Case No. 20180265-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

FRANK VAL MODES,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated sexual abuse of a child, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Keith Kelly presiding

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INTRODUCTION

When the victim was four-years-old, her uncle—Defendant—woke her up from naps, slide his hand under her underwear, and stuck his finger in her vagina.

In a bench trial, Defendant was convicted of aggravated sexual abuse of a child.

On appeal, Defendant raises multiple unpreserved claims. Defendant first argues that the trial court plainly erred by admitting prior child molestation evidence under Rule 404(c), Utah Rules of Evidence. Defendant asserts that the rule does not allow admitting the details of a prior child molestation conviction and that the evidence presented here was unfairly

prejudicial. Defendant has not shown that the trial court plainly erred. Because the law does not clearly state that the details of prior child molestation are inadmissible under rule 404(c), Defendant cannot show that the trial court plainly erred. Defendant cannot show that the probative value of the evidence substantially outweighed the risk of unfair prejudice because the need for the evidence was great and the risk of prejudice was minimal. And because the evidence was used as the rule intended, Defendant has not shown prejudice.

In three separate claims, Defendant argues that his trial counsel was ineffective for (1) not introducing the victim's CJC interview videos into evidence; (2) not objecting to the prior child molestation victim's testimony or cross-examining the prior child molestation victim; and (3) not consulting a memory expert. To prevail, Defendant must prove both deficient performance and prejudice. Defendant's ineffectiveness claims fail. On this record, Defendant cannot show that no competent counsel would have made the decisions that counsel made. Nor can he show prejudice because he has not shown that admitting the CJC interviews, objecting to the prior child molestation victim's testimony or cross-examining the prior child molestation victim, or consulting a memory expert would have changed the

evidentiary picture enough to make a more favorable outcome reasonably likely.

Defendant also argues that he was not provided adequate notice of the charged offense. Defendant's claim fails because it is unpreserved, and he argues no exception to the preservation rule. In any event, his claim fails because the State provided adequate notice through the Amended Information and the victim's preliminary hearing testimony.

Last, Defendant argues that this Court should reverse on cumulative error. His claim fails because there was no error, let alone, cumulative error.

STATEMENT OF THE ISSUES

Issue 1. Did the trial court plainly error when it admitted evidence of Defendant's prior acts of child molestation pursuant to Rule 404(c), Utah Rules of Evidence?

Standard of Review. To show plain error, a defendant must show obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

Issue 2. Has Defendant proven that his trial counsel was constitutionally ineffective by not moving to admit the victim's CJC interviews into evidence, objecting to or cross-examining the prior child molestation victim's testimony, or not calling an expert witness?

Standard of Review. An ineffective assistance of counsel claim raised for the first time on appeal is a question of law. *State v. Ott,* 2010 UT 1,¶16, 247 P.3d 344.

Issue 3. Does Defendant's unpreserved challenge that the criminal information did not provide constitutionally adequate notice fail because he does not assert any exception to the preservation rule?

Standard of Review. No standard of review applies to this issue.

Issue 4. Did the cumulative effect of the alleged errors deprive Defendant of a fair trial?

Standard of Review. This Court "will reverse only if the cumulative effect of the several errors undermines [its] confidence … that a fair trial was had." *State v. Cruz*, 2016 UT App 234, ¶78, 387 P.3d 618 (citing *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993)) (omission in original).

STATEMENT OF THE CASE

A. Summary of relevant facts.

Defendant was the victim—K.V.'s—uncle. R364,387,401-02. Defendant was her father's cousin and "best friend," and was married to her mother's sister, Kim. R357,364, 401-02,457. K.V. called Defendant "Uncle Val." R363-64.

In the "early 2000s," Kim and Defendant lived together, and Kim operated a licensed daycare in their home. R409. While the day-to-day operations of the daycare were Kim's responsibility, Defendant was left alone with the children during naptime. R410-11,417. During naptime, the daycare children napped in bunkbeds. R366,411.

From 2000 until 2004, when K.V. was five-months-old until she was about four-years-old, she attended daycare at Kim's house. R371,383,410,414.

When K.V. was four-years-old, and at daycare, Defendant woke her and other little girls from their naps, forced them to take off their shirts, and forced them to "lay down together." R364-65. Defendant then exposed his penis to the little girls, "touch[ed]" the little girls, and masturbated. R364-66.

Defendant also sexually abused K.V. when she was alone. R367. More than once, K.V. woke up from her nap to find Defendant lying next to her in the bunkbed "masturbating with his penis out." R367-69. K.V. "could hear the bunk beds squeaking" and feel the bed "shaking." R367. Defendant then "slide his hands inside [her] pants," "under [her] underwear," and "st[u]ck a finger inside" her vagina. R367-68. K.V. testified that it "hurt. R369." Because K.V. "was just scared" when Defendant abused her, she would try to "not [] think about being there," "look around the room," and "lay there," staring "at the lines on top of the bunk bed." R369.

About the same time that Defendant was abusing K.V., she acted out sexually at home. R384. K.V. hid behind bunkbeds, naked, hugging or laying on top of her stuffed animals. R384-86. K.V.'s mother was concerned that "somebody was showing her that or teaching her something." R385. She also noticed that K.V.'s demeanor changed around this time. R386. K.V. started throwing up when she was about "three or four." *Id*. Around the same time, K.V.'s mother also heard that two other little girls accused Defendant of sexually abusing them at the daycare. R390. K.V.'s mother then removed K.V. from Kim's daycare. R386,390.

As K.V. grew up, she continued to have emotional problems. R386,404-05. K.V. "shakes," "hyperventilates," and is "terrified." R386. "She's always looking over her shoulder" and does not like to be alone with men. *Id*., R370,405. And because Kim cleaned the daycare floors with bleach, when K.V. smells bleach it "just brings up those feelings" and "memories" of being abused and she "just feel[s] sick." R370-71.

K.V. also does not like to be near Defendant. At her father's wedding reception, K.V. was initially seated next to Defendant, but moved to sit next to her father because she was "immediately uncomfortable." R403.

Disclosure. K.V. first disclosed Defendant's abuse to her counselor and her mother when she was fourteen-years-old. R369-70,378. She explained that

she delayed disclosure because she was "scared." R369. K.V. explained that Defendant was "close to the family" and she thought disclosing "would just throw things in a whirl." R378. She explained that she was afraid that disclosure meant that she "would have to face someone [like defense counsel] who would protect someone like [Defendant]." Id.

The abuse was then reported to police. R402.

Police Investigation. Detective Ryan Carver, a trained forensic interviewer, met K.V. at the Children's Justice Center. R424-28. Following the National Institute of Children's Health and Development (NICHD) guidelines, Detective Carver interviewed K.V. R428,432. When Detective Carver asked K.V. about the abuse, her demeanor changed. R430. K.V. "kind of put her head down, looked at the floor, and [] became embarrassed." R430. She "wasn't able to continue talking" and "started crying." *Id*. Detective Carver tried to reengage K.V. and help her feel safe, but K.V. was not able to continue the interview. *Id*.

Detective John Pittman interviewed K.V. again at the Children's Justice Center. R437. Detective Pittman also followed NICHD guidelines when interviewing K.V. R432-38. At the beginning of the interview, when Detective Pittman was building a rapport with K.V., she was "a little nervous because she's in front of a police officer by herself talking," but she was "talking pretty

well" with him. R437. When Detective Pittman asked K.V. to discuss the abuse, her demeanor changed. R437-38. K.V. "began to cry," "her voice began to crackle," and Detective Pittman could "tell she was upset and that it was very hard" for her to talk about the abuse. R438.

Detective Pittman also interviewed Defendant. *Id*. Defendant told the detective that Kim operated a daycare in their home. R439. At first, Defendant denied that K.V. attended the daycare, but later "remembered" that K.V. attended the daycare. R440. According to Defendant, during the time that K.V. attended Kim's daycare, Defendant had a back injury that prevented him from picking anything up. R439-40. Detective Pittman asked Defendant about his prior sexual abuse conviction involving a different victim, M.E., that occurred at the daycare, involved physically lifting M.E., and occurred after he injured his back. R440. Defendant responded, "Oh yeah." *Id.*

B. Summary of proceedings and disposition of the court.

Defendant was charged with aggravated sexual abuse of a child, a first degree felony. R43-44.

Prior acts of child molestation. At Defendant's bench trial, the State presented prior child molestation evidence under Rule 404(c), Utah Rules of Criminal Procedure. R391,398-99. The State entered into evidence a certified copy of Defendant's conviction for sexual battery, a class A misdemeanor, for

his sexual abuse of M.E. R398-99; State's Exhibit (SE) 1. Defendant's prior child molestation victim, M.E. testified. R391.

M.E. testified that when she was "six or seven" years old, she attended daycare at Kim and Defendant's house. R392. She testified that even though she was not related to Defendant, she called Defendant "Uncle Frank." *Id*.

M.E. testified that Defendant made her sit on his lap, close her eyes, and stick her fingers in her mouth. R393-94. Defendant then made M.E. straddle his hips with her legs as he moved his hips and rubbed his "private parts against [M.E.'s private parts]." R394-96. M.E. testified that Defendant "tugged on" her pants and "unbuttoned his pants" as she straddled him. R395-96. M.E. testified that this happened "a couple of times" and she felt like Defendant "got a sick pleasure from it." R396.

Defendant also made M.E. lie down with another boy who attended daycare. R397. M.E. testified that Defendant told her to "kiss" and "make out" with the boy and when she refused, he told her she "need[ed] to do it for [her] uncle." *Id*. Defendant called M.E. "his girlfriend." R394. Defendant also tried to convince M.E. not to tell her mom about the abuse. R397.

Directed verdict motion. At the close of the State's case-in-chief, defense counsel moved to dismiss the charge. R441-42. Counsel argued that because there was not a timeline or specific date that the abuse occurred, the

State had not met its burden. R442-43. The State argued that the date and time were not elements. R444.

The court denied the motion, finding that sufficient evidence was presented to support the charges. R445-47.

Defense. Defendant testified. R447. Defendant denied abusing K.V. R456.According to Defendant, during the time that the abuse occurred, he was not living in the house where the daycare was located and was never alone with the daycare kids. R448,450,459. Defendant said that K.V. did not attend Kim's daycare and he was never alone with K.V. R450-52. Defendant also said that his back injury prevented him from lifting more than ten pounds. R449,454.

Defense counsel also cross-examined the State's witnesses. He cross-examined Kim about Defendant's injured back, R414-420; and K.V., her mother, Kim, and Detective Pittman about the timeline of abuse, and challenged the witness' memories, R371-79,387-90,413-20,440-41.

Findings of facts and conclusions of law. Following the trial, the court found Defendant guilty of aggravated sexual abuse of a child. R217-19, 473-79.

The trial court first made findings of facts. R217-19,474-79. The court found the testimony of K.V., her mother, her father, Kim, Detective Pittman, and M.E. credible. R475-78.

The findings detailed the facts that the court found the evidence proved. Kim operated a daycare in her home and that Defendant was left alone with the children. R218,477. K.V. attended daycare at Kim's house for an extended period when she was under five-years-old. R218,477.

Defendant woke K.V. up from her naps at Kim's daycare, had K.V. take off her shirt, and "pull[ed] out his penis and masturbate[d] in front of her and . . . other children." R218,476. K.V. napped at daycare, she "woke up and found Defendant standing next to her. . . masturbating with his penis out, touching himself, rubbing his penis up and down." R218,476. "Defendant then put his hands under K.V's underwear," that he "put his finger in her vagina," and that "this hurt" K.V. R218,476. K.V. was scared at the time of the abuse, and that she did not disclose the abuse because she was scared. R218,476-77. And Defendant admitted that K.V. was his niece. R218,478.

Defendant committed sexual battery on M.E. when she was at Kim's daycare. *Id*. Defendant's abuse of M.E. and K.V. were "similar." R218,477.

The court did not find Defendant's testimony credible. R218,478. Specifically, Defendant's testimony that he was never alone with children at

the daycare, never alone with K.V., and his denial that he masturbated in front of or touched K.V. not credible. R218,478.

Then, the court made conclusions of law. R219,479. Defendant occupied a position of special trust in relation to K.V. because he was her uncle and assisted at Kim's daycare as a babysitter. R219,479. Defendant was previously convicted of class A misdemeanor sexual battery—a misdemeanor involving a sexual offense. *Id*. Defendant penetrated K.V.'s genitals by putting his finger in her vagina in a way that caused her pain. *Id*. When Defendant touched K.V.'s genitalia and took indecent liberties in front of K.V., he did it with the intent to arouse and gratify his own sexual desire. *Id*.

The court sentenced Defendant to the statutory prison term of fifteen-years-to-life. R282-83. Defendant timely appeals. R289.

SUMMARY OF ARGUMENT

Point I. Defendant argues that the trial court plainly erred by admitting prior child molestation evidence under rule 404(c), Utah Rules of Evidence and that the evidence was unfairly prejudicial under rule 403, Utah Rules of Evidence. Relying on *State v. Cuttler*, Defendant argues that evidence of the prior child molestation should have been limited to the fact of the convictions, and should not have included the details of the underlying crimes.

Defendant argues these details unfairly prejudiced him. To prevail on a preserved challenge, Defendant must show that the trial court abused its discretion when it admitted M.E.'s testimony. But where, as here, Defendant's claim is unpreserved, Defendant must prove plain error—obvious, prejudicial error.

Defendant's claim fails. To prevail, Defendant must show that the law governing the alleged error was clear at the time the alleged error was made. The supreme court's *Cuttler* decision did not make clear that detailed rule 404(c) allows only the fact of prior convictions and prohibits evidence of their details. Thus, Defendant cannot show that the trial court plainly erred by admitting the detailed testimony.

Nor has Defendant shown prejudice. Defendant argues only that he was prejudiced because M.E.'s testimony made it more likely that the trial court believed K.V. But that is the purpose of rule 404(c).

Point II. Defendant argues that his counsel was ineffective for (1) not admitting K.V.'s CJC interviews into evidence, (2) not objecting to or cross-examining M.E., and (3) not calling an expert witness. Defendant also argues these errors lead to cumulative error.

Defendant's claims fail because he cannot show either deficient performance or prejudice. Defendant cannot show that all competent counsel

would have moved to admit K.V.'s CJC interview videos. Because K.V. is crying in both videos, visibly upset, and had a difficult time talking about the abuse, a competent attorney could conclude that Defendant would be worse off playing the videos for the judge deciding both his guilt and his sentence where the judge only heard testimony about what happened.

Defendant cannot show that all competent counsel would have objected to M.E.'s testimony or that such an objection would have succeeded. Rule 404(c) allowed M.E.'s testimony and the probative value of her testimony outweighed any risk of unfair prejudice. Nor can Defendant show that his counsel performed deficiently for not cross-examining M.E. To prevail, Defendant must show what evidence cross-examining M.E. would have produced or what his counsel believed it would have produced. Without proving what counsel could have expected to elicit on cross-examination, Defendant has not proved that it would have been so compelling that all competent counsel would have cross-examined her. In any event, Defendant cannot show that all competent counsel would have cross-examined M.E. because counsel may have reasonably decided that cross-examination would have been more detrimental to Defendant's case than helpful. Counsel may have reasonably decided that cross-examination

risked revealing more details of the abuse and only highlighted that Defendant's back injury did not prevent him from sexually abusing M.E.

Defendant cannot show that his counsel performed deficiently for not consulting a memory expert. Defendant presents no evidence that his counsel did not fully consider and investigate the risks and benefits of consulting a memory expert. Defendant has not identified a memory expert that all competent counsel would have consulted with, what that expert would have said, or that the expert's opinion would have led counsel to call the expert to testify. And without such evidence, Defendant cannot overcome the presumption of reasonable representation.

Nor can Defendant show prejudice. Defendant has not identified what evidence the CJC videos, cross-examining M.E., objecting to M.E.'s testimony, or consulting a memory expert would have produced or that such evidence would have so changed the evidentiary picture that Defendant would have received a more favorable outcome.

Point III. Defendant argues that he was not provided adequate notice of the charged offense because got no notice of the date on which the State claimed the offense occurred. Defendant's claim is unpreserved and he argues no exception to the preservation rule. Regardless, the State provided

Defendant with the best information available about when the crimes took place. He was entitled to no more.

In any event, Defendant never claimed that the information provided by the State prevented him from defending the charge. Nor could he. Defendant testified that during the time the abuse occurred he was not living in the home with the daycare, was never alone with the daycare kids, K.V. did not attend the daycare, and he was never alone with K.V. Defendant also put on evidence that his back was injured during the time of the abuse, thus, it was physically impossible for him to commit the crime.

Point IV. Defendant argues that this Court should reverse on cumulative error. His claim fails because there was no error, let alone cumulative error.

ARGUMENT

I.

Defendant has not shown that the trial court plainly erred when it admitted details of Defendant's child molestation conviction.

Defendant argues that the trial court plainly erred when it admitted the details of his prior child molestation conviction under Rules 404(c) and 403, Utah Rules of Evidence. Br.Aplt.7. Defendant argues that M.E.'s testimony was inadmissible because it was "extraneous," contained "inflammatory

details," and the similarities with K.V.'s testimony were "minimal." Br.Aplt.7-10. Defendant's claim fails because he has not shown that the trial court plainly erred when it admitted M.E.'s detailed testimony about Defendant molesting her rather than limiting the evidence to the fact of the convictions.

Rule 404(c), Utah Rules of Evidence, provides that when a defendant is charged with a sexual offense against a child under the age of 14, "the court may permit evidence that the defendant committed any other acts of child molestation to prove propensity to commit the crime charged." In other words, evidence of prior child molestation may be used to demonstrate a defendant's propensity to molest children and, from that propensity, to infer that the defendant committed the charged molestation. Rule 404 evidence carries "'a presumption in favor of admissibility.'" *State v. Lucero*, 2014 UT 15, ¶32, 328 P.3d 841 *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016 (quoting *State v. Dunn*, 850 P.2d 1201, 1221-22 (Utah 1993)).

Like any other evidence, prior child molestation evidence admissible under rule 404(c) is subject to rule 403: a trial court may exclude the otherwise relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Rule 403, Utah Rules of Evidence. When a court examines evidence under rule 403, it should begin with "'a presumption in favor of admissibility'"—the evidence has already been found to be both relevant and admissible for a proper purpose. *Lucero*, 2014 UT 15, ¶32 (quoting *Dunn*, 850 P.2d at 1221-22); *accord United States v. Sumner*, 119 F.3d 658, 662 (8th Cir. 1997) (observing that prior child molestation evidence "'is typically relevant and probative, and . . . its probative value is normally not outweighed by any risk of prejudice or other adverse effects'").

A court may exclude prior child molestation evidence only if "the probative value of the evidence [is] '*substantially* outweighed by the danger of *unfair* prejudice, and unfair prejudice results only because the evidence has an 'undue tendency to suggest decision on an improper basis.'" *Id.* (quoting *State v. Bair*, 2012 UT App 106, ¶22, 275 P.3d 1050); *accord United States v. Bentley*, 475 F.Supp.2d 852 (N.D. Iowa 2007).

To prevail on a preserved challenge, Defendant would have had to show that the trial court abused its discretion when it admitted M.E.'s detailed testimony about what Defendant did to her on the charges he was convicted of. *State v. Cuttler*, 2015 UT 95,¶12, 367 P.3d 981 (cleaned up). But because Defendant did not preserve his claim, his burden is much higher. *Dunn*, 850 P.2d at 1208. Defendant must prove plain error—that an error

exists, that the error should have been obvious to the trial court, and that absent the error, there would be a reasonable likelihood of a more favorable outcome. *Id.* 1209. Thus, Defendant must show that rule 404(c) or the law applying it so plainly limited the prior molestation evidence to the mere fact of the conviction that the trial court should have intervened sua sponte to exclude evidence of the details of the molestation. *State v. Hummel*, 2017 UT 19,¶¶107-112, 393 P.3d 314 (emphasis in original). On this record, he cannot.

A. Defendant cannot show that the trial court plainly erred by allowing M.E. to testify to the details of Defendant's abuse under Rule 404(c), Utah Rules of Evidence.

Relying on *State v. Cuttler*, 2015 UT 95, ¶27, 367 P.3d 981, Defendant argues that M.E.'s testimony was inadmissible under rule 404(c) because it included the details of the abuse and showed his propensity to molest prepubescent girls. Br.Aplt.8-9. Specifically, Defendant argues that M.E.'s testimony was inadmissible because it contained "extraneous and inflammatory details" that rule 404(c) does not "contemplate." Br.Aplt.9. Defendant argues that *Cuttler* only allows such evidence to prove a "pattern of conduct." *Id*.

To prevail on his unpreserved claim, Defendant must show that "the law governing the error was clear at the time the alleged error was made."

Salt Lake City v. Josephson, 2019 UT 6, ¶23, ---P.3d ---. He has not, and for this reason alone, Defendant's claim fails.

In *Cuttler*, Cuttler was charged with sexually abusing his seven-year-old daughter. 2015 UT 95, ¶1. At trial, the State sought to admit under rule 404(c) that in 1984 and 1985—over twenty years earlier—Cuttler sexually abused his then eight-and ten-year-old daughters. *Id*. The district court did not admit the evidence, explaining that the evidence was admissible under rule 404(c), but not under rule 403 because the evidence presented a danger of unfair prejudice that substantially outweighed its probative value. *Id*.

The supreme court reversed. *Id*. ¶¶2-3. The supreme court explained that prior child molestation evidence admitted under rule 404(c) "by itself cannot be said to lead to unfair prejudice automatically." *Id*. ¶27. "[C]hild molestation convictions have evidence that is emotionally charged and that may have the potential to lead to unfair prejudice," thus, the trial court can prevent the danger of unfair prejudice by "limiting the details admitted about the previous conviction." *Id*. Under rule 403, a trial court "may limit the evidence to that which shows the defendant's propensity for child molestation, rather than include unnecessary and emotionally charged details . . . such as other accompanying physical abuse." *Id*.

The supreme court's decision was limited to how rule 403 interacts with rule 404(c). *Id*. The decision did not interpret the plain language of rule 404(c). *Id*. Thus, *Cuttler* did not reach the issue that Defendant argues—whether the details of the abuse are admissible under a rule 404(c) analysis. *See id*.; Br.Aplt.9. Because *Cuttler* did not reach the issue, it would not have been obvious to the trial court that M.E.'s testimony should have been restricted. *See Josephson*, 2019 UT 6, ¶23. For this reason alone, the trial court did not plainly err.

Regardless, trial court properly admitted the details of M.E.'s abuse. M.E.'s testimony did not plainly run afoul of *Cuttler.* The details admitted here conformed to *Cuttler's* limitations; or at least, they did not plainly exceed them. M.E. did not testify to extraneous information of physical abuse. Rather, she confined her to testimony to the sexual abuse Defendant inflicted on her. R397. The details M.E. testified to were necessary to show Defendant's propensity for child molestation. *See Cuttler*, 2015 UT 95, ¶27.

And the limitations Defendant suggests—only the fact of a prior conviction—would contradict the very purpose of rule 404(c)—to prove a propensity to commit the kind of crime under consideration. Defendant's conviction alone would not have informed the court of his propensity. Defendant was convicted of class A misdemeanor sexual battery. Nothing

about that type of charge or the judgement the State entered into evidence to support that Defendant was convicted of the charge put the trial court on notice that Defendant's conviction involved a prepubescent girl and similar circumstances to the case before the court. *See* SE1.

And simply because M.E.'s testimony was emotionally charged does not mean that it should have been excluded. Indeed, *Cuttler* recognizes that prior child molestation testimony is, by its nature, "emotionally charged," but is nevertheless admissible so long as it doesn't include evidence of non-sexual abuse. *Id*.

Defendant also argues that the error should have been obvious to the trial court because the similarities between Defendant's abuse of K.V. and M.E. were "minimal." Br.Aplt.9. Nothing in the rule requires similarity. *See* Rule 404(c), Utah Rules of Evidence. Indeed, as explained in *Cuttler*, "courts are bound by the text" of the rule, not weighing factors like similarity to determine admissibility. 2015 UT 95, ¶18.

Regardless, the cases are similar—Defendant molested prepubescent girls at the daycare run in his home. He waited until he was alone with the girls, had each girl call him "Uncle," and had each girl lie down with another daycare child naked or partially naked then watched the children and masturbated. R364,397. And that similarity is enough.

Thus, Defendant has not shown that the trial court plainly erred by admitting the details of M.E.'s testimony under rule 404(c).

B. Defendant cannot show that the trial court plainly erred by admitting the details of M.E.'s abuse under Rule 403, Utah Rules of Evidence.

To prevail, Defendant must show that the trial court plainly erred by not excluding the details of Defendant's prior child molestation conviction because the probative value substantially outweighed the danger of unfair prejudice. Rule 403, Utah Rules of Evidence. On this record, Defendant cannot make that showing where the probative value of the evidence was great and the risk of unfair prejudice was minimal.

1. The probative value of the rule 404(c) evidence was great.

The probative value of the prior child molestation evidence was great: (1) the reliability of the evidence was strong—Defendant pleaded no-contest to sexual battery of M.E. pursuant to a plea agreement and was subsequently convicted, SE1; and (2) the need for the evidence was great.

"Child sexual abuse . . . most often occurs in private, often the perpetrator is a member of the victim's family, and physical evidence of the abuse is rare." *State v. Chauvin*, 846 So.2d 697, 702 (La. 2003). This case is no different.

K.V. disclosed about ten years after the abuse that her uncle, Defendant, molested her when she was four-years-old at her aunt's daycare. R367-69,385,370. There was no physical evidence of abuse.[1] As a result, the case was largely a credibility contest between Defendant and K.V. The prior child molestation evidence was important evidence corroborating K.V.'s testimony. *McLean v. State*, 934 So.2d 1248, 1258 (Fla. 2006) (holding that prior child molestation evidence "corroborate[s] the victim's testimony in both familial and nonfamilial child molestation cases").

Regardless, Defendant argues that M.E.'s detailed testimony was inadmissible because his conviction was from a no-contest plea. Br.Aplt.10-11. But a no-contest plea is a conviction. *See e.g.*, UTAH CODE ANN. §77-38a-102(1) (under the crime victim's restitution act, a conviction includes a no-contest plea); *Brown v. Theos*, 345 S.C. 626, 629 (2001) (no-contest plea

[1] "There are several reasons for lack of physical findings in sexually abused children. Many abusive acts, such as fondling, kissing, fellatio, cunnilingus, or the use of the child in pornography leave no marks. Even full penile penetration may not damage the hymen. Some sexual offenders suffer from erectile and/or ejaculatory dysfunction. Severe injuries to the genitalia of sexually abused children are rare. Healing of injuries in the genital area may be complete and rapid, so that no physical evidence remains when the child comes to the medical examination." John E.B. Myers, Jan Bays, Judith Becker, Lucy Berliner, David L. Corwin, and Karen J. Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 37 (1989) (footnotes omitted).

functions as a guilty plea and is a conviction). As such, it can be used to support rule 404(c) evidence. Otherwise, prosecutors would be "handcuffed" from using rule 404(c) evidence as it was intended, and defendants would be incentivized to plead no-contest instead of guilty. *Cuttler*, 2015 UT 95, ¶3.

In sum, absent physical evidence or other witnesses to the abuse, the prior child molestation evidence is important corroborating evidence of K.V.'s abuse. "Sexual assaults on a minor of the type presented in this case are *always considered aberrant*." *State v. Roscoe*, 910 P.2d 635, 642 (Ariz. 1996) (en banc) (emphasis added). That Defendant has previously engaged in such aberrant behaviors with another prepubescent girl strongly corroborates K.V.'s testimony that he did so with her.

2. The risk of unfair prejudice was minimal.

The rule 403 prejudice analysis that applies to rule 404(b) cases—the threat that the jury will consider a criminal propensity when deciding guilt for the charged crime—does not apply to a rule 404(c) analysis. Rule 404(c) expressly allows a jury to rely on exactly that propensity. Indeed, the probative weight of the prior child molestation evidence under rule 404(c) is "significantly greater—and the risk of *unfair* prejudice considerably less—because the rule now permits fact-finders to consider a defendant's propensity to molest children as demonstrated by prior acts of child

molestation." *Lintzen*, 2015 UT App 68, ¶19, 347 P.3d 433 (emphasis in original). Prior acts of child molestation admitted under rule 404(c) that show only that a defendnat has a propensity for child molestation is "not a factor that weighs against the evidence's admissibility under rule 403." *Cuttler*, 2015 UT 95, ¶¶26, 27.

Further, any concern that the jury would misuse prior child molestation evidence and that misuse would unfairly prejudice Defendant is not a concern here. This was not a jury trial, but a bench trial. R353. "Although the nature of the proceedings should not affect the admissibility of evidence, we recognize a presumption that the court considers only admissible evidence and disregards any inadmissible evidence." *State v. Adams*, 2011 UT App 163, ¶12, 257 P.3d 470. "[J]udges in bench trials are presumed to be less likely than juries to be prejudiced by" evidence. *Id.* ¶12; *see State v. Park*, 17 Utah 2d 90, 404 P.2d 677, 679 (1965) ("[T]he rulings on evidence are looked upon with a greater degree of indulgence when the trial is to the court than when it is to the jury."). Thus, the risk of unfair prejudice is further diminished because the fact-finder was the court. Defendant, therefore, cannot show that he was unfairly prejudiced by the admission of the evidence.

C. Defendant has not shown prejudice.

Defendant argues that he was prejudiced because admitting the evidence made it more likely that the trial court believed K.V. Br.Aplt.10-11. But that is the purpose of prior child molestation evidence admitted under rule 404(c). *See* Rule 404(c), Utah Rules of Evidence; *Cuttler*, 2015 UT 95, ¶¶26, 27; *Lintzen*, 2015 UT App 68, ¶¶16-19. Because the only use Defendant points to was a permissible use, he has not shown prejudice.

In sum, the trial court did not err—plainly or otherwise—when it admitted M.E.'s testimony under rules 404(c) and 403.

II.

Defendant has not proven that his counsel performed ineffectively.

Defendant argues that his counsel was ineffective for (1) not admitting K.V.'s CJC interview into evidence, (2) not objecting to M.E.'s testimony under rule 404(c) or cross-examining her, and (3) not presenting an expert witness on memory. Br.Aplt.11-19. Defendant also argues that these errors led to cumulative error. Br.Aplt.20. Defendant's claims fail because he cannot show that no reasonable attorney would have proceeded as his counsel did here. Nor can he show prejudice. On this record, Defendant cannot show that but for his counsel's alleged errors he there would have been a reasonably likelihood of a more favorable outcome.

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).

A. Defendant has not proven deficient performance.

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, ¶7, 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. "The 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*.; *accord Burt v. Titlow*, 571 U.S. 12, 24 (2013); *Strickland*, 466 U.S. at 687.

At bottom, then, counsel performs deficiently only when overlooking an issue is "'sufficiently egregious and prejudicial,'" *id*. 111 (citation omitted),

that "no competent attorney" would have missed it, *Premo v. Moore*, 562 U.S. 115, 124 (2011).

1. Defendant has not proven that all competent counsel would have moved to admit K.V.'s CJC interview videos.

Defendant argues that his counsel performed deficiently for not introducing K.V.'s CJC interview videos into evidence because, he says, the interviews contained "inconsistencies." Br.Aplt.14. Specifically, Defendant says that in the first interview K.V. "declined to tell investigators" about the abuse, but in the second interview, K.V. gave "significant details about the abuse" and disclosed that another person previously molested her. Br.Aplt.14-15.

To prevail, Defendant must provide record evidence to support his claim. Defendant has not and cannot. *See* Br.Aplt.15. Neither interview was entered into evidence. Without such evidence, Defendant's claim fails. *See Titlow*, 571 U.S. at 22-23 (explaining that "that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance") (quoting *Strickland,* 466 U.S. at 689); *State v. Litherland*, 2000 UT 76,¶17, 12 P.3d 92 (holding that inadequacies in the record "will be construed in favor of a finding that counsel performed effectively").

And on this record, Defendant cannot show that all competent counsel would have sought to admit the videos themselves. The only evidence of what was in the videos came from the interviewing detectives' testimony. The first detective testified that when he brought up the abuse in the first interview, K.V.'s demeanor changed dramatically; she "put her head down, looked at the floor, and [] became embarrassed"; and she "wasn't able to continue talking" and "started crying." R430. In fact, K.V. became so upset that the detective ended the interview. *Id.*

The second interviewing detective testified that in the second interview, K.V. "began to cry," and "her voice began to crackle" when she discussed the abuse. R438. The detective testified he could tell that K.V. was "upset and that it was very hard for her to talk about the abuse." *Id*.

A competent attorney could conclude that on balance, Defendant would be worse off playing the videos for the judge deciding both his guilt and his sentence. The judge only heard testimony about what happened. A competent attorney could conclude that it would not help his client to play a video of K.V. first being too emotional to speak at all, then finally wrenching the accounts of abuse out of herself while crying.

Defendant has not shown that there was anything to gain, let alone anything so compelling that all competent counsel would have risked

showing the judge a video of the emotional disclosure. Defendant says that the videos would have shown an inconsistency because K.V. did not disclose the abuse in first interview, then disclosed it in the second. Being too emotional to disclose the first time is not inconsistent with disclosing the second. *See* R430,438.

2. Defendant has not proven that all competent counsel would have objected to or cross-examined the prior child molestation victim.

Defendant argues that his counsel performed deficiently for not objecting to M.E.'s testimony or cross-examining M.E. Br.Aplt.15-17.

Defendant's claim fails because he cannot show that all competent counsel would have objected to M.E.'s testimony or that such an objection would have succeeded. *See State v. Isom*, 2015 UT App 160, ¶¶82-85, 354 P.3d 791 (holding that trial counsel's decision to not object to testimony was reasonable professional assistance). Nor can Defendant show that any objection would have succeeded given the plain language of rule 404(c). *See State v. Chacon*, 962 P.2d 48, 51 (Utah 1998) ("Neither speculative claims nor counsel's failure to make futile objections establishes ineffective assistance of counsel."). As explained, rule 404(c) allowed M.E.'s testimony to show that Defendant has a propensity to molest prepubescent girls and the probative value of M.E.'s testimony outweighed any risk of unfair prejudice to

Defendant. *See Supra* I; *see* Rules 404(c), 403, Utah Rules of Evidence. And as explained, there was no law making the details so plainly inadmissible that all counsel would have objected to admitting the details. *Dunn*, 850 P.2d at 1208.

Defendant also cannot show that his counsel performed deficiently for not cross-examining M.E. To prevail, Defendant must show what evidence cross-examining M.E. would have produced or what his counsel believed it would produce in order to show that it would have been so compelling that all competent counsel would have chosen to cross-examine her. Defendant offers no evidence to support either. *See Titlow*, 571 U.S. at 22-23 (explaining that "that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance") (quoting *Strickland,* 466 U.S. at 689); *Litherland*, 2000 UT 76,¶17 (holding that inadequacies in the record "will be construed in favor of a finding that counsel performed effectively"). Defendant's claim is purely speculative that cross-examining M.E. would have been fruitful. *See Chacon*, 962 P.2d at 51. Thus, his claim fails for that reason alone. *Parsons v. Barnes*, 871 P.2d 516, 524 (Utah 1994) (cleaned up).

In any event, Defendant argues that his counsel should have cross-examined M.E. to limit the impact of her testimony. Br.16-17. He also argues

that counsel should have cross-examined M.E. on his back injury defense. Br.Aplt.16-17.

Counsel may have reasonably decided that cross-examination would have been more detrimental than helpful to Defendant. *See State v. King*, 2010 UT App 396, ¶49, 248 P.3d 984 ("[A]ttorneys may opt to forego cross-examination of witnesses for valid strategic reasons."); *see also Strickland*, 466 U.S. at 675-76 (no ineffective assistance for not cross-examining medical experts). Given that M.E.'s testimony was limited and that Defendant was convicted of molesting her, counsel may have reasonably decided that cross-examining her may have brought further unwanted attention to Defendant's prior crime and cross-examination risked that M.E. would reveal more details of the abuse. Counsel may have also reasonably decided that cross-examining M.E. about Defendant's back injury would have only highlighted that Defendant's injured back did not prevent him from sexually abusing her, allowing the judge to extrapolate that it did not prevent him from sexually abusing K.V. *See* R439.

Thus, Defendant has not shown that all competent counsel would have cross-examined or objected to M.E.'s testimony.

3. Defendant has not proven that his counsel did not consult a memory expert or that all competent counsel would have consulted a memory expert.

Defendant argues that his counsel performed deficiently for not consulting a memory expert to challenge K.V.'s testimony. Br.Aplt.17-19.

An allegation that counsel did not consult an expert does not establish that counsel, in fact, did not consider or investigate whether an expert would be useful to the defense. This is because counsel's decision "not to call an expert witness is a matter of trial strategy, which will not be questioned and viewed as ineffectiveness unless there is no reasonable basis for that decision." *State v. Walker*, 2010 UT App 157,¶14, 235 P.3d 766; *accord State v. Tyler*, 850 P.2d 1250, 1256, (Utah 1993).

Defendant presents no evidence that his counsel did not fully consider and investigate the risks and benefits of consulting a memory expert. And without that evidence, Defendant cannot overcome the presumption of reasonable representation. *See Titlow*, 571 U.S. at 22-23 (explaining that "that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance") (quoting *Strickland,* 466 U.S. at 689); *Litherland*, 2000 UT 76,¶17 (holding that inadequacies in the record "will be construed in favor of a finding that counsel performed effectively"). And while Defendant says his

counsel should have consulted a memory expert, he has not identified a memory expert that all competent counsel would have consulted with, or what that expert would have said, let alone that it would have been so compelling that all competent counsel would have called the expert to testify. Defendant's claim amounts to nothing more than speculation that his current counsel "'would have taken a different course.'" *Parsons*, 871 P.2d at 524 (cleaned up).

To the extent Defendant's premise is that counsel must always call an expert, the law is otherwise. *See Richter*, 562 U.S. at 110 (recognizing that the Sixth Amendment does not mandate calling an expert for every issue). Rather, counsel may choose to rely on cross-examining the State's witnesses to support the defense theory.

This record shows that that is the course Defendant's counsel chose. Counsel cross-examined K.V. about her memory and her disclosure delay. R373-80. He also cross-examined K.V.'s mother, father, and the second interviewing detective, challenging the accuracy of K.V.'s testimony. R387,405,413,440. *See Richter*, 562 U.S. at 107. And again, Defendant has not shown that any expert would have so materially added to this that all competent counsel would have identified and consulted that unidentified expert.

Relying on *Landry v. State*, 2016 UT App 164, 380 P.3d 25, Defendant argues that his counsel had "no plausible strategic reason" for not calling an expert witness. Br.Aplt.19. But 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. To prevail, Defendant must prove that his counsel's performance was objectively unreasonable—in other words, that "no competent attorney" would have done as counsel did. *Moore*, 562 U.S. at 124. As explained, whether defense counsel's action was a sound strategy may be one consideration. But it is not alone determinative of objectively reasonable representation. And as explained, Defendant has not, on this record, shown that no competent counsel would have relied on cross-examination as his counsel did.

Moreover, *Landry* is distinguishable. In *Landry*, this Court held that trial counsel was deficient for not consulting an arson expert because trial counsel was inexperienced with arson trials, and the record showed counsel's investigation efforts. *Id*.¶¶34-37. But the record here does not show that Defendant's counsel was similarly so uneducated on the issue of memory or that memory presents the same level of scientific complexity that the Sixth Amendment required counsel to consult with a memory expert. And in *Landry*, the record demonstrated what assistance an expert would have leant

to the defense. *Id*. But as explained, this record is silent on this indispensable component of Defendant's claim. *See Titlow*, 571 U.S. at 22-23 (explaining that "that the absence of evidence cannot overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance") (quoting *Strickland,* 466 U.S. at 689). Thus, Defendant's claim fails.

B. Defendant has not proven prejudice. [2]

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," *Harrington v. Richter*, 562 U.S. 86, 112 (2011). The defendant "has the difficult burden of showing…*actual prejudice*." *Tyler*, 850 P.2d at 1259 (cleaned up).

Under that standard, Defendant cannot show prejudice. Defendant contends that but for his counsel's failure to address the State's purported lack of evidence and present evidence, there would have been a more favorable outcome. Br.Aplt.19. Defendant also argues that he was prejudiced by the cumulative effect of counsel's alleged errors. Br.Aplt.19-20.

[2] This section responds to Defendant's Point B.iv. Br.Aplt.19-20.

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. He 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.

Defendant cannot meet his burden. Defendant has not identified what evidence the CJC interview videos, cross-examining M.E., or consulting the memory expert would have produced. Nor has Defendant shown that admitting the CJC interview videos, excluding M.E.'s testimony, cross-examining M.E., or consulting a memory expert would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely. *Id*. And without such a showing, his claim fails.

Regardless, Defendant argues that he was prejudiced because his counsel did not "present any evidence favorable" to him. Br.Aplt.19. But Defendant fails to identify what evidence counsel should have presented or what witnesses counsel should have called. And without that proof, Defendant has not shown how his hypothetical evidence would have rebutted any of the evidence against him, let alone "so altered the evidentiary landscape that a more favorable outcome would have been reasonably probable." *Strickland*, 466 U.S. at 695-96.

Defendant also argues that he was prejudiced because counsel did not address the State's "lack of evidence" and that the court "never heard the defense's theory of the case." Br.Aplt.19.

Defendant is mistaken. Counsel challenged the State's evidence and presented Defendant's theory of the case. *See* 467-70. Counsel cross-examined the witnesses on the timeline, trying to establish that Defendant was either not present during the abuse, or that the witness' memories were faulty. R371-79,387-90,413-20,440-41. He also cross-examined Kim about Defendant's back injury—the only witness who knew about the injury—and Defendant testified about his back injury, trying to establish that it was impossible for Defendant to have committed the crime. R414-20,448-57.

Nor can Defendant prove that even if the prejudice from any one of his ineffective assistance claims is insufficient to reverse, the cumulative prejudice from all of them is sufficient. Br.Aplt.1-20. Defendant has not proven prejudice on any of his ineffective assistance claims, he necessarily cannot show cumulative prejudice. *See State v. Killpack*, 2008 UT 49, ¶62, 191 P.3d 17, *abrogated on other grounds as recognized by State v. Lowther*, 2017 UT 34, 398 P.3d 1032.

In sum, Defendant has not shown that his counsel rendered constitutionally deficient representation or that but for his counsel's alleged errors he would have received a more favorable outcome.

III.

Defendant was provided adequate notice of the charged offense.

The Amended Information charged Defendant with one count of aggravated sexual abuse of a child, occurring sometime between "February 1, 2000 through December 31, 2004." R43. As the preliminary hearing testimony revealed, the aggravated child abuse dates represented the years between K.V.'s first and fifth birthdays and the years that K.V. was enrolled at Kim's daycare. R598-99. As the prosecutor explained, the State moved to amend the information following the preliminary hearing because "that seem[ed] like what the testimony, to give a better timeline of when this event could have occurred." R600. Defendant did not object. *Id*. Nor did Defendant move for a bill of particulars under rule 4(e), Utah Rules of Criminal Procedure or UTAH CODE ANN. §77-14-1 (West 2018).

During the trial, after the State rested, Defendant moved to dismiss the charge. R441-42; *see* R447. Defendant argued the court should dismiss the charge because there was not "a timeline at all for the alleged incident." *Id*.

The court denied Defendant's motion, ruling that sufficient evidence supported the charge. R445-47.

On appeal, Defendant argues that his due process rights were violated because the State did not provide adequate notice of the timeline. Br.Aplt.20. Defendant argues that his oral motion to dismiss during trial preserved his claim. Br.Aplt.3. Defendant's claim fails because it is unpreserved, and he argues no exception to the preservation rule. In any event, his claim lacks merit.

A. Defendant's unpreserved claim fails because he argues no exception to the preservation rule.

A party generally cannot raise an issue on appeal that it did not properly preserve in the trial court. *State v. Johnson*, 2017 UT 76, ¶14, 416 P.3d 443. To preserve an issue for appeal, a party must present the issue in "'the district court in such a way that the court has an opportunity to rule on [it].'" and if necessary fix any error to avoid a re-trial. *Id.* ¶15 (cleaned up). In other words, a party's objection must be both timely and specific. *See id.* The specificity requirement prevents a party from raising an issue on one ground but arguing another ground on appeal. *See Oseguera v. State*, 2014 UT 31,¶10, 332 P.3d 963 (a party that objects "based on one ground does not preserve any alternative grounds for objection for appeal") (cleaned up).

Defendant argues that his oral motion to dismiss preserved his claim. Br.Aplt.3. Defendant is mistaken.

To challenge that an information does not provide sufficiently precise notification, a defendant must make a "timely *written* demand" to the State to "specify in writing as particularly as is known [] the place, date and time of the commission of the offense charged." UTAH CODE ANN. §77-14-1 (West 2018) (emphasis added). The most obvious way for a defendant to make such a demand is to move for a bill of particulars. Rule 4(e), Utah Rules of Criminal Procedure. Under rule 4(e), "[w]hen facts not set out in an information are required to inform a defendant of the nature and cause of the offense charged, so as to enable the defendant to prepare a defense, the defendant may file a *written* motion for a bill of particulars." (emphasis added). Rule 4(e) states that the "motion shall be filed at arraignment or within 14 days thereafter, or at such later time as the court may permit."

Here, Defendant never filed a written bill of particulars or any written motion requesting that the State more particularly specify the timeline. That alone makes his claim unpreserved. *See e.g., State v. Wilcox,* 808 P.2d 1028, 1033 (Utah 1991) (Wilcox preserved his challenge by "properly and timely fil[ing] a request for a bill of particulars and a demand for the place, date and

time of the offense."); *State v. Klenz*, 2018 UT App 201, ¶¶4-5, --- P.3d --- (Klenz preserved his appellate challenge by moving for a bill of particulars).

Regardless, Defendant's motion to dismiss in the middle of trial after the State presented its case-in-chief did not preserve his claim. R442. Defendant's motion to dismiss was a challenge to the sufficiency of the evidence, not a challenge to the information's specificity. That is, Defendant only argued that the State did not prove its case. He never told the trial court that he could not prepare a defense because he lacked sufficient information to meet the charges leveled against him. *See* R441-47; *Johnson*, 2017 UT 76, ¶14 (a party must present the issue in the district court in such a way that the court has an opportunity to rule on it.).

And even if this Court were to read Defendant's motion to dismiss as a challenge to the information, his motion still did not preserve his claim. The motion to dismiss was untimely as a challenge to the information. *See* Rule 4(e), Utah Rules of Criminal Procedure. Defendant did not raise the issue "at arraignment or within 14 days thereafter, or at a later time as the court may permit" *Id*. Defendant's motion was made in the middle of trial, after the State presented its entire case-in-chief. Prior to trial, Defendant never moved for a bill of particulars or challenged the information in any way. *See* Rule 4(e), Utah Rules of Criminal Procedure.

Thus, Defendant's claim is unpreserved. *Johnson*, 2017 UT 76,¶15.

A party seeking review of an unpreserved issue must articulate an appropriate justification for appellate review—such as plain error—in the party's opening brief. *Johnson*, 2017 UT 76, ¶14. When a party does not, this Court will decline to consider the issue. *See id.*; *Oseguera*, 2014 UT 31,¶15. Defendant does not justify appellate review of this issue, and this Court should decline to consider it. State v. *Atkinson*, 2017 UT App 83,¶6, 397 P.3d 874; *see State v. Kozlov*, 2012 UT App 114, ¶32, 276 P.3d 1207.

B. Defendant has not shown that the information was insufficiently specific to enable him to prepare a defense.

A defendant has a federal and state constitutional right "to know the nature of the offense with which he is charged." *State v. Nelson-Waggoner*, 2004 UT 29, ¶17, 94 P.3d 186. This right to notice "is rooted in the recognition that when the government exercises its authority to bring criminal charges against a person and thereby places him at risk of losing his liberty, the accused should be entitled to insist that the crime be defined with such reasonable clarity that he can mount a defense." *Nelson-Waggoner*, 2004 UT 29, ¶17.

But "there are few ironclad rules for determining the adequacy of notice beyond the requirement that the elements of the offense be alleged." *State v. Wilcox*, 808 P.2d 1028, 1032 (Utah 1991). Where, as here, time is not a

statutory element of the offense, the State need not identify—in the information or elsewhere—the exact date when the charged crime occurred. *See State v. Taylor*, 2005 UT 40, ¶9, 116 P.3d 360; *State v. Robbins*, 709 P.2d 771, 772 (Utah 1985); *accord* Rule 4(e), Utah Rules of Criminal Procedure. All that is required is that the State provide the defendant with "sufficiently precise notification of the date of the alleged crime so that he can prepare his defense." *McNair v. Hayward*, 666 P.2d 321, 326 (Utah 1983).

In determining whether the prosecution provided that notice, the Court weighs "the completeness of the notice and its adequacy for the defendant's purposes against the background of the information *legitimately available to the prosecuting authority*." *Wilcox*, 808 P.2d at 1032 (emphasis added); *accord Taylor*, 2005 UT 40, ¶9. In other words, the State is required "to give the defendant the best information it has as to when the alleged crime took place." *Nelson-Waggoner*, 2004 UT 29, ¶20. " '[A]s long as a defendant is sufficiently apprised of the State's evidence upon which the charge is based so that the defendant can prepare to meet that case, the constitutional requirement is fulfilled.' " *Id.* (quoting *Wilcox*, 808 P.2d at 1032).

In *Wilcox*, the Utah Supreme Court "recognized that there are notice problems, especially as to the date, place, and time, inherent in prosecutions based on the testimony of very young [child abuse] victims." 808 P.2d at 1032.

This is so because " 'children are often not able to identify with a high degree of reliability, and sometimes not at all, when an event in the past took place.' " *Id*. 1032-33 (quoting *Robbins*, 709 P.2d at 773). Moreover, the difficulty of a young child's ability "to specify a date on which abuse occurred or a location where it occurred is exacerbated by situations in which the abuse occurred on many occasions over a long period of time, a not-uncommon occurrence." *Id*. 1033. It is reasonable that older children testifying about sexual abuse that occurred when they were younger would have that same difficulty specifying dates and times.

In sum, "so long as the elements of the crimes are covered by the factual allegations and the defendant is fully apprised of the State's information regarding the time, place, and date of the crimes, any lack of factual specificity goes not to the constitutional adequacy of the notice, but to the credibility of the State's case." *Wilcox,* 808 P.2d at 1032-33; *see also State v. Klenz*, 2018 UT App 201, ¶35, --- P.3d --- (same).

C. The date range of the sexual abuse provided by the State satisfied the constitutional notice requirements for the charged offense.

As noted, the Amended Information alleged that Defendant sexually molested K.V. between February 1, 2000 and December 31, 2004. R43. As

evidenced by K.V.'s preliminary hearing testimony, this was the "best information" that the State had as to when the abuse occurred.

At the preliminary hearing. K.V. testified that when she was four-years-old, Defendant molested her when she attended daycare at Kim and Defendant's house. R574-83. K.V. testified that on more than one occasion when she was alone in her bunkbed at naptime, Defendant masturbated in front of her and "slide his hands inside [her] panties and inside [her], touching her "vagina." R578-80. K.V. testified that Defendant stuck his fingers in her vagina. R579. K.V. testified that when Defendant stuck his fingers inside her vagina, she remembered the bunkbed "squeaking" and the room smelled like cleaning supplies. R581-82. K.V. also testified that Defendant also told her and two other little girls to take off their clothes, touch each other, and Defendant masturbated. R580, 582-83.

K.V. was unable to provide specific dates when the abuse occurred, testifying that she did not know the specific dates or times of the abuse. R589. She testified that the abuse occurred more than five times but less than ten times. R595. She testified that the abuse occurred in "2004," because that is the year she turned four. R589. She testified that she did not know when it happened in 2004 and remembered that "some mornings" were cold so "maybe it took place in the winter," but did not "know for sure." R589.

Thus, the date range set forth in the Amended Information was the "best information" available to the State. *Nelson-Waggoner*, 2004 UT 29, ¶20. Indeed, the prosecutor amended the Information following the preliminary hearing to provide the "best information." *Id*.; R600. It reflected the preliminary hearing testimony of K.V. who could only say that the abuse occurred between five and ten times when she was four years old. R589,595.

Defendant argues that he was "incapable of preparing a defense with such a broad timeline" because K.V.'s trial testimony expanded the period for the alleged offense from 2004, as she testified to at the preliminary hearing, to "any time between 2000 and 2004." Br.Aplt.22.

But K.V.'s direct testimony did not expand the period of the offense. At trial, K.V. consistently testified that Defendant molested her when she was "four." R365. Only when counsel cross-examined K.V. and asked for a specific year did K.V. testify that the abuse occurred between 2000 and 2004—the same dates on the Amended Information. R43,371-72. Because the dates K.V. testified to and the dates on the Amended Information were the same, K.V.'s trial testimony did not expand the date range. Moreover, K.V.'s cross-examination testimony did not undercut her testimony that Defendant abused her when she was "four." R365. K.V. was "four" between 2000 and 2004. *See* R371 (K.V.'s birthday is September 7, 1999). And it is unlikely that

the one statement made a difference when K.V. was otherwise consistent that Defendant molested her when she was "four."

Thus, Defendant was "sufficiently appraised of the State's evidence upon which the charge [was] based" through the Amended Information and K.V.'s preliminary hearing testimony. R43, 574-89; *Taylor*, 2005 UT 40, ¶9. K.V.'s trial testimony did not change the period of the abuse. *Cf.* R43, 574-89, 365-72.

But even if this Court finds that K.V.'s testimony increased the period of abuse, the State did not expand the timeline—Defendant did. As such, he cannot claim on appeal that the expanded timeline infringed upon his rights.

In any event, Defendant's constitutional rights were not infringed upon. The purpose of the rule is to give a defendant adequate pretrial notice so he can prepare his defense. *See Klenz*, 2018 UT App 201, ¶34. To resolve that question, "courts weigh 'the completeness of the notice and its adequacy for the defendant's purposes against the background of the information legitimately available to the prosecuting authority.'" *Id.* ¶35 (quoting *Taylor*, 2005 UT 40, ¶9). At the time of trial, Defendant had all the information "legitimately available to the prosecuting authority." *Id*. That is all that was required—and Defendant does not claim otherwise.

At bottom, Defendant's claim is that even when the State provides constitutionally proper pre-trial notice, if a witness's trial testimony differs from her preliminary hearing testimony, then Defendant's pre-trial notice right is infringed upon and this Court should reverse. Br.Aplt.22-23. Defendant's interpretation of rule 4's requirements is wrong. The notice rule applies to the State's pre-trial obligations—not its trial obligations. Trial events cannot determine whether the State retroactively met pre-trial obligations. *See Taylor,* 2005 UT 40, ¶10; *Nelson-Waggoner*, 2004 UT 29, ¶¶17-18.

Regardless, Defendant never claimed that he could not defend the charge. Because, in fact, he did. Defendant testified that during the time that the abuse occurred, he was not living in the house where the daycare was located and was never alone with the daycare kids. R448,450,459. Defendant said that K.V. did not attend Kim's daycare and he was never alone with K.V. R450-52. Defendant also said that his back injury prevented him from lifting more than ten pounds. R449.

In sum, Defendant received the best information that the State had as to when the crimes took place, and the lack of specific dates did not in any way impair his ability to prepare a defense. Accordingly, Defendant received constitutionally adequate notice of the charged offenses

IV.

Cumulative error does not justify overturning the verdict.

Defendant finally claims that this Court should reverse on cumulative error, if nothing else. Br.Aplt.23-24. An appellate court reverses on cumulative error only if errors are so pervasive and prejudicial that they "undermine[] [this Court's] confidence" in the essential fairness of the trial. *State v. Maestas*, 2012 UT 46, ¶363, 299 P.3d 892. Because there was no error, there is no cumulative error. And even if there were any error, its impact was de minimis, and would not have been collectively prejudicial.

CONCLUSION

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

Respectfully submitted on March 18, 2019.

SEAN D. REYES
Utah Attorney General

/s/ 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 11,142, 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

Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on March 18, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Gregory G. Skordas
Kaytlin V. Beckett
Skordas, Caston, & Hyde, LLC
560 South 300 East, Suite 225
Salt Lake City, Utah 84111

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 R. Evid. 403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion, Or Waste Of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Utah R. Evid. 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(c) Evidence of similar crimes in child molestation cases.

(1) In a criminal case in which the accused is charged with child molestation, evidence of the commission of other acts of child molestation may be admissible to prove a propensity to commit the crime charged provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(2) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(3) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Utah R. Crim. P. 4. Prosecution of Public Offenses

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(c) The court may strike any surplus or improper language from an indictment or information.

(d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.

(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.

Current with amendments received through July 1, 2009.

Utah Code Annotated § 77-14-1 (West 2018)

The prosecuting attorney, on timely written demand of the defendant, shall within 10 days, or such other time as the court may allow, specify in writing as particularly as is known to him the place, date and time of the commission of the offense charged.

Addendum B

Q. Was it your understanding that she was there at the grandmother's house that entire time?

A. Did you say grandmother's house or did you say Kim's house, or did I just misunderstand your question?

Q. I said grandmother's house.

A. Oh, I misunderstood your question. I'm sorry. At grandmother's house there was, I'm not exactly 100 percent sure. It was somewhere after the first allegation came out in 2002 when she was taken to grandmother's house.

Q. And are you sure about the 2002? Could that have been August or, excuse me, April 2001?

A. I do not know.

Q. Okay.

MR. SPENCER: Nothing further.

THE COURT: Redirect?

MR. HANSEN: Nothing further, Your Honor.

THE COURT: You can step down.

THE WITNESS: Thank you, Your Honor.

MR. HANSEN: Your Honor, at this point, the State rests.

THE COURT: Okay.

Are there any motions?

MR. SPENCER: We move to dismiss for failure to meet the standard that a criminal case requires.

THE COURT: Okay. Counsel, do you want to go ahead

and argue that? Mr. Spencer?

MR. SPENCER: Your Honor, I find it somewhat stranger that we don't have a timeline at all for this alleged incident. We've got it occurred somewhere between this year and year. And it may have been 2002 or it may have been 2003 or it may have been 2004. We just don't have anything specific upon which to convict Mr. Modes in this particular case.

I talked in some of my questions about interviews that various people had with Detective Arlington and even in those written interviews that were--

THE COURT: And you said Detective Arlington. We've had Detective Pittman and Detective Carver. Was there some other detective?

MR. SPENCER: No. Detective Arlington is the one that actually interviewed the persons in this particular case where provided with his report.

THE COURT: Okay. He's not--just to be clear--

MR. SPENCER: He's not a witness.

THE COURT: --he's not a witness?

MR. SPENCER: He's not a witness. But we tried to nail down the timeline that was in Detective Arlington's paperwork and we couldn't even do that. We got the child was there somewhere between six months and four years old. We don't know exactly when or where. We've got the interview that Kim had with Detective Arlington saying at age two the child went

to Grandma Lita's. So I'm just not sure where and when the abuse took place because we simply don't have a timeline that could be nailed down. The only--

THE COURT: Now let me ask you a question. I thought I heard you say we're not sure where and when.

MR. SPENCER: Correct.

THE COURT: I thought the testimony of the witnesses was pretty consistent that it occurred at Mr. Modes' home. Are you saying there's no evidence of that?

MR. SPENCER: What I'm saying is the timelines don't match what they told the detective when this (inaudible) was interviewed. That if the child was at Grandma Lita's beginning at age two, that would have been 2001. And if we take Kayla's testimony as true, the abuse took place in 2003. Well, that would have been at Grandma Lita's house rather than at Kim's house. So that's the problem that I have with this case is I don't have a timeline that I can argue yeah Mr. Modes was there, no Mr. Modes wasn't there because I don't know exactly when the child was abused, if the child was abused and where the child was abused.

So that's the basis for my motion, Your Honor.

THE COURT: State?

MR. HANSEN: Your Honor, I'm assuming--

THE COURT: Mr. Hansen?

MR. HANSEN: --we're arguing a directed verdict

objection. I'm going to be quoting from State v. Garcia and State v. Davelo. In State v. Davelo, it was clear the evidence is sufficient of a denial of a motion to dismiss proper if the evidence and all inferences that can be reasonably drawn from it establish that some evidence exists from which a reasonable jury can find elements of the crime to prove beyond a reasonable doubt.

Now, obviously this is not a jury trial, but I think the standard is the same. I think the inferences are clear. You've had several, multiple witnesses tell you that the location, which is an element, happened in Salt Lake County. You know where it happened. The date and time are not an element. And you've heard evidence that there was penetration, touching and the under 14. So consent is not an issue. The law says no when you're under 14. So I believe that certainly with all the reasonable inferences drawn in favor of the State that the directed verdict is not proper.

I'll take any questions.

THE COURT: Thank you.

Any reply?

MR. SPENCER: No, Your Honor.

THE COURT: Okay.

This is the matter of State v. Frank Modes. This is case 161912922. And we have--the State has put on its evidence. The charge is aggravated sexual abuse of a child, a first

degree felony. And we have testimony from--

Let me just make a comment about where we're at now. I tell juries to keep an open mind until all of the evidence is in. I realize I'm the finder of fact right now and I'm keeping my mind open until I hear all of the evidence and until I hear closing statements.

The issue right now is whether sufficient evidence was presented to allow the case to go forward and require the defense to put on a defense. And the issue is has the State put on evidence sufficient to support the charges. And the charge is aggravated sexual abuse of a child. And the elements are as follows: in Salt Lake County, State of Utah, the defendant did and the--I have testimony from the alleged victim, Kayla Valdez, confirming that this did occur in Salt Lake County.

The allegations are, and the evidence supports the allegations, that the defendant did touch the genitalia of the victim or otherwise took indecent liberties with the child. And it's clear from, it's not exactly certain what exact age the alleged victim was, but it's clear that she was under the age of five. And the testimony of the victim was that he pulled down her pants and put his finger in her vagina and caused pain. That he would pull his penis out and masturbate in front of the children including the victim more than one time and that the defendant would masturbate in front of the victim; that he slid his hand inside of her pants. When she woke up

next to the victim, he was masturbating with his penis out. He was touching himself and then he put his hand under the alleged victim's underwear, touched her vagina, put his finger into her vagina, it hurt and she was scared. She testified that this happened more than one time. That she was scared and as a result didn't tell anyone at the time.

So that testimony supports the charge that the defendant did touch the genitalia of the child and take, otherwise take indecent liberty to her, with that child. And based on that testimony and other testimony that's been provided, including by another alleged victim, it was that it was--there's sufficient evidence that it was with intent to cause substantial emotional or bodily pain or the intent to gratify the sexual desire of the defendant.

And that the other element, the offense, was committed by a person who occupied a position of special trust in relation to the victim. Special trust includes an uncle. And the testimony is that the defendant was the uncle of the victim. In addition, he was able to exercise undue influence over the victim due to the fact that he was a childcare provider and she was at childcare. The testimony was that the defendant assisted his wife, who provided childcare at her home. And that, furthermore, that the accused caused the penetration, however slight, of the genital opening of the child.

So the evidence supports each of the elements of the charge and therefore I'm denying the motion to dismiss. I want to be clear, I haven't heard all the evidence so I'm keeping my mind open before I make any decision in this case. What I have determined at this time is that the State has met its burden to have this case go forward.

Any clarification by the defense?

MR. SPENCER: No, Your Honor.

THE COURT: State?

MR. HANSEN: No.

THE COURT: Okay.

Okay. Would the defense call its first witness?

MR. SPENCER: Yes. We call Frank Modes.

THE COURT: Okay. Could you step forward and be sworn, sir?

(WITNESS IS SWORN IN)

THE COURT: Could you step forward? Mr. Spencer?

MR. SPENCER: Yes, Your Honor.

FRANK VAL MODES

Having first been duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SPENCER:

Q. Are you ready?

A. Yes.

Addendum C

The Order of the Court is stated below:
Dated: February 27, 2018 07:40:46 PM
/s/ KEITH KELLY
District Court Judge

Sim Gill
District Attorney for Salt Lake County
Matthew J. Hansen, Bar No. 9003
Deputy District Attorney
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SALT LAKE CITY, UT 84111
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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. FRANK VAL MODES Defendant.	**FINDINGS OF FACT and CONCLUSIONS OF LAW** Case No. 161912922 Judge KEITH KELLY

The Bench Trial in which Defendant was represented by counsel, Terry Spencer and Gavin Collier, and the State was represented by counsel, Matthew J. Hansen, came before this Court on January 23, 2018. The Court, after careful review of oral arguments, statutes, case law, and motions/memoranda from both parties, enters the following FINDINGS OF FACT and CONCLUSIONS OF LAW.

FINDINGS OF FACT

1. Mr. Frank Valdez was charged with one count of Aggravated Sexual Abuse of a Child, a violation of Utah Code Ann. § 76-5-404.1(4).
2. The Court finds that K.V., when under the age of five, was at daycare at her aunt Kim Castillo's home, which was the home of the Defendant. The Court finds that the Defendant is K.V.'s uncle and that she would call him Val, and that he would be at the home when she was there for daycare. The Court finds credible the testimony of K.V. that there were occasions that she took

naps, that the Defendant would get her up from her nap, have her take off her shirt, and the Defendant would pull out his penis and masturbate in front of her and in front of other children. The Court also finds credible K.V.'s testimony that she was taking a nap in the bottom bunk bed and that she woke up and found the Defendant standing next to her while she was at her aunt's daycare, and that he was masturbating with his penis out, touching himself, rubbing his penis up and down and that the Defendant then put his hands under K.V.'s underwear and put his finger in her vagina. The Court finds it credible that this hurt her, she was scared, and all she could do was freeze. The Court finds that the Defendant did this at least one time, and when K.V. said that it happened more than one time, the Court finds that testimony credible as well. The Court further finds it credible that K.V. did not tell anyone at that time because she was scared. Finally, the Court finds that K.V. is credible when she said she was subject to night terrors, trauma and other challenges and difficulties that resulted from those instances

3. The Court finds Eleanor Kesler Castillo is K.V.'s mother and that her testimony credible that she took K.V. to daycare at the Defendant's home for an extended period of time when she was under the age of five.
4. The Court finds that Maria Escalante has no relationship with K.V. or Eleanor Castillo, and they do not know Maria, but that the circumstances are similar. The Court finds Ms. Escalante's testimony credible which supports the conviction of the Defendant in Case #021102008 of sexual battery, a class A misdemeanor. Maria Escalante was the complaining witness that led to the no-contest plea, which led to the entry of a conviction of sexual battery against the Defendant. The Court finds her testimony credible that Defendant committed sexual battery with Maria Escalante as the victim when she was a young child in daycare.
5. The Court finds Kim Castillo is K.V.'s aunt and Eleanor Castillo is her sister. She was married to the Defendant for an extended period of time and the Court found the testimony credible when she testified that K.V. came to their home for day care, and that the Defendant was there for at least part of the time that K.V. was being cared for in day care. The Court found Ms. Castillo's testimony credible that when she had daycare at her home, there were times that she would leave to run to the store and would leave the Defendant to care for the children who were in daycare.
6. The Court finds Detective John Pittman's testimony credible that the Defendant, in 2016, admitted that K.V. was his niece.
7. The Court finds Defendant's testimony not credible when he testified that he was never alone with children at his wife's daycare. The Court finds that Defendant's testimony that he was not alone with K.V. is not credible. The Court further finds that the Defendant's testimony that he denies masturbating in front of or touching K.V. not credible.

CONCLUSIONS OF LAW

1. The Court finds after careful review of oral arguments, statutes, case law, and motions/memoranda from both parties the following:

    a. The Court finds beyond a reasonable doubt that when the victim, K.V., was under the age of five, sometime during the period approximately between 2000 – 2015 in Salt Lake County, the Defendant did touch the genitalia of the victim, K.V., and otherwise did take indecent liberties with K.V. by masturbating in front of her and requiring her to take off her clothes in front of him

    b. Further, the Court finds that when Defendant touched the genitalia of K.V. and took indecent liberties in front of K.V., he did it with the intent to arouse and gratify his own sexual desire.

    c. The Court also finds that at the time the offense was committed, the Defendant occupied a position of special trust in relation to K.V. because he was her uncle and because he was assisting his wife as a babysitter

    d. In addition, the Court finds that the Defendant prior to sentencing for this offense was previously convicted of a misdemeanor involving a sexual offense, namely the Class A misdemeanor of sexual battery in the case #021102008 in the Utah Third District Court

    e. Finally, the Court finds that Defendant caused the penetration of the genitals of the victim K.V. by putting his fingers in her vagina in a manner that caused her pain.

BY THE COURT:

*****EXECUTED AND ENTERED BY THE COURT AS INDICATED BY THE DATE AND SEAL AT THE TOP OF THE FIRST PAGE OF THIS DOCUMENT*****