Case No. 20180224-CA

IN THE

# UTAH COURT OF APPEALS

STATE OF UTAH,
*Plaintiff/Appellee,*

*v.*

JUSTIN POPP,
*Defendant/Appellant.*

## Brief of Appellee

Appeal from convictions for two counts of sodomy on a child, first degree felonies, in the First Judicial District, Box Elder County, the Honorable Brandon Maynard presiding

STACI VISSER
Intermountain Legal
2159 South 700 East, Suite 240
Salt Lake City, Utah 84106
Svisser@intermountainlegal.net

ANN M. TALIAFERRO
Brown Bradshaw & Moffat
422 North 300 West
Salt Lake City, Utah 84103
ann@brownbradshaw.com

Counsel for Appellant

TERA J. PETERSON (12204)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Telephone: (801) 366-0180
Email: tpeterson@agutah.gov

BLAIR T. WARDLE
Box Elder County Attorney's Office

Counsel for Appellee

## TABLE OF CONTENTS

ADDENDA

Addendum A: Constitutional Provisions, Statutes, and Rules

- Utah Code Annotated § 76-5-403.1 (West 2018) (sodomy on a child)
- Utah Code Annotated § 77-17-13 (West 2018) (expert testimony—notice requirements)
- Utah R. App. P. 23B (motion to remand for findings necessary to determination of ineffective assistance of counsel claim)
- Utah R. Crim. P. 12 (motions)
- Utah R. Crim. P. 15.5 (out of court statement and testimony of child victims)

Addendum B: Jury instructions 2 & 3, R.172-174; and verdict form, R.207

Addendum C: Child victim's CJC interview

# TABLE OF AUTHORITIES

## FEDERAL CASES



## STATE CASES

**STATE STATUTES**



**STATE RULES**

Case No. 20180224-CA

IN THE

# UTAH COURT OF APPEALS

STATE OF UTAH,
*Plaintiff/Appellee,*

*v.*

JUSTIN POPP,
*Defendant/Appellant.*

## Brief of Appellee

## INTRODUCTION

Popp sodomized his step-daughter, F.H., on at least two occasions. After disclosing the abuse to her mother, F.H. recounted in detail two incidents of sodomy at a recorded Children's Justice Center interview that the State later played at trial. Popp was convicted of two counts of child sodomy.

Popp raises four plain-error and ineffective-assistance claims on appeal, contending that the child-sodomy instruction and verdict form were incorrect, the CJC interview was unreliable, the investigating detective improperly testified that Popp declined to be interviewed, and the detective improperly testified that the CJC interviewer followed recommended

guidelines. He further argues that his counsel did not investigate or call potential witnesses to testify.

None of Popp's plain-error claims, however, can be reviewed because he invited any error when he advised the court that he had no objection. And Popp's ineffective-assistance claims all fail because he has not shown, as he must, that all competent counsel would not have taken the action that his counsel did.

Popp also has not proven prejudice for any of his claims. He did not show that there is a reasonable probability that, but for any error, the result of the proceeding would have been different. This Court should affirm.

## STATEMENT OF THE ISSUES

1a. Did Popp invite any error when his counsel stipulated to the child-sodomy instruction and verdict form?

*Standard of Review*. None applies.

1b. Alternatively, did the trial court plainly err by providing the instruction and verdict form?

*Standard of Review*. Plain error requires obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993).

1c. Did Popp prove that his trial counsel was ineffective for not objecting to the instruction and verdict form?

*Standard of Review*. This is a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

2a. Did Popp invite any error in admitting the victim's CJC interview when his counsel withdrew his initial objection to the interview and stipulated to its admission?

*Standard of Review*. None applies.

2b. Did Popp prove that his counsel was ineffective for (1) not challenging the admission of the CJC interview's reliability under rule 15.5, Utah Rules of Criminal Procedure; (2) not requesting that the trial court make reliability findings under rule 15.5; and (3) not consulting with or calling an expert to challenge the interview's admissibility?

*Standard of Review*. See standard for 1c.

3. Before trial, the prosecutor informed the trial court that he would ask the detective to confirm that he attempted to interview Popp, but Popp declined on his attorney's advice. The prosecutor explained that he would not mention this in closing argument or use it to suggest Popp's guilt, but only wanted to show that the detective did "everything he could … to investigate the case." Counsel responded that he had no objection.

a. Did Popp invite any error when his counsel affirmatively represented that he had no objection to this testimony?

b. Alternatively, did the trial court plainly err by not sua sponte giving the jury a curative jury instruction?

*Standard of Review*. See standard for 1b.

c. Did Popp prove that his trial counsel was ineffective for not objecting to the detective's testimony or requesting a curative instruction?

*Standard of Review*. See standard for 1c.

4. Did Popp prove that his counsel was ineffective for not calling three potential defense witnesses or for not objecting to the detective's testimony that the CJC interview followed recommended guidelines?

*Standard of Review*. See standard for 1c.

## STATEMENT OF THE CASE

### A. Factual summary.[1]

One night, twelve-year-old F.H. got up in the middle of the night to use the bathroom. R.431,439. As she passed her mother Kaitlyn and her stepfather Zaun's bedroom, F.H. saw that they were having sex and "she became very, very upset." R.431. F.H. "was a hysterical mess," "having a serious breakdown." *Id*. Kaitlyn comforted F.H. and told her, "I need to understand

[1] Consistent with appellate standards, the facts are stated in the light most favorable to the jury's verdict and conflicting evidence is presented only as needed to understand the issues raised on appeal. *See State v. Kruger*, 2000 UT 60, ¶2, 6 P.3d 1116.

why you are so upset." *Id*. F.H. eventually explained that "when she was younger," Kaitlyn's then husband, Defendant Justin Popp, "told her that he had a magic spoon with frosting on it and made her lick it off," but the spoon was actually his penis. R.432. Kaitlyn told F.H. to "get some sleep" and they would "worry about everything in the morning." *Id*. Kaitlyn called the Utah Division of Child and Family Services (DCFS) the next morning. *Id*. Within 24 hours, DCFS scheduled an interview with F.H. at a Children's Justice Center (CJC). R.433.

F.H. was three or four years old when her mother started dating Popp. R.426,433,435,476,502. Before long, Kaitlyn and F.H. moved in with Popp and Kaitlyn became pregnant with a son, B.J. R.426,428,435,502. Five years later, Kaitlyn and Popp married. R.435-436,503. F.H. called Popp "dad." R.436,503; CJC.3. But after a little over a year of marriage, Kaitlyn and Popp separated and eventually divorced. R.428-29. Kaitlyn and Popp shared "joint custody" of the children but agreed that the children would live with Popp because they wanted to keep them together and Kaitlyn "was the only one that worked." R.429-430,438,508-09. Indeed, during their relationship, Kaitlyn worked while Popp cared for the children. R.429-430. Kaitlyn worked the "swing shift"—2:00 p.m. to 10:00 p.m.—and it was easier to have Popp watch the children than find daycare. R.429-430,433,549.

But about a year into this post-separation arrangement, F.H. decided she wanted to live with her mom. R.430. She moved in with Kaitlyn and her new husband, Zaun. R.427. B.J. remained with Popp. R.431.

Cheryl Burgan, a child protective services investigator for DCFS, interviewed F.H. R.444-445,448,465. Cheryl was trained in the National Institute of Child Health and Human Development's child forensic interview techniques and followed those techniques in the interview. R.449-450,460,467-468. She recorded the interview while Detective Rory Pyatt observed from an adjacent observation room. R.458,460,483-484.

F.H. told Cheryl that she was twelve, but "[a] few years ago when [she] was seven or eight," Popp "put frosting on his thing and then he made [her] lick it off."[2] CJC.2,4,7. F.H. explained that the first time it happened, her mom "was at work" and her brother was napping. CJC.4. Around 3:00 or 4:00 in the afternoon, Popp asked F.H. if she "wanted a treat." CJC.4,12. When F.H. said yes, Popp told her to go into his room. *Id*. Popp's light was off and his room was dark. CJC.5,11. Popp "blindfolded" F.H. and "made" her "kneel

[2] Although the CJC interview was played at trial, it was not transcribed or placed into the record. R.479. This Court granted Popp's motion to supplement the record with a copy of the recording and a transcript. *See* Order, June 22, 2018. The transcript, however, is not Bates stamped, so the State cites to the transcript page, for example, CJC.1.

down." CJC.4. Popp then told F.H. to "lick it." *Id*. At first, F.H. did not know Popp's penis was underneath the frosting. CJC.5-6. But when she lost her balance and reached out, she grabbed Popp's leg and noticed that he was not wearing any pants. CJC.5,11. And when Popp "kept doing it," F.H. figured out that it was Popp's penis underneath the frosting. CJC.5-6.

After F.H. licked all the frosting off, Popp pulled up his pants. CJC.6,7. F.H. listened as Popp put the frosting back in the fridge and washed his hands. *Id*. Then he returned to his room, took off F.H.'s blindfold, and they watched TV. CJC.6,7.

F.H. told Cheryl that this happened "[m]ore than once," but she did not know "the exact number." CJC.4,7. The last time it happened, F.H. "was still seven or eight" and Popp was in the downstairs bathroom. CJC.7-8. He told F.H. that he needed help cleaning some glass bottles. *Id*. When F.H. came into the bathroom, the light was off and Popp shut the door. CJC.8,12,15. She could not see anything. CJC.10. Popp told F.H. to sit on the toilet and lick the bottles clean. CJC.8-9. There was no frosting this time, but F.H. knew she was not licking a bottle because it was "squishy and warm," not "hard." CJC.8. After she finished, Popp told F.H., "Good job." CJC.10. Then they went upstairs and Popp "hosed the bottles off anyways outside." CJC.9.

After F.H.'s interview, Detective Pyatt asked Popp to speak with him. R.488. Popp agreed to come the next day, but said he would "get with his attorney first and make sure that was okay." *Id*. Popp "never showed" up. *Id*. When Detective Pyatt called and asked why, Popp said "his attorney had advised him not to." R.489.

**B. Summary of proceedings.**

The State charged Popp with two counts of sodomy upon a child, first degree felonies, for the period of January 2012 through December 2013. R.1-2. The probable cause statement outlined the two incidents F.H. recounted in her CJC interview. R.2.

**1. Admission of F.H.'s CJC Interview.**

Before Popp's preliminary hearing, the State moved under rule 15.5, Utah Rules of Criminal Procedure, to admit the video of F.H.'s CJC interview. R.24-26. Popp did not object. R.31-33,36,289. At the preliminary hearing, the State played F.H.'s CJC interview and called Cheryl Burgan to testify. R.36, 289, 291-301. Trial counsel cross-examined Cheryl on her training and use of the National Institute of Child Health and Human Development's forensic interviewing techniques in the interview. R.295-301.

The State also moved to admit F.H.'s CJC interview at trial. R.54-56. In its motion, the State outlined how all eight admissibility factors under rule

15.5 were satisfied. *Id*. The State further noted that "because the Court has already viewed the video at the preliminary hearing and allowed for its admissibility, the State anticipates that the Court will find that the video 'is sufficiently reliable and trustworthy that the interest of justice will best be served'" by admitting the statement. R.55.

Popp objected, but not on the ground that any of rule 15.5's factors were not satisfied, including the requirement that the interview be "sufficiently reliable and trustworthy." R.65-69,130. Rather, Popp argued that admitting the interview would violate his confrontation rights under Utah and United States constitutions. *Id*. But after the State explained that F.H. would be present at trial and available for cross-examination, Popp withdrew his objection. R.130-131,315-317. The trial court ruled that the issue was moot "as long as the victim is present" at trial. R.131,317.

**2. Notice of trial witnesses.**

The trial court ordered that both parties disclose their trial witnesses by December 5, 2017—one month before trial. R.50-51.

The State gave timely notice that it would call Cheryl Burgan as an expert witness. R.95-100. Defense counsel likewise gave timely notice that he would call Dr. Kyle Hancock as an expert "to testify about the propensity for child witnesses to recall or falsify testimony" and "the proper techniques that

need to be used when interviewing child witnesses and whether they were used in this case." R.106-115;154n.1,334.

A week before trial, however, trial counsel notified the prosecutor of three more witnesses: Lauralee Johnson, F.H.'s grandmother; Lindsey Amidan, a friend of Kaitlyn's; and Kelly Loftus, a friend who had lived with Popp and Kaitlyn. R.141. Trial counsel explained that as he "was preparing for trial," "it was conveyed to" him that these witnesses could "impeach the State's witnesses with regards to how the victim acted during the time frame that she has alleged to have been abused and after." R.147-148,324. Counsel represented that the witnesses "will testify the alleged victims' [sic] behavior was normal," that they "saw no behavior changes," and that Popp and F.H.'s relationship was good. R.148-149,330. Counsel moved for a continuance to give the State time to prepare for the testimony. R.149.

In response, the State moved to "preclude" these witnesses from testifying because they were not disclosed timely. R.140-144. The State opposed a continuance because it would harm F.H., who had "already built up an expectation of testifying" the following week at trial. R.143.

The day before trial, the trial court held a telephonic conference and the prosecutor offered a "compromise." R.152,324-34. Noting counsel's representation that the three witnesses would testify that F.H. did not have

any behavioral changes, the prosecutor offered that counsel could call the witnesses in rebuttal only if the State introduced evidence of F.H.'s behavioral changes or unusual interaction with Popp. R.330-331. Trial counsel eventually agreed to the compromise, explaining "that's what I was intending to do with the witnesses anyway...." R.331,334;152. The parties signed a stipulated order providing that counsel would not call the three witnesses unless "the State elicits evidence … of … unusual behavior or interaction by the victim (F.H.) while she was with her father." R.153-154.

Trial counsel also informed the court that he would not call his expert Dr. Hancock to testify "unless it was necessary for rebuttal." R.154n.1,334. The next morning, he further advised that Popp "[m]ost likely" would testify. R.352.

**3. Admission of testimony that Popp did not interview with Detective Pyatt.**

The morning of trial, the prosecutor told the court that he planned to ask Detective Pyatt if he ever interviewed or met with Popp. R.346. The prosecutor explained that he was not going "mention it in closing" or use it to "suggest guilt or say [Popp]'s trying to hide something" but only wanted "to show that Detective Pyatt was doing his job, he covered his bases and that he did everything he could to … investigate the case." *Id*. When the court

asked if defense counsel had any objections or "comment on that," counsel answered, "No." R.346-347.

**4. Trial.**

**a. The State's case.**

The State called Kaitlyn, Cheryl Burgan, Detective Pyatt, and F.H. and also played F.H.'s CJC interview. Kaitlyn testified about how F.H. disclosed Popp's abuse and said that she never told F.H. "what to say about this incident" or "how to testify." R.431-434. She also testified that F.H. refused to eat her cake at her recent thirteenth birthday party because "still to this day [she] cannot eat frosting, will not touch it." R.434.

Cheryl testified about interviewing F.H. at the CJC. R.448. Cheryl explained that the child forensic interview techniques she used—the "FIT model" developed through the National Institute of Child Health and Human Development—were meant to ensure the child's story was her own and that the interviewer did not "put[] any ideas, any suggestions into their head." R.456,485. Cheryl explained each step of the FIT model and the types of questions asked. R.449-460. Cheryl also explained why children may delay disclosing sexual abuse. R.462-465.

F.H. then testified and said she was thirteen years old. R.476. She said that she had lived with Popp from age "about four to eleven." *Id*. F.H. said

that her CJC interview was accurate and nothing in it was incorrect. R.477. And after the jury watched the interview, R.157,479, F.H. reiterated that when Popp asked her to lick off the frosting and to use her mouth to clean a bottle, she licked his penis. R.479-480. F.H. finally told the jury that no one told her what to say about the incidents or how to testify. R.480.

Detective Pyatt testified that he watched F.H.'s interview from an adjacent room. R.484. He said that he was also trained in child forensic interviewing and that he had either watched or conducted hundreds of interviews himself. R.484-485. When the prosecutor asked Detective Pyatt if he would consider himself an expert in interviewing children, trial counsel objected. R.484. The prosecutor explained that given Detective Pyatt's "training and experience" with the FIT model, "he can comment on whether Ms. Burgan accurately and correctly followed the guidelines in that model." *Id*. Trial counsel responded, "I have no objection if that's what you want to ask." R.485. Detective Pyatt then testified that the FIT model is "highly reliable," "is based on that 30 years of research," and is "standard best practices." *Id*. He said that he "believe[d]" F.H.'s interview complied with the FIT "guidelines very well." R.486.

Detective Pyatt also testified that he "attempted to interview" Popp and Popp initially said he would meet, "but he needed to get with his

attorney first and make sure that was okay." R.488. Detective Pyatt explained that they set up an interview, but Popp "never showed" and later told Detective Pyatt that "his attorney had advised him not to interview" with the police. R.488-489.

**b. The defense.**

The defense theory was that Kaitlyn coached F.H. into fabricating the allegations because Kaitlyn wanted custody of the children and she did not want to pay Popp child support. R.423-424,538-539. Kaitlyn admitted that after F.H. reported the abuse, she obtained custody of B.J. and her child-support obligation was canceled. R.442.

And although Kaitlyn denied it, trial counsel argued that when F.H. saw Kaitlyn and her husband having sex, Kaitlyn suggested to F.H. that she was upset because Popp sexually abused her: "there's something bothering you. Are you sure Justin hasn't abused you?" R.423,440. On cross-examination, Cheryl, the CJC interviewer, agreed with counsel that by using suggestive questions, a child can "cue on that and answer what he thinks or she thinks you want him to say...." R.468. And during F.H.'s CJC interview, F.H. told Cheryl that Kaitlyn "asked [her] if anyone ever hurt [her] or did anything to [her]" after she became upset seeing Kaitlyn having sex. CJC.13. F.H. also told Cheryl, "My mom thinks that since my mom and [Popp] ... were

never really affectionate toward each other, and I'd always tried to push those memories back, she thinks that since I've seen [Kaitlyn and her husband] be affectionate towards each other, she thinks that that sort of brought those memories back." CJC.14.

The defense also pointed out that the only evidence of abuse was F.H.'s testimony. On cross-examination, Kaitlyn admitted that she "never" suspected any abuse and that there were "no signs whatsoever" "that gave [her] concern." R.439. And trial counsel elicited from Detective Pyatt that he had not found any physical evidence or DNA, he had not located any witnesses who observed any abuse or questionable behavior, and B.J. did not disclose any abuse and said he never "saw anything" in his own CJC interview. R.493. Detective Pyatt further admitted that he did not search Popp's home; he did not interview the children's daycare provider or teachers; and he did not interview Kelly Loftus, a friend who lived with Popp and the children during the timeframe the abuse occurred. R.491-493,537.

Popp testified that he had a good relationship with F.H. and that he had "[a]bsolutely not" sexually abused her. R.507.

**5. Verdict and appeal.**

While deliberating, the jury asked, "Did the detective tell [Popp] why they wanted to interview him?" R.160. Trial counsel recommended that the

court respond by telling the jury "to make a decision based on what they heard" and simply refer them to jury instructions 10 (jury is the factfinder), 12 (testimony transcripts would not be available during deliberation), and 20 (jury must base its verdict on the trial evidence, not any other source). R.574,577.

The prosecutor agreed with counsel's suggestion. The court therefore responded: "Please refer to Jury Instruction #10, #12, and #20." R.160,161,579-580.

The jury found Popp guilty as charged. R.162,207,583-584. Popp timely appealed and the Utah Supreme Court transferred the case to this Court. R.269,279-280,285. Popp filed a rule 23B motion concurrently with his opening brief.[3]

## SUMMARY OF ARGUMENT

**Point I**: Popp argues that the child-sodomy instruction and verdict form were "fatally flawed" because they omitted the "basic elements" of (1) "when the conduct occurred," and (2) "the specific criminal acts applicable to each independent count." Because this claim is unpreserved, Popp argues that the trial court plainly erred and that his counsel was ineffective in

[3] The State filed its opposition to the remand motion concurrently with this brief.

handling the instruction and verdict form. Plain error review is unavailable, however, because Popp invited any error when he told the trial court that he had no objections to the instruction and verdict form. Regardless, the court did not plainly err, nor was his counsel ineffective, because the instruction and verdict form were not so obviously flawed that the trial court plainly erred in giving them or that all competent counsel would have objected. The child-sodomy instruction followed the statutory language and included all the statutory elements, including that F.H. was under 14 when the conduct occurred. And because time is not an element of child sodomy, the instructions and verdict form did not need to include it. Moreover, because F.H. described at least two incidents of sodomy, it did not matter which "specific criminal acts" were "applicable to each independent count."

Popp has also not proved prejudice because there is no reasonable likelihood that Popp would not have been convicted if the jury had been instructed on "when the conduct occurred," and "the specific criminal acts applicable to each independent count."

**Point II**: Popp asserts that the trial court plainly erred when it admitted F.H.'s CJC interview. Popp likewise faults his trial counsel for (1) not challenging the reliability of the CJC interview, (2) not asking the trial court to make reliability findings, and (3) not consulting with and calling an

expert to challenge the CJC interview. This Court should not review Popp's plain-error claim because he invited any error when he withdrew his objection and stipulated to admitting the CJC interview.

Popp's ineffective-assistance claims also fail. First, Popp has not proven that all competent counsel would have objected to admitting the interview. Reasonable counsel could conclude that he was unlikely to succeed in excluding F.H.'s interview, and that if he were, the prosecutor would merely call F.H. to testify, and that admitting the video would further the defense because F.H.'s statements could be interpreted to support the defense theory that Kaitlyn planted the idea of Popp's abuse.

Second, Popp has not proven that all competent counsel would ask the trial court to make reliability findings. Competent counsel could conclude that either he was better off not admitting the interview or that a challenge to the reliability of the interview would likely fail. And neither rule 15.5 nor settled law requires a trial court to make reliability findings when a CJC interview's admission is uncontested.

Third, Popp's claim that his trial counsel was deficient for not consulting with an expert fails because it is speculative and unsupported by the record.

Popp also has not proved prejudice. He cannot meet his burden because he relies entirely on nonrecord evidence. But Popp also cannot show prejudice because there is no reasonable probability that the court would have excluded the interview.

**Point III**: Popp contends that the trial court plainly erred when it did not give a curative instruction to the jury's question, "Did the detective tell [Popp] why they wanted to interview him?" Popp also asserts that his trial counsel should have objected to the detective's testimony or requested a curative instruction. Popp, however, cannot obtain plain error review because he invited the error when he told the court that he had no objections to the detective's testimony and fashioned the response that the court gave to the jury. Regardless, because the prosecutor did not use Popp's declination as substantive evidence of his guilt, Popp has not shown that the court plainly erred, nor that all competent counsel would have objected. Reasonable counsel could have further concluded that the evidence would come in anyway, so it was not worth objecting, especially because the testimony could be emphasized in the narrower context of redirect or rebuttal.

Popp also has not proven prejudice because the jury would not have naturally and necessarily construed the comment as referring to Popp's

silence, the evidence of Popp's guilt was strong, and the reference was isolated.

**Point IV**: Popp finally argues that his counsel was constitutionally ineffective for (1) not adequately investigating the case or calling three potential witnesses; and (2) not objecting to the detective's alleged "unnoticed expert testimony" about whether the CJC interview followed recommended guidelines, and for not calling an expert to rebut the detective's testimony.

Absent a rule 23B remand, this Court must reject Popp's claim that his counsel inadequately investigated and should have called three potential defense witnesses because the claim relies solely on nonrecord evidence.

And Popp has not shown that all competent counsel would have objected to the detective's testimony about the CJC interview or called an expert to rebut the detective's testimony. Because the remedy for lack of expert notice is a continuance, trial counsel could have reasonably concluded that he did not need a continuance where he had already consulted a Ph.D. psychologist on whether "proper" interview techniques "were used in this case" and was therefore prepared to challenge the detective's testimony. Popp also has not shown prejudice because he relies entirely on nonrecord evidence.

## ARGUMENT

### I.

**This Court cannot review for plain error Popp's objections to the elements instruction because he invited any error; regardless, he cannot prove that any error was so obvious and material that the trial court plainly erred in giving the instruction, or that all competent counsel would have objected to it, nor can he prove prejudice.**

For the first time on appeal, Popp argues that the child-sodomy instruction and verdict form were "fatally flawed" because they omitted the "basic elements" of (1) "when the conduct occurred," and (2) "the specific criminal acts applicable to each independent count." Br.Aplt.24-27 (citing R.173-174 (Jury instr. 3)). Because this claim is unpreserved, Popp argues that the trial court plainly erred and that his counsel was ineffective in handling the instruction and verdict form. Br.Aplt.27-28. Plain error review is unavailable, however, because Popp invited any error when he told the trial court that he had no objections to the instruction and verdict form. Regardless, the court did not plainly err, nor was his counsel ineffective, because the instruction and verdict form were not so obviously flawed that the trial court plainly erred in giving them or that all competent counsel would have objected.[4]

[4] In passing, Popp also asserts that the instruction and verdict form "violated Popp's constitutional right to a unanimous verdict" because they did not "specify the conduct for each offense or the date/age of the alleged

### A. Plain-error review is unavailable because Popp invited any error when his counsel said he had no objection to the instruction or verdict form.

This Court should not address Popp's claim that the trial court plainly erred by giving the instruction and verdict form because Popp invited any error.

"[A] jury instruction may not be assigned as error even if such instruction constitutes manifest injustice if counsel, either by statement or act,

---

victim at the time of conduct" and it was therefore "impossible to determine whether the jury agreed unanimously on all of the elements." Br.Aplt.25 & n.14 (quotation marks and citation omitted). This Court should not address this claim because his three-sentence argument is inadequately briefed, and Popp invited any alleged error when he approved the instructions and verdict form. *See State v. Alzaga*, 2015 UT App 133, ¶42, 352 P.3d 107 ("Briefs require not just bald citation to authority but development of that authority and reasoned analysis based on that authority."); *State v. Tillman*, 750 P.2d 546, 566 (Utah 1987) (holding Tillman invited error when he did not request an instruction "which would enable him to know which theory the jury adopted").

But in any event, Popp is incorrect. There is no requirement that jurors be unanimous about the date of an offense or the specific theory about how it was committed. *See State v. Saunders*, 1999 UT 59, ¶60, 992 P.2d 951 ("[B]ecause time itself is not an element of an offense, it is not necessary that the jurors unanimously agree as to just when the criminal act occurred."); *State v. Hummel*, 2017 UT 19, ¶¶52, 65, 393 P.3d 314 (holding that "the constitutional requirement of unanimity is limited to those matters identified as *elements* of a crime in the substantive criminal law" and does not attach "at the level of theory of a crime or means of fulfilling an element"). F.H. described at least two incidents of sodomy, and the jury convicted Popp of only two counts of sodomy. The jury had to be unanimous only on whether Popp committed two separate acts of sodomy, not the precise manner in which he did so. *See id.*

affirmatively represented to the court that he or she had no objection to the jury instruction." *State v. Geukgeuzian*, 2004 UT 16, ¶9, 86 P.3d 742 (quotation simplified).

Trial counsel here "affirmatively represented to the court" that he "had no objection" to the instruction or verdict form. *Geukgeuzian*, 2004 UT 16, ¶9. When the court asked if the parties had any objections to the initial instructions—including the child-sodomy instruction—trial counsel answered, "I have none." R.347. So too with the verdict form. R.351-352,512-518. This Court should thus not address his plain error claim. *See Geukgeuzian*, 2004 UT 16, ¶9.

**B. Even if this Court were to review Popp's jury instruction claim for plain error, there was no obvious error.**

To establish plain error, Popp must show obvious, prejudicial error. *State v. Samples,* 2012 UT App 52, ¶8, 272 P.3d 788. He cannot show that here.

A person commits sodomy upon a child if he intentionally, knowingly, or recklessly engages in any sexual act involving the genitals or anus of the actor or the child and the mouth or anus of either person, and the child is under the age of 14. Utah Code Ann. §§76-2-102 (West 2018); 76-5-403.1 (West 2018). Any touching, "even if accomplished through clothing, is sufficient." *Id.* §76-5-407(3)&(a) (West 2018).

Following this statutory language, the instruction here informed the jury that the State had to prove beyond a reasonable doubt that (1) 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." R.173-174 (Instr. 3) (attached at Addendum B). The jury was also instructed that for each of the two counts of child sodomy, Popp was charged with committing the acts "on or about January 2012 through December 2013." R.172 (Instr. 2). The verdict form asked the jury to find if Popp was guilty, or not guilty, for each of the two counts. R.207.

Popp argues that the child-sodomy instruction and verdict form were "fatally flawed" because they omitted the "basic elements" of (1) "when the conduct occurred," and (2) "the specific criminal acts applicable to each independent count." Br.Aplt.24-27 (citing R.173-174 (Instr. 3)). Although he acknowledges that "time is not always a statutory element of an offense," he nonetheless contends that it was a "necessary part of the state's burden of proof" here because F.H. had to be under fourteen years old when the sodomy occurred. Br.Aplt.26. But the error, if any, could not have been obvious to the trial court.

Jury instructions and verdict forms require no particular form as long as they accurately convey the law. *State v. Maama*, 2015 UT App 235, ¶29, 359 P.3d 1272; *State v. Alzaga*, 2015 UT App 133, ¶78, 352 P.3d 107 ("The duty to properly instruct the jury applies to the verdict form") (quotation simplified). "To determine if jury instructions correctly state the law," reviewing courts "look at the jury instructions in their entirety and will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *State v. Painter*, 2014 UT App 272, ¶6, 339 P.3d 107 (quotation simplified).

Here, the child-sodomy instruction and verdict form "accurately convey[ed] the law." *Maama*, 2015 UT App 235, ¶29. The instruction tracked the statute. *Compare* R.173-174 *with* Utah Code Ann. §76-5-403.1; §76-5-407(3)(a). It included the element that F.H. was "under the age of 14 years old at the time of the conduct." R.173-174. And because time is not an element of the crime of child sodomy, *see* §76-5-403.1, neither the instructions nor the verdict form needed to include it. *See* Utah R. Crim. P. 4(b) (providing that "[s]uch things as time ... need not be alleged unless necessary to charge the offense."). But even so, the jury *was* instructed that the sexual acts were alleged to occur "on or about January 2012 through December 2013." R.172.

In addition, Popp cites no authority that requires an instruction or verdict form to delineate which allegation applies to each count, and the State is aware of none. Nor does Popp explain why this is necessary or what difference it would have made. But to show an obvious error, Popp must demonstrate that "the law governing the error was *clear*, or plainly settled at the time the alleged error was made." *State v. Johnson*, 2017 UT 76, ¶21, 416 P.3d 443 (quotation simplified) (emphasis added). He has not done so. And because F.H. described at least two incidents of child sodomy, and Popp was charged with only two counts of child sodomy, it did not matter which "specific criminal acts" were "applicable to each independent count." Br.Aplt.26. Consequently, even if there were some error in the instruction or verdict form, it could not have been obvious to the trial court. *See Samples,* 2012 UT App 52, ¶8.

### C. Popp has not shown that all competent counsel would have objected to the instruction and verdict form where they required the jury to find that the victim was under fourteen and she described only two acts of sodomy.

Popp likewise has not shown that his trial counsel was deficient for not objecting to the child-sodomy instruction or verdict form. To show that his counsel was ineffective, Popp must prove that (1) his counsel performed deficiently, and (2) he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-689, 694 (1984).

To prove deficient performance, Popp must show that his counsel's performance "fell below an objective standard of reasonableness." *Id*. 687-88. "Judicial scrutiny of counsel's performance" is "highly deferential" and "counsel is strongly presumed to have rendered adequate assistance." *Id.* 689-690. Given this presumption, when conceivable tactical bases support trial counsel's actions, a defendant has not rebutted the strong presumption that his counsel performed reasonably. *See State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162 (explaining that defendant claiming ineffective assistance must show that "there was *no conceivable tactical basis* for counsel's actions") (quotation simplified) (emphasis in original). But to prove deficient performance, a defendant must do more than merely rebut the strong presumption that "under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689 (quotation simplified). A defendant must ultimately prove that his counsel's performance "fell below an objective standard of reasonableness." *Strickland* 466 U.S. at 688; *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000).

The United States Supreme Court has distilled the rule to this: counsel's representation is objectively reasonable, and therefore constitutionally compliant, unless "no competent attorney" would have proceeded as he did. *Premo v. Moore*, 562 U.S. 115, 124 (2011).

Popp has not met this burden. As explained, the child-sodomy instruction followed the statutory language and included all the statutory elements, including that F.H. was under 14 when the conduct occurred. *Compare* R.173-174 *with* Utah Code Ann. §76-5-403.1; §76-5-407(3)(a). And because time is not an element of child sodomy, *see Id.*§76-5-403.1, the instructions and verdict form did not need to include it. *See* Utah R. Crim. P. 4(b). Moreover, because F.H. described at least two incidents of sodomy, it did not matter which "specific criminal acts" were "applicable to each independent count." Br.Aplt.26. Popp therefore cannot show that "no competent attorney" would have refrained from objecting to the instructions here. *Moore*, 562 U.S. at 124.

**D. Popp cannot show prejudice.**

Popp's plain-error and ineffective-assistance claims also fail because he cannot show prejudice. Both claims share the same prejudice standard: Popp must show a "reasonable probability that, but for" the error, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; s*ee State v. McNeil*, 2016 UT 3, ¶29, 365 P.3d 699 ("[T]he prejudice test is the same whether under the claim of ineffective assistance or plain error."). The "likelihood of a different result must be substantial, not just conceivable," *Harrington v. Richter*, 562 U.S. 86, 112 (2011), such that the error "'actually had

an adverse effect on the defense.'" *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quoting *Strickland*, 466 U.S. at 691,693). In other words, the proof of prejudice "cannot be a speculative matter but must be a demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (quotation simplified).

Popp has not met this burden. Besides the conclusory statement that the "fundamental instructional error made by both the trial court and trial counsel was both harmful and prejudicial," Popp does not try to show how, absent the alleged error, a different outcome was reasonably likely. Br.Aplt.28. His claim fails for this reason alone. "[M]erely rephrasing" the *Strickland* prejudice test is "clearly insufficient to affirmatively demonstrate" prejudice. *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993).

But Popp cannot meet his burden in any event. There is no reasonable likelihood that Popp would not have been convicted if the jury had been instructed on (1) "when the conduct occurred," and (2) "the specific criminal acts applicable to each independent count." Br.Aplt.24-27.

First, not only was the jury instructed when the acts of child sodomy were alleged to have occurred—"on or about January 2012 through December 2013," R.172—Popp's complaint is that this detail was necessary because the State was required to prove that F.H. was under fourteen when the sodomy occurred. Br.Aplt.26. But this fact was undisputed. F.H. was still

only thirteen when she testified about acts that occurred years earlier, when she was just "seven or eight.". R476;CJC.2,4,7. There was consequently no doubt, let alone a reasonable one, that F.H. was under fourteen when the sodomy occurred.

Second, because F.H. described in detail at least two incidents of sodomy, and Popp was charged with and convicted of only two counts, "the specific criminal acts ... applicable to each independent count" were not in question. Br.Aplt.26. Moreover, in closing argument, the prosecutor explained to the jury that count one was for the acts involving "licking the frosting off of a spoon" and count two was for the acts involving "cleaning" the glass bottle. R.531,533,535. The jury was thus informed of "the specific criminal acts ... applicable to each independent count." Br.Aplt.26. As a result, even if the jury instructions and verdict form were incorrect, Popp has not proven prejudice. *Strickland*, 466 U.S. at 695-96; *Richter*, 562 U.S. at 112; *Munguia*, 2011 UT 5, ¶30.

**II.**

**This Court cannot review for plain error Popp's objections to admitting the CJC interview because he invited any error when he stipulated to the interview's admission; regardless, Popp cannot prove that the interview was so plainly unreliable that the trial court should have excluded it despite counsel's stipulation, or that his counsel was ineffective for stipulating**

**where admitting the interview likely benefitted the defense, nor has he proven prejudice.**

Popp asserts for the first time on appeal that the trial court "improperly" admitted F.H.'s CJC interview. Br.Aplt.28-38. According to him, the trial court plainly erred because it did not conduct an "'in depth evaluation' and ent[e]r of findings and conclusions" on the video's reliability under rule 15.5, Utah Rules of Criminal Procedure. Br.Aplt.29 (quoting *State v. Roberts*, 2018 UT App 9, ¶12, 414 P.3d 962). Popp likewise faults his trial counsel for not "challeng[ing] the admissibility of the CJC interview on reliability grounds," asking the trial court to make reliability findings, or "consult[ing] with and call[ing] an expert" at the "critical time for challenging that statement—the Rule 15.5 admissibility proceedings." Br.Aplt.31, 35, 37. This Court should not review Popp's plain-error claim because he invited any error when he withdrew his objection and stipulated to admitting the CJC interview. Regardless, he has not proven either plain error or that his counsel was ineffective.

**A. Plain error review is unavailable because Popp invited any error.**

This Court should not address Popp's plain-error claim because he invited any error when he withdrew his objection and stipulated to admitting F.H.'s CJC interview without an "'in depth evaluation' and entry of findings

and conclusions" of the video recording's reliability. Br.Aplt.29. *See State v. Moa*, 2012 UT 28, ¶27, 282 P.3d 985 (when a party "encourage[es] the court to proceed without further consideration of an issue, an appellate court need not consider the party's objections to that action on appeal"); *State v. Cruz*, 2016 UT App 234, ¶24, 387 P.3d 618 (holding that Cruz invited error when he did not object on ground he asserted on appeal and "assured the trial court that he did not object to the CJC video recordings being played at trial").

The State moved to admit at the preliminary hearing a video of F.H.'s CJC interview. R.24-26. Popp's counsel did not object R.31-33,36,289. The State later also moved to admit F.H.'s CJC interview at trial. R.54-56. Popp's counsel objected, but on the ground that admitting the video would violate Popp's confrontation rights under Utah and United States constitutions, not because the interview was allegedly unreliable. R.65-69, 130. After the State explained that F.H. would be present at trial and available for cross-examination, Popp's counsel withdrew the objection because his only concern was that "she would be available." R.130-131,315-317. The trial court then confirmed that counsel had no other objection to admitting the interview. *Id*.

Later, while the court discussed trial logistics, the prosecutor said he would play the CJC interview "that we stipulated to on the record." R.353.

Popp's counsel did not object to the prosecutor's characterization that he stipulated to the CJC interview's admission at trial. *Id*.

This Court consequently should not address Popp's plain error claim. He invited any error when he withdrew his objection and stipulated to admitting the interview. *Moa*, 2012 UT 28, ¶27.

Not only is plain-error review unavailable because counsel stipulated to admitting the interview, but a court should not interfere with counsel's strategy by excluding evidence to which counsel stipulates. Indeed, a court is "'not required to constantly survey or second-guess [a] nonobjecting party's best interests or trial strategy' and is not expected to intervene in the proceedings unless the evidence 'would serve no conceivable strategic purpose.'" *State v. Bedell*, 2014 UT 1, ¶26, 322 P.3d 697 (citation omitted). Courts "should take measures to avoid interfering with potential legal strategy or creating an impression of a lack of neutrality." *Id*. Thus, "plain error does not exist" when there is a "'conceivable strategic purpose'" for counsel's actions. *Id*. As explained below, there were conceivable strategic reasons for counsel admitting the interview here.

**B. Popp has not proven that all competent counsel would have objected to admitting the interview.**

Popp also contends that his trial counsel was constitutionally deficient because he (1) did not "challenge the admissibility of the CJC interview on

reliability grounds," Br.Aplt.31; (2) did not ask the trial court to make reliability findings under rule 15.5, Br.Aplt.30-31; and (3) did not "consult with and call an expert" at the "critical time for challenging that statement—the Rule 15.5 admissibility proceedings," Br.Aplt.37. Popp has not shown that "no competent attorney" would have proceeded as his trial counsel did. *Moore*, 562 U.S. at 124 (2011).

**1. Competent counsel could decide not to object to admitting the interview.**

Popp asserts that his trial counsel was deficient for not "challeng[ing] the admissibility of the CJC interview on reliability grounds." Br.Aplt.31. Popp's ineffectiveness claim fails at the outset because he has not undertaken the analysis—let alone shown—that a motion to exclude F.H.'s CJC interview as unreliable would have been successful. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (to prove ineffective assistance, at minimum, the defendant must prove that his underlying claim "is meritorious"); *State v. Gonzales-Bejarano*, 2018 UT App 60, ¶23, 427 P.3d 251 (To "succeed" on an ineffective assistance claim, defendant "must show that such evidence would have actually been excluded had trial counsel objected"). Indeed, competent counsel could conclude that he would not succeed in excluding the interview. Not only did counsel consult an expert on the "propensity" of children to "falsify testimony" and whether "proper" interview techniques "were used

in this case," R.107, but there is no "one 'right' way to conduct an interview," *Roberts*, 2018 UT App 9, ¶21. Rule 15.5's purpose "is to prevent child victims from being further traumatized by the experience of testifying of their abuse in court" and "ensure that the jury hears the most accurate testimony from the child victim" because it is "removed from the stressful setting of a trial." *State v. Nguyen*, 2012 UT 80, ¶¶21-22, 293 P.3d 236. Flaws in the interview will thus not "render the interview unreliable" as long as the interview is reliable "overall." *Roberts*, 2018 UT App 9, ¶21.

*Roberts* held that a CJC interview was reliable "overall," even where the CJC interviewer used some leading questions, "did not elicit a promise from the victim to tell the truth and did not establish what truth was," and did not "ask follow-up questions about certain key issues." *Id*. ¶15. This was because the child's answers contained "sufficient detail or description," she "volunteered information," her responses "did not appear to be rehearsed," and she "did not appear to be under pressure to tell a certain story." *Id*. ¶20.

Reasonable counsel could therefore conclude that he was unlikely to succeed in excluding F.H.'s interview because her answers likewise contained "sufficient detail or description" like the location and circumstances of each incident of sodomy; she "volunteered information" like losing her balance and grabbing Popp's leg, and hearing Popp put away

the frosting and washing his hands; her responses "did not appear to be rehearsed"; and she "did not appear to be under pressure to tell a certain story." *Id*. ¶¶20-21. In addition, F.H. agreed to tell Cheryl "only ... those things that are true and that really happened," CJC.2, and F.H. demonstrated that she would stop Cheryl and tell Cheryl if she said "something that's not right," CJC.1-2.

Reasonable counsel could also conclude that excluding the interview was not the best course. Without the video, F.H. would have testified about the two incidents of sodomy at trial. *Gonzales-Bejarano*, 2018 UT App 60, ¶¶27-29 (to prove ineffective assistance, defendant must prove that had hearsay objection been successful, other witnesses would not have testified to same information). Reasonable counsel could conclude that F.H.'s live testimony likely would have carried more emotional weight than a video recording of the same testimony. *Id*. ¶30 ("[T]he impact of direct testimony from a physically present crime victim may carry more weight with a jury."). Competent counsel could therefore conclude that Popp was better off with the jury viewing the video. *State v. Lucero*, 2014 UT 15, ¶53, 328 P.3d 841 ("counsel's decision to choose one of two alternative, reasonable trial strategies is not grounds for an ineffective assistance of counsel ruling").

Reasonable counsel could also conclude that admitting the video would further the defense. The defense theory was that Kaitlyn coached F.H. into fabricating the allegations because Kaitlyn wanted custody of the children and she did not want to pay Popp child support. R.423-424,539-540. To that end, trial counsel alleged that before F.H. disclosed Popp's abuse, Kaitlyn asked F.H., "are you sure [Popp] hasn't abused you?" R.423. During cross-examination, Kaitlyn denied asking F.H. this. R.440. But in the CJC interview, F.H. says that Kaitlyn asked her the night she disclosed "if anyone ever hurt me or did anything to me." CJC.13. F.H. also said in the interview, "My mom thinks that since my mom and [Popp] … were never really affectionate toward each other, and I'd always tried to push those memories back, she thinks that since I've seen [Kaitlyn and her husband] be affectionate towards each other, she thinks that that sort of brought those memories back." CJC.14. Reasonable counsel could thus conclude that F.H.'s statements in the interview could sow doubt about Kaitlyn's story and support the defense theory that Kaitlyn planted the idea that Popp abused F.H.

For all these reasons, Popp has not proven that all competent counsel would have objected to admitting the interview. Popp therefore has not proven that his counsel performed deficiently. *Moore*, 562 U.S. at 124.

**2. Competent counsel could decide to forgo requesting reliability findings because there was no reason to do so.**

Popp also asserts that his trial counsel was deficient because he did not ask the court to make reliability findings under rule 15.5. Br.Aplt.30-31. This claim fails for two reasons. First, as shown above, competent counsel could conclude that either he was better off not challenging admitting the interview or that a challenge to the reliability of the interview would likely fail. *See supra* II.C.2.

Second, neither rule 15.5 nor settled law requires a trial court to make reliability findings when a CJC interview's admission is uncontested. Utah R. Crim. P. 15.5(a). Thus, no controlling authority required that, to be competent, an attorney must require the trial court to make reliability findings under these circumstances. Popp has consequently failed to prove that "no competent attorney" would have proceeded as his counsel did. *Moore*, 562 U.S. at 124.

**3. Popp's claim that his trial counsel was deficient for not consulting with an expert fails because it is speculative and unsupported by the record.**

Popp further argues that his counsel was deficient for not "consult[ing] with and call[ing] an expert" at the "critical time for challenging that statement—the Rule 15.5 admissibility proceedings." Br.Aplt.37. Counsel, however, "is strongly presumed to have rendered adequate assistance."

*Strickland*, 466 U.S. at 690. The "absence of evidence," therefore, "cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Burt v. Titlow* 134 S.Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 689). Indeed, proof of deficient performance "cannot be a speculative matter but must be a demonstrable reality." *Munguia*, 2011 UT 5, ¶30 (quotation simplified). And this burden "rests squarely on the defendant." *Titlow*, 134 S.Ct. at 17. Popp's claim fails because it is speculative.

Trial counsel *did* consult with an expert. R.106-115. Trial counsel hired a Ph.D. psychologist to testify about the "propensity" of children to "falsify testimony" and whether "proper" interview techniques "were used in this case." R.107. Trial counsel later informed the trial court that he would not call the expert in his case-in-chief, but said that he might call the expert in rebuttal "if necessary." R.154, 334. Trial counsel ultimately did not call the expert.

Although Popp acknowledges that his counsel consulted this expert, he claims that his counsel was nonetheless deficient because the consultation did not happen until "briefing on the Rule 15.5 admissibility issue was complete." Br.Aplt.36. Popp bases this assertion on the fact that his trial counsel filed the expert notice after the parties briefed the rule 15.5 issue. *Id*. But when trial counsel filed the notice says nothing about when trial counsel

actually spoke with the expert. The notice itself is silent on the matter. R.106-115. And nothing else in the record addresses this point. Indeed, trial counsel must have spoken with the expert before filing the notice because by that time the expert had already agreed to testify in the matter. *Id*. Additionally, the trial court did not hear argument on the admissibility of the interview until after counsel filed the expert notice. R.130-131. Because Popp cannot show that his counsel did not consult with the expert before the "critical time" for challenging the CJC interview's admission, Br.Aplt.37, his claim is speculative, and he has not rebutted the presumption of effective performance. *Munguia*, 2011 UT 5, ¶30.

The case Popp relies on, *State v. Landry*, 2016 UT App 164, 380 P.3d 25, does not prove otherwise. Br.Aplt.37. *Landry* held that counsel was ineffective there for "failing to consult with an arson expert." 2016 UT App 164, ¶22. But as shown, Popp's counsel *did* consult with an expert. R.106-115. And *Landry* cautioned that appellate courts "are generally reluctant to question trial strategy, including whether to call an expert witness," *id*. ¶32, but that it was a rare exception because (1) counsel had "never before worked on an arson case," (2) counsel "made only minimal efforts to educate herself on fire investigation principles" and simply "accepted the state's characterization of the scene," (3) there were "substantial errors in the State's arson case," (4) an

expert would have shown that the State's experts relied on unaccepted scientific principles and would have supported a successful bid to exclude the evidence, and (5) counsel used a "much weaker" defense that was "only somewhat supported by the evidence." *Id*. ¶¶34-40. In contrast, this is not a case where specialized scientific knowledge was necessary to understand the evidence or mount a defense. And nothing in the record supports that the State relied on unaccepted scientific principles or that trial counsel would have been successful in excluding evidence. Quite the opposite. As shown, F.H.'s CJC interview was reliable. *See Roberts*, 2018 UT App 9, ¶21 (explaining that there is not "one 'right' way to conduct an interview" and flaws will not "render the interview unreliable" as long as the interview is reliable "overall"). And even if it were not, competent counsel could have concluded that Popp was better off with it. *See supra*, II.C.1. *See Strickland*, 446 U.S. at 689-690 ("[C]ounsel is strongly presumed to have rendered adequate assistance."). In sum, Popp has not rebutted the presumption of constitutionally adequate assistance. *Id*.

**C. Popp cannot show prejudice.**

Nor can Popp show a "reasonable probability that, but for" the error, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Indeed, even if the trial court erred or his trial counsel performed

deficiently, it would not have so altered the evidentiary landscape that a more favorable outcome was demonstrably, substantially probable. *Strickland*, 466 U.S. at 695-96; *Richter*, 562 U.S. at 112; *Munguia*, 2011 UT 5, ¶30.

Popp contends that he was prejudiced because F.H.'s CJC interview was of "questionable reliability." Br.Aplt.34-35. But in support, he relies solely on nonrecord documents from his 23B motion. *See* Br.Aplt.34 (stating that "[s]everal facts and factors are identified in the 23B affidavits that raise substantial issues regarding the reliability of F.H.'s interview/testimony" and listing examples). But Popp must point to "specific instances *in the record* demonstrating both counsel's deficient performance and the prejudice it caused the defendant." *State v. Griffin*, 2015 UT 18, ¶16, __ P.3d __. Appellants may not use a rule 23B motion to circumvent the fundamental rule that litigants may rely only on the appellate record. *State v. Gunter*, 2013 UT App 140, ¶12 & n.4, 304 P.3d 866 (reiterating impropriety of using non-record evidence supporting pending rule 23B motion as basis for substantive claim of error on appeal). Courts "consider affidavits supporting Rule 23B motions solely to determine the propriety of remanding ineffective assistance of counsel claims for evidentiary hearings." *State v. Bredehoft*, 966 P.2d 285, 290 (Utah App. 1998), *superseded by statute on other grounds*; *accord State v. Johnson*,

2007 UT App 184, ¶39, 163 P.3d 695; Revised Order Pertaining to Rule 23B. Popp's claim fails for this reason alone.

But Popp also cannot show prejudice because he has not shown a reasonable probability that the court would have excluded the interview. Br.Aplt. 34-35. That is because Popp's objections go to the weight of the evidence, not its admissibility. *See Roberts*, 2018 UT App 9, ¶21 (explaining that there is not "one 'right' way to conduct an interview" and flaws will not "render the interview unreliable" as long as the interview is reliable "overall"). Indeed, as shown, F.H.'s interview was at least as reliable, if not more so, than the interview in *Roberts*. *See id*. ¶¶15,20-21; CJC.1-2. Popp therefore has not shown a reasonable probability that the trial court would have excluded F.H.'s interview.

But even if Popp had successfully excluded the interview, he still has not shown a reasonable probability that the "evidentiary picture would not have differed." *Gonzales-Bejarano*, 2018 UT App 60, ¶31 (holding that where "there is no indication that the quantity or quality of the evidence presented at trial would have differed ... [a reviewing court] cannot conclude that there was a reasonable likelihood of a result more favorable for the defendant"). As explained, absent the video, F.H. would have testified about the same two incidents of sodomy. *Id*. ¶¶27-29 (explaining that burden rests on defendants

to prove that had an objection been successful, other witnesses would not have testified to same information). And F.H.'s live testimony would likely have carried additional emotional weight. *Id*. ¶30 (explaining that "the impact of direct testimony from a physically present crime victim may carry more weight with a jury"). Thus, Popp has not proven that, absent the video of the interview, there is a reasonable probability of a different result.

**III.**

**This Court cannot review for plain error Popp's objections to testimony that Popp declined to speak to the Detective because Popp invited any error; regardless, because the prosecutor did not use Popp's declination as substantive evidence of guilt, Popp has not proven that any error was so obviously improper and potentially harmful that the trial court should have sua sponte excluded the testimony, or that all competent counsel would have objected, nor has he proven prejudice.**

The detective testified that Popp initially agreed to meet with him, but wanted to check with his attorney first. R.488. The detective explained that they scheduled an interview, but Popp "never showed" and later told the detective that "his attorney had advised him not to interview" with police. R.488-489.

Popp argues, again for the first time on appeal, that his state and federal constitutional rights were violated when the prosecutor questioned the detective about Popp's declination to interview with police. Br.Aplt.38-41. He contends that, in responding to the jury's question, "Did the detective

tell [Popp] why they wanted to interview him?", the trial court plainly erred. Br.Aplt.40 (quoting R.160). Popp also asserts that his trial counsel should have objected to the detective's testimony or requested a curative instruction. Br.Aplt.38-39. Popp, however, cannot obtain plain error review because he invited the error when he told the court that he had no objections to the detective's testimony and fashioned the response that the court gave to the jury. Regardless, because the prosecutor did not use Popp's declination as substantive evidence of his guilt, Popp has not shown that the court plainly erred, nor that all competent counsel would have objected.

### A. Popp invited any error when he told the trial court he had no objection to the detective's testimony and fashioned the court's response to the jury.

This Court should not address Popp's plain-error claim because he invited any error when he "affirmatively represented to the court that he … had no objection" to Detective Pyatt's testimony and crafted the response to the jury's question. *See Moa*, 2012 UT 28, ¶27.

On the morning of trial, the prosecutor informed the trial court that he was "going to ask Detective Pyatt if ... he was ever able to have an interview or meet with" Popp. R.346. The prosecutor explained that he was not going "mention it in closing" or use it to "suggest guilt or say [Popp]'s trying to hide something" but only wanted "to show that Detective Pyatt was doing

his job, he covered his bases and that he did everything he could to, you know, investigate the case." R.346. When the court asked counsel if he had any objections or "comment on that," counsel answered, "No." R.346-347. When Detective Pyatt testified, counsel did not object. Nor did he ask the trial court for a curative instruction. R.481-496.

Later, when the jury asked the court, "Did the detective tell [Popp] why they wanted to interview him?", R.160, counsel suggested that the court respond by "tell[ing] them that they have the evidence, they have to make a decision based on what they heard." R.574. He proposed that the court simply refer the jury to jury instructions 10, 12, and 20, which instructed the jury that it could consider only the evidence received at trial. R.577. The prosecutor agreed with counsel's suggestion. *Id*. The court consequently answered the jury's question with: "Please refer to Jury Instruction #10, #12, and #20." R.160, 161, 579-580.

By advising the trial court that he had no objection to the detective's testimony and crafting the response to the jury's question, trial counsel "encouraged the court to proceed without further consideration" of the issue. *Moa*, 2012 UT 28, ¶27. Any alleged error was thus invited and this Court should not address it. *Id*.

**B. Popp cannot show plain error because any error was not obvious where the prosecutor did not use Popp's pre-*Miranda* "silence" as proof of guilt.**

Popp contends that the trial court plainly erred by not giving the jury a curative instruction "that Popp's pre-arrest silence cannot be used as evidence of guilt." Br.Aplt.40-41. Popp has failed to meet his burden here because he cannot show an obvious error.

Utah recognizes a pre-*Miranda* right against self-incrimination.[5] But the "'mere mention' of a defendant's exercise of his rights does not automatically establish" a Fifth Amendment violation. *State v. Maas*, 1999 UT App 325, ¶20, 991 P.2d 1108 (citation omitted). "[R]ather, it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited." *Id.* (quotation simplified). "The key is the framing of a question or a prosecutor's comment that demands an explanation from the defendant and raises the inference that silence equals guilt." *Id*. (no Fifth Amendment violation occurred because "the prosecution did not attempt to cast the forbidden

[5] Utah courts have not yet decided whether one must unequivocally invoke his right to remain silent before arrest in order to claim at trial that the right was violated. *See State v. Gallup*, 2011 UT App 422, ¶18 n.4, 267 P.3d 289. But this Court has held that there was no Fifth Amendment violation when the prosecutor introduced evidence in its case-in-chief that the defendant failed to come forward or tell police at the crime scene that he was involved in the crime because the defendant did not invoke his right to remain silent. *State v. Shepherd*, 2015 UT App 208, ¶¶22-28, 357 P.3d 598.

inference that Maas's silence equaled guilt"). In other words, the prosecutor must exploit the defendant's decision to remain silent "to demonstrate [the] defendant had a consciousness of guilt." *State v. Palmer*, 860 P.2d 339 (Utah App. 1993); *see also State v. Urias*, 609 P.2d 1326, 1328 (Utah 1980) (finding no Fifth Amendment violation when prosecutor did not use defendant's silence as "consciousness of guilt"); *Gallup*, 2011 UT App 422, ¶16 (finding Fifth Amendment violation because the "State argued that Gallup's silence via the hang-up [phone call] inexorably demonstrated his guilt").

"[O]nce a defendant takes the witness stand," however, "evidence of privileged pre-*Miranda* silence can be used for impeachment purposes." *Gallup*, 2011 UT App 422, ¶¶15, 17. The Fifth Amendment does not prohibit "the use of prearrest silence to impeach a criminal defendant's credibility." *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

Here, it would not have been obvious to the trial court that the prosecutor used the detective's testimony "to cast the forbidden inference that [Popp]'s silence equaled guilt." *Maas*, 1999 UT App 325, ¶25. In fact, before the detective testified, the prosecutor informed the trial court that he would not do that. R.346. Although the prosecutor said that he planned to ask the detective about Popp's declination to be interviewed, he would not mention that testimony in his closing argument or use it to "suggest guilt or

say [Popp]'s trying to hide something." R.346. The prosecutor explained that he wanted only "to show that Detective Pyatt was doing his job, he covered his bases and that he did everything he could to, you know, investigate the case." R.346.

True to his word, and unlike in *Gallup*, where the prosecutor told the jury, "[h]anging up that phone, ladies and gentlemen, showed his consciousness of guilt," 2011 UT App 422, ¶16; or in *Palmer*, where the prosecutor argued that the reason why Palmer did not tell police, "No, I didn't do it," was "[b]ecause he knew he was guilty," *Palmer*, 860 P.2d at 346; the prosecutor did not mention Popp's declination to be interviewed at all in closing argument. It consequently would not have been obvious to the trial court that the prosecutor was using Popp's declination to be interviewed as substantive evidence of his guilt. *See State v. Fairbourn*, 2017 UT App 158, ¶22, 405 P.3d 789, *cert. denied,* 409 P.3d 1050 (Utah 2017) (holding that trial court did not plainly err because prosecutor's question why Fairbourn did not tell his story to police was not obviously a "question related to Defendant's silence").

Furthermore, because trial counsel advised the court before the detective's testimony that Popp "[m]ost likely" would be testifying and Popp did indeed testify at trial, it any potential Fifth Amendment violation would

not have been obvious. R.352,501-510. The Fifth Amendment does not prohibit "the use of prearrest silence to impeach a criminal defendant's credibility," *Jenkins*, 447 U.S. at 238. *See also Gallup*, 2011 UT App 422, ¶¶15, 17 ("[O]nce a defendant takes the witness stand, evidence of privileged pre-*Miranda* silence can be used for impeachment purposes").

Yet Popp asserts that the jury's question showed that the jury was improperly considering Popp's declination to be interviewed as proof of his guilt. Br.Aplt.40. Not so. Nothing in the question indicates that the jury was equating Popp's declination to be interviewed with his guilt. Indeed, the trial court, the prosecutor, and trial counsel all interpreted the question as focused on what evidence was introduced at trial. They consequently agreed to instruct the jury "to make a decision based on what they heard." R.574. Under these circumstances, it would not have been obvious to the court that any Fifth Amendment violation occurred. *Fairbourn*, 2017 UT App 158, ¶22 (trial court did not plainly err because prosecutor's question about why Fairbourn did not tell police his story did not obviously "relate[] to Defendant's silence"). Popp's plain error claim thus fails.

### C. Popp has not shown that all competent counsel would have objected to the detective's testimony or requested a curative jury instruction.

Popp likewise argues that his trial counsel was constitutionally deficient because (1) he did not object to the detective's testimony that Popp declined to be interviewed by police, and (2) he did not request a curative jury instruction "that Popp's pre-arrest silence cannot be used as evidence of guilt." Br.Aplt.39-41. But Popp has not shown that "no competent attorney" would have proceeded as his trial counsel did. *Moore*, 562 U.S. at 124 (2011).

First, as shown above, reasonable counsel could have concluded that the testimony did not violate the Fifth Amendment because the prosecutor "did not attempt to cast the forbidden inference that [Popp]'s silence equaled guilt," *Maas*, 1999 UT App 325, ¶25.

Reasonable counsel could have further concluded that the detective's testimony that Popp declined an interview would come in in any event, so it was not worth objecting to the timing of that testimony. The defense theory, in part, was that the detective did not adequately investigate the case and merely accepted F.H.'s version of events. To that end, trial counsel questioned the detective about what he had *not* done to investigate the case, such as search for physical evidence or DNA; make a "pretext" phone call to Popp; search Popp's home; locate any witnesses; interview the children's daycare

provider or teachers; or interview Kelly Loftus, a friend who lived with Popp and the children during the timeframe the abuse occurred. R.491-493,537. The prosecutor was consequently entitled, either on redirect or on rebuttal, "to show that Detective Pyatt was doing his job, he covered his bases and that he did everything he could to, you know, investigate the case." R.346. And that included asking the detective why he did not interview Popp. *See State v. Thompson*, 2014 UT App 14, ¶30, 318 P.3d 1221 ("[O]nce the defendant offers evidence or makes an assertion as to any fact, the State may cross-examine or introduce on rebuttal any testimony or evidence which would tend to contradict, explain or cast doubt upon the credibility of [that evidence]") (quotation simplified)). Reasonable counsel therefore could have concluded that if the evidence would come in anyway, it was not worth objecting, especially because the evidence in the narrower context of redirect or rebuttal, rather than part of the detective's larger testimony, might highlight testimony about the refusal to be interviewed and allow the jury to focus on its negative aspects.

Reasonable counsel could have also concluded that the detective's testimony that Popp declined to be interviewed would have been admissible because "[o]nce a defendant takes the witness stand, evidence of privileged pre-*Miranda* silence can be used for impeachment purposes." *Gallup*, 2011 UT

App 422, ¶¶15, 17. Because Popp intended to testify, R.352—and later did testify—reasonable counsel could have concluded that it was likewise not worth objecting to the detective's testimony. *Id*.

As for the curative instruction, Popp has not proved—as he must—that all competent counsel would have recognized a need to request one. *See Moore*, 562 U.S. at 124. Indeed, nothing in the question indicated that the jury was equating Popp's declination to be interviewed with his guilt. *See* R.160 (asking "Did the detective tell [Popp] why they wanted to interview him?"). And because the prosecutor only asked the detective one question—"you say you attempted to interview, could you tell the jury about that and what happened with that?" R.488—and never raised the issue again, there was no reason for the jury to connect the detective's testimony with Popp's consciousness of guilt. *Compare with Gallup*, 2011 UT App 422, ¶16 (prosecutor telling jury that "[h]anging up that phone, ladies and gentlemen, showed his consciousness of guilt,") and *Palmer*, 860 P.2d at 346 (prosecutor arguing that the reason why Palmer did not tell police, "No, I didn't do it," was "[b]ecause he knew he was guilty").

But even if the jury's question could reasonably be interpreted to be focused on Popp's consciousness of guilt, reasonable counsel could still conclude that instructing that "Popp's pre-arrest silence cannot be used as

evidence of guilt," Br.Aplt.40, would have only emphasized Popp's refusal to be interviewed. "Choosing to forgo a limiting instruction can be a reasonable decision to avoid drawing attention to unfavorable testimony." *State v. Garrido*, 2013 UT App 245, ¶26, 314 P.3d 1014; *see also State v. Brooks*, 2010 UT App 97U at *1 ("[T]rial counsel's decision to forgo an otherwise available limiting jury instruction can be a 'sound trial strategy,' … designed to avoid emphasizing the subject of the instruction."); *State v. Harter*, 2007 UT App 5, ¶16, 155 P.3d 116 (counsel had strategic reason to forgo curative jury instruction and avoid emphasizing defendant's flight from crime scene); *State v. Silva*, 2000 UT App 292, ¶23, 13 P.3d 604 (acknowledging that cautionary instruction "may have actually bolstered the jurors' belief" in State's evidence).

Reasonable counsel could decide that turning the jury's focus to the fact that it could only consider the evidence presented at trial was a better strategy than emphasizing that the refusal might be evidence of guilt. R.160-162 (suggesting that court answer jury's question with "Please refer to Jury Instruction #10, #12, and #20"). Instruction 10 told the jury that it was their "job" to "decide what the facts are" and that they must "decide from the evidence what happened…." R.178. Instruction 12 told jurors that transcripts of testimony were not available during deliberations. R.180. And instruction

20 informed the jury that their "duty is to determine the facts of the case from the evidence received in the trial and not from any other source" and that they must "conscientiously consider and weigh the evidence and apply the law of the case…." R.190.

One reasonable reading of the jury's question is that they would consider Popp's decision not to talk to the detective as having some bearing on this case only if the detective had told Popp that he wanted to talk about this case. Because the detective did not testify that he told Popp why he wanted to interview him, the answer that trial counsel proposed—and that the court adopted—eliminated the evidentiary basis for inferring anything about this case from Popp's silence. The answer counsel formulated thus effectively instructed the jury that they could not consider why Popp declined to be interviewed. Trial counsel could have reasonably determined that this answer more powerfully, and tactfully, ensured that the jury did not consider Popp's "silence" be used as substantive proof of his guilt. Br.Aplt.40.

For all these reasons, Popp has not shown that "no competent attorney" would have proceeded as his counsel did. *Moore*, 562 U.S. at 124. His ineffective-assistance claim thus fails.

**D. Popp has not proven prejudice.**

Popp argues that he was prejudiced because the detective's "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)"; and that the jury's question showed that it "impermissibly considered Popp's silence as evidence." Br.Aplt.40-41. Popp is mistaken. Even if the court plainly erred or counsel were deficient, he has not shown a reasonable probability of a different outcome. *Strickland*, 466 U.S. at 695-96.

In deciding whether a prosecutor's comments on a defendant's silence were prejudicial, reviewing courts "typically consider" (1) whether the jury would "naturally and necessarily construe" the comment as referring to defendant's silence; (2) the strength of the evidence of defendant's guilt; (3) whether the reference was isolated; and (4) whether the trial court "instructed the jury not to draw any adverse presumption from defendant's decision not to testify." *Fairbourn*, 2017 UT App 158, ¶24. Popp has not shown prejudice under this standard.

First, as explained, it was unlikely that the jury construed the prosecutor's question "as referring to Defendant's silence." *Id.* ¶25. Indeed,

the prosecutor's question did not "cast the forbidden inference that [Popp]'s silence equaled guilt." *Maas*, 1999 UT App 325, ¶25.

Second, the evidence against Popp was strong. The jury was able to hear and see both F.H. and Popp and weigh their respective credibility. F.H.'s account was consistent and credible. She told the jury that no one told her what to say about the incidents or how to testify. R.480. And she reiterated that when Popp asked her to lick off the frosting and to use her mouth to clean a bottle, she licked his penis. R.479-480.

In contrast, Popp's contention that Kaitlyn coached F.H. to fabricate the allegations because she wanted custody of the children and did not want to pay Popp child support was not believable. R.423-424,538-539. Popp was not F.H.'s father and F.H. was already living with Kaitlyn full-time when she disclosed the abuse. R.431. And Popp was not "awarded as a custodial parent" of their son B.J. R.429. Rather, Kaitlyn and Popp had merely "agreed" that because Kaitlyn worked and they did not want to split up the kids, F.H. and B.J. would live with Popp. R.429-430,438,508-509. And once F.H. and B.J. moved in with her, Kaitlyn had to pay her children's expenses anyway. Popp's declination to be interviewed was thus "of little consequence to the result given the evidence that was before the jury." *Fairbourn*, 2017 UT App 158, ¶28.

Third, the reference to Popp's declination was isolated. *Id.* ¶24. The prosecutor asked only one question of the detective and did not mention it again, including during Popp's cross-examination and closing arguments. R.346.

Finally, as shown above, in response to the jury's question, the jury was instructed that it could not consider why Popp declined to be interviewed. R.160-162 (instructing "Please refer to Jury Instruction #10, #12, and #20"). Because jury instructions 10, 12, and 20 instructed the jury that their "duty is to determine the facts of the case from the evidence received in the trial and not from any other source" and the detective did not testify that he told Popp why he wanted to interview him, the jury was instructed that it could not consider why Popp declined to be interviewed. Reviewing courts presume that the jury follows their instructions. *State v. Christensen*, 2014 UT App 166, ¶33, 331 P.3d 1128. In short, Popp has not shown prejudice.

## IV.

**Popp has not rebutted the strong presumption that his counsel's investigation and preparation was adequate, and that his counsel adequately responded to the detective's testimony about the CJC interview, nor has he shown prejudice.**

Popp finally argues that his counsel was constitutionally ineffective for (1) not adequately investigating the case or calling three potential witnesses whose names Popp claims he provided to counsel, Br.Aplt.41-46; and (2) not

objecting to the detective's alleged "unnoticed expert testimony" about whether the CJC interview followed the National Institute of Child Health and Human Development guidelines, and for not calling an expert to rebut the detective's testimony, Br.Aplt.47-51.

"Surmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010), and proof of ineffectiveness "cannot be a speculative matter but must be a demonstrable reality." *Munguia*, 2011 UT 5, ¶30. Popp has not surmounted *Strickland*'s high bar here.

### A. Absent a rule 23B remand, this Court must reject Popp's claim that his counsel inadequately investigated and should have called three potential defense witnesses because the claim relies solely on nonrecord evidence.

Popp contends that his counsel did not adequately investigate the case and should have called three potential witnesses whose names Popp claims he gave to counsel. Br.Aplt.41-46. He concedes that the "issue relies heavily on the 23B materials." Br.Aplt.41 n.23. But in fact, it relies entirely on those materials. *See* Br.Aplt.41-46. Thus, absent a rule 23B remand, this Court must reject his claim.

To succeed on an ineffective-assistance claim, Popp must point to "specific instances *in the record* demonstrating both counsel's deficient performance and the prejudice it caused the defendant." *State v. Griffin*, 2015 UT 18, ¶16. Courts "consider affidavits supporting Rule 23B motions *solely* to

determine the propriety of remanding ineffective assistance of counsel claims for evidentiary hearings." *Bredehoft*, 966 P.2d at 290 (emphasis added); Revised Order Pertaining to Rule 23B. Appellants thus may not use a rule 23B motion to circumvent the fundamental rule that litigants may rely only on the record on appeal. *Gunter*, 2013 UT App 140, ¶12 & n.4 (reiterating impropriety of using non-record evidence supporting pending rule 23B motion as basis for substantive claim of error on appeal). Popp's claim consequently cannot succeed unless the Court grants his 23B motion and receives additional findings and supplemental briefing. *See* Utah R. App. P. 23B; *Bredehoft*, 966 P.2d at 290. Thus, absent a 23B remand, this Court should deny this claim. *See Gunter*, 2013 UT App 140, ¶12 & n.4.

**B. Popp has not shown that all competent counsel would have objected to the detective's testimony about the CJC interview or called an expert to rebut the detective's testimony, nor has he has shown prejudice.**

Popp asserts that his counsel was ineffective because he did not object to the detective's "unnoticed expert testimony" that the CJC interviewer followed the National Institute of Child Health and Human Development guidelines, and did not call an expert to rebut the detective's testimony. Br.Aplt.47-51. Popp, however, has failed to rebut the strong presumption that his trial counsel represented him competently, nor has he proved prejudice.

Although Popp concedes that the State need not give expert notice for government employees if discovery puts the opposing party on reasonable notice of the testimony, Popp nonetheless argues that trial counsel should have objected here because the discovery did not provide reasonable notice that the detective would testify about the National Institute of Child Health and Human Development guidelines. Br.Aplt.47-48 (citing Utah Code Annotated § 77-17-13(6)). This claim fails at the outset because discovery is not part of the appellate record and the record does not otherwise show what the discovery disclosed.

As explained, Popp must point to "specific instances *in the record* demonstrating both counsel's deficient performance and the prejudice it caused the defendant." *Griffin*, 2015 UT 18, ¶16. "[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality." *Munguia*, 2011 UT 5, ¶30 (quotation marks and citation omitted). The "absence of evidence," therefore, "cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.'" *Titlow* 134 S.Ct. at 17. And ambiguities or deficiencies in the appellate record "simply will be construed in favor of a finding that counsel performed effectively." *State v. Litherland*, 2000 UT 76, ¶17, 12 P.3d 92.

Regardless, Popp cannot rebut the strong presumption of reasonable performance because the record show that reasonable counsel could have concluded that an objection was unnecessary. Because the remedy for lack of expert notice is a continuance, trial counsel could have reasonably concluded that he did not need a continuance where he had already consulted a Ph.D. psychologist on whether "proper" interview techniques "were used in this case" and was therefore prepared to challenge the detective's testimony. R.107.

Yet Popp asserts that had trial counsel objected, Popp "may have been entitled to exclusion of Pyatt's entire 'expert' testimony on child interviewing" because "the record suggests the State's failure to file notice was deliberate." Br.Aplt.49. Beyond this speculative statement, however, Popp does not otherwise explain how the State's lack of notice was deliberate. Again, he cannot prove ineffective assistance of counsel with speculation. *Munguia*, 2011 UT 5, ¶30 ("[P]roof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.") (quotation simplified); *Litherland*, 2000 UT 76, ¶17 (ambiguities or deficiencies in the appellate record "simply will be construed in favor of a finding that counsel performed effectively").

Popp finally contends that he suffered prejudice because "what [the detective] testified to was simply false" and an expert would have assisted trial counsel in countering the detective's "blatantly false representation to the jury that the interview complied with established guidelines…." Br.Aplt.50-51. Once again, however, Popp relies entirely on nonrecord 23B materials to support this argument. *Id*. As a result, he has failed to meet his burden. *See Gunter*, 2013 UT App 140, ¶12 & n.4.

## CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on March 13, 2019.

SEAN D. REYES
Utah Attorney General

*/s/ Tera J. Peterson*
TERA J. PETERSON
Assistant Solicitor General
Counsel for Appellee

## CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 13,865 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

*/s/ Tera J. Peterson*
TERA J. PETERSON
Assistant Solicitor General

## CERTIFICATE OF SERVICE

I certify that on March 13, 2019, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

STACI VISSER
Intermountain Legal
2159 South 700 East, Suite 240
Salt Lake City, Utah 84106
Svisser@intermountainlegal.net

ANN M. TALIAFERRO
Brown Bradshaw & Moffat
422 North 300 West
Salt Lake City, Utah 84103
ann@brownbradshaw.com

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

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

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

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

*/s/ Melanie Kendrick*

# Addenda

# Addendum A

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

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

**Utah Code Annotated § 77-17-13 (West 2018)**

(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.

**Utah R. App. P. 23B — Motion to Remand for Findings Necessary to Determination of Ineffective Assistance of Counsel Claim**

**(a) Grounds for Motion; Time.** A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel. The motion shall be available only upon a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective.

The motion shall be filed prior to the filing of the appellant's brief. Upon a showing of good cause, the court may permit a motion to be filed after the filing of the appellant's brief. In no event shall the court permit a motion to be filed after oral argument. Nothing in this rule shall prohibit the court from remanding the case under this rule on its own motion at any time if the claim has been raised and the motion would have been available to a party.

**(b) Content of Motion; Response; Reply.** The content of the motion shall conform to the requirements of Rule 23. The motion shall include or be accompanied by affidavits alleging facts not fully appearing in the record on appeal that show the claimed deficient performance of the attorney. The affidavits shall also allege facts that show the claimed prejudice suffered by the appellant as a result of the claimed deficient performance. The motion shall also be accompanied by a proposed order or remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed on remand.

A response shall be filed within 20 days after the motion is filed. The response shall include a proposed order of remand that identifies the ineffectiveness claims and specifies the factual issues relevant to each such claim to be addressed by the trial court in the event remand is granted, unless the responding party accepts that proposed by the moving party. Any reply shall be filed within 10 days after the response is served.

**(c) Order of the Court.** If the requirements of parts (a) and (b) of this rule have been met, the court may order that the case be temporarily remanded to the trial court for the purpose of entry of findings of fact relevant to a claim of ineffective assistance of counsel. The order of remand shall identify the ineffectiveness claims and specify the factual issues relevant to each such claim to be addressed by the trial court. The order shall also direct the trial court to complete the

proceedings on remand within 90 days of issuance of the order of remand, absent a finding by the trial court of good cause for a delay of reasonable length.

If it appears to the appellate court that the appellant's attorney of record on the appeal faces a conflict of interest upon remand, the court shall direct that counsel withdraw and that new counsel for the appellant be appointed or retained.

**(d) Effect on Appeal.** Oral argument and the deadlines for briefs shall be vacated upon the filing of a motion to remand under this rule. Other procedural steps required by these rules shall not be stayed by a motion for remand, unless a stay is ordered by the court upon stipulation or motion of the parties or upon the court's motion.

**(e) Proceedings Before the Trial Court.** Upon remand the trial court shall promptly conduct hearings and take evidence as necessary to enter the findings of fact necessary to determine the claim of ineffective assistance of counsel. Any claims of ineffectiveness not identified in the order of remand shall not be considered by the trial court on remand, unless the trial court determines that the interests of justice or judicial efficiency require consideration of issues not specifically identified in the order of remand. Evidentiary hearings shall be conducted without a jury and as soon as practicable after remand. The burden of proving a fact shall be upon the proponent of the fact. The standard of proof shall be a preponderance of the evidence. The trial court shall enter written findings of fact concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result, in accordance with the order of remand. Proceedings on remand shall be completed within 90 days of entry of the order of remand, unless the trial court finds good cause for a delay of reasonable length.

**(f) Preparation and Transmittal of the Record.** At the conclusion of all proceedings before the trial court, the clerk of the trial court and the court reporter shall immediately prepare the record of the supplemental proceedings as required by these rules. If the record of the original proceedings before the trial court has been transmitted to the appellate court, the clerk of the trial court shall immediately transmit the record of the supplemental proceedings upon preparation of the supplemental record. If the record of the original proceedings before the trial court has not been transmitted to the appellate court, the clerk of the court shall transmit the record of the supplemental proceedings upon the preparation of the entire record.

**(g) Appellate Court Determination.** Upon receipt of the record from the trial court, the clerk of the court shall notify the parties of the new schedule for briefing or oral argument under these rules. Errors claimed to have been made during the trial court proceedings conducted pursuant to this rule are reviewable under the same standards as the review of errors in other appeals. The findings of fact entered pursuant to this rule are reviewable under the same standards as the review of findings of fact in other appeals.

**Utah R. Crim. P. 12. Motions**

**(a) Motions.** An application to the court for an order shall be by motion, which, unless made during a trial or hearing, shall be in writing and in accordance with this rule. A motion shall state succinctly and with particularity the grounds upon which it is made and the relief sought. A motion need not be accompanied by a memorandum unless required by the court.

**(b) Request to Submit for Decision.** If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request to submit the motion for decision. If a written Request to Submit is filed it shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was served, the date the opposing memorandum, if any, was served, the date the reply memorandum, if any, was served, and whether a hearing has been requested. The notification shall contain a certificate of mailing to all parties. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

**(c) Time for filing specified motions.** Any defense, objection or request, including request for rulings on the admissibility of evidence, which is capable of determination without the trial of the general issue may be raised prior to trial by written motion.

(1) The following shall be raised at least five days prior to the trial:

(A) defenses and objections based on defects in the indictment or information;

(B) motions to suppress evidence;

(C) requests for discovery where allowed;

(D) requests for severance of charges or defendants;

(E) motions to dismiss on the ground of double jeopardy; or

(F) motions challenging jurisdiction, unless good cause is shown why the issue could not have been raised at least five days prior to trial.

(2) Motions for a reduction of criminal offense at sentencing pursuant to Utah Code Section 76-3-402(1) shall be in writing and filed at least ten days prior to the date of sentencing unless the court sets the date for sentencing within ten days of the entry of conviction. Motions for a reduction of criminal offense pursuant to Utah Code Section 76-3-402(2) may be raised at any time after sentencing upon proper service of the motion on the appropriate prosecuting entity.

**(d) Motions to Suppress.** A motion to suppress evidence shall:

(1) describe the evidence sought to be suppressed;

(2) set forth the standing of the movant to make the application; and

(3) specify sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and to enable the court to determine what proceedings are appropriate to address them.

If an evidentiary hearing is requested, no written response to the motion by the non-moving party is required, unless the court orders otherwise. At the conclusion of the evidentiary hearing, the court may provide a reasonable time for all parties to respond to the issues of fact and law raised in the motion and at the hearing.

**(e)** A motion made before trial shall be determined before trial unless the court for good cause orders that the ruling be deferred for later determination. Where factual issues are involved in determining a motion, the court shall state its findings on the record.

**(f)** Failure of the defendant to timely raise defenses or objections or to make requests which must be made prior to trial or at the time set by the court shall constitute waiver thereof, but the court for cause shown may grant relief from such waiver.

**(g)** Except in justices' courts, a verbatim record shall be made of all proceedings at the hearing on motions, including such findings of fact and conclusions of law as are made orally.

**(h)** If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect provisions of law relating to a statute of limitations.

**Utah R. of Crim. P. 15.5 Out of Court Statement and Testimony of Child Victims or Child Witnesses of Sexual or Physical Abuse--Conditions of Admissibility**

**(a)** 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 his 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)** 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 his testimony 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 his 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)** 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)** 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.

# Addendum B

## 2. CHARGE

The Defendant is charged with the following crimes:

COUNT 1

SODOMY UPON A CHILD, a criminal offense, in violation of Utah Code Ann. § 76-5-403.1, as follows: That on or about January 2012 through December 2013, the defendant did engage in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

COUNT 2

SODOMY UPON A CHILD, a criminal offense, in violation of Utah Code Ann. § 76-5-403.1, as follows: That on or about January 2012 through December 2013, the defendant did engage in a sexual act upon or with a child under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

## 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.

**IN THE FIRST JUDICIAL DISTRICT COURT**
**BOX ELDER COUNTY, STATE OF UTAH**

| | |
|---|---|
| STATE OF UTAH,<br>Plaintiff,<br><br>vs.<br><br>JUSTIN WILLIAM POPP,<br>Defendant. | VERDICT<br><br>Case No. 171100138 |

We the Jury, duly impaneled and sworn, find as follows as to: COUNT 1

✓ Guilty of SODOMY UPON A CHILD

____ Not Guilty of SODOMY UPON A CHILD

We the Jury, duly impaneled and sworn, find as follows as to: COUNT 2

✓ Guilty of SODOMY UPON A CHILD

____ Not Guilty of SODOMY UPON A CHILD

Dated this the 5 day of January, 2018.

JURY FOREPERSON

DISTRICT COURT JUDGE

STATE OF UTAH
FIRST DISTRICT COURT
BOX ELDER COUNTY

# Addendum C

FIRST JUDICIAL DISTRICT COURT, BRIGHAM

BOX ELDER COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | : | Case No. 171100138 |
| | : | |
| Plaintiff, | : | Appellate Court No. 20180224 |
| | : | |
| v | : | |
| | : | |
| JUSTIN WILLIAM POPP, | : | |
| | : | |
| Defendant. | : | With Keyword Index |

CJC INTERVIEW OF F. H. MARCH 10, 2017

BY

CHERYL BERGAN

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 Ellen Way
Sandy, Utah 84092
801-523-1186

CHILDREN'S JUSTICE CENTER INTERVIEW MARCH 10, 2017

OF F[redacted] H[redacted] BY CHERYL BURGAN

MS. BURGAN: I know these couches are really big. I have to scoot back too.

So F[redacted], before we get talking about stuff, and there's lots of questions that I'll probably ask as we get going, okay? And so when I ask a question and you don't know the answer to it, you can just say, Cheryl, I don't know. I don't want you to guess. Okay?

F[redacted]: Okay.

MS. BURGAN: So if I said, F[redacted], what's the name of my dog?

F[redacted]: I don't know.

MS. BURGAN: You don't know. That was kind of an easy one, huh? So just no guessing, just say I don't know and I'll just move on, okay?

F[redacted]: Okay.

MS. BURGAN: And If I ask you a question and you don't quite know what I mean, you don't understand what the question is, just stop and tell me and say, Cheryl, I don't know what you mean, and I'll try to ask it in a different way.

F[redacted]: Okay.

MS. BURGAN: Okay? And if I ask you a question - oh, I take that back. If I say something that's not right, okay, if I've got something wrong you need to stop and you

need to tell me, No, Cheryl, that's not the right thing. So if I said F[redacted] is 16 years old.

F[redacted]: No, that's not right.

MS. BURGAN: That's not right? Okay, so how old are you?

F[redacted]: Twelve.

MS. BURGAN: You're twelve. Okay. So you stop me and tell me what the right thing is, okay?

F[redacted]: Okay.

MS. BURGAN: It's just really important that as we talk today that you only tell me those things that are true and that really happened, okay?

F[redacted]: Okay.

MS. BURGAN: Okay. So we've got all that out of the way. Tell me about you. Tell me, what do you like to do?

F[redacted]: I like to spend time with my friends and I like to do math and color.

MS. BURGAN: Okay. So tell me about spending time with your friends. What do you guys do?

F[redacted]: We normally play games like today we were playing a game 'cause her mom had these old crutches so we were using those. I was pretending my foot was broken and she was carrying me around in a wheelbarrow.

MS. BURGAN: Awesome. Okay. And you said color, like art kind of color?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: And then math. What kind of stuff do you like to do with art?

F[redacted]: Well, I like to paint and we have these self-starters where you draw whatever is on the board. Like today we had to draw a sheep and it shows steps to draw it.

MS. BURGAN: Okay. So that's like in your art class that you have?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Okay. So, tell me about something that happened this week that's made you happy.

F[redacted]: I don't really know, (inaudible).

MS. BURGAN: Okay, well, tell me about something that maybe this week that's been kind of sad or made you unhappy.

F[redacted]: When I had to tell my mom.

MS. BURGAN: Okay. So tell me, tell me what it is that you had to tell your mom.

F[redacted]: So, while she 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.

MS. BURGAN: Okay. So I know that this is really hard but I need you to tell me everything about that, okay? You said that this wasn't your real dad. So what's his name?

F[redacted]: Justin.

MS. BURGAN: Justin? Okay, and when did this happen?

F[redacted]: A few years ago when I was seven or eight.

MS. BURGAN: When you were seven or eight? Okay. Did this happen one time or more than one time?

F[redacted]: More than once, I don't know the exact number.

MS. BURGAN: More than once. Okay. So I want you to go back and I want you to think of the very first time this happened. Do you have it in your head?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Okay, tell me everything that happened from the very beginning to the very end.

F[redacted]: 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.

MS. BURGAN: So he had you kneel down and made you lick what exactly?

F[redacted]: I don't know, I think it was his...

MS. BURGAN: It's okay to say whatever it is you

need to say. What was it that you think it was?

F[redacted]: His penis.

MS. BURGAN: You think it was his penis?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: What makes you think that?

F[redacted]: Because one time - well, first, it was always in a dark room or something like that. He never had the light on and one day I was kneeling down and I was like almost going to fall backwards because I lost my balance so I had to grab onto something and grabbed onto his leg and he didn't have any pants on.

MS. BURGAN: He didn't have any pants on?

F[redacted] Uh-huh (affirmative).

MS. BURGAN: Did he have any clothes on?

F[redacted]: I don't know. All I know is that he didn't have any pants on.

MS. BURGAN: Okay. So, let's go back to that very first time, okay? So you said that he had you kneel down and he had you lick it - and when you say it, was it the frosting or was it something else?

F[redacted]: It was the frosting on his penis.

MS. BURGAN: On his penis. Okay. That very first time, did you know that it was his penis or did you think it was something else?

F[redacted]: I thought it was something else until he

kept doing it.

MS. BURGAN: Okay. All right. So he had you lick it and then what happened after that?

F[redacted]: And then after the frosting was all gone I guess he pulled his pants up and then he put the frosting away and I could hear the sink running, so he washed his hands and then he, and then he took whatever the blindfold was, off and then we were just watching TV (inaudible).

MS. BURGAN: Okay. So this happened in his bedroom?

F[redacted]: Uh-huh (affirmative), sometimes it was in the downstairs bathroom.

MS. BURGAN: Sometimes it was in the downstairs bathroom? Okay. Sorry, you are talking so quietly and there's somebody banging in the other room so sometimes it's kind of hard to hear you a little bit, so I'm sorry if I have to ask you again and if you could speak just a little louder just because they're being so loud in there, okay? And I apologize for that. And okay.

So that very first time when he - after you licked everything, he pulled his pants up and he went into the bathroom and you heard the water, is that what you said or...

F[redacted]: First he went and put the frosting back in the fridge 'cause I heard the fridge open.

MS. BURGAN: Okay, okay. And then what happened after that?

F[redacted]: And then he went into the bathroom and washed his hands and then he went back in his bedroom and took off the blindfold and then we went and sat and watched TV.

MS. BURGAN: So that was the very first time and you said you were seven?

F[redacted]: Seven or eight.

MS. BURGAN: Seven or eight. Okay. Was there anybody there at the house with you guys?

F[redacted]: I think it was my brother but he normally took naps at that time of day so...

MS. BURGAN: Okay. So tell me - you said that this happened more than one time - and remember, I don't want you to guess, but how many times did this happen?

F[redacted]: I don't know, I just know it happened more than once.

MS. BURGAN: Okay. Did it happen more than five?

F[redacted]: I don't exactly know.

MS. BURGAN: Don't know? Okay. But you know it happened more than once?

F[redacted]: Yes.

MS. BURGAN: Okay. Tell me about the last time it happened. Do you remember that?

F[redacted]: Uh-huh (affirmative). The last time happened, it was in the bathroom, he said he needed my help but this time there wasn't any frosting, he was having me

clean bottles. I don't remember what with but I knew it wasn't a bottle.

MS. BURGAN: So you were in the bathroom.

F[redacted]: The downstairs bathroom.

MS. BURGAN: The downstairs bathroom and he asked if you would help him clean bottles?

F[redacted]: Uh-huh (affirmative), 'cause he had old soda - you know the glass bottles of soda? He had a whole bunch of those and he was going to sell them or something and so he needed to clean them off but once again, the light was off.

MS. BURGAN: Okay, so I need you to tell me everything that happened from the moment you went into the bathroom and tell everything he said.

F[redacted]: Okay. 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 my mouth to clean the bottles and I don't know why but I knew it wasn't a bottle because it wasn't hard.

MS. BURGAN: Okay. So tell me what it was like. If it wasn't hard, what was it like?

F[redacted]: It was like squishy and warm.

MS. BURGAN: And what was - he said that you had to

clean it with your mouth, so what exactly were you doing?

F[redacted]: I had to put my mouth on the bottle and sort of just lick it clean.

MS. BURGAN: Okay. Okay. And then what happened after that?

F[redacted]: And then he said we were done cleaning bottles and so we went upstairs and it was still dark because I couldn't see - well, when we went upstairs it wasn't dark but so we went upstairs and then he hosed the bottles off anyways outside.

MS. BURGAN: So did you clean other bottles with your mouth or just -

F[redacted]: No, just those ones, not after that.

MS. BURGAN: Not after that. But that day did you clean any other bottles with your mouth or was it the one time where it was warm -

F[redacted]: It was just the one -

MS. BURGAN: It was just that one?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Okay. So that was the last time. How old were you then?

F[redacted]: I think I was still seven or eight.

MS. BURGAN: Okay. Was anybody home during that one?

F[redacted]: Still my brother but like I said, he was

asleep.

MS. BURGAN: Okay, okay. Has anything happened any differently than those two times? Has there been anything else that's happened?

F[redacted]: The first one that I told you was the very first time and then the bottle one was the last one. I don't remember the other ones. I can remember those two.

MS. BURGAN: You can remember those two? But you can't remember the other ones?

F[redacted]: Huh-uh (negative).

MS. BURGAN: But there were more than those two?

F[redacted]: I think so, but I don't know.

MS. BURGAN: You don't know exactly but you can remember those two?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Okay. Okay. Did he ever say anything to you when you were doing this or say anything to you before or after?

F[redacted]: After we were done cleaning the bottles he said, Good job, but that's it.

MS. BURGAN: That's it? Okay. I'm going to take just a little bit of a break, okay? While I'm gone I want you to think if there's anything else that's happened that you need to tell me, if there's anything else you remember, okay?

F[redacted]: Okay.

MS. BURGAN: So I'm going to take just a minute, I'll be right back. You say here, okay?

F[redacted]: Uh-huh (affirmative)..

(Cheryl exits room from 16:56:15 to 16:59:55)

MS. BURGAN: So did you think of anything else?

F[redacted]: No.

MS. BURGAN: Okay. I've got a few other questions, okay?

F[redacted]: Okay.

MS. BURGAN: You mentioned before that you - there was a time that you had lost your balance and you were falling back and you grabbed his leg and you said that he didn't have any pants on.

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Was that, did that happen on the first time or that last time or was that a separate time that -

F[redacted]: That was the first time.

MS. BURGAN: That happened the first time? Okay. So that happened the very first time. So, tell me, tell me about the room - about the first time that this all happened, tell me everything you remember about that room.

F[redacted]: Like what it looked like?

MS. BURGAN: Uh-huh (affirmative). Tell me everything about what you remember.

F[redacted]: Well, like I said the light was off. I

can't remember. There was a dresser next to the bed and it was a king size bed and then after that there was another dresser and then by the window was the cooler, then after the cooler there was the closet and then there was just an empty corner.

MS. BURGAN: Okay. So, just talking about the very first time, do you remember, did this happen in the morning; in the afternoon; in the evening; at nighttime?

F[redacted]: It was like 4:00 or 3:00ish.

MS. BURGAN: So kind of early afternoon? Three or four o'clock? Okay. The second - or not the second, but the last time it happened, you said it happened in a downstairs bathroom. Tell me everything about that bathroom.

F[redacted]: The door was shut because it was always really - there was lots of light downstairs and so I knew he had the light - not the light - the door was closed and then after that there was another door but it had the water heater and stuff in it and then there was a rack where we kept all the towels and then it was just sort of emptiness until you got to the shower and then next to the shower was the toilet and next to the toilet was a big sink.

MS. BURGAN: Okay. So this house, where is this house at?

F[redacted]: Like the address?

MS. BURGAN: Uh-huh (affirmative) or even do you know the town that it was in?

F[redacted]: It's still in Brigham and he still lives there.

MS. BURGAN: He still lives there? Okay.

F[redacted]: The address is 431 South 400 West.

MS. BURGAN: So he still lives there?

F[redacted]: Uh-huh (affirmative).

MS. BURGAN: Okay. So, this happened several years ago. So tell me about the first person you told about all of this?

F[redacted]: It was my mom just a few nights ago.

MS. BURGAN: A few nights ago. So tell me everything that happened when you told mom.

F[redacted]: 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.

MS. BURGAN: So you only told her about the first time it happened?

F[redacted]: Uh-huh (affirmative).

MS. 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[redacted]: Uh-huh (affirmative).

MS. BURGAN: Why do you think it bothered you?

F[redacted]: 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 that sort of brought those memories back.

MS. BURGAN: Okay. Is there anybody else that you told? Just mom?

F[redacted]: Just mom.

MS. BURGAN: Just mom. Okay.

F[redacted] And the only other two people that know are my stepdad that she's with right now and my grandpa.

MS. BURGAN: Okay. Do you know if he's done anything like this to anybody else?

F[redacted]: I don't know.

MS. BURGAN: Don't know? Okay. You know, I just thought of something else. The first or the second time - or the last time, sorry, the first or the last time, where were your clothes? Were your clothes on, off, or something else?

F[redacted]: My clothes were on.

MS. BURGAN: Your clothes were on. Okay. You mentioned on the first time that you said his pants were off because you grabbed his leg. What about the last time? What

were his clothes like, on, off, or something else?

[redacted]: I don't know because the bathroom didn't have any windows and it was just really dark if the door is closed so I couldn't see anything.

MS. BURGAN: Okay. Okay. Well now, I'm trying to think if there's any other questions that I have. I don't think I have any more.

Is there anything you want to ask me?

[redacted]: Huh-uh (negative).

MS. BURGAN: Is there anything that you've been worried or concerned about?

[redacted]: Huh-uh (negative).

MS. BURGAN: No? Okay. All right. Well, I think that's all I have. Okay?

(Whereupon the interview was concluded)

(Transcript completed on June 23, 2018)

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned proceeding was transcribed by me from an audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed in Sandy, Utah.

Carolyn Erickson

Carolyn Erickson
Certified Shorthand Reporter
Certified Court Transcriber