PUBLIC

Case No. 20180224-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee/Plaintiff,

v.

JUSTIN POPP,
Appellant/Defendant.

OPENING BRIEF OF APPELLANT

APPEAL FROM CONVICTION AND JUDGMENT FOR TWO COUNTS OF SODOMY UPON A CHILD, FIRST DEGREE FELONIES
THE HONORABLE BRANDON MAYNARD PRESIDING,
FIRST DISTRICT COURT, BOX ELDER COUNTY, STATE OF UTAH
DISTRICT COURT CASE NO. 171100138

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APPELLANT IS INCARCERATED
ORAL ARGUMENT IS REQUESTED

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INTRODUCTION

Justin Popp ("Popp") went to trial on two first-degree felony charges January 4, 2018, with no witnesses, no experts, no evidence, and virtually no defense. As a result, in less than a year, Justin Popp ("Popp") went from a divorced father working and taking care of his children in Brigham City, Utah, to an inmate in the Utah State Prison serving two, concurrent twenty-five to life sentences. R.1-2,259-60,609.

Popp is a loving father; he was the primary caretaker of his two children, F.H. and B.J., for most of their lives. *See Popp Aff.,* Although the end of his romantic relationship with their mother, Caitlin Hanks ("Hanks"), ended in a difficult divorce, he continued to care and provide for both of these children, even though F.H. was not his biological daughter. R.421-22,436,471,503.

When Popp was served with a child protective order ("CPO") on March 17, 2017, he did what most do, seek legal counsel and put his trust in his attorney to prove his innocence, or at least ensure he received a fair process. R.14-15,506-07. This is not what happened. Trial counsel failed to investigate witnesses, to consult necessary experts, to challenge the State's primary evidence—F.H.'s CJC interview, and overall failed in preserving Popp's rights to due process and a fair trial. Simply put, trial counsel was not prepared for trial.

The trial court also abdicated its duties to Popp. The trial court failed in its duty to properly instruct the jury, to ensure the jury received only reliable evidence, and allowed the jury to consider evidence expressly prohibited by the United States and Utah Constitutions.

Worse, Popp was left in the dark about his case and his defense until it was too late. He was unaware he had no witnesses, experts, or other evidence until the State rested its case during the trial. Popp had no way of knowing his conviction was virtually guaranteed by the actions and inactions of the trial court and his own attorney before Popp even stepped foot in the courtroom.

Popp concurrently files a *Motion and Memorandum in Support of 23B Remand* with supporting affidavits. Throughout this brief, Popp refers to non-speculative facts from the 23B materials that are pivotal to his IAC claims. Popp hereby incorporates these materials by reference and renews his request for remand should this Court not find error and reverse on other grounds.

STATEMENT OF ISSUES

ISSUE I: Whether Popp Is Entitled to a New Trial Where the Jury Instructions Did Not Include an Elements Instruction.

Preservation/Standards of Review: Trial counsel did not pose objections, agreed to, or submitted the jury instructions at issue here. This Court should correct the errors under the plain error, manifest injustice, or ineffective assistance of counsel doctrines.[1] These standards of review are detailed prior to argument in the "Standards" on page 20.

Whether jury instructions correctly state the law is a question of law reviewed for correctness. *See, e.g., State v. Liti*, 2015 UT App 186, ¶ 8, 355 P.3d 1078. Ineffective assistance of counsel claims raised for the first time on appeal are reviewed as a matter of law. *See State v. King*, 2010 UT App 396, ¶20, 248 P.3d 984; *State v. Clark,* 2004 UT 25, ¶6, 89 P.3d 162.

ISSUE II: Whether the CJC Interview Was Erroneously Admitted.

Preservation/Standards of Review: The trial court failed to make the requisite reliability findings under Rule 15.5 of the Utah Rules of Criminal Procedure before admitting the CJC interview at trial. Trial counsel did not pose objections or agreed to the admission of the CJC recording without requisite findings. This Court should correct the error under the plain error or ineffective assistance of counsel doctrines. The admission of evidence is a question of law. *See, e.g., State v. Cruz*, 2016 UT App 234, ¶16, 387 P.3d 618. "[T]rial

[1] For brevity, these standards of review are detailed prior to the argument, on page 20 herein.

courts do not have discretion to misapply the law," however. *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991). Ineffective assistance of counsel claims raised for the first time on appeal are reviewed as a matter of law. *See King*, 2010 UT App 396, ¶20; *Clark,* 2004 UT 25, ¶6. Claims of ineffective assistance of counsel are an exception to the preservation doctrine. *See State v. Houston*, 2015 UT 40, ¶17, 353 P.3d 55.

ISSUE III: Whether the Jury's Consideration of Popp's Invocation of his Pre-arrest Right to Remain Silent Requires this Court to Reverse and Remand for a New Trial.

Preservation/Standards of Review: Trial counsel did not pose objections or agreed to the admission of the evidence and response to the related jury question. This Court should correct the error under the plain error or ineffective assistance of counsel doctrines.

ISSUE IV: Popp's Convictions Should Be Reversed and the Case Remanded for a New Trial Where Trial Counsel Provided Constitutionally Ineffective Assistance, and Where Counsel's Multiple Deficiencies Resulted in Prejudice.

Preservation/Standards of Review: These issues are not preserved. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law[,]" reviewed for correctness. *Clark*, 2004 UT 25, ¶6.

SUB-ISSUES:

A. Failing to Investigate and Call Lay Witnesses in a Case that Hinged on Credibility.

B. Failing to Object and Rebut Unnoticed Expert Testimony and Improper Bolstering of F.H.'s Statement/Testimony.

STATEMENT OF THE CASE

Popp and Caitlin Hanks ("Hanks") began dating in 2007. R.428,435,502. At the time, Hanks already had a daughter, F.H., who was born in 2004. R.428. Popp always loved and treated F.H. as his own. *Popp Aff.*,¶8. Popp and Hanks moved in together in Brigham City, Utah in 2008 and were married in November 2013. R.428,502-03. B.J. was born of the couple in October 2008 and Popp became a stay-at-home dad while Hanks worked. R.429-30,508; *Popp Aff.*,¶10(a),(e).

Due to her infidelity, Hanks left Popp and the children on January 13, 2015, moving in with her boyfriend. R.342,437,504; *Popp Aff.*,¶11(a). Their divorce became final in July 2015. R.428. Divorce proceedings were contentious and bitter; Popp received the home and Hanks was ordered to pay child support. R.438-39,504. Hanks and Popp agreed to keep the kids primarily with Popp and keep them together. R.438,508. This was despite F.H. not being Popp's biological daughter. R.421-22,436,471,503. F.H. lived with Popp for fifteen months thereafter, but moved in with Hanks, by mutual agreement, in September 2016. R.430-31,506-07.

Out of nowhere, in March of 2017, Popp was served with a child protective order ("CPO"). R.506-07. The CPO, filed by Hanks, included their son, B.J. and F.H. R.424,441-42,507. This was the first time Popp heard of the allegations that he sexually abused F.H. at least four years prior. *Popp Aff.*,¶14(a)

F.H. Interviewed and Charges Filed

On March 21, 2017, Popp was charged in Box Elder County by Information with two counts of Sodomy Upon a Child, First Degree Felonies, under Utah Code section 76-

5-403.1. R.1-2. Popp retained counsel, attorney Shannon Demler ("trial counsel" or "defense counsel") who represented him through trial and sentencing. R.14-15. Trial counsel also represented Popp in the CPO proceedings in the juvenile court and a divorce modification filed by Hanks related to the allegations. *Popp Aff.*,¶15(a),(e),(g).

The criminal charges arose from disclosures purportedly made by twelve year-old F.H. to Hanks. R.294,297-98. A recorded interview with F.H. occurred at the Children's Justice Center ("CJC") on March 10, 2017 with Child Protective Services worker Cheryl Burgan ("Burgan"). *See* TCJC.[2] F.H.'s little brother, B.J. was also interviewed; he made no disclosures of abuse. R.103,300

Proceedings Up to Trial

On October 20, 2017, the State filed a *Motion for Admissibility of Recorded Statement of Child Victim at Trial*. R.54-60. Defense counsel filed a memorandum in opposition on November 3, 2017. R.65-69. Counsel argued it would violate Popp's constitutional rights to confront his accusers if the interview were played but F.H. did not testify. *Id*. This objection was withdrawn at the final pretrial as the State previously noted it intended to call F.H. at trial. R.130-31,314-18. *See infra*, Part II.

Also on November 3, 2017, defense counsel filed a *Motion in Limine*, requesting a pretrial order precluding evidence regarding uncharged allegations contained in the police reports made by Hanks about Popp's parenting and character. R.63-64. The State admitted these allegations were likely inadmissible under the Utah Rules of Evidence.

[2] The record was supplemented on appeal with the transcript of the CJC interview. References to this transcript are "TCJC" followed by the page number.

R.84-87. The State reserved the right to use this evidence if it became relevant and otherwise admissible. R.85. The defense responded, "if the State seeks to bring in the evidence in rebuttal the Court should have a hearing on this matter and make a final decision before its admission." R.90.

On December 4, 2017, trial counsel filed *Notification of Expert Witness Pursuant to Utah Code of Criminal Procedure § 77-17-13* (sic). R.106-15. Notice was given that Dr. Kyle Hancock ("Dr. Hancock") would "testify about the propensity for child witnesses to recall or falsify testimony, especially when there is a delay in reporting the allegations. He will also testify to the proper techniques that need to be used when interviewing child witnesses and whether they were used in this case." R.107. Defense counsel did not call Dr. Hancock. R.334. *See infra*, Part II(C)(iii).

With trial scheduled for January 4-5, trial counsel provided notice to the State on Dec. 29th of the intention to call three lay witnesses at trial: Laura Johnson, F.H.'s grandmother; Lindsay Amidan, a close friend of Hanks; and Kelly Loftis, an individual that resided with Popp, Hanks, and the children during at least some of the relevant time period. R.147-49;324; *Popp Aff.*,¶10(g).[3] The State filed a *Motion to Preclude Defendant's Witnesses*, arguing Popp's witnesses should be excluded as they were not disclosed in compliance with the discovery order, and because a continuance would "prejudice" the victim and State. R.140-45. Defense counsel responded, misrepresenting that he was only informed of the witnesses in the week prior to trial and the witnesses

[3] Affidavits from these witnesses are contained in the 23B materials.

would be used only "to show that the alleged victim did not change her behavior in any way shape or form during the time of the alleged abuse." R.149;[4] *cf. Popp Aff.*,¶16(j).

The court held a telephonic conference on January 3, 2018. R.151-52,321-36. During this conference, the State appropriated the role of the judge and suggested, "if the [S]tate doesn't alleged [sic] that there was behavioral changes or anything like that . . [Popp] wouldn't be able to use the witnesses as rebuttal witnesses. But if the [S]tate did . . . then perhaps the defense can use those as rebuttal witnesses[.]" R.330. The State also made clear it intended to move forward with trial the following day, even if the court did not preclude the witnesses. R.327. Although trial counsel stated he "would like the continuance[,]" he ultimately agreed to not call the defense witnesses because he was concerned he would "look worse" if the request was denied. R.333-34; *see also* R.153-54. *See infra*, Part IV(A).

Trial

Although the trial was scheduled for two days, jury selection, instructions, opening statements, all evidence, final instructions, and closing statements took place in a single day. R.155-59. Prior to trial, trial counsel never informed his client he had agreed to not call defense witnesses and he would not be calling an expert. *Popp Aff.*,¶18(b).

Before jury selection, the State made an oral motion to preclude any testimony regarding "infidelity in the marriage" between Popp and Hanks under Utah Rule of Evidence 403. R.342. Defense counsel responded he intended to "go with that area" and "did want to talk briefly about the fact that they got a divorce and [Popp] was awarded

[4] Trial counsel never actually spoke to these witnesses. *See infra*, Part III(A)

custody of the kids . . . they separated in January of 2015, [Hanks] left the kids with [Popp], [Popp] got custody in the divorce[.]" R.343. The State clarified it intended to discuss custody of F.H. and B.P. also but was concerned about testimony of an affair. R.343. The trial court ultimately ruled the evidence about Hanks "moving out, those types of things" was relevant but "any sexual relationship" wasn't relevant at that point. R.344-45.[5]

Also prior to jury selection, the State noted its intention to call Detective Pyatt and ask "if he was able, if he tried to meet with the defendant." R.346. The purpose would be to show Pyatt "did everything he could to, you know, investigate the case." *Id*. Defense counsel did not object. R.346-47. *See infra*, Part III.

The trial court and the parties also discussed the preliminary jury instructions, Instructions 1-19, prior to jury selection. R.345-47. Both the State and defense counsel stipulated to the use of the preliminary jury instructions. R.347.

The State called four witnesses at trial: Hanks, F.H.'s mother; Burgan, the CJC interviewer; F.H.; and Detective Rory Pyatt ("Pyatt"). R.341-555. Hanks testified first. *Id*.

Hanks' Testimony

Hanks gave background on F.H., B.J. and her relationship with Popp. Hanks testified regarding the divorce:

> We did have some arguments in the beginning because I was not willing to give up custody of my kids. And in the divorce, neither one of us were awarded custody, there was joint custody. Neither one were awarded as a custodial parent rather.

[5] Trial counsel's only "preparation" of his client prior to testifying was the advice to not discuss the divorce, keep his answers short, and not to ramble. *Popp Aff*..¶19(e).

R. 429. She described custody of the children after the divorce as:

> I was the only one that worked, so he was given majority of the parent time. I had at least—I was supposed to be at least three weekends a month that I was not working . . . sometimes it was kind of a fight to even get anybody to answer the phone so that I could see my kids.

Id.; see also R.438-39. Hanks also testified that for five years during the relationship, Popp stayed at home to care for the children instead of using paid childcare. R.429-30. Hanks also stated when she left, Popp "refused to let me take my children." R.437.

Hanks then described on September 23, 2016, F.H. moved in with Hanks, because F.H. "has enough of doing everybody else's chores, constantly making food for herself and her brother and it was—she was ready to be a kid." R.430.[6] Hanks described F.H.'s disclosure to her in March 2017 as:

> That night, it was about 11:30 at night, we thought that she was already asleep in bed because she did have school the next day, and we were having sex and she had walked by our bedroom door to go to the restroom. She saw it, she became very, very upset. Immediately we stopped, I went in to talk to her to find out why she was so upset. And anytime that we even hugged or kissed, she kind of became standoffish. But that night she was a hysterical mess, not just a kid crying because she was upset, she was having a serious breakdown and I just asked her, I need to understand why you are so upset.
>
> I understand that this is not something a kid should see, I understand that you're upset because of that but this is different. I need to understand why you are upset as you are right now. And that's when she told me that when she was younger her stepfather, Justin William Popp, told her that he had a magic spoon with frosting on it and made

[6] F.H. being "forced" to do chores was an underlying theme during the trial. Had trial counsel investigated, evidence available to trial counsel suggested F.H. enjoyed cleaning and F.H. moving was completely unrelated. *See Popp Aff*.,¶13; *Johnson Aff*.,¶14 (F.H. school project stating her favorite activity is "cleaning").

> her lick it off, and she knew that it was not a spoon. She knew that it was his penis.

R.431-32. Hanks contacted DCFS and set up an interview with F.H. R.433. Hanks also testified F.H. "couldn't even eat" her birthday cake and "still to this day cannot eat frosting, will not touch it." *Id*.

On cross-examination, Hanks testified F.H. "always" knew Justin was not "her real father" and F.H. had pictures of her grandparents and real father in her room. R.436. Further, there were no disclosures by F.H. prior to March 2017. R.440. Hanks also testified that F.H. did not specify when it happened only that she was "younger." R.441. Defense counsel elicited that after Hanks went to DCFS, she also filed the CPO and went to ORS and "cancelled the child support obligation" to Popp. R.442.

Burgan's Testimony

Next the State called Burgan. R.444-45,448-49. Burgan testified about the CPS investigation process and her personal qualifications and training. R.445-48. Burgan also detailed the "forensic interview technique" used with F.H. on March 10, 2017, including how the technique was developed. R.448-49. Burgan went on to discuss the stages of the interview beginning with introduction (including eliciting a promise to tell the truth). R.451-52. Burgan described the rapport building, episodic memory, disclosure, break, and leading questions stages of the interview. R.452-53,458,459.[7]

[7] As discussed in the 23B materials, Burgan did not follow the NICHD FIT guidelines including doing many of the things she described in testimony, for example, not eliciting a promise to tell the truth from F.H. R.451-52; *Cf. Peterson Rpt.*

Burgan also testified about early disclosure during interviews, frequency of child remembering "every single episode" of abuse, the initial disclosure being incomplete, and the commonality of children staying with their abusers.[8] R.454, 461-62, 464.

Trial counsel engaged in limited cross-examination, eliciting that Burgan is paid by the State, R.465-66; she reviews the Child Abuse Neglect Report (CANR) taken by DCFS prior to the interview, R.467; clarified why "suggestive questions" are not used with children; and questioned if suggestibility issues arise with "lay people" as well as experts. R.468. Defense counsel also read from the CANR: "The referent said that it happened while the mother was working, she worked 2:00 to 10:00pm and the referent would guess that it happened about two years ago." R.470. Counsel also read, "FH's biological father is Douglas Moser. FH has not met him[.]" R.471.

F.H.'s Testimony and CJC Interview

F.H. then testified. R.475-81. Her testimony provided little to no substantive evidence of the actual allegations. F.H. testified she is "thirteen years old[,]" Popp "was [her] stepdad[,]" and she identified him in the courtroom. R.476. F.H. believes she was "four to eleven" when she lived with Popp but she didn't "know for sure[.]" *Id*.[9] The State then laid minimal foundation for the CJC interview through F.H., who also testified

[8] Defense counsel objected to the question:"In your experience, how common is it for a child to stay with their abuser?" A side bar was held that is inaudible in the record. There is no on-record ruling but the question was re-asked. R.462-63.

[9] This testimony is important because the Information charged a two-year time period, from January 2012 through December 2013; this is what Popp was bound over on. Even though time is not usually an element the State must prove, Popp was not charged with abuse occurring from when F.H. was 4-11 years old. *See infra*, Part I.

there was no information in the CJC interview that was "incorrect." R.477. F.H. stepped down and the CJC interview was played for the jury. R.479 (video shown; not received as an exhibit); *See generally*, TCJC.

The CJC interview as viewed by the jury presented the following: F.H. stated that while Hanks was at work, "my dad–he's not my real dad–he put frosting on his thing and then he made me lick it off." TCJC:3. F.H. identified "he" as Popp and stated it occurred "[a] few years ago" when she "was seven or eight." TCJC:4. F.H. stated it happened more than once but she could not recall how many times. *Id*. When asked to describe the first time this occurred from beginning to end, F.H. stated:

> Well, he asked me if I wanted a treat so I said yes and so he told me to go in his room and I did and he blindfolded me and I don't know what it was though, I think it was a bandana but I don't know. And he said he wanted to get a spoon but I didn't hear anything so I just sat there and then he came back and he had frosting, I didn't know that at first but then he made me kneel down and lick it, whatever he had off of it.

TCJC:4. F.H. stated she thought "it" was his penis because one time it occurred and she fell backwards and she "had to grab onto something and grabbed onto his leg and he didn't have any pants on." TCJC:5. F.H. stated the first time she believed "it" was "something else until he kept doing it." TCJC:5-6.

When asked to describe the "last time" it happened, F.H. stated she was in the bathroom and Popp was having her clean bottles. TCJC:7-8. F.H. described:

> So, he asked if I wanted to help him clean some bottles and so I said sure, and so we went into the bathroom and he never turned the light on but he had me kneel down again–no, he had me sit on the toilet and then he said I'd probably have to use mouth to clean the bottles and I don't know why but I knew it wasn't a bottle because it wasn't hard . . . It was like squishy and warm.

TCJC:8. Toward the end of the interview, F.H. was asked to whom she previously disclosed:

> [F.H.]: It was my mom just a few nights ago.
>
> Burgan: A few nights ago. So tell me everything that happened when you told mom.
>
> [F.H.]: So my mom and my stepdad were having sex and so I was in my room and I never really liked it when they did that so I was crying 'cause it made my stomach upset and my mom asked me if anyone ever hurt me or did anything to me and so then I told her but I only told her about the first time because after that she told me to get some sleep.
>
> Burgan: So you only told her about the first time it happened?
>
> [F.H.]: Uh-huh (affirmative).
>
> Burgan: So you, just that I make sure—remember if I say something wrong, you've got to stop and tell me. So you had heard your mom and stepdad having sex and it bothered you?
>
> [F.H.]: Uh-huh (affirmative).
>
> Burgan: Why do you think it bothered you?
>
> [F.H.]: My mom thinks that since my mom and my other stepdad, since they were never really affectionate toward each other, and I'd always tried to push those memories back, she thinks that since I've seen them be affectionate towards each other, she thinks that since I've seen them be affectionate towards each other, she thinks that that sort of brought those memories back.

TCJC:13-14.

After the interview was played, F.H. retook the stand. R.479. The State elicited confirmation that it was from Popp's penis that F.H. licked frosting and put her mouth on while cleaning bottles. R.479-80.

Defense counsel's cross-examination of F.H. was extremely brief, asking only if F.H. had spoken to her mother, her stepdad and the prosecutor prior to testifying, to which F.H. responded, "yes." R.481.

Detective Pyatt's Testimony

Pyatt, the investigating officer, then testified. R.481-95. He briefly described his employment history, education, and training. R.482-83. Pyatt testified he was trained on "how to investigate sex offense cases" and "how to interview" children according to the NICHD FIT training guidelines.R.483-84.

Pyatt testified he was present in "an adjacent room" when F.H. was interviewed. R.484. Without objection, the State elicited surprise expert testimony from Pyatt. *Id*. Pyatt testified he was an "expert" in interviewing children because he's been "assigned in this responsibility" for "nine years" and "watched hundred of interviews and participated in them as well and conducted them[.]" R.485. *See infra,* Part IV(B). He regarded the NICHD interview guidelines generally as "highly reliable" in obtaining disclosures from children. *Id*. Pyatt then testified he observed Burgan's interview with F.H. and believed it followed the NICHD guidelines "very well." R.486. Pyatt reiterated similar points as heard in Burgan's testimony regarding child memory, delayed disclosure, and lack of forensic evidence in sex abuse cases. R.487.

When asked what investigators rely on without forensic evidence, Pyatt stated, "We rely heavily on the interview process and look at indicators of truthfulness, or deceptiveness and so forth like that, consistency type things." R.487-88. Pyatt testified that for his investigation, he watched the CJC interview with F.H. and attempted to talk to Popp. R.488-89. Pyatt's testified he initially spoke to Popp and set up an interview but Popp later cancelled the interview, telling Pyatt he was advised by counsel not to interview. *Id*. *See infra*, Part III.

Cross-examination of this witness, like all others, was sparse. Defense counsel asked about investigative techniques not used in the case. R.489-90. Defense counsel also: elicited the facts that no physical evidence was gathered, R.490; there were no eyewitnesses, R.491; Kelly Loftis who defense counsel suggested lived with Popp at the time, was not interviewed, *id*.; and that Pyatt did not speak to F.H.'s childcare provider or schoolteacher. *Id.*

The State then rested its case. R.495. At this point in proceedings, Popp still anticipated his witnesses would be called and an expert would testify. *See Popp Aff.*, ¶¶18(b),19(a)-(e). However, trial counsel advised Popp for the first time that no other witnesses would be testifying. *Id*. ¶18(b).

Defense Case: Popp's Testimony

The defense case lasted approximately ten minutes. R.158. Popp was the only witness. R.497-510; *See Popp Aff.*, ¶19.

Popp testified he met Hanks his "last year of high school, which would be 2000 or 2001." R.502. The two started dating in 2007 and moved in together in 2008. *Id*. Popp

testified he is "the biological father of BJ, but not of FH." R.503. Popp did not believe F.H. knew who her father was "until F.H. moved in with [Hanks.]" *Id.* He never saw F.H. visit her father. R.504.

Popp and Hanks separated January 13, 2015, and Hanks went to live with her boyfriend. *Id*. Popp stayed "[i]n the house with the kids." *Id*. The divorce was bitter:

> I don't think that she liked the fact that I got custody of the children, well, joint custody of the children, for them to live with me. And I tried to make things as easy for her as possible, you know, the judge wanted to give her two weekends a month and I gave her three and then the fourth one, if I didn't have anything planned[.]

R.504-05. Popp described he and Hanks rarely spoke after the divorce. R.505. Hanks exercise of visitation was "sketchy, trying to figure out schedules and stuff." R.506.[10]

Popp described he and F.H., "had a great relationship. We'd go on road trips [] to my grandparent's ranch and go swimming up in Manaway, go to the pool, go to my work parties, you know, just normal, fun, family stuff." R. 505. On the issue of F.H. doing chores, Popp testified, "If they wanted to earn money they had chores and each chore had a different amount that was paid for it." *Id*.[11] F.H. lived with Popp for fifteen months after the divorce and B.J. lived with him until March, when Hanks obtained the CPO. R.506-07. In regards to F.H. moving in with Hanks, Popp explained, "[F.H.] asked me if it was a problem if she moved in with her mother and we talked about how… she's getting ready

[10] According to the 23B affidavits, Hanks essentially disappeared after leaving Popp and did not speak to or see the kids for several weeks. *See Popp Aff.,* ¶11(b)-(d); *Amidan Aff.,* ¶18. This is in direct contravention to Hanks' testimony Popp kept the children from her. R.437-38.

[11] *See supra*, n.6.

to do her girl things and wanted to be with her mother. And I had no issues with that. It was totally understandable to me." R.507. Popp testified F.H. never had any issues with frosting. R.507.

As to the sexual abuse allegations:

[Defense]: Now, I'm going to get right to the chase here I guess. You've heard the allegations, did you ever sexually abuse F.H.?

[Popp]: Absolutely not.

[Defense]: Did you ever sodomize her as has been alleged?

[Popp]: No.

Id.

On cross-examination, the State clarified that after their separation Hanks and Popp agreed the kids would stay with Popp to keep them together and because Hanks was working. R.508. The State attempted to clarify whether the physical custody was joint. R.509. The State questioned if F.H. had pictures of her biological father and parents in her room to which Popp responded, "None that I've ever seen. The only photo I know in her bedroom was a picture of her grandpa." *Id*. The State also asked about F.H.'s chores including cooking, cleaning, and laundry. R.510. Popp did not recall ever calling F.H. "a jerk" for not doing laundry. *Id*.

Instruction Conference, Arguments, & Verdict

The defense rested its case after Popp's testimony and the State offered no rebuttal evidence. R.511. The jury was excused and there was a discussion of the final jury instructions (Instructions 20- 36) and the verdict form. R.511-18.

Thereafter, the State used the CJC interview in its closing argument, playing portions of the interview again for the jury which purportedly corresponded to the elements as stated by the State. R.529-35.

Jury deliberations began the next day. R.161. During deliberations, the jury sent one question to the court: "Did the detective tell Justin why they wanted to interview him?" R.160,574-80. The trial court responded by referring the jurors to instructions numbered 10, 12, and 20. *Id*. *See infra*, Part III. Also, after approximately two hours of deliberation, the jurors sent a request to "take a break, and apparently one or more were, had been crying[.]" R.581.[12] The jury was released for an early lunch. R.582.

After approximately three hours of deliberations, the jury returned a verdict. R.162. Popp was found guilty on both counts. R.583-84. The jury was dismissed and Popp was taken into custody. R.585. On March 7, 2018, Popp was sentenced to twenty-five years to life in the Utah State Prison for each sodomy conviction, with sentences ordered to run concurrently. R.259-60, 609. A notice of appeal was timely filed March 22, 2018.

SUMMARY OF THE ARGUMENT

Popp was denied his right to a fair trial. First, the instructions provided to the jury did not include a complete elements instruction. This error should have been plain to the trial court and counsel and requires a new trial.

Second, the CJC interview was improperly admitted for use at trial. The trial court conducted no reliability analysis as required by Utah Rule of Criminal Procedure 15.5

[12] During jury selection, one of the panel stated she would likely cry upon hearing child sex abuse evidence. R.389-90. This prospective juror sat on the jury. R.397.

and trial counsel did not cure this defect. Additionally, trial counsel did not consult and call an expert to address the reliability issues. Had trial counsel retained an expert at this stage, he would have learned the CJC interview was not reliable. The result of these errors is the Jury convicted Popp based upon unreliable evidence.

Third, Popp's conviction should be reversed where the Jury considered evidence presented by the State that Popp invoked his pre-arrest right to remain silent as substantive evidence of guilt. This is demonstrated in a jury question sent during deliberations and inadequately responded to by the trial court and counsel.

Finally, trial counsel provided ineffective assistance of counsel: (1) failure to investigate and call readily witnesses; and (2) failure to object and rebut unnoticed exert testimony from the investigating detective that improperly bolstered the CJC interview.

SUMMARY OF STANDARDS FOR UNPRESERVED ISSUES

To the extent trial counsel did not preserve the claims raised herein, Popp relies on the following doctrines and standards referred to throughout this Opening Brief.

A. Doctrines of Plain Error and Manifest Injustice.

This Court "may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved." Utah R. Evid. 103(e). To establish plain error, Popp must show: (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. *See State v. Lee*, 2006 UT 5, ¶26, 128 P.3d 1179. An error is obvious when "the law governing the error was clear at the time the alleged error was made." *State v. Dean*, 2004 UT 63, ¶16, 95 P.3d 276. An error is harmful if, absent the error, there is a reasonable likelihood of a more favorable outcome.

See Lee, 2006 UT 5, ¶26. "This harmfulness test is equivalent to the prejudice test applied in assessing claims of ineffective assistance of counsel." *Dean*, 2004 UT 63, ¶22.

Similarly, "manifest error" exists when the error is plain and made to appear on the record, to the harm of the accused. *See State v. Maestas,* 2012 UT 46, ¶158, 299 P.3d 892. Utah Rule of Criminal Procedure 19(e) specifically states instructional errors not properly objected to during trial may be considered on appeal "to avoid a manifest injustice." In most cases, "manifest injustice" has become synonymous with the "plain error" standard. *See State v. Bair*, 2012 UT App 106, ¶9 n.3, 275 P.3d 1050; *State v. Alinas*, 2007 UT 83, ¶10, 171 P.3d 1046. The purpose of the doctrine is to assure a defendant is not convicted even though technical requirements were not complied with in raising an error. *See Alinas*, 2007 UT 83, ¶10. Indeed, "[n]either a counsel's nor a judge's error should be the cause of one's going to prison." *State v. Bullock*, 791 P.2d 155, 164. (Utah 1989) (Stewart, J. dissenting). "[T]he law should seek to make a party liable for his own transgressions, not for the sins of his lawyer." *Id*.

B. Ineffective Assistance of Counsel Standard.

Defendants in Utah are entitled to counsel under the Sixth Amendment of the United States Constitution and Utah Constitution, Article I, section 12. The right to counsel includes more than having an attorney; "A defendant is deprived of this right where his counsel's conduct so undermine[s] the proper *functioning* of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Hales*, 2007 UT 14, ¶68, 1152 P.3d 321 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). To prevail on claims of ineffective assistance ("IAC"), Popp must "pass the two-

part *Strickland* test, which requires that the defendant show both deficient performance and prejudice." *State v. Nelson*, 2015 UT 62, ¶12, 355 P.3d 1031 (citing *Strickland*, 466 U.S. at 687). Deficient performance requires a showing "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. To establish prejudice, Popp must show "the deficient performance prejudiced the outcome of the trial." *State v. Baker*, 963 P.2d 801, 806-07 (Utah Ct. App. 1998); *see also State v. Ott*, 2010 UT 1, ¶40, 247 P.3d 344. This finding does not require showing a "jury would have more likely than not" acquitted Popp, rather, "[a] reasonable probability is a probability sufficient to undermine confidence in the [jury verdict]." *State v. Barber*, 2009 UT App 91, ¶22, 206 P.3d 1223 (quoting *Hales*, 2007 UT 14, ¶86).

C. A "Common Standard."

As noted, the "harm factor" in the plain error analysis is equivalent to the "prejudice" standard applied to IAC claims. *See Bair*, 2012 UT App 106, ¶35. Appellate courts occasionally rely on a so-called "common standard" in determining the "harmfulness" and "prejudice" applicable when a defendant raises both an IAC and a plain error argument. *See, e.g., State v. Verde*, 770 P.2d 116, 124 n.15 (Utah 1989); *State v. Brooks*, 868 P.2d 818, 822 (Utah Ct. App. 1994). Appellant likewise does so throughout this brief, asserting that specified errors resulted in both "harm" and "prejudice."

ARGUMENT

I. POPP IS ENTITLED TO A NEW TRIAL WHERE THE JURY WAS NOT PROPERLY INSTRUCTED AS TO THE ELEMENTS OF THE OFFENSE.

"A fundamental precept of our criminal law is that the State must prove all elements of a crime beyond a reasonable doubt." *State v. Starks*, 627 P.2d 88, 92 (Utah 1981) (citation omitted). This right is guaranteed by the due process clauses of both the Utah and the United States Constitutions. *See* U.S. Const. amends V, XIV; Utah Const. art. 1, § 7.[13]

A criminal defendant is therefore entitled to instructions that provide jurors with a clear and meaningful statement of the law and those elements that need to be proven beyond a reasonable doubt. *See, e.g.*, *State v. Campos*, 2013 UT App 213, ¶41, 309 P.3d 1160; *State v. Potter*, 627 P.2d 75, 78 (Utah 1981); *State v. Torres*, 619 P.2d 694, 696 (Utah 1980). It is the role and duty of the judge to "instruct the jury on the law and to insist that the jury follow his [or her] instructions." *State v. Palmer*, 2009 UT 55, ¶14, 220 P.3d 1198. *See also State v. Low*, 2008 UT 58, ¶27, 192 P.3d 867; *State v. Ontiveros*, 835 P.2d 201, 205 (Utah Ct. App. 1992).[14]

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[13] *Also accord* U.S. Const. amends. V,VI,XIV; Utah Const. art. I §§ 7,10,12; Utah Code § 76-1-501(1).

[14] The duty to properly instruct also applies to the verdict form. *See State v. Alzaga*, 2015 UT App 133, ¶78, 352 P.3d 107; *Campos*, 2013 UT App 213, ¶42. The verdict form given the jury in this case did not specify the conduct for each offense or the date/age of the alleged victim at the time of conduct. R.207(executed verdict form),528,535. Without this specified, it is "impossible to determine whether the jury agreed unanimously on all of the elements of a valid and evidentially support theory of the elements of the crime." *Bair*, 2012 UT App 106, ¶63. When a statute, such as the sodomy upon a child statute, defines multiple ways a crime may occur, including when, where, and how it may have

Erroneous instructions are prejudicial and deprive a defendant of his right to a fair trial when they tend to mislead or confuse the jury or insufficiently or erroneously advise the jury on the law and the necessary elements. *See, e.g., State v. Penn*, 2004 UT App 212, ¶28, 94 P.3d 308. When "the instructions, read as a whole, create a reasonable likelihood that the jurors were misled or confused as to the correct legal standard," remedy, including a new trial, is appropriate. *State v. Lambdin*, 2017 UT 46, ¶47, 424 P.3d 117.

Here, the jury instructions and the verdict form were fatally flawed in two respects. First, the jury was never given a complete and accurate elements instruction on the two counts charged; and second, because neither the instructions nor the verdict form denote the specific act or conduct for which the jury first considered, and then found guilt, the verdict violates Popp's right to a unanimous verdict as to each element of the offenses.

A. The Jury Was Not Properly Instructed as to the Elements.

In this case, the jury was never instructed on the "elements" of the charged offenses in the closing jury instructions before jurors were sent out to deliberate. The only purported "elements instructions" given were read in the court's preliminary instructions to the jury before the case began. R.404-05. Instruction 3 states:

> The Defendant has been charged with the offense of SODOMY UPON A CHILD, a criminal offense. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:
>
> 1. That the Defendant, Justin William Popp;

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occurred, the jury must unanimously find on one factual or legal theory. *See State v. Saunders*, 1999 UT 59, ¶62, 992 P.2d 951. In addition to the instruction error, the verdict also violated Popp's constitutional right to a unanimous verdict. *See* Utah Const. art. I, § 10.

> 2. intentionally, knowing, or recklessly committed a sexual act with F.H. involving any touching, however slight, of the genitals of one person and the mouth or anus of another, even if accomplished through the clothing; and
>
> 3. F.H. was under the age of 14 years old at the time of the conduct.

Id.; R.173-74; *see* Add.C.

Popp was charged in the Information with two counts of Sodomy Upon a Child, both alleged to have occurred between January 2012 and December 2013. R.1,172. One count concerned the allegation that Popp obtained oral sex under the guise of having F.H. "lick frosting" from a spoon. The other count centered around the allegation that Popp obtained oral sex under the guise of having F.H. "clean bottles with her mouth." No instruction, including Instruction 3, delineates the specific criminal acts (i.e actus reus) applicable to each independent count. Additionally, no instruction, including Instruction 3, ever advises the charged time frames for the offenses.

An "element of the offense" includes "the conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense." Utah Code §76-1-501(2). Although time is not always a statutory element of an offense, in cases where the age of a victim or defendant may alter the level of offense, this becomes a necessary part of the state's burden of proof. *See, e.g., State v. Fulton*, 742 P.2d 1208, 1212-13 (Utah 1987). In this case, F.H.'s age at the time of offense was an element of the offense (i.e. "under the age of 14 years old") so it was necessary for the State to prove when the conduct occurred and as such, the jury should have been so instructed. Also, the only dates ever provided to the jury were included in preliminary

jury Instruction 2, labeled "Charges." R.172. But as Utah law has repeatedly held, "[A]n information instruction is not a substitute for an elements instruction." *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991).

B. As the Instruction Issue was Not Preserved, this Court Should Review for Plain Error, Manifest Injustice, and/or IAC.

"The general rule is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985). Here, the trial court failed to instruct the jury on all of the basic elements of an offense. Based upon this error, the Court should reverse Popp's conviction and remand for a new trial.

First, the trial court plainly erred, failing in its duty to provide correct instructions to the jury amounting to manifest injustice. *See Low*, 2008 UT 58, ¶27. *Ontiveros*, 835 P.2d at 205. The necessity to completely and accurately instruct the jury as to the elements of a crime is fundamental and a requirement that should have been obvious to the trial court. Given the circumstances, the trial court should have been aware that an error was being committed. *See State v. Casey*, 2003 UT 55, ¶44, 82 P.3d 1106. There is just no question the trial court knew its responsibilities to properly instruct the jury, especially as to the elements of a crime.

Trial counsel also rendered IAC in failing to ensure the jury was properly instructed. By initially failing to pose any objections on the record, trial counsel undermined preservation of the issue. Additionally, proposing, stipulating to, or failing to object to erroneous jury instructions (and verdict form) has been found to constitute

deficient performance underlying an IAC claim. *See, e.g., State v. Jimenez*, 2009 UT App 368, ¶ 18, 223 P.3d 461; *State v. Eyre*, 2008 UT 16, ¶20, 179 P.3d 792; *State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989). Trial counsel's performance has also been deemed deficient when counsel fails to object or otherwise act to remove ambiguity between jury instructions. *See State v. Hutchings*, 2012 UT 50, ¶¶19–23, 285 P.3d 1183. Here, what appears to be an oversight, trial counsel failed to ensure that the jury was fully, clearly, and completely instructed as to the elements of the serious crimes his client was facing that were required to be proven beyond a reasonable doubt.

This fundamental instructional error made by both the trial court and trial counsel was both harmful and prejudicial, resulting in the failure to completely and correctly instruct the jury on necessary and fundamental law. *See Dean*, 2004 UT 63, ¶22 (harm equivalent to IAC prejudice). This error also affected Popp's substantial rights, which were designed to prevent conviction and punishment except upon proof of each element of a crime beyond a reasonable doubt, by a unanimous verdict. The errors mandate a new trial before a properly instructed jury.

II. THIS COURT SHOULD REVERSE AND REMAND DUE TO THE IMPROPER ADMISSION OF THE CJC INTERVIEW.

Utah Rule of Criminal Procedure 15.5(a)(8) ("Rule 15.5") permits in cases of "child abuse or of a sexual offense against a child, the oral statement of a victim . . . younger than 14 years of age which was recorded prior to the filing of an information . . ., upon motion or good cause shown" to be admissible as evidence if, "the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and

trustworthy and that the interest of justice will best be served by admission of the statement into evidence." *See* Add.D.

Rule 15.5(a)(8) requires a pre-determination of reliability. "Reliability in this context is a fact-intensive inquiry, requiring the trial court to undertake an in-depth evaluation of the proposed testimony and then enter findings and conclusions to explain its decision to admit or exclude the testimony." *State v. Roberts*, 2018 UT App 9, ¶12, ___ P.3d ___ (quotation omitted); *see also State v. Nguyen*, 2012 UT 80, ¶11, 293 P.3d 236 ("good cause under rule 15.5 is met" when the trial court "considers the factors specified in the rule and determines that the recorded statement is accurate, reliable, and trustworthy, and that its admission is in the interest of justice"). No "in depth evaluation" and entry of findings and conclusions took place prior to admission of the CJC interview in Popp's trial—indeed, there was no legal analysis or fact-finding at all.

A. Presenting the CJC Interview to the Jury Without Any Rule 15.5 Analysis was Error.

The trial court had the opportunity to address the CJC interview twice during proceedings, first before the preliminary hearing, and then again prior to trial. R.24-33,54-60. Popp's counsel did not object to the State's motion to admit F.H.'s CJC interview at the preliminary hearing so the trial court signed the State's proposed Order. R.24,36. The order contained no reliability findings. R.31-33.

The State filed a similar motion and order for use of the CJC interview at trial, this time including Rule 15.5's reliability language. R.54-60. But, the State's motion did not actually argue reliability, simply asserting, "the State anticipates that the Court will find

that the video 'is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.'" R.55 (citation omitted); *see, e.g., State v. Ramirez*, 917 P.2d 774, 778 (Utah 1991), *holding modified by State v. Thurman*, 846 P.2d 1256 (Utah 1993) (generally, proponent of the proffered evidence has the burden to prove its admissibility).

Defense counsel did object to the use of the CJC interview at trial but upon bases that clearly were not at issue. R.65-69.[15] Trial counsel did not, at any point, question the reliability of the CJC interview or ask the trial court to make findings in accordance with the Rule 15.5 requirement. Indeed, the only findings as to the admissibility of the CJC interview are from the trial court's oral ruling at the final pretrial:

> So, really, [F.H. being available for cross-examination] makes the motion moot in my opinion if you're not objecting to playing the video of the interview, then that resolves that issue as long as the victim is present, the alleged victim is present.
>
> So with that, that can be my order that's orally placed on the record here today. And then there's no need for any written, further decision.
>
> All right, so then that'll take care of that issue. I won't be issuing any written orders on that because we've taken care of that orally herein court. I'll go ahead and sign the minute entry so there is an order in place if there's any question as far as an appeal is concerned, okay?

R.317. The trial court did not conduct the in-depth evaluation of reliability required by Rule 15.5. *See Roberts*, 2018 UT App 9, ¶12.

B. This Error Should be Reviewed for Plain Error and/or IAC.

[15] Defense counsel argued the CJC interview should not be used as it would violate Popp's right to confrontation to use the CJC interview without F.H. present and what may be characterized as a "good cause" argument regarding the State not calling F.H. testify. *Id*. These arguments were inapplicable as the State's initial motion acknowledged prior that it intended to call F.H. at trial. R.72-73,314-17.

The requirement for the trial court to evaluate reliability is plain in Rule 15.5 and relevant case law. The court's failure and therefore error should have been obvious. Further, trial counsel's failure to challenge the admissibility of the CJC interview on reliability grounds, and thereafter, failure to require the trial court to make the requisite findings falls below the objective standard of reasonableness expected by the constitutional guarantee of counsel. *See Strickland*, 466 U.S. at 688.

The wholesale failure by either the court or trial counsel to address the reliability of the CJC interview was particularly harmful in this case because the State's case relied almost exclusively on this evidence. Rather than substantively question F.H. on direct examination, the State briefly laid foundation for the interview through F.H. then played the interview with F.H. in the courtroom. R.475-81. The State only thereafter asked a few questions of F.H. after the video in order to meet its elements not clear from the video:

> [State]: Tell the jury, just to be clear, when the defendant, Justin, asked you to lick off the frosting what exactly was it that he had you lick frosting off of?
>
> [F.H.]: His penis.
>
> [State]: Just to be clear, when the Defendant Mr. Popp asked you to use your mouth to clean the bottles, what exactly was it that you had put your mouth on?
>
> [F.H.]: His penis.
>
> [State]: FH, has anyone told you what to say about these incidents?
>
> [F.H.]: No.
>
> [State]: Has anyone told you how to testify here today?

[F.H.]: Huh-uh (negative). No.

R.479-80.

The State even gave warning it intended to proceed this way: "[J]ust so you know, for [defense counsel] too, I'm going to call [F.H.] up to just lay some initial foundation, maybe five questions, play the video, ask a couple of followups (sic)…" R.353. Exacerbating the issue, the State replayed excerpts of the CJC interview during its' closing argument, playing the excerpt relevant to the specific element as the prosecutor discussed that particular element. R.529-33.[16]

In effect, F.H. was never required to give independent testimony of the underlying facts supporting the charged offenses.[17] The evidence given by Hanks, Burgan, and Pyatt were also based upon this prior statement of F.H.[18] As such, this case is akin to *State v. Matsamas*. 808 P.2d 1047 (1991).In *Matsamas*, the trial court permitted the use of a child's hearsay statements to four witnesses at trial without "making specific findings and conclusions demonstrating a careful appraisal of all factors relevant to a determination of

[16] This was objectionable as the interview was received as "a portion of testimony", not an exhibit. *See* R.477-79,517; *cf. Cruz*, 2016 UT App 234, ¶¶36-41. Trial counsel did not object. R.477-79.

[17] How the State used the CJC interview as testimony deprived the jury the opportunity to see whether F.H.'s story maintained the "steadfastness across time with regard to the core elements of the episodic experience." *Esplin Aff.*, p.9. When a child "changes the core elements of a salient personally experienced episode, it is inconsistent with autobiographical memory research." *Id*.

[18] F.H.'s interview amounts to an out of court statement, not under oath, elicited by a CPS investigator that failed to ascertain F.H. would be truthful, among other errors. *See Hancock Notes; Peterson Rpt*.

statutory[19] and constitutional reliability." 808 P.2d at 1052. The child's testimony at trial was "general" and thus "[t]he hearsay may have been essential to prove the necessary elements." *Id*. at 1053. As a result, the *Matsamas* Court found this error not to be harmless and reversed the conviction. *Id*.

As described above, the State relied on F.H.'s prior statement to establish all of the elements of the offense. By not conducting a proper Rule 15.5 analysis, the trial court sidestepped its "responsibility to perform the required constitutional admissibility analysis[,]" leaving the "protection of constitutional rights to the whim of [the] jury and abandon[ing] the court's responsibility to apply the law." *Ramirez*, 817 P.2d at 778. Simply put, this was plain error because a trial court is required under Rule 15.5 to assess the reliability of F.H.'s prior statement before the jury was permitted to view it.

Further, defense counsel's failure to hold the trial court to a prevailing legal standard falls "below an objective standard of reasonable professional judgment." *Archuleta v. Galetka*, 2011 UT 73, ¶38, 267 P.3d 232 (citation omitted). Trial counsel's comprehensive failure to address reliability of the CJC interview or the accusations was likewise deficient performance.[20]

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[19] Repealed in 2009, Utah Code section 76-5-411 listed factors trial courts must consider in determining when the interests of justice would be served by use of the prior recorded statement, namely, "the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child." *Matsamas*, 808 P.2d at 1050-51. The requirement for a fact-specific inquiry has survived the repeal of this statute. *See, e.g., Roberts*, 2018 UT App 9, ¶12.

[20] As detailed in the 23B, if trial counsel had even engaged in a substantive conversation with Popp about the facts *prior to the week before trial*, he would have had additional

These failures of the trial court and trial counsel resulted in Popp's conviction based primarily upon hearsay with no finding whatsoever of its reliability.

C. The Improper Admission of the CJC Interview Resulted in Harm and Prejudice.

The failure to address the reliability of the CJC interview was particularly harmful in this case because 1) the State's case rested almost exclusively on this evidence (as described above), and 2) the interview itself was not reliable.

Reliability is a legal matter of constitutional due process significance. *See, e.g., Ramirez*, 817 P.2d at 780 (discussing due process implications in reliability of evidence presented to jurors). Trial courts hold a duty to ensure that a jury is not exposed to "unreliable" testimony or evidence. *See id; see also Fulton*, 742 P.2d at 1218.

In the Rule 15.5 context, the trial court must "assess the interview in all of its circumstances" to determine reliability. *Roberts*, 2018 UT App 9, ¶21. Several facts and factors are identified in the 23B affidavits that raise substantial issues regarding the reliability of F.H.'s interview/testimony. For example, investigators did not inquire further on F.H. observing her mother's sexual activities, TCJC:13; when and how F.H. learned Popp was not her biological father, R.503; F.H.'s exposure to sexually themed materials prior to disclosures, *Popp Aff.*,¶13(f)-(g) ; *Palmer Aff.*,¶¶13,15; *Johnson Aff.*,¶25(i); and what conversations actually took place between F.H. and Hanks prior to her interview*, cf.* TCJC:13-14. *See also Hancock Notes*, p.3; *Esplin Aff.*, p.10.

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information to provide to the expert and the trial court to facilitate the reliability analysis. *See Popp Aff.*,¶17(b).

Additionally, there were several issues with the CJC interview itself that diminish reliability, for example, Burgan did not "establish a baseline of truth vs. lie" or elicit a promise to tell the truth, asked F.H. or B.J. if anyone told them what to say in the interview, and asked numerous leading questions. *Hancock Notes*, p.2-3; *Peterson Rpt*.[21] As summarized by one of the expert's retained on appeal, "it would be very difficult for anyone to judge with any certainty that the disclosure made by F.H. was either reliable or trustworthy." *Peterson Rpt.*, p.3.

The admission of unreliable evidence is prejudicial. To allow such tainted testimony into trial infects the proceeding with "with fundamental unfairness and cannot stand constitutionally." *Bullock*, 791 P.2d at 162 (Stewart, J., dissenting). This is so because "[o]nce testimony is tainted, it is unlikely that the taint can be excised." *Id*. The use of the CJC interview of questionable reliability, without any actual reliability findings whatsoever, violated Popp's right to due process. This error demands Popp's convictions be reversed and remanded for a new trial.

i. Trial Counsel's Failure to Consult and Call an Expert to Address the Rule 15.5 Issue was Deficient and Resulted in the Admission of Unreliable evidence.

Inexorably linked to the lack of Rule 15.5 analysis issue, is the failure of trial counsel to consult with and call an expert. Popp's case required an expert to challenge the reliability of F.H.'s interview/testimony and if one had been called at this critical stage, they would have testified to the reliability issues described above and in the 23B Motion.

[21] Interestingly, Burgan testified at trial to many of the interview procedures she did not actually employ in the interviews with F.H. and B.J.

As stated by this Court, some cases "may require trial counsel to investigate potential witnesses to determine whether such testimony would be appropriate" including, engaging an expert "at least to advise and possibly to testify." *Landry v. State*, 2016 UT App 164, ¶32, 380 P.3d 25.

When Popp retained trial counsel for the criminal case in March 2017, counsel advised Popp he intended to hire an expert to review the evidence in the case and hire a private investigator. *See Popp Aff.*, ¶16(e),(h).[22] Although the record shows trial counsel consulted with an expert (Dr. Hancock), this expert notice was filed after motions were due and briefing on the Rule 15.5 admissibility issue was complete. R.38-39; *cf.* R.70 (filed Nov. 7, 2017 *Request to Submit* on Rule 15.5 filings), *and* R.116-25 (filed Dec. 4, 2017, *Notice of Expert Witness*).

It was not sound trial strategy for counsel to not involve the expert prior to when counsel had to provide the trial court with evidence and argument sufficient to allow the trial court to make detailed findings as to reliability (and good cause) under Rule 15.5.

In *Landry*, this Court examined the failure of an attorney to consult with her own arson expert and concluded this failure was ineffective for multiple reasons. *Id*. ¶¶32-38. In particular, counsel's decision in *Landry* not to consult an expert left her uneducated about her case; led to a failure to learn about inadequacies in the State's investigation; she "missed the opportunity to understand the several problems with the State's case and to highlight them for the jury"; and it was critical to Landry's defense to "effectively

[22] Popp did not receive any report from experts or private investigators. *Popp Aff.*,¶16(b)(d)(h),18(b). Trial counsel only informed Popp that an expert would not be testifying in his on the day of trial. *Id*.¶18(b).

challenge the State's theory of the case and supporting expert testimony" because the other defenses were only "somewhat supported by the evidence." *Id*.

Although *Landry* involved an expert to consult on physical evidence, the need for an expert in Popp's case was no less acute. In particular, Popp's counsel "missed the opportunity to understand the several problems" with F.H.'s statement at the critical time for challenging that statement—the Rule 15.5 admissibility proceedings. At the time Popp's counsel objected on erroneous grounds to the State's *Motion to Admit*, he had not had the opportunity to learn the deficiencies in the interview procedure and the glaring failures by investigators to follow-up on concerning statements by F.H.

Even more problematic, the 23B evidence suggests trial counsel was aware of potential issues with the CJC interview because he told Popp after the preliminary hearing they needed to hire an expert and F.H.'s statement appeared "coached." *Popp Aff.*, ¶16(d). Trial counsel simply failed to do this until after the critical point in the pretrial process. Trial counsel was not in a position to make a strategic decision as to whether or not an expert was necessary to address reliability because he had not done the investigation required to make that decision. *See, e.g, State v. Gordon*, 913 P.2d 350, 356 (Utah 1996); *State v. Templin*, 805 P.2d 182, 188 (Utah 1990); *Gregg v. State*, 2012 UT 32, ¶24, 279 P.3d 396. *See also infra*, Part III(A) (failure to investigate).

Not having an expert at the Rule 15.5 stage, particularly given what the later retained experts actually found was akin to not having consulted an expert at all. Particularly given the lack of reliability findings by the trial court and the utter reliance of the State on the CJC interview at trial, trial counsel's failures "so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Hales*, 2007 UT 14, ¶68 (quoting *Strickland*, 466 U.S. at 686). This Court should reverse and remand.

III. THIS COURT SHOULD REVERSE AND REMAND DUE TO THE JURY'S CONSIDERATION OF POPP'S INVOCATION OF HIS PRE-ARREST RIGHT TO REMAIN SILENT AS SUBSTANTIVE EVIDENCE OF GUILT.

A. Consideration of a Defendant's Invocation of his Pre-Arrest Right to Remain Silent is a Constitutional Rights Violation.

Defendants have a state and federal constitutional right to remain silent assured by Art. I, Sec. 12 of the Utah Constitution and the Fifth Amendment of the United States Constitution. *See State v. Palmer*, 860 P.2d 339, 345-50 (Utah Ct. App. 1993). This right "is a comprehensive privilege" applying to "any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . [I]t protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution[.]" *State v. Gallup*, 2011 UT App 422, ¶14, 267 P.3d 289 (citations omitted). It is a violation of these constitutional rights for a defendant's pre-arrest silence to be used against him at trial unless for impeachment of the defendant if they take the stand *and* if relevant. *Palmer*, 860 P.2d at 348-50.

B. The Failure to Cure the Defect When Presented with a Jury Question on Popp's Silence was Error.

Prior to the taking of evidence, the State informed the trial court of its intention to ask Pyatt in its case-in-chief about his efforts in investigating the case, including contacting Popp for an interview. R.346-47. Defense counsel did not object or further comment on the issue. R.346. Thereafter, Pyatt testified at trial, after receiving a

recording of the CJC interview, he "attempted to interview the person accused, Mr. Popp." R.488. The State inquired, "you say you attempted to interview, could you tell the jury about that and what happened with that?" Pyatt testified,

> I went to Mr. Popp's house, tried to contact him there, at least once, maybe twice…I left my business card on his front door. I was able to talk to him by phone either the next day or the day after…and I asked him specifically would he be willing to come into the police department for an interview and at that time he said he would, but he needed to get with his attorney first and make sure that was okay. And we actually had made an arrangement to come in the following day for an interview and he never showed [up.] So I called back and I talked to him again and he said at that point that he had met with his attorney or contacted him in some form and his attorney had advised him not interview with me.

R.488-49.

First, trial counsel should have objected to this testimony elicited in the State's case-in-chief as it is well settled in constitutional law that such "silence evidence" is wholly inadmissible. *See, e.g., Palmer*, 860 P.2d at 348-50. Indeed, Pyatt's testimony was not a "mere mention" of Popp's decision not to be interrogated. This testimony was Pyatt's lengthiest response to any question posed to him. R.481-95. Pyatt's comments regarding his attempts to interview Popp and Popp's eventual refusal, upon the advice of his attorney, take up approximately seventeen lines in the transcript. Moreover, the testimony did not simply state Popp refused an interview, Pyatt detailed how Popp initially agreed to be interviewed but didn't appear at the scheduled time and later told Pyatt his "attorney had advised him not to interview[.]" R.488-89. The inference presented being not only that Popp had something to hide, but that Popp's attorney was likewise hiding something.

Moreover, whether intended or not, the Jury in this case impermissibly considered Popp's silence as evidence. The jury sent a single question to the trial court during deliberations: "Did the detective tell [Popp] why they wanted to interview him?" R.160. This question indicates the jury was considering Popp's silence as "consciousness of guilt." *See Gallup*, 2011 UT App 422, ¶16. However, rather than submit a supplemental instruction in response instructing the jury that Popp's pre-arrest silence cannot be used as evidence of guilt, the trial court referred the jury back to the original instructions, specifically instructions 10, 12, and 20. R.160-62. None of these instructions explain the constitutional precept that Popp's silence is not evidence. Instruction 10 explained the "Functions of Jury," describing the jury's role in determining facts. R.178. Instruction 12 dealt with juror "Note-Taking." R.180. Instruction 20 outlined "A Guide to Deliberations" of the trial court's own design that makes no reference to the due process issue raised by the jury question. R.186-89. Indeed, none of the instructions given to the jury addressed this issue. R.170-206.

C. The Failure of the Trial Court and/or Counsel to Appropriately Remedy this Error Should Be Reviewed for Plain Error and/or IAC.

This error should have been obvious to the trial court as it concerns a well-established constitutional right. Also, trial counsel did not object or otherwise attempt to cure this error and approved the trial court's response. R.577-78. These failures were prejudicial. The conviction in this case was based entirely on the credibility of the child testimony of F.H. This testimony was certainly an attempt by the State to bolster the credibility of F.H. (inferring that this child had nothing to hide) and to attack the

credibility of the defendant (inferring that Popp and his counsel refused to cooperate in this investigation). *Cf. Palmer*, 860 P.2d at 350 (discussing harmfulness of errors). Given the nature of the only question posed by the jury during deliberations, the jury was questioning why Popp would refuse to speak with law enforcement, and thus, it is likely "the result of the proceeding would have been different" had the jury been properly instructed not to consider Popp's pre-arrest silence as evidence of guilt. *Strickland*, 466 U.S. at 694. The trial court's failure to recognize and cure this defect is plain. Trial counsel's deficient and prejudicial errors therefore warrant reversal and remand for a new trial.

IV. POPP'S CONVICTIONS SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL WHERE TRIAL COUNSEL PROVIDED IAC.

A. Trial Counsel Provided IAC by Failing to Investigate and Call Defense Witnesses and this Error was Highly Prejudicial.

Trial counsel was aware of but failed to contact and ultimately call witnesses that were available and willing to testify on Popp's behalf. This fundamental failure to investigate his case was objectively unreasonable and left Popp without any evidence supporting his defense in a case that was, at its core, a credibility case.[23].

i. Failing to Investigate is Deficient Performance.

Defense counsel has a duty to "adequately investigate the underlying facts of the case because investigation sets the foundation for counsel's strategic decisions about how to build the best defense." *Hales*, 2007 UT 14, ¶69 (citations omitted); *see also Gregg*,

[23] This issue relies heavily on the 23B materials. Popp reiterates his request to develop the record in this regard in a remand hearing.

2012 UT 32, ¶24 (failure to conduct a "reasonable investigation" is deficient performance under *Strickland*). Whether an inquiry is adequate is examined based upon the "objective standard of reasonable professional judgment." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998).

ii. Trial Counsel's Failure to Investigate is Demonstrated in the Record and the 23B Materials.

Trial counsel really did not begin investigating the case until approximately one month before the trial. In late November, Popp and trial counsel had a telephone discussion about Popp's civil matters[24] and trial counsel asked about potential witnesses for the criminal trial. *Popp Aff.*,¶14(j). Popp supplied a list of witnesses including Laura Lee Johnson, Kelly Loftis, and Lindsay Amidan, and offered to provide many others. *Id*. Trial counsel did not contact these potential witnesses after this phone call. *See Johnson Aff.,*¶28; *Loftis Aff*.,¶23; *Amidan Aff*.,¶25.

The first in depth conversation between Popp and trial counsel occurred on December 28, 2017, approximately one week before trial. *Popp Aff.*,¶17(b); *Johnson Aff.*,¶¶25-27.[25] During this meeting, trial counsel again requested the names and phone numbers of the witnesses Popp previously discussed with him. *Id*. It was only after this

[24] Defense counsel represented Popp in the CPO and divorce modification also. *Popp Aff.*,¶15(a),16(g). Popp's communications counsel for theses cases was similarly limited. *Id*.¶20(c).

[25] Popp made "at least thirty" attempts to contact and meet with trial counsel prior to this meeting, including numerous phone calls and even travelling to his office for a scheduled meeting at which defense counsel never appeared. *See, e.g., Popp Aff*.,¶¶15(e)-(f),16(c)-(d),20(c). Between the three cases, over a ten-month period, Popp made contact with counsel " maybe 7 times." *Id.*¶20(c).

meeting that trial counsel gave notice to the State of his intent to call three lay witnesses for "impeachment" on December 29, 2017. R.148. Defense counsel provided this notice without having actually spoken to the witnesses and/or determining what they could offer in testimony. *See Johnson Aff.*,¶28; *Loftis Aff.,*¶23; *Amidan Aff.*,¶25.

The State objected to the notice and asked the trial court to exclude the witnesses due to the reciprocal discovery deadline of December 5, 2017. R.140-44. Trial counsel responded with a request for a continuance. R.147-49. A telephonic conference occurred on January 3, 2018, the day before trial, to address the State's motion to exclude the defense witnesses:

[State]: I'm ready to go forward tomorrow and I'd rather just go forward tomorrow regardless.

[Defense]: I'm thinking out loud. I'm thinking—Your Honor, I think I will do the compromise and make it to where if they don't bring it up, I won't use them. If they do, then I can use them.

The Court: Okay.

[Defense]: If that's acceptable

The Court: [State]?

[State]: Yeah, like I said, I know that it's difficult for [defense counsel]. I don't want there to be any issues on appeal obviously and I think to avoid an issue on appeal, it would have to be compromise because I think effectively, by stipulating to that it would waive any potential appeal issues on that, just so we're all clear . . .

[Defense]: I know, that's the problem, I've got. The problem is if I gamble on this …

[State]: Yeah, I know.

[Defense]: --rules against me, I look worse.

R.332-33. The "compromise" was defense counsel stipulating to not calling the witnesses in defendant's case in chief unless it was "for the limited purpose of rebuttal in the event that the State elicits evidence for the purpose of showing unusual behavior or interaction by the victim (F.H.) while she was with her father." R.153-54,334. Popp was not informed his witnesses would not be called until trial had begun. *Popp Aff.*,¶18(b).

Trial counsel's performance was deficient in a number of respects when dealing with the lay witness issue. First, trial counsel did not even speak to the potential witnesses about what they could offer in testimony prior to trial. *See Amidan Aff.,*¶25; *Loftis Aff.*,¶23; *Johnson Aff.*,¶28. Had trial counsel actually spoken to these witnesses he would have found these witnesses offered more than evidence of F.H.'s lack of unusual behavior during 2012 and 2013. Cf. R.147-49.

Second, trial counsel could have easily avoided the State's objection and limitation on the use of witnesses. Counsel learned of Loftis, Johnson, and Amidan from his client in November 2017, prior to the discovery deadline on December 5, 2017. *Popp Aff.,*¶14(j). The issue of whether Popp should be permitted to call his witnesses would never have been an issue and Popp would have had valuable witnesses on his behalf, had counsel made a reasonable inquiry at the time his client provided him with this information.

Finally, trial counsel made misrepresentations to the trial court as to when he learned of the witnesses, the reason for the late disclosure, and rather than argue for his client's Federal Sixth Amendment and Utah Constitution art I, section 12 right to call witnesses on his own behalf, entered into a stipulation with the State effectively barring

all beneficial testimony from the witnesses. R.324-34; *see State v. Schreuder*, 712 P.2d 264, 274-75 (Utah 1985) (right to call witnesses); *State v. Ison*, 2006 UT 26, 32-33, 135 P.3d 864 (no strategic justification to not submit evidence despite "the speculative possibility that the trial judge might have exercised his discretion" to exclude it). Further, by failing to investigate his case, trial counsel was "not in a position to make a reasonable strategic choice" whether or not to enter into the stipulation with the State. *Hales*, 2007 UT 14, ¶83 (quoting *Wiggins v. Smith*, 539 U.S. 510, 536 (2003)).

Utah law is clear: "a decision not to investigate cannot be considered a tactical decision." *Gordon*, 913 P.2d at 356 (citation omitted); *Templin*, 805 P.2d at 188; *Gegg*, 2012 UT 32, ¶24. Trial counsel's decision not to investigate or call these witnesses was not objectively reasonable.

iii. The Failure to Investigate Resulted in Prejudice Where Witnesses Testimony Would Have Cast Doubt as to the Credibility of the State's Lay Witnesses.

Trial counsel's failure to investigate and call witnesses essentially left Popp without a defense. This was highly prejudicial.

These facts are similar to those underlying the Utah Supreme Court decision in *Templin*. 805 P.2d 182. In *Templin*, trial counsel failed to contact three witnesses who were with the defendant and alleged victim on the date of the alleged offense. *Id*. at 187. The *Templi*n Court noted trial counsel's decision not to contact the witnesses because the testimony of the victim and the defendant was "adequate information" was "not a tactical decision which [could] be characterized as reasonable professional assistance" because counsel "made this decision without contacting any of the other potential witnesses[.]" *Id*.

at 187−88. The same is true here—trial counsel acknowledged the existence of beneficial witnesses but never contacted them. Trial counsel even went a step further by making decisions impacting the use of the witness testimony without even knowing what that testimony would have been.

Trial counsel was aware this case hinged on whether the jury believed Popp over F.H.'s interview. In closing, trial counsel argued the lack of evidence: "No witnesses . . . No physical evidence, none. . . . No pretext call . . . No confession . . . No behavior by F.H. . . . No DNA." R.537-38. The failure to have witnesses on his behalf was prejudicial to Popp where the jury verdict in this case ultimately rested upon "credibility determination[s]." *See State v. Rackham*, 2016 UT App 167, ¶24, 381 P.3d 1161 (citation omitted); *see also Templin*, 805 P.2d at 188 (when impeachment testimony "affects the credibility of the only witness who gave direct evidence of defendant's guilt, the testimony affects the 'entire evidentiary picture.'").

Had trial counsel investigated and called these witnesses, the jury would have had corroborating evidence of Hanks' motive to influence F.H.'s disclosure (i.e. gaining custody of the parties' son, B.J.) and a potential motive for F.H. to make a false disclosure (i.e. learning Popp was not her biological father). Further, the jury would have had opinions of Hanks' reputation for truthfulness from individuals familiar with her, including a lifelong best friend. *See, e.g., Amidan Aff*. This evidence, as adduced on a 23B remand, would change the entire evidentiary picture.

B. Trial Counsel Provided IAC by Failing to Object and Have an Expert to Rebut Unnoticed Expert Testimony that Improperly Bolstered F.H.'s CJC Interview.

Trial counsel failed to object to testimony from Detective Pyatt, the investigating officer, whose testimony improperly bolstered the CJC interviewer and F.H.'s CJC interview generally. "Decisions as to what witnesses to call, what objections to make, and by and large, what defenses to interpose, are generally left to the professional judgment of counsel." *State v. Franco*, 2012 UT App 200, ¶7, 283 P.3d 1004 (citation). But, "[f]I clearly inadmissible evidence has no conceivable benefit to a defendant, the failure to object to it on nonfrivolous grounds cannot ordinarily be considered a reasonable trial strategy." *State v. Doutre*, 2014 UT App 192, ¶24, 335 P.3d 366; *see also Landry*, 2016 UT App 164, ¶27.

i. Popp was Entitled to Notice that Pyatt Would Testify as an Expert in Child Interviews.

Pyatt himself *qualified himself* as an "expert" in forensic child interviewing R.485. The State failed to notice Pyatt as an expert for this purpose as required by Utah Code §77-17-13(1)(a). *See* Add.E.

Admittedly, under Utah Code §77-17-13(6) the notice requirement "does not apply to the use of an expert who is an employee of the state[.]" This requires though that the defendant be "on reasonable notice" via discovery "the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice." *Id*. The discovery references reports from Pyatt.

See R.102-05 (discovery included Pyatt's 8-page report). At no point in the discovery though does it reveal Detective Pyatt to be an expert on child interviews or that he would be called for this purpose. *See Aff. Appellant Counsel*. Of note, the State *did provide* notice of Burgan as an expert with a summary of her testimony and her CV although she is a government witness. *See* R.95-101.

ii. Pyatt's Unnoticed Expert Testimony Improperly Bolstered the CJC Interviewer and F.H.'s Interview Statements.

Shortly into Pyatt's testimony, the State began to ask questions regarding his training and experience with forensic interviewing of children. R.484. Defense counsel objected based on relevance and the State responded, "I have Detective Pyatt who also has his training and experience in the model that was used, that he can comment on whether Ms. Burgan accurately and correctly followed the guidelines in that model." *Id.* Defense counsel withdrew the objection: "I have no objection if that's what you want to ask." *Id.*

Thereafter, Pyatt *deemed himself* an "expert" in interviewing children. R.485. Pyatt testified as to his opinion of the NICHD guidelines generally as "highly reliable" in obtaining disclosures from children. *Id*. Thereafter, the State asked:

> [State]: [W]ere you able to I guess specifically watch for, look for the particular questions and methods used by Ms. Burgan during [F.H.'s] interview?
>
> [Pyatt]: Yes.
>
> [State]: Would you tell the jury in your opinion whether Ms. Burgan's interview complied with the procedures that they use in the NICHD model for forensic interviewing?

[Pyatt]: I believe it did comply with those guidelines very well.

R.486.

At no point in the trial did the defense challenge Burgan's application of the guidelines. Indeed, defense counsel's cross-examination of Burgan focused on suggestibility in children, contributing to his overall theory that Hanks coached F.H. Counsel never challenged the validity of the interview itself. By withdrawing his objection, trial counsel allowed Pyatt's testimony about the validity of the interview that "was clearly calculated to bolster Child's believability by assuring the jury no credibility problem was presented" by how the interview was conducted. *State v. Peraza*, 2018 UT App 68, ¶36, ___P.3d___ (citation omitted).

iii. Trial Counsel's Failure to Object and/or Rebut with an Expert was Deficient and Resulted in Harm.

Trial counsel's failure to object to such "expert" testimony proffered without notice and which improperly bolstered F.H.'s CJC interview was objectively unreasonable. At a minimum, trial counsel should have objected and requested a continuance to consult an expert. *See* Add.E (remedy usually a continuance). Popp also may have been entitled to exclusion of Pyatt's entire "expert" testimony on child interviewing where the record suggests the State's failure to file notice was deliberate. *See id.; Roberts*, 2018 UT App 9, ¶37; *cf*. R.95-101.

Trial counsel was aware of expert notice requirements, as demonstrated by his own expert notice filing and should have seen no notice was filed for Pyatt. Moreover, the failure to object to this evidence was not consistent with trial counsel's apparent

strategy; to wit, to show F.H.'s allegations were planted by Hanks. *Cf. Landry*, 2016 UT App 164, ¶31 (could have objected "without contradicting or interfering with her alternative defense"). There was no sound strategic reason for counsel not to object.

Finally, this error prejudiced Popp because what Pyatt testified to was simply false. As detailed extensively in the 23B materials, the interview of F.H. did not follow the guidelines "very well." Even based only on the notes Dr. Hancock provided Popp's counsel before trial, Burgan did not follow the guidelines. *See Hancock Notes*. Generally, "Ms. Burgan did not follow the guideline the way she was trained or the way the NICHD designed it." *Peterson Rpt.*

As discussed in the 23B motion, this case is similar to the recently decided *State v. Peraza* where this Court found the admission of an expert's testimony resulted in reversible error "because of its prejudicial effect of bolstering Child's trial testimony." 2018 UT App 68, ¶34. The *Peraza* expert was called "to testify about disclosures and recantations by victims of sexual abuse." *Id*. ¶11. Prior to trial, the State did not provide statutory notice or an expert report. *Id*. ¶37. The *Peraza* Court found the trial court's error in admitting the expert testimony to be prejudicial where the "case hinged on the jury's assessment of Child's credibility versus that of Peraza." *Id*. ¶36; *cf. State v. Rammel*, 721 P.2d 498, 500-01 (Utah 1986).

The trial court had no opportunity to assess the reliability of Pyatt's testimony regarding forensic child interviewing and if the testimony would be more probative than prejudicial. *Peraza*, 2018 UT App 68, ¶27. And just as in *Peraza*, this case case "hinged on" the jury's assessment of F.H.'s credibility versus Popp's. *Id*. ¶36; *see also King*, 2010

UT App 396, ¶46, (reversal more likely when improper bolstering comes through an expert).

Had trial counsel objected and at least obtained a continuance to consult his own expert (or even simply looked at his expert's notes), he could have countered Pyatt's blatantly false representation to the jury that the interview complied with established guidelines that produce "highly reliable" results. *See* R.485-86. In a case that relied almost entirely on the statement from F.H. elicited through what the State claimed to be guidelines adherent, the failure of counsel to object to and/or counter the false testimony was prejudicial.

CONCLUSION

Based on the foregoing, this Court should reverse Popp's convictions and order retrial before a properly instructed jury in a trial where Popp receives effective assistance and the evidence admitted is determined to be reliable and otherwise properly admitted.

DATED this 26th day of October, 2018.

/s/ Staci Visser

STACI VISSER
Attorney for Appellant Justin Popp

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1).

*****

I, STACI VISSER, certify that this brief contains 13,984 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

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

*****

I, STACI VISSER, further certify that this Brief complies with Utah Rule of Appellate Procedure 21 regarding public and private records.

/s/ Staci Visser

STACI VISSER
Attorney for Appellant Justin Popp

CERTIFICATE OF DELIVERY

On this October 26, 2018, I hereby caused the OPENING BRIEF OF APPELLANT filed herewith, to be delivered this day via email to the following:

Court of Appeals
450 South State Street,
5th Floor Salt Lake City, UT 84111
Courtofappeals@utcourts.gov

Utah Attorneys General Office
Tom Brunker
Assistant Attorney General
tbrunker@agutah.gov

I further state the required paper copies shall be delivered to the appellate clerk's office within seven (7) days of emailing.

/s/ Staci Visser

ADDENDUM A

The Order of the Court is stated below:
Dated: March 09, 2018 10:15:07 AM **/s/** BRANDON J. MAYNARD
District Court Judge

FIRST DISTRICT - Box Elder
BOX ELDER COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 171100138 FS
JUSTIN WILLIAM POPP,	:	Judge: BRANDON MAYNARD
Defendant.	:	Date: March 7, 2018
Custody: Box Elder County Jail		

PRESENT
Clerk: sama
Prosecutor: WARDLE, BLAIR T
Defendant Present
The defendant is in the custody of the Box Elder County Jail
Defendant's Attorney(s): DEMLER, SHANNON R

DEFENDANT INFORMATION
Date of birth: February 3, 1982
Audio
Tape Number: CRTRM 3 Tape Count: 11:05-11:32

CHARGES
1. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/05/2018 Guilty
2. SODOMY ON A CHILD - 1st Degree Felony
Plea: Not Guilty - Disposition: 01/05/2018 Guilty

HEARING

Comments by counsel regarding Sentencing Recommendations.

Comments by victim's mother, Kaitlyn Hanks and victim's father, Douglas Moser.

After listening to comments by counsel the Court finds that 25 years to life is

appropriate in this case. The Court proceeds with Sentencing.

Rights and time for an appeal are discussed.

SENTENCE PRISON
Based on the defendant's conviction of SODOMY ON A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than twenty five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of SODOMY ON A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than twenty five years and which may be life in the Utah State Prison.

To the BOX ELDER County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
Sentences to run concurrent.

End Of Order - Signature at the Top of the First Page

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 171100138 by the method and on the date specified.

EMAIL: BOX ELDER TRANSPORT betransport@boxeldercounty.org
EMAIL: PRISON RECORDS UDC-Records@utah.gov
EMAIL: SEX REGISTRY registry@utah.gov
EMAIL: SHANNON R DEMLER demlerandgalloway@hotmail.com
EMAIL: BLAIR T WARDLE bwardle@boxeldercounty.org

Date: 03/09/2018 /s/ SAMANTHA ASHCRAFT

Deputy Court Clerk

ADDENDUM B

3. ELEMENTS

COUNT 1

The Defendant has been charged with the offense of SODOMY UPON A CHILD, a criminal offense. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That the Defendant, Justin William Popp;
2. intentionally, knowingly, or recklessly committed a sexual act with F.H. involving any touching, however slight, of the genitals of one person and the mouth or anus of another, even if accomplished through the clothing; and
3. F.H. was under the age of 14 years old at the time of the conduct.

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

COUNT 2

The Defendant has been charged with the offense of SODOMY UPON A CHILD, a criminal offense. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. That the Defendant, Justin William Popp;
2. intentionally, knowingly, or recklessly committed a sexual act with F.H. involving any touching, however slight, of the genitals of one person and the mouth or anus of another, even if accomplished through the clothing; and
3. F.H. was under the age of 14 years old at the time of the conduct.

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

ADDENDUM C

Did the detective tell Justin why they wanted to interview him?

Please refer to Jury Instruction #10, #12 and #20.

ADDENDUM D

Rule 15.5.Out of court statement and testimony of child victims or child witnesses of sexual or physical abuse - Conditions of admissibility.

(a) **Previously recorded statements.** In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

(a)(1) the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;

(a)(2) no attorney for either party is in the child's presence when the statement is recorded;

(a)(3) the recording is visual and aural and is recorded on film, videotape or other electronic means;

(a)(4) the recording is accurate and has not been altered;

(a)(5) each voice in the recording is identified;

(a)(6) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;

(a)(7) the defendant and the defendant's attorney are provided an opportunity to view the recording before it is shown to the court or jury; and

(a)(8) the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) **Remote transmission of testimony.** In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

(b)(1) Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:

(b)(1)(A) the defendant may not be present during the child's testimony;

(b)(1)(B) the court shall ensure that the child cannot hear or see the defendant;

(b)(1)(C) the court shall advise the child prior to testifying that the defendant is present at the trial and may listen to the child's testimony;

(b)(1)(D) the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with the defendant's attorney during the child's testimony; and

(b)(1)(E) the conditions of a normal court proceeding shall be approximated as nearly as possible.

(b)(2) Only the judge and an attorney for each party may question the child.

(b)(3) As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.

(b)(4) If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) **Remote recording of testimony.** In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

(c)(1) the recording is visual and aural and recorded on film, videotape or by other electronic means;

(c)(2) the recording is accurate and is not altered;

(c)(3) each voice on the recording is identified; and

(c)(4) each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) **Presence of child when recording is used.** If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

Effective November 1, 2008

ADDENDUM E

Rule 19. Instructions.

(a) After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written request that the court instruct the jury on the law as set forth in the request. At the same time copies of such requests shall be furnished to the other parties. The court shall inform counsel of its proposed action upon the request; and it shall furnish counsel with a copy of its proposed instructions, unless the parties waive this requirement. Final instructions shall be in writing and at least one copy provided to the jury. The court shall provide a copy to any juror who requests one and may, in its discretion, provide a copy to all jurors.

(d) Upon each written request so presented and given, or refused, the court shall endorse its decision and shall initial or sign it. If part be given and part refused, the court shall distinguish, showing by the endorsement what part of the charge was given and what part was refused.

(e) Objections to written instructions shall be made before the instructions are given to the jury. Objections to oral instructions may be made after they are given to the jury, but before the jury retires to consider its verdict. The court shall provide an opportunity to make objections outside the hearing of the jury. Unless a party objects to an instruction or the failure to give an instruction, the instruction may not be assigned as error except to avoid a manifest injustice. In stating the objection the party shall identify the matter to which the objection is made and the ground of the objection.

(f) The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(g) Arguments of the respective parties shall be made after the court has given the jury its final instructions. Unless otherwise provided by law, any limitation upon time for argument shall be within the discretion of the court.

ADDENDUM F

77-17-13 Expert testimony generally -- Notice requirements.

(1)
(a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or 10 days before the hearing.
(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
(i) a copy of the expert's report, if one exists; or
(ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
(iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.
(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.

(2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.

(3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).

(4)
(a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.
(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.

(5)
(a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.
(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.

(6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Amended by Chapter 290, 2003 General Session

ADDENDUM G

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article I, Section 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law. Article 1, Section 10

Article I, Section 10. [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Article I, Section 11. [Courts open -- Redress of injuries.]

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.