ORIGINAL

PUBLIC

Case No. 20180224-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee/Plaintiff,

v.

JUSTIN POPP,
Appellant/Defendant.

REPLY BRIEF OF APPELLANT

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

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APPELLANT IS INCARCERATED
ORAL ARGUMENT IS REQUESTED

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Appellant, Justin Popp ("Popp"), hereby replies to the State's *Brief of Appellee* ("Br.Aplee."). In doing so, Popp reasserts the arguments and authorities presented in the *Opening Brief of Appellant* ("Popp.Br."), and makes the following additional points and clarifications. Any argument not further addressed herein is not waived, but has been briefed in the *Opening Brief of Appellant.*

ARGUMENT

I. THE CORRECT INEFFECTIVE OF ASSISTANCE ("IAC") STANDARD.

Popp already briefed standards of review, *see* Popp.Br.21-23 but an initial point must be made: This Court must not allow the State to lead it astray by its application of a heightened/inapplicable IAC standard. Counsel for Appellant has noticed a concerted effort on the part of the State, in this case and others, to argue (and assume as truth) a heightened standard in cases where defendants claim IAC. Although the State initially cites the appropriate standards, it concludes by indicating whether counsel's performance is "objectively reasonable" is one where "no competent counsel would have proceeded as he did." Br.Aplee.27. The State declares this standard as "distilled" by the United States Supreme Court in *Premo v. Moore*, 562 U.S. 115, 124 (2011). *Id.* This representation of the IAC standard is, frankly, intellectually dishonest.

Premo examined a claim of IAC in the context of a plea bargain. 562 U.S. at 118,121. The case "turn[ed] on the proper implementation of one of the states premises for issuance of federal habeas corpus contained in 28 U.S.C. §2254(d)" (amended by the

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)), specifically, whether "*the state court's decision* denying relief involves 'an unreasonable application' of clearly established Federal law." *Premo*, 562 U.S. at 118 (quoting 28 U.S.C. §2254(d)) (emphasis added). The Court determined "the relevant clearly established law derive[d] from *Strickland v. Washington.*" *Id.*; *Strickland v. Washington*, 466 U.S. 688 (1984). At its core, *Premo* deals with the question of whether *Strickland* was reasonably applied in habeas proceedings under AEDPA. *See id.* at 128 ("The state court likely reached the correct result under *Strickland.* And under § 2254(d), that it reached a reasonable one is sufficient."). To equate the standard of "reasonable application" in habeas proceedings to *Strickland* itself is not what *Premo* and the concurrently issued decision in *Harrison v. Richter* represent. *See Harrsion v. Richter*, 562 U.S. 86, 110 (2011) ("*Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, . . . *Strickland* does not guarantee perfect representation," only a "reasonably competent attorney").

In parsing the "no competent attorney" language from *dicta* in *Premo*, the State equates a federal, statutory, standard of review for trial court decisions, with a defendant's IAC burden on a direct appeal. Br.Aplee.27. In doing so, the State artificially heightens the *Strickland* standard without analysis, simply stating it as if it is settled law. The *Strickland* standard of showing ineffective assistance of counsel—deficient performance "below an objective standard of reasonableness" coupled with prejudice—

has not changed. 466 U.S. at 687–88.

II. ERRORS IN ADMITTING THE CJC INTERVIEW WERE NOT INVITED, WERE PLAIN, OR WERE THE RESULT OF IAC.

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"No matter how defenseless the child, or how strong the policy of protecting the victims of abuse, justice is not served by 'proving' sexual abuse through misleading and unreliable testimony."

State v. Rimmasch, 775 P.2d 388, 390 (Utah 1989) (citation omitted), *superc'd* in part, on other grounds.

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The State argues admission of the CJC interview at trial was proper despite the trial court's wholesale failure to make any findings as to the reliability, trustworthiness, and service to the interests of justice as mandated by Utah Rule of Criminal Procedure 15.5(a)(8) ("Rule 15.5").

The State first contends this issue may not be reviewed for plain error, alleging trial counsel invited the error. The State further argues trial counsel's failures surrounding the CJC interview do not amount to ineffective assistance of counsel ("IAC") where: (1) not objecting to the CJC interview was reasonable trial strategy; (2) Rule 15.5 does not require findings when admissibility is "uncontested"; (3) Popp's arguments as to reliability are not supported by the record; and (4) Popp cannot show prejudice. Br.Aplee.38–44.

As a threshold matter, Popp concedes some of the evidence relevant to findings under Rule 15.5(a)(8) require a 23B remand. *Cf.* Br.Aplee.38–41; *see also 23B Filings*. However, the multiple errors made by the trial court and trial counsel in failing to follow Rule 15.5 are sufficient for this Court to grant a new trial. Should this Court determine further evidence as to the Rule 15.5 factors is necessary to evaluate these claims, Popp requests his Rule 23B remand request be granted.

A. Trial Counsel Did Not Invite Error Where Trial Counsel Did Not Affirmatively Represent the Rule 15.5(a)(8) Requirements Were Met.

The State argues Popp invited any error in admitting F.H.'s CJC interview at trial where counsel withdrew his objection to the interview in a phone conference with the trial court the day before trial. Br.Aplee.30–33. In doing so, the State misconstrues the invited error doctrine.

"[A]n error is invited when counsel encourages the trial court to make an erroneous ruling. The rule discourages 'parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal' and gives 'the trial court the first opportunity to address the claim of error.'" *State v. McNeil*, 2016 UT 3, ¶17, 365 P.3d 699 (citing authority). Further, invited error exists when "counsel, either by statement or act, affirmatively" represents to the trial court the position then complained of on appeal. *State v. Hamilton*, 2003 UT 22, ¶54, 70 P.3d 111. Such did not occur here.

This Court recently addressed a similar argument in *State v. Robinson*, 2018 UT App 227, ___ P.3d___. In *Robinson*, trial counsel's concession to the authenticity of a police report and other evidence was found to be distinct from an affirmative representation that the evidence was reliable. *Id.* ¶¶22–23. The *Robinson* Court explained that by "never affirmatively represent[ing] that he had no objection" to the reliability of the evidence, the issue of reliability survived the invited error analysis. *Id.*

Similarly, counsel here never affirmatively represented to the trial court he was conceding reliability under Rule 15.5.[1] The only objection made by trial counsel was the CJC interview was a potential violation of Popp's right to confrontation if F.H. did not testify. R.130–31,315–17. Certainly, were Popp to now challenge admissibility based upon F.H. being unavailable, this would indeed amount to invited error where trial

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[1] Comparably this Court found invited error in *State v. Cruz* when Cruz challenged the reliability of a CJC video on appeal but below trial counsel affirmatively stated he was not objecting to the video being used during extensive discussion with and factual findings by the trial court. 2016 UT App 234, ¶22, 387 P.3d 618. Here, there was no discussion whatsoever about the Rule 15.5(a)(8) requirements. The failure to object, mere silence, or even affirmative acquiescence to an error initiated by the trial court does not amount to invited error. *See, e.g., McNeil*, 2016 UT 3, ¶21,n.2; *State v. Marquina*, 2018 UT App 219, ¶24, 437 P.3d 628.

counsel affirmatively conceded the Rule 15.5(a)(1) condition was met. R.353. As this is the only objection raised by trial counsel below and affirmatively withdrawn prior to trial, trial counsel never affirmatively represented the CJC interview was reliable or he had no objection based upon the Rule 15.5(a)(8) pre-conditions. It follows, this claim now raised on appeal, while not preserved, did not amount to invited error. This Court may review Popp's CJC interview inadmissibility claims for plain error.

B. This Court Should Review Admission of the CJC Interview without Rule 15.5(a)(8) Analysis, and Find Plain Error.

Plain error requires a showing that: (1) an error occurred; (2) the error should have been obvious to the trial court; and (3) the error was harmful. *See State v. Cegers,* 2019 UT App 54, ¶ 22, ___ P.3d ___. The requirements of Rule 15.5 are and were at the time of trial, in a word, plain.

As to the first two prongs of the plain error test, the trial court's error in failing to make any findings was in clear violation of Utah law and should have been obvious to the trial court. This is so because Rule 15.5 requires findings regardless of an objection. The State argues, however, that these findings are not required unless there is a challenge made. Br.Aplee.38. This interpretation contradicts the plain language of the rule, case law, and opens the door to obviating the rule entirely.

Rule 15.5 states that "upon motion and for good cause shown," oral statements of victims under the age of 14 recorded prior to the filing of charges may be admissible as

evidence. Utah R. Crim. P. 15.5(a). The rule goes on to list eight antecedents to admissibility, concluding the evidence is admissible only if ***all*** are met. *See Id.* The final of the conditions is: "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." *Id.* 15.5(a)(8). By suggesting the trial court is not required to make Rule 15.5 findings unless there is an objection to the evidence, the State inherently suggests that parties to such cases—usually the prosecution –are free to use unreliable and untrustworthy evidence admitted against the interests of justice so long as no one objects. *Cf. State v. Matsamas*, 808 P.2d 1048, 1051–52 (Utah 1991) (stressing "the critical nature of the requirement of findings on reliability"). This is untenable, is contrary to the plain language of the statute requiring a motion and showing of good cause, and as demonstrated by this case, results in a conviction based entirely upon hearsay that is never actually determined to be reliable. *See* Popp.Br.32.

Nor is the State's position supported by case law. For example, in *State v. Nguyen* court found the "good cause" requirement of Rule 15.5 is only met when the trial court considers the factors specified in Rule 15.5, and makes findings. 2012 UT 80, ¶11, 293 P.3d 236. It follows that if a trial court never considers these factors, whether upon objection or not, "good cause" is not met for admissibility and the recorded statement should not be admitted. *Id.*; *also c.f., State v. Ring*, 2018 UT 19, ¶44, 424 P.3d 845 (oral

statements admissible "provided several requirements are met"); *State v. Hanigan*, 2014 UT App 165, ¶4, 331 P.3d 1140. Moreover, the State's argument allows trial courts to abandon its gatekeeping role and ignore reliability issues contrary to the basic guarantee of due process. The Utah Supreme Court explained it best:

> Potential for role confusion and for erosion of constitutional guarantees inheres in [the] overlap of responsibility of judge and jury to determine the same issue . . . the trial court may be tempted to abdicate its charge as gatekeeper to carefully scrutinize proffered evidence for constitutional defects and may simply admit the evidence, leaving all questions pertinent to its reliability to the jury. **But courts cannot properly sidestep their responsibility to perform the required constitutional admissibility analysis. To do so would leave protection of constitutional rights to the whim of a jury and would abandon the courts' responsibility to apply the law.**

State v. Ramirez, 817 P.2d 774, 778 (Utah 1991) (emphasis added).

The court's error was also harmful. Because the "harm factor" in the plain error analysis is equivalent to the "prejudice" standard applied to IAC claims, *e.g., State v. Johnson*, 2017 UT 76, ¶21, 416 P.3d 443; the "harm" of the trial court's error will be discussed contemporaneously with the prejudice of trial counsel's failures in part I(D), *infra*.

C. This Court May Also Review for and Find IAC.

In the event plain error review does not apply, this Court should find trial counsel rendered IAC by allowing the admission of the CJC interview at trial without the requisite Rule 15.5 findings.

The State argues there were legitimate, strategic reasons for trial counsel to not object to the admission of the CJC interview. Br.Aplee:33–38. Not only is this not true, but it should *never* be deemed a constitutionally permissible "strategic decision" for defense counsel to allow a child-sex-abuse case to rest entirely upon hearsay evidence without, at least, a pre-determination of reliability.

Admittedly, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Larrabee*, 2013 UT 70, ¶19, 321 P.3d 1136. However, "the mere incantation of 'strategy' does not insulate attorney behavior from review." *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir. 2002) (citing authority). And, *even if* tactical, actual trial strategy may be found to be unreasonable and amount to constitutionally proscribed deficient performance. *See, e.g., State v. Bullock*, 791 P.2d 155, 158–59 (Utah 1989) (strategic decisions subject to review for reasonableness); *State v. Ott*, 2010 UT 1, ¶¶34–39, 247 P.3d 344 (rejecting claim that failure to object to evidence was part of valid trial strategy). Consequently, some decisions are not objectively reasonable and do not amount to "sound trial strategy" as a matter of law. *Larrabee*, 2013 UT 70, ¶20. This includes failures to pose objections to evidence or arguments, or request other remedies available to the defendant. *See, e.g., Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) ("No tactical reason – no reason other than oversight or incompetence" for counsel's failure to substantial claim); *State v. Millett*, 2015 UT App 187, ¶19, 356 P.3d 700 (failure to recognize *Miranda* issue

"fell outside the wide range of professionally competent assistance"); *State v. Liti*, 2015 UT App 186, ¶20, 355 P.3d 1078 ("no reasonable lawyer would have found an advantage in understating mens rea requirement"); *State v. Doutre*, 2014 UT App 192, ¶24, 335 P.3d 366 (failure to object to inadmissible evidence cannot ordinarily be considered reasonable trial strategy); *Larrabee*, 2013 UT 70, ¶¶20,26 (failing to object not "sound trial strategy"). This also includes allowing damaging evidence to be presented to the jury. *C.f. State v. Fowers*, 2011 UT App 383, ¶26, 265 P.3d 832 (IAC in eliciting testimony of "twenty-five-year-old conviction of sodomy on a child"). Given this legal backdrop, counsel's decision to not object to the admission of the CJC interview was not objectively reasonable, contrary to the State's arguments. Br.Aplee.34-38.

First, the State argues trial counsel could have made the strategic decision not to object to the CJC interview because it was in line with counsel's apparent strategy to show Hanks coached F.H. Br.Aplee.36–37;[2] TCJC:13–14; R.421–25 (defense closing argument). The does not make sense, however, because evidence that Hanks spoke to F.H. prior to the CJC interview was presented to the jury before the interview was ever

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[2] The State also argues counsel could have decided not to challenge the CJC interview because trial counsel could have determined the motion would not be successful. Br.Aplee.34-36. As this issue overlaps substantially with the issue of prejudice, this argument is addressed in section II(D).

played. R.439-40. There was simply no need for the CJC interview because Hanks already acknowledged eliciting the allegation from F.H. And while F.H.'s CJC statement differed from Hanks' testimony to some extent, this information could have been elicited by "refreshing" Hanks' recollection, or asked about on cross-examination of F.H. or the interviewer (after F.H.'s testimony, as rebuttal) instead of ignoring fundamental reliability requirement.

Second, the State argues counsel could have concluded live testimony would be more damaging than the CJC interview, relying on *State v. Gonzales-Bejarano*, 2018 UT App 60, 427 P.3d 251, for the proposition. Br.Aplee.36. *Gonzales-Bejarano* is highly distinguishable, however, as the issue there was whether allowing law enforcement testimony without objection instead of delaying a trial to obtain the presence of the direct witnesses was a reasonable strategic decision. *Id.*¶¶23,30. In the present case, there was no issue of victim availability—F.H. *actually testified.* Also, the testimony at issue in *Gonzales-Bejarano* was not subject to Rule 15.5 requirements. *Id.*¶7. Here, allowing the interview to be presented to the jury wasn't a *choice or preference* of trial counsel since both direct and indirect testimony occurred. *See* Utah R. Crim. P. 15.5(a)(1). Rather, it was an abdication of advocacy to simply allow the "indirect victim testimony" by way of hearsay recordings to be admitted in a situation where the live testimony was likely insufficient to meet the State's burden.

Finally, the State suggests the only purpose of Rule 15.5 is to protect the child

witness and thus, the CJC interview would have come in regardless of objection. Br.Aplee.35. This is not true. Rule 15.5 is also designed to protect defendants by ensuring hearsay from children to have "sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule" before being admitted as evidence. *See White v. Illinois*, 502 U.S. 349, 356 (1992); *Bullock*, 791 P.2d at 166 (" hearsay evidence to be admitted only if it is found to be reliable."). *See* U.S. Const. amend VI,XIV; Utah Const. art. I, §12.

Overall, perhaps the State's arguments about reasonable strategic decisions would carry more weight had trial counsel actually (1) cross-examined F.H. regarding the potential taints to her prior recorded statement; and (2) consulted with his own expert prior to making any ostensible strategic decision about not objecting. *See* Popp.Br.49–50. As it stands, trial counsel's efforts to pursue any reasonable strategy were woefully inadequate, particularly in a prosecution so dependent on the credibility of the State's witnesses and involving a child victim. *See State v. Peraza*, 2018 UT App 68, ¶36, 427 P.3d 276, *cert. granted*, 429 P.3d 460 (Utah 2018).

D. Popp Has Shown Prejudice and Harm. In the Alternative, This Court Should Remand Under Rule 23B.

The State argues that even if the trial court erred and/or trial counsel's performance was deficient regarding the admission of the CJC interview at trial, Popp has not shown harm or prejudice, reasoning that Popp has not shown the CJC interview was

inadmissible.[3] Br.Aplee.34–36;41–44. The State's argument ignores that this Court is unable to review the admissibility of the CJC interview because there are no factual findings or analysis in the record for this Court to review in regards to admissibility. *See, e.g., Bailey v. Bayles,* 2002 UT 58, ¶25, 52 P.3d 1158 (appellate court should not take the place of the fact finder); *American Fork City v. Singleton*, 2002 UT App 331, ¶¶6–7, 57 P.3d 1124. For this reason, the case relied upon by the State, *State v. Roberts*, 2018 UT App 9, is inapplicable.[4]

Although Popp encourages this Court to grant the *23B Motion, if necessary*, Popp believes sufficient evidence in the record exists the CJC interview did not meet the Rule 15.5(a)(8) that allows this Court to find harm/prejudice warranting reversal, including:

- The interview took place when F.H. was 12-years-old. TCJC:2;R.294,439,441. According to F.H., the events occurred four to five years prior. TCJC:4. *Cf. Roberts*,

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[3] The "harm factor" in the plain error analysis is equivalent to the "prejudice" standard applied to IAC claims. *See, e.g., Johnson*, 2017 UT 76, ¶21; *State v. Bair*, 2012 UT App 106, ¶35, 275 P.3d 1050. Again Popp acknowledges that a 23B remand may be necessary to fully address harm/prejudice in the context of whether the interview was actually admissible under Rule 15.5

[4] *Roberts* was decided *after* Popp's trial and thus could not have been relied upon in any supposed strategic decision-making. 2018 UT App 9.

2018 UT App 9, ¶¶23–25 (length of time between abuse and interview a reliability factor).

- In the video, F.H. acknowledged conversations with her mother that raised questions about Hanks influencing the reliability of both F.H.'s statement/testimony. *See Bullock*, 791 P.2d at 166 ("Adults may influence or shape a child's testimony").
- The interviewer engaged in leading questions in violation of standardized interview protocol. *Cf.* R.457 (Burgan: "the thing about free recall is again, we don't want to as an interviewer be able to have any kind of influence").
- The interviewer did not elicit a promise to tell the truth in violation of protocol as she herself acknowledged is "really important" in the interview process. *Cf.* R.452.
- F.H. was between 13 and 14-years-old at the time of testifying and near the age where such a statement would not come in under Rule 15.5. See Rule 15.5(a) (age cut-off 14). The interests of justice would be better served by her testifying independently of the CJC interview, given her maturity level.

As further argued in the 23B filings, there were a substantial number of other issues that should have been considered by the trial court in ultimately determining the interview did not meet the Rule 15.5(a)(8) requirements. Where the interview would have been excluded, the errors were harmful.

III. THE JURY WAS NOT PROPERLY INSTRUCTED AND THE ERROR WAS HARMFUL. THIS ERROR WAS NOT INVITED; OR, POPP RECEIVED IAC.

Popp argued he was denied his right to a fair trial where the jury was never given a complete and accurate elements instruction on the two counts charged. Popp.Br.24-28. Popp asserts this error should have been plain to the trial court and counsel and requires a new trial. In response, the State contends plain error review is unavailable because trial counsel "invited error". Br.Aplee.22–23. The State further argues the court did not plainly err, nor is there IAC, because the instruction and verdict form were not so obviously flawed that the trial court plainly erred or that all "competent counsel" would have objected. Br.Aplee.17,21–30; *see* Part I, *supra.*

Popp relies on his prior briefing but for the following.

A. Trial Counsel did Not Invite Error.

Popp admittedly raised jury instruction issues not raised below. Popp.Br.27–28. The State contends, however, that counsel invited error when, in response to the trial court's question as to whether the parties had any objections to the initial instructions—including the child-sodomy instruction—trial counsel answered, "I have none." R.347. Counsel answered similarly with the verdict form. R.351–52,512–18. Thus, the State asserts that this Court should not address the plain error claim. Br.Aplee.22–23.

As noted, invited error occurs "when counsel encourages the trial court to make an erroneous ruling", most particularly in when the context reveals that counsel

independently made a clear affirmative representation of the erroneous principle that leads the court astray. *McNeil*, 2016 UT 3, ¶17-18; *also Hamilton*, 2003 UT 22, ¶54; *Robinson*, 2018 UT App 227, ¶22. Here, while trial counsel may have indicated he had no objection to the *opening* instructions, R.347; and while counsel may not have affirmatively objected to the verdict form and remained silent, R.518; the issue on appeal is not that the opening instructions were erroneous per se, but that the instructions *as a whole*, including closing instructions and the verdict form, were incomplete and never fully and accurately instructed the jury as to the requisite elements of the crime, including identifying a time frame and the specific act relevant to each count. As such, this is a failure of trial counsel to object to the incompleteness of the jury instructions, rendering the issue merely unpreserved and subject plain error and manifest injustice review. *See e.g. McNeil*, 2016 UT 3, ¶21, (counsel's conduct in "affirmative acquiescence" by not offering a proper objection when asked to do so by the trial court, does not amount to invited error); *Marquina*, 2018 UT App 219, ¶24 (counsel, while perhaps affirmatively acquiescing in court's decision, did not invited error). Counsel does not invite error by silence. *See McNeil*, 2016 UT 3, ¶21,n.2.

B. This Court Should Review For and Find Plain Error or Manifest Injustice.

Because this Court should find that trial counsel did not "invite error," this Court may review for, and find plain error and manifest injustice.

First, Popp has shown an error occurred in that the jury was never instructed on all

the "elements" of the charged offenses, and only an incomplete instruction was given during the court's preliminary instructions. Popp.Br.25–27. Indeed, "When a crime is charged by information, the pleader must have in mind a particular transaction having the elements of time, place, and circumstance, which transaction in his judgment is unlawful." *State v. Ortega,* 751 P.2d 1138, 1140 (Utah 1988) (internal quotation omitted). Thus, the trial court erred in failing to instruct as to the specific time frame and the act or conduct for which each count applied. The consequence of this error is that the verdict is rendered invalid because there is no guarantee the verdict was unanimous—as constitutionally required—in finding all elements beyond a reasonable doubt.[5]

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[5] *See* Popp.Br.24,n.14. The State is required to prove to the unanimous satisfaction of the jury members all elements of the crimes charged beyond a reasonable doubt. *E.g., United States v. Gaudin*, 515 U.S. 506, 510–15 (1995); Utah Const., art. I, § 10; *State v. Saunders*, 1999 UT 59, ¶59, 992 P.2d 951 (plurality) (jury unanimity is a "fundamental tenet of criminal law."); *State v. Hummel*, 2017 UT 19, ¶¶26,29, 393 P.3d 314. "So a generic guilty verdict that does not differentiate among various charges would fall short." *Hummel*, 2017 UT 19, ¶26 (quotation omitted).

With regard to sex offenses, an act of sexual abuse can fall into a number of categories based upon a particular act or body part touched. *Cf. State v. Escamilla-Hernandez*, 2008 UT App 419, ¶¶13–14, 198 P.3d 997. These are not alternative

Second, Popp has shown this error should have been obvious to the trial court. The law is clear: it is the role and duty of the judge to instruct the jury on the law. *See e.g.,*

"means" or "theories" of committing a single offense as with theft offenses. *Cf.* Br.Aplee.21–22,n.4. Rather, a defendant charged with a sex offense can be charged and convicted for separate offenses based upon each independent "act" or touch. *E.g., Escamilla-Hernandez*, 2008 UT App 419, ¶¶10-14; *State v. Hattrich*, 2013 UT App 177, ¶35, 317 P.3d 433; *State v. Suarez*, 736 P.2d 1040, 1042 (Utah Ct. App. 1987) (individual touches "are separate acts requiring proof of different elements and constitute separate offenses"). Accordingly, a court should not permit a jury to potentially "return[] a guilty verdict with each juror deciding guilt on the basis of a different act by defendant." *Saunders*, 1999 UT 59, ¶62.

Here, where the jury was not instructed as to the specific elements of time, place, and circumstance for which each count applied, *see Ortega*, 751 P.2d at 1140, we are left to wonder whether each juror based its decision for the individual counts upon the same "act." And it does not suffice to say that because F.H. described at least two incidents of sodomy, and the jury convicted Popp of only two counts of sodomy, there is "no harm no foul." Br.Aplee.21–22,n.4,25–26,30. To the contrary, the jury was presented with multiple allegations, and the jury needed to be unanimous as to which act it was basing guilt for each count. *See Saunders*, 1999 UT 59, ¶65.

State v. Palmer, 2009 UT 55, ¶14, 220 P.3d 1198; *State v. Low*, 2008 UT 58, ¶27, 192 P.3d 867; *State v. Ontiveros*, 835 P.2d 201, 205 (Utah Ct. App. 1992). The duty to properly instruct applies to the verdict form. *See State v. Alzaga*, 2015 UT App 133, ¶78, 352 P.3d 107; *State v. Campos*, 2013 UT App 213, ¶42, 309 P.3d 1160. The law is also clear that the trial court must instruct the jury "when the evidence is concluded" in addition to any other appropriate time. *See* Utah R. Crim. P. 17(f)(6). While it is permissible and appropriate for a trial court to provide the jury with preliminary instructions, there is a concern that the jury should be instructed "on matters of law vital to the rights of a defendant" at the close of the evidence. *State v. Reyes*, 2005 UT 33, ¶46, 116 P.3d 305. And even though choosing to instruct in preliminary instructions may not amount to an abuse of discretion, in an effort to achieve the "paramount goal" of jury comprehension, the court should repeat important instructions at the close of evidence. *Id.* ¶47.[6] The law is also clear that "an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Bird*, 2015 UT 7, ¶14, 345 P.3d 1141. Thus, the issue here is more than just failing to instruct the

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[6] *See* Utah R. Crim. P. 19 (in preliminary instructions, court *may* instruct concerning the elements, among other things); *State v. Reyes*, 2005 UT 33, ¶49, 116 P.3d 305 (trial judge's decision to forego repetition of jury instruction within bounds of discretion); *State v. Weaver*, 2005 UT 49, ¶10, 122 P.3d 566 (no abuse of discretion on facts of case).

jury upon the elements of the charges prior to their deliberations, the issue here is that the jury was *never* instructed fully.

Third, the error was harmful. As noted, the consequence of this error is that the verdict is rendered invalid because there is no guarantee that the jury was unanimous in finding all elements beyond a reasonable doubt. *See* n.5, *supra*. Additionally, Utah courts have consistently found that failure to provide an accurate instruction on the basic elements of a crime cannot be harmless error and invariably requires reversal. *See, e.g., State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991); *American Fork v. Carr*, 970 P.2d 717, 720 (Utah Ct. App. 1998); *State v. Stringham*, 957 P.2d 602, 608 (Utah Ct. App. 1998); *State v. Souza*, 846 P.2d 1313, 1320 (Utah Ct. App. 1993) (accurate basic elements instruction is essential; failure to provide is reversible error that is never harmless).

C. *Even if This Court Finds Invited Error, this Court may still review for IAC.*

Even if this Court finds that trial counsel did invite error, the instruction errors may nevertheless be reviewed for IAC. *See State v. Parkinson*, 2018 UT App 62, ¶8, 427 P.3d 246, *cert. denied*, 429 P.3d 462 (Utah 2018). The appropriate IAC standard and IAC in this context has been briefed and Popp does not now add thereto. *See* Part II(C), *supra*; Popp.Br.27–28.

IV. THE JURY IMPROPERLY CONSIDERED POPP'S PRE-ARREST SILENCE AS SUBSTANTIVE EVIDENCE OF GUILT; TRIAL COURT AND COUNSEL'S FAILURES TO REMEDY THIS DENIED POPP DUE PROCESS.

Popp has also demonstrated error occurred when the jury was presented with and allowed to consider as evidence of guilt Popp's refusal to interview with law enforcement. Popp.Br.38–41; R.160,488–89. The State again responds that any error was invited by trial counsel, and even if it was not, the error was not obvious or harmful. Br.Aplee.44–50. The State alternatively argues counsel was not ineffective. *Id.* The State's arguments must be rejected.

A. Trial Counsel Did Not Make an Affirmative Representation Waiving the Fifth Amendment Violation.

The State again asks this Court to decline plain error review due to supposed invited error. Although it is true trial counsel did not object when the prosecutor explained how it intended to use Popp's pre-arrest silence in evidence, R.346–47, trial counsel's failure to object is a far cry from making an affirmative representation leading the court into error. As such, this Court should conduct a review for plain error. *See, e.g., United States v. Rice*, 52 F.3d 843, 845 (10th Cir. 1995) ("Because no objection asserting a violation of the defendant's Fifth Amendment self-incrimination privilege was raised at trial" issue reviewed for plain error). *Cf. State v. Fairbourn*, 2017 UT App 158, ¶20, 405

P.3d 789 (invited error where trial court "explicitly asked" trial counsel whether objection was based upon right to remain silent and trial counsel denied).

B. The Error Should Have Been Obvious.

The Fifth Amendment does not prohibit, in all cases, evidence of defendant's pre-arrest silence in a criminal trial. Popp.Br.38; Br.Aplee.47–58. However, this evidence may only come in for impeachment purposes, which is not how the evidence was used in this case. Br.Aplee.48. This alone was obvious error as the law on permissible uses of pre-arrest silence in a criminal case was well settled at the time of Popp's trial. *See State v. Gallup*, 2011 UT App 422, ¶¶14–18, 267 P.3d 289.

Further, the prosecution presented evidence beyond the purposes for which it gave notice. The prosecutor proffered the testimony would show law enforcement conducted a thorough investigation by attempting to interview Popp. R.346–47. The prosecution went beyond such purpose, however, and presented evidence that Popp "no showed" to a scheduled interview and elicited testimony that Popp had "lawyered up." *Id.* In this way, and contrary to the State's briefing, this case is exactly like *State v. Gallup* where this Court found that evidence of the defendant hanging up on law enforcement used in the State's case-in-chief violated Gallup's Fifth Amendment rights, despite Gallup testifying later at trial. 2011 UT App 422, ¶¶17,18. The State makes no meaningful distinction between hanging up police during a phone call and not appearing for a pre-scheduled

interview; both actions carry the same potential inference—the accused was avoiding law enforcement contact because he knew he was guilty.

In addition, even when using pre-arrest silence as impeachment during a defendant's testimony, the State must show this evidence is actually *relevant* for impeachment. *See Palmer*, 860 P.2d 339, 348–50; Utah R. Evid. 401. As explained by the *Palmer* Court, "the mere act of taking the stand does not independently make defendant's silence relevant. The prosecution can only question [a] defendant regarding silence for impeachment purposes if, for example, the silence is inconsistent with the testimony the defendant offers at trial." *Id.* at 348. This did not occur here. Rather, the State argues Popp's pre-arrest silence became relevant when defense counsel cross-examined Pyatt on the thoroughness of the investigation. Br.Aplee.51–52. Even if true, the State ignores the fundamental requirement to admit pre-arrest silence evidence without running afoul of constitutional protections—impeaching a defendant.[7] This requires a defendant to testify, and to testify in a way contrary to the pre-arrest silence evidence. A review of Popp's trial testimony does not reveal anything that would "open the door" to this kind of impeachment evidence. R.498–510. Popp's brief testimony was

[7] Assuming trial counsel can "open the door" as suggested by the State, trial counsel did not because he did not ask about the interview attempts or otherwise suggest these attempts weren't made. R.489–93.

limited to his relationship and divorce/custody issues with Hanks, the nature of his relationship with F.H. and home life when she resided with him, and a denial of the sodomy allegations. *Id.* Popp's pre-arrest silence was therefore not relevant based upon anything to which he testified.

The State also argues the error could not have been obvious to the trial court because trial counsel already indicated that Popp would likely testify before Pyatt's testimony. Br.Aplee.49–50. This does not change that the State impermissibly used impeachment testimony in its case-in-chief, prior to any testimony by the witness being "impeached." The trial court also had no way of knowing at the beginning of the State's case that Popp would choose later to *not* testify after the State rested its case, regardless of trial counsel's representations at the beginning of trial.

Finally, the State argues the error could not have been plain because the prosecutor in Popp's case did not make the kind of inflammatory comments seen in cases like *Palmer* where the State directly stated to the jury that Palmer did not talk to the police "[b]ecause he knew he was guilty." 860 P.2d at 346; Br.Aplee.49. This argument ignores the fact that the prosecutor intentionally solicited improper impeachment. Eliciting evidence in a way contrary to Fifth Amendment protections thereby undermined those rights. *See State v. Harmon*, 956 P.2d 262, 268 (Utah 1998) ("the State must, in some way, use the defendant's silence to undermine the exercise of those rights . . . before it can be said that such rights have been violated).

Furthermore, to say that such an error is only obvious when prosecutors make a direct, overt connection to the improper consciousness of guilt inference would leave this serious, constitutional issue beyond review in a case where we have *actual evidence* (i.e. jury note) the jury was considering this as evidence. *See Palmer*, 860 P.2d at 343 (exception to obviousness requirement where error would otherwise "always escape review under the obviousness requirement."). The Fifth Amendment guarantees cannot be so easily set aside.

C. Popp Has Shown Harm/Prejudice.

As the State points out, the danger of the pre-arrest silence evidence comes when the inference is drawn that a defendant declines an interview because of consciousness of guilt. Br.Aplee.48. This case presents one of the rare occasions where the record on appeal supports the fact that the jury considered this evidence for an improper purpose. R.160;Popp.Br.Add.C.

The State argues the jury question does not demonstrate the jury considered Popp's silence as evidence of guilt, rather the jury was simply asking for clarification on "what evidence was introduced at trial." Br.Aplee.50. This highlights the fundamental issue. By the trial court not recognizing the legal issue at play,[8] the jury was ultimately

[8] Or trial counsel not recognizing the issue, should plain error review be unavailable.

not instructed on the law relevant to their question. As previously described by this Court:

> When it appears from a jury's question that the jury is headed toward basing its decision on an improper understanding of the law, it is incumbent on the district court to correct the jury's understanding of that law via a new and correct instruction, after consulting with counsel.

State v. Dozah, 2016 UT App 13, ¶30, 368 P.3d 863. *See also, U.S. v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991) ("availability to the trial judge . . . to give curative instructions" a factor in determining Fifth Amendment violation and prejudice).

The jury question, "Did the detective tell Justin why they wanted to interview him?" can easily be interpreted as the jury "head[ing] toward[s] basing its decision on an improper understanding of the law"—that Popp's pre-arrest silence could not be considered evidence of guilt. R.160;Popp.Br.Add.C; *Dozah*, 2016 UT App 13, ¶30. This is so because the question is worded such that the jury was seeking a "yes" or "no" response. Comparatively, a clarifying question about evidence might read: "Did the detective testify he told Justin why they wanted to interview him?" As phrased, the core of the question was discovering Popp's prior knowledge/awareness of the allegations.

The State further argues Popp cannot show prejudice because "the evidence against Popp was strong." Br.Aplee.57. The State is reaching. The only evidence supporting all the elements against Popp was hearsay. Popp.Br.31–33. In addition, the State notes the "jury was able to hear and see both F.H. and Popp and weigh their

respective credibility" which is precisely why this error was prejudicial. Br.Aplee.57. The trial court allowed improper impeachment evidence against Popp in a case without physical evidence, eyewitnesses, or anything other than the credibility assessment the State cites to. In cases resting upon "credibility determination[s]" impeachment evidence is critical and the improper use of it without trial court intervention is harmful. *See, e.g., State v. Rackham*, 2016 UT App 167, ¶24, 381 P.3d 1161 (citation omitted).

D. IAC in Failing to Object to the Impeachment Testimony and In Failing to Cure the Improper Inference Made by the Jury.

The State again relies on the incorrect standard of "no competent attorney" in arguing trial counsel was not ineffective for (1) not objecting to Detective Pyatt's testimony; and (2) not requesting a curative instructions. Br.Aplee.51–55. Rather, Popp must show that trial counsel's performance was objectively deficient, and such performance "harm[s the defendant] in a way that undermines our confidence in the verdict." *Doutre*, 2014 UT App 192, ¶25. Popp has done so.

First, the State has already acknowledged the manner in which the prosecution introduced the evidence of Popp's pre-arrest silence was improper. Further, as shown above, the evidence could not have been properly admitted to impeach Popp based on the content of his own testimony. *See Palmer*, 860 P.2d at 348–50. For this reason, trial counsel's failure to object either when the prosecutor warned of its intention to use the evidence or when Pyatt actually testified was objectively unreasonable. *See Doutre*, 2014

UT App 192, ¶24 ("If clearly inadmissible evidence has no conceivable benefit to a defendant, the failure to object to it on nonfrivolous grounds cannot ordinarily be considered a reasonable trial strategy.").

Second, the jury question would have put objectively reasonable counsel on notice of the Fifth Amendment issue. As noted previously, the reading of the jury question suggests the jury was concerned with Popp's knowledge prior to declining the law enforcement interview. What should have been communicated to the jury was Popp's silence could not be considered as evidence of guilt. Instead, what occurred was a simple referral back to instructions. R.178,180,186–89 (Instr.10,12,&20). In no way did this correct the jury from making their decision based upon Popp's pre-arrest silence in violation of the Fifth Amendment. *See Dozah*, 2016 UT App 13, ¶30.

The same harm/prejudice discussed above under the plain error analysis applies here. Where there was no proper objection or curative instruction, there is a substantial likelihood that the jury based its verdict upon evidence adduced in violation of Popp's constitutional rights and left uncured by trial counsel.

V. POPP'S OTHER CLAIMS OF IAC REQUIRE REMAND.

Popp raises additional issues of IAC, to include that trial counsel was ineffective for failing to investigate and call defense witnesses and for failing to object to and rebut unnoticed, prejudicial expert testimony. Popp.Br.41–51. The State responds that these issues cannot be fully reviewed without a 23B remand. Br.Aplee.58–63. Popp agrees and asks this Court to grant his Motion.

CONCLUSION

Based upon the foregoing, this Court should remand this case for a new trial. In the alternative, this Court should remand for supplementation of the record as requested in the *Motion for 23B Remand* and *Reply.*

DATED this 28th day of May, 2019.

/s/ Staci Visser
Attorney for Appellant—Justin Popp

CERTIFICATE OF COMPLIANCE

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

*****

I, STACI VISSER, certify that this brief contains 6995 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery.

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

*****

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/s/ Staci Visser
STACI VISSER
Attorney for Appellant

CERTIFICATE OF DELIVERY

On this May 28, 2019, I hereby caused the REPLY BRIEF OF APPELLANT filed herewith, to be delivered this day via email to the following:

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

/s/ Staci Visser