este momento...
69	8:37:10	Gilberto	si
70	8:37:11	OF 1	no va a estar buscándolo (?), o algo así...I just told him you're not going to be looking at it or anything...
71	8:37:15	OF 2	ok...does he have a password on it?
72	8:37:20	OF 1	tiene un código?
73	8:37:21	Gilberto	no
74	8:37:22	OF 1	no
75	8:37:23	OF 2	no password, ok...I'll leave it right here for now...so it just slides and it's open?
76	8:37:28	OF 1	yea
77	8:37:30	OF 2	ok
78	8:37:32	OF 1	he was just telling me about a friend that was accused of kind of the same thing a while ago
79	8:37:38	OF 2	so he's concerned about something
80	8:37:41	OF 1	yea... he committed suicide...over all of it...he doesn't know all of the details but...
81	8:37:48	Gilberto	y según el reporte...
82	8:37:49	OF 1	(TN:unintelligible)
83	8:37:50	Gilberto	el reporte, qué tiempo fue?, hace cuánto fue eso?...qué paso...
84	8:37:56	OF 1	so, when? He just wants to know when that happened. So, it was over a course of the last year
85	8:38:04	OF 2	specifically September of last year

LINE	TIME CODE	SPEAKER	ENGLIS
59	8:36:21	OF 1	yes, yes...
60	8:36:23	Gilberto	as I said it's something ver
61	8:36:25	OF 1	yes, it's something very se
62	8:36:26	Gilberto	very, very serious and...an friends of mine that have.. almost a year ago I think, a don't know how the case v daughters, also that he tou
63	8:36:49	OF 1	is that so?
64	8:36:49	Gilberto	the man was arrested and. himself, he murdered hims
65	8:36:58	OF 1	really?
66	8:36:59	Gilberto	aha...I don't think that is tr
67	8:37:03	OF 2	I'm gonna hold this...so yo it...(TN:unintelligible)...
68	8:37:05	OF 1	(TN:unintelligible)...that yc
69	8:37:10	Gilberto	yes
70	8:37:11	OF 1	he's not going to search it, you're not going to be look
71	8:37:15	OF 2	ok...does he have a passwo
72	8:37:20	OF 1	does it have a code?
73	8:37:21	Gilberto	no
74	8:37:22	OF 1	no
75	8:37:23	OF 2	no password, ok...I'll leave it's open?
76	8:37:28	OF 1	yea
77	8:37:30	OF 2	ok
78	8:37:32	OF 1	he was just telling me abou same thing a while ago
79	8:37:38	OF 2	so he's concerned about so
80	8:37:41	OF 1	yea... he committed suicid details but...
81	8:37:48	Gilberto	and based on the report...
82	8:37:49	OF 1	(TN:unintelligible)
83	8:37:50	Gilberto	...the report, when was it? happened...
84	8:37:56	OF 1	so, when? He just wants to over a course of the last ye
85	8:38:04	OF 2	specifically September of l

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
86	8:38:07	OF 1	dice que específicamente es algo que pasó en Setiembre...
87	8:38:12	Gilberto	del año que pasó...
88	8:38:13	OF 1	del año pasado, si...
89	8:38:18	OF 2	and we'll get into that, we'll explain it to him (TN:unintelligible)
90	8:38:22	OF 1	el va, mejor cuando llegue el otro detectivo, porque el ya sabe todo los detalles del caso, y, y, va a ser mucho mejor para tí...(lengthy silence)...quieres agua?
91	8:38:48	Gilberto	no, estoy bien, gracias...lo único que quiero es pasar al baño...
92	8:38:51	OF 1	all right, si...hay un baño aquí...
93	8:40:07		(TN:defendant returns alone)
94	8:40:32	OF 2	un momento, OK
95	8:41:27	OF 2	Gilberto, is this correct? ...Social security,
96	8:41:33	Gilberto	mmm
97	8:41:36	OF 2	not that one...address here...do you have a middle name?
98	8:41:51	Gilberto	no
99	8:41:53	OF 2	just Gilberto Martinez?
100	8:41:54	Gilberto	si
101	**BREAK IN TRANSCRIPTION AND TRANSLATION**		
102	8:47:39	Detective	Gilberto?
103	8:47:41	Gilberto	Si, soy yo
104	8:47:42	Detective	Gilberto, qué tal?
105	8:47:43	Gilberto	muy bien
106	8:47:44	Detective	Yo soy el Detective Lee del Departamento de Springville y me pidieron que viniera y ayudara con la situación
107	8:47:50	Gilberto	mhm
108	8:47:52	Detective	como yo hablo español, está bien si hablamos un ratito?
109	8:47:52	Gilberto	sí, claro
110	8:47:53	Detective	ok, me voy a sentar aquí, ok?
111	8:47:54	Gilberto	Ok
112	8:47:57	Detective	Are you going to give me a copy of that o do you want to record it?
113	8:48:00	OF 2	A copy of...
114	8:48:02	Detective	Yeah
115	8:48:02	OF 2	Yeah

LINE	TIME CODE	SPEAKER	ENGLISH
86	8:38:07	OF 1	he says that it's specifically
87	8:38:12	Gilberto	of last year...
88	8:38:13	OF 1	of last year, yes
89	8:38:18	OF 2	and we'll get into that, we'l
90	8:38:22	OF 1	he's going to, it'll be better because he knows all the d much better for you...(lengt
91	8:38:48	Gilberto	no, I'm OK thank you...the c
92	8:38:51	OF 1	all right, yes...there's a bath
93	8:40:07		(TN:defendant returns alon
94	8:40:32	OF 2	just a moment, OK
95	8:41:27	OF 2	Gilberto, is this correct? ...S
96	8:41:33	Gilberto	mmm
97	8:41:36	OF 2	not that one...address here
98	8:41:51	Gilberto	no
99	8:41:53	OF 2	just Gilberto Martinez?
100	8:41:54	Gilberto	yes
101	**BREAK IN TRANSCRIPTION A**		
102	8:47:39	Detective	Gilberto?
103	8:47:41	Gilberto	yes, it's me
104	8:47:42	Detective	Gilberto, how you doing?
105	8:47:43	Gilberto	very well
106	8:47:44	Detective	My name is Detective Lee c I will help you with the situ
107	8:47:50	Gilberto	mhm
108	8:47:52	Detective	...because I speak spanish. I
109	8:47:52	Gilberto	yes, of course
110	8:47:53	Detective	ok, I'm going to sit down he
111	8:47:54	Gilberto	ok
112	8:47:57	Detective	Are you going to give me
113	8:48:00	OF 2	A copy of...
114	8:48:02	Detective	Yeah
115	8:48:02	OF 2	Yeah

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
116	8:48:04	Detective	Yep..ok...entonces Gilberto..ah...este muchacho que habló contigo, el te leyó tus derechos, ok?..ah...pero como que te los voy a leer otra vez, como para que...cualquier cosa que quieras preguntar, me preguntes. Tienes el derecho de estar callado, cualquier pregunta que tengas ah,...cualquier cosa que digas puede ser usada en tu contra tuya en la corte de la ley, vas a tener derecho a un abogado presente mientras hacemos preguntas, uhm... si no tienes uno el estado te puede proveer uno para que te represente, ok? Terminados tus derechos presentes, Quieres hablar con nosotros ahora?
117	8:48:40	Gilberto	Pues, como digo yo no sé si estoy bien o estoy mal, pero me dijeron que voy a hablar con ustedes...
118	8:48:48	Detective	ok...la razón por la que estamos aquí, uhm, estamos investigando un, un caso y queremos saber cual es tu relación uhm...con Ailyn..
119	8:49:00	Gilberto	Con [redacted]?
120	8:49:00	Detective	aha
121	8:49:02	Gilberto	No, no mucho con ella
122	8:42:04	Detective	no mucho?
123	8:49:05	Gilberto	no, no, no, no tengo mucho contacto con ella
124	8:49:07	Detective	no tienes mucho contacto?
125	8:49:08	Gilberto	No
126	8:49:09	Detective	ok, tú eres el tío, no?
127	8:49:11	Gilberto	No, soy el...como se puede decir?..mmm...yo estoy casado con la abuela de ella
128	8:49:17	Detective	Estás casado con la abuela de ella?
129	8:49:18	Gilberto	ah, sí
130	8:49:19	Detective	ok, es como si fueras el substituto a un abuelo
131	8:49:22	Gilberto	Exactamente
132	8:49:23	Detective	ok, Cuánto tiempo tienen casados ustedes?
133			**BREAK IN TRANSCRIPTION AND TRANSLATION**
134	9:11:32	Detective	ok, entonces esto es que, que estás haciendo es que nos estás dando permiso sólo para buscar en tu teléfono, y entonces uhm... como te estaba diciendo, la niña incluso dijeron que tu le habías enseñado a ellos...uhm cosas en el teléfono
135	9:11:43	Gilberto	que yo les enseñé?
136	9:11:44	Detective	si
137	9:11:45	Gilberto	no, jamás, como te dije jamás
138	9:11:48	Detective	entonces esto es lo que...

LINE	TIME CODE	SPEAKER	ENGLIS
116	8:48:04	Detective	Yep...ok...then Gilberto...ah your rights to you, right?... in case...anything you wan remain silent, any questio be used against you in a co an attorney present while one the state can provide finished with your present
117	8:48:40	Gilberto	well, as I said I don't know that I was going to speak w
118	8:48:48	Detective	ok...the reason why we're we want to know what yo
119	8:49:00	Gilberto	with [redacted]?
120	8:49:00	Detective	mmm
121	8:49:02	Gilberto	no, not much with her
122	8:42:04	Detective	not much?
123	8:49:05	Gilberto	no, no, no, I don't have mu
124	8:49:07	Detective	you don't have much cont
125	8:49:08	Gilberto	no
126	8:49:09	Detective	ok, you are the uncle, right
127	8:49:11	Gilberto	no, I am the...how can it be grandmother
128	8:49:17	Detective	you're married to her gran
129	8:49:18	Gilberto	ah, yes
130	8:49:19	Detective	ok, it's like you a substitute
131	8:49:22	Gilberto	exactly
132	8:49:23	Detective	ok, for how long have you
133			**BREAK IN TRANSCRIPTION**
134	9:11:32	Detective	ok, then, this is so, so you your phone, and then, uhn that you had showed them
135	9:11:43	Gilberto	that I showed them?
136	9:11:44	Detective	yes
137	9:11:45	Gilberto	no, never, as I told you, ne
138	9:11:48	Detective	then, this is what the...

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
139	9:11:49	Gilberto	te voy, te voy a decir lo que pasó una vez con el niño
140	9:11:52	Detective	con la niña?
141	9:11:53	Gilberto	el niño, que dice que, que estaba viendo mujeres encueradas pero, no, no estaba yo viendo
142	9:11:56	Detective	Ok
143	9:11:57	Gilberto	porque, tu sabes que pasan en youtube videos que a veces están nada más en trajes de baño y todo eso y, y cosas chistosas, es lo único que estaba yo viendo, pero ni ya exageró que estaba yo viendo mujeres encueradas y todo eso...me entiendes?
144	9:12:13	Detective	ok...he said that the only ocation was that he was watching youtube videos and there were girls wearing bikinies and boys watching those kind of videos
145	9:12:22	OF 2	Which boys?
146	9:12:25	Detective	mmm...the brother
147	9:12:25	OF 2	a, a brother?
148	9:12:26	Detective	mhm
149	9:12:27	OF 2	ok
150	9:12:27	Detective	and he said they weren't naked but they were wearing a swimmsuite and and the boy said something about that
151	9:12:32	OF 2	That's not what we are here for
152	9:12:35	Detective	no, no he said that was the only ocation...
153	9:12:37	OF 2	...ok
154	9:12:43	Detective	...that something big happened...am...entonces esto es que nos está diciendo que nos está dando permiso a nosotros para buscar en su teléfono, es solamente un día, dos días y luego nosotros lo devolvemos para atrás porque nosotros no nos quedamos con la propiedad
155	9:12:48	Gilberto	ok...antes de todo...
156	9:12:51	Detective	mhm
157	9:12:51	Gilberto	...que dices que se va a quedar con mi telefono...
158	9:12:53	Detective	aha
159	9:12:54	Gilberto	aha...yo tengo la (TN:unintelligible) de mi trabajo y tengo que llevarlas a mi trabajo...no sé si me a soltar hoy...me entiende?...y necesito hacer una llamada a mi esposa pasándole los números de teléfono de la persona con la que voy a ir a trabajar...aja...para que pueda el ir por ella
160	9:13:12	Detective	ok, eso no hay problema...el número lo podemos sacar y, y puedes llamar de ahí o de otro teléfono, podemos buscar la manera...

LINE	TIME CODE	SPEAKER	ENGLIS
139	9:11:49	Gilberto	I'm going, I'm going to tell
140	9:11:52	Detective	with the girl?
141	9:11:53	Gilberto	the boy, who says that, tha I wasn't watching...
142	9:11:56	Detective	ok
143	9:11:57	Gilberto	...because, you know that i sometimes they wear only things, that's the only thing saying that I was watching understand me?
144	9:12:13	Detective	ok...he said that the only o videos and there were girls kind of videos
145	9:12:22	OF 2	Which boys?
146	9:12:25	Detective	mmm...a brother
147	9:12:25	OF 2	a, a brother?
148	9:12:26	Detective	mhm
149	9:12:27	OF 2	ok
150	9:12:27	Detective	and he said they weren't n and and the boy said some
151	9:12:32	OF 2	That's not what we are her
152	9:12:35	Detective	no, no he said that was the
153	9:12:37	OF 2	...ok
154	9:12:43	Detective	...that something big happe have given us permission t two days and then we retu
155	9:12:48	Gilberto	ok...before we start...
156	9:12:51	Detective	uhm
157	9:12:51	Gilberto	you're saying he's going to
158	9:12:53	Detective	aha
159	9:12:54	Gilberto	aha...I have half my (TN:un to work...I don't know if I'm understand me?...and I nee the phone numbers of the work...aja...so he can go pic
160	9:13:12	Detective	ok, that's not a problem...w call from that phone or fro

GILBERTO MARTINEZ S.F. INTERVIEW / SPANISH TRANSCRIPTION AND ENGLISH

LINE	TIME CODE	SPEAKER	SPANISH/ENGLISH TRANSCRIPTION
161	9:13:20	Gilberto	no, yo solamente quiere conversar con mi esposa que, que, que ella es la madre...
162	9:13:21	Detective	está bien, tú vas a tener la oportunidad de hacer esa llamada
163	9:13:23	Gilberto	como te digo mañana yo trabajo y ella tiene que trabajar mañana
164	9:13:25	Detective	aja...no, que...
165	9:13:29	Gilberto	como te digo
166	9:13:30	Detective	no es que no queramos...
167	9:13:32	Gilberto	aquí, aquí...yo no sé si voy a salir, o si no voy a salir...
168	9:13:33	Detective	no es que no queramos dejarte hacer la llamada...esto es lo que hace que nos das permiso de buscar en este teléfono específicamente por eso es que pusimos que el modelo y número, de, de, dar permiso a el departamento de Spanish Fork para buscar en tu teléfono y dice que este consentimiento es de tu libre voluntad, que tu das autorizacion a nosotros para buscar en el teléfono, ok?
169	9:13:58	Gilberto	mmm...
170	9:13:59	Detective	entonces si quieres darnos autorizacion, solo tienes que firmar aquí abajo
171	9:14:03	Gilberto	no, no voy a firmar nada
172	9:14:05	Detective	no va a firmar nada?
173	9:14:05	Gilberto	no
174	9:14:06	Detective	no? ok
175	9:14:06	Gilberto	no
176	9:14:07	Detective	he says he's not going to sign anything

LINE	TIME CODE	SPEAKER	ENGLIS
161	9:13:20	Gilberto	no, I just want to speak wi mother...
162	9:13:21	Detective	it's ok, you will have the cl
163	9:13:23	Gilberto	as I told you I work tomor
164	9:13:25	Detective	aja...no, that...
165	9:13:29	Gilberto	as I told you...
166	9:13:30	Detective	not that we don't want...
167	9:13:32	Gilberto	here, here...I don't know if to be released...
168	9:13:33	Detective	not that we don't want to that you give us permissio why we wrote that the De Department authorization consent is given on your o to search your phone, ok?
169	9:13:58	Gilberto	mmm...
170	9:13:59	Detective	then, you do want to give at the bottom
171	9:14:03	Gilberto	no, I am not going to sign a
172	9:14:05	Detective	you're not going to sign an
173	9:14:05	Gilberto	no
174	9:14:06	Detective	no? ok
175	9:14:06	Gilberto	no
176	9:14:07	Detective	he says he's not going to s

TRANSLATOR CERTIFICATION: *I, PABLO SILVEIRA, UTAH STATE CERTIFIED INTERPRETER, HAVE TRANSCRIBED AND TRANSLATED THIS DOCUMENT AND CERTIFY THAT IT IS AN ACCURATE TRANSCRIPTION AND TRANSLATION FROM THE ORIGINAL DOCUMENT WHICH I HAD BEFORE ME. BEGINNING AT 8:49:23 INTO THE INTERVIEW RECORDING, I DID NOT TRANSCRIBE/TRANSLATE THE INTERVIEW FROM THAT TIME UNTIL 9:11:32 DUE TO TIME CONSTRAINTS OF DEFENSE COUNSEL. I DID LISTEN TO THE ENTIRE INTERVIEW. DURING THIS TIME PERIOD THAT I DID NOT TRANSCRIBE, THERE WERE NOT DISCUSSIONS OR QUESTIONS REGARDING WAIVER OF MIRANDA RIGHTS.*

Date 10/13/2017 *Signature* _____

PABLO SILVEIRA – Cell 801-687-4116

State of Utah
ss:
County of Utah

On the 13th day of October 2017, per
this instrument who duly acknowledg

_____
Notary Public