

2015

State of Utah v. Paul Dubrae Waldoch : Brief of Appellee

Utah Court of Appeals

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Case No. 20140851-CA

IN THE
UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

PAUL DUBRAE WALDOCH,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for object rape, a first degree felony,
and two counts of forcible sexual abuse, second degree
felonies, in the Sixth Judicial District, Kane County, the
Honorable Marvin D. Bagley presiding

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STATE OF UTAH,
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v.

PAUL DUBRAE WALDOCH,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from convictions for object rape, a first degree felony, and two counts of forcible sexual abuse, second degree felonies. This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j) (West Supp. 2012).

INTRODUCTION

The victim agreed to give Defendant Paul Waldoch a ride home from a party. Instead of directing her toward his home, he tried steer her up a nearby canyon. When this misdirection failed, he expressed his desire for her and began “vigorously kissing and sucking” on her neck as she drove. The “shocked” victim pushed Waldoch away and told him to stop. Undaunted, he put his hands down her shirt and pants, rubbing her breasts

and the outside of her vagina. The victim stopped her car and told Waldoch to get out. He refused, put his finger in her vagina, rubbed “really hard,” and forced her to masturbate him. He then got out of the car and ran home.

STATEMENT OF THE ISSUES

The victim testified that Waldoch put his finger “inside” her vagina and rubbed her “really hard.” She previously told police and medical personnel that Waldoch digitally penetrated her. And both prosecution and defense experts testified that the victim’s injuries were consistent with digital penetration.

1. Was this evidence sufficient for the jury to find penetration?

Standard of Review. This Court reviews all evidence and reasonable inferences in the light most favorable to the verdict and reverses only if the evidence is so “inconclusive or inherently improbable” that reasonable minds must have a reasonable doubt. *State v. Johnson*, 821 P.2d 1150, 1156 (Utah 1991) (citation omitted).

The jury foreman was married to one of the alternate jurors. Neither the court nor counsel asked the jurors if their relationship would bias them. The alternate juror spouse was dismissed after closing arguments and did not participate in deliberations.

2.A. Does the fact that a juror and an alternate juror are married to each other constitute an exceptional circumstances relieving Defendant of his preservation burden?

Standard of Review. Exceptional circumstances excuse a lack of preservation only when an issue was not raised below due to a rare procedural anomaly. See *State v. Nelson-Waggoner*, 2004 UT 29, ¶23, 94 P.3d 186.

2.B. Did the trial court plainly err or did counsel render ineffective assistance during jury selection by not asking venire members about bias between jurors or by not striking one of the spouse jurors?

Standard of Review. Plain error requires obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). An ineffective assistance claim raised for the first time on appeal is a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

Rule 17(k), Utah Rules of Criminal Procedure, requires a court to admonish jurors before each recess to not discuss the case and to not form or express an opinion on the case until the case is submitted to them. The court took nine recesses during trial; four of these included admonishments, five did not. None of the pre-recess admonishments included an injunction

against forming an opinion, but the opening jury instructions fully informed the jury consistent with rule 17(k).

2.C. Did the trial court plainly err by not giving, or did counsel render ineffective assistance by not insisting on, full admonishments before each recess and follow-up after each recess?

Standard of Review. See issue 2.B.

The prosecutor argued in closing that the victim was credible based on her demeanor, consistency, and behavior. He acknowledged that the victim had a motive to maintain her story—assuming it was a lie—in order to avoid the bad feelings of being branded a liar. He further argued that Defendant had motives to lie based on the marital and legal consequences he faced. Defense counsel did not object to any of this argument or request any curative instruction.

3.A. Did the trial court plainly err or was defense counsel ineffective for not interrupting the prosecutor's closing argument on the ground that it inappropriately vouched for the victim's credibility?

3.B. Did the trial court plainly err for not sua sponte giving, or was counsel ineffective for not seeking, a curative instruction on this same argument?

Standard of review. See issue 2B.

Defense counsel retained a highly-qualified expert on rape examinations, consulted her during the State's expert's testimony, and called her to elicit testimony favorable to the defense, including that: the physical evidence was equally consistent with consent and non-consent; the State's medical witnesses were biased in favor of the victim; and portions of the physical exam were inconsistent with the victim's story.

4. Did counsel render ineffective assistance by not "fully appreciat[ing] or mak[ing] use of" his expert's experience and opinions on consent or lack of consent?

Standard of review. See issue 2.B.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are reproduced in Addendum A:

Utah Code Ann. § 76-5-402.2 (object rape);
Utah R. Crim. P. 17 (conduct of trial).¹

¹ Unless otherwise indicated, the State cites to current versions of statutes and rules, as they have not materially changed for purposes of appeal.

STATEMENT OF THE CASE

A. Summary of facts.²

Melissa Sorensen had just gotten off work and was getting gas at a service station when she saw her friend Bill with Defendant Paul Waldoch. R299:156. Bill asked Melissa if she had any plans that night; Melissa said she did not. *Id.* Bill invited her to come over for drinks at his mother's house. *Id.* Melissa agreed. *Id.* After a low-key evening of drinking and visiting, Bill asked Melissa if she wanted him to wake up his mom to drive her home. *Id.* at 158. Melissa said that she would just stay the night to sleep off her drinking. *Id.*

The next morning, Bill asked Melissa if she could give Waldoch a ride home; Melissa agreed. *Id.* at 160. They got in the car, and Melissa asked Waldoch where he lived. *Id.* He told her to head "out of town" toward a nearby canyon. *Id.* Melissa asked, "Don't you live on the other side of town?" *Id.* at 160-61. Waldoch asked her how she knew that. *Id.* at 161. Melissa said that she heard someone at the party say that he lived near Wendy's. *Id.*

² Consistent with appellate standards, the facts are recited in the light most favorable to the jury verdict. *State v. Dunn*, 850 P.2d 1201, 1205-06 (Utah 1993).

As Melissa began driving toward town, Waldoch “[i]mmediately . . . grabbed [her] neck and started very vigorously kissing and sucking” on it. *Id.* Melissa was “shocked”; she said, “Stop it. What are you doing?” and “tried to push him away.” *Id.* Undeterred, Waldoch told her that he “wanted this since the first time [he] saw [her].” *Id.* at 174. He “started putting his hands in [her] shirt and down [her] pants,” rubbing her breasts and vagina under her clothing as she drove. *Id.* at 162-64. All this time, Waldoch continued to misdirect her away from his home, saying that “he lived in different areas of town.” *Id.* at 164-65, 173.

Melissa pulled over multiple times, telling Waldoch to “Get out of the car.” *Id.* at 163-65. Waldoch repeatedly refused. *Id.* When Melissa pulled over near a call center, things “got worse”: Waldoch “stuck his finger inside of” her vagina and rubbed it “really hard.” *Id.* at 164-66; State’s Exh. 21 at 2. Melissa again tried to dissuade him, telling him that it hurt, that she was menstruating, and that he was married. R299:166. Waldoch, still undeterred, grabbed Melissa’s hand and put it on his penis, forcing her to rub it “until he ejaculate[d] all over” her sweater. *Id.* He then “just got out of the car and ran to his house.” *Id.* at 167.

Melissa was “in shock” and “disgusted.” *Id.* She “went home and went to bed for two days.” *Id.* Her vagina felt “extremely bruised inside

and out,” and was “just really red and swollen.” *Id.* at 172. After concerned friends checked in on her and encouraged her to report what happened, Melissa went to the hospital. *Id.* at 170. There, she underwent a rape exam that was “extremely humiliating,” requiring her to submit to nude pictures and to “re-live it again” by telling “a stranger what happened.” *Id.* at 172.

The exam revealed bruising on Melissa’s rib cage, under her left breast, and on both thighs. R298:95-96; State’s Exh. 1, 2, 3, 4, 9. She also had vaginal abrasions. R298:100-02; State’s Exh. 5, 6, 7, 8, 10. These injuries were consistent with her story. R298:116. And her story itself remained consistent from her written statement to police to her statements to medical providers, to her testimony at trial. *Compare* R298:72-74, 98-99; R299:161-66; State’s Exh. 20, 21. Further corroboration came via DNA testing, which confirmed Waldoch’s semen on her sweater. R299:128; State’s Exh. 11, 12.

Defendant’s story. Waldoch admitted that he had ejaculated on Melissa’s sweater, but claimed that it had been consensual. R299:258. He denied misdirecting Melissa, rubbing her breasts and vagina, or penetrating her vagina. *Id.* at 260-61, 264-65. He claimed that she had come onto him during the ride and that the only contact between them was her kissing and masturbating him. *Id.* at 258, 260.

B. Summary of proceedings.³

The State charged Waldoch with one count of object rape, a first degree felony, and two counts of forcible sexual abuse, second degree felonies. R119-21. The jury convicted him as charged. R232. The trial court sentenced him to a prison term of five years to life on the object rape count, and two suspended terms of one to fifteen years on the forcible sexual abuse counts. R288-89. Waldoch timely appealed. R292-93. The Utah Supreme Court transferred the case to this Court. Order of Sep. 24, 2014.

SUMMARY OF ARGUMENT

Issue I: Penetration sufficiency. Waldoch first argues that the evidence of penetration was so contradictory as to preclude the jury from considering it. But in doing so, he largely fails to account for the victim describing two different portions of Waldoch's abuse—an earlier one in which he rubbed the outside of her vagina and a later one in which he digitally penetrated and rubbed the inside of her vagina. The victim's testimony alone was sufficient to prove penetration. It was also corroborated by the victim's prior statements and the physical evidence. To the extent that other evidence may have cast doubt on the victim's

³ The pleadings file is numbered in reverse order. The State cites it in regular order.

assertions, it created merely a factual dispute that the jury was able to— and did— resolve against Waldoch.

Issue II: Plain error/ineffective assistance regarding spouse jurors.

Waldoch's second set of arguments relate to the jury foreman being married to one of the alternate jurors. He argues that (1) having spouse jurors is an exceptional circumstance excusing his preservation failures and relieving him of his prejudice burden; (2) the court or counsel should have either (a) asked the jury panel if their relationships with each other would prejudice them, or (b) stricken one of the spouse jurors; and (3) the court or counsel should have insisted on admonishing the jurors before each recess not to form opinions or discuss the case with each other prior to deliberations, and followed up to ensure that each admonishment was followed.

All of these arguments are unpreserved and inadequately briefed. He has thus failed to carry his burden of persuasion on appeal. But his arguments also fail under plain error and ineffective assistance analysis.

As a preliminary matter, the exceptional circumstances doctrine applies to rare procedural anomalies, not the facts here.

Regarding jury selection, Waldoch cannot show plain error because he invited any error by passing the jury for cause. He alternatively argues that his trial counsel was ineffective for not striking one of the spouse jurors

or at least inquiring into juror biases stemming from relationships with other jurors. But Waldoch cannot show prejudice because he has not shown that a biased juror sat.

Regarding juror admonitions, there is no presumption of prejudice from a failure to admonish except perhaps where—unlike here—a trial court fails to admonish the jury at all. And Waldoch has not shown prejudice because he has not demonstrated that the jurors violated the admonitions they were given.

Issue III: Plain error/Ineffective assistance regarding alleged prosecutorial misconduct. Waldoch argues that the trial court plainly erred and/or that his counsel was ineffective for not objecting to the prosecutor's closing argument on the basis that the prosecutor vouched for the victim's credibility and appealed to the juror's emotions. These arguments are unpreserved and inadequately briefed. At any rate, the prosecutor did not vouch or appeal to the jury's passions; rather, he made permissible arguments to infer the victim's truthfulness from the evidence.

Because the prosecutor's arguments were valid, Waldoch has not shown any error, let alone plain error. And he has not shown ineffective assistance because any objection to these valid arguments would have been futile.

Issue IV: Ineffective assistance regarding use of expert testimony.

Waldoch finally argues that his counsel was ineffective for not asking more questions of his expert medical witness. Because he does not say what those questions—or their answers—would be, this claim is inadequately briefed. In any event, Waldoch cannot show ineffective assistance where counsel hired a highly-qualified expert, consulted her during trial, and called her to give testimony helpful to Waldoch's case.

ARGUMENT

I.

The victim's testimony and corroborating physical evidence sufficed to show penetration.⁴

To prove object rape, the State needed to show that Waldoch (1) "without the victim's consent"; (2) "caused the penetration, however slight,

⁴ Waldoch appears to concede that none of his appellate arguments are preserved. Br.Aplt. 39. Though that concession is well-taken on his other arguments, it appears precipitous here. Counsel moved after verdict to reduce the object rape from a first degree felony to a second degree felony based on an alleged lack of evidence of penetration. R299:310. The trial court denied the motion. *Id.*

In substance, counsel's motion was to arrest judgment under rule 23, Utah Rules of Criminal Procedure—the standard for which is identical to the directed verdict standard. *See State v. Robbins*, 2009 UT 23, ¶14, 210 P.3d 288. Counsel thus made a timely, specific motion preserving the penetration sufficiency issue. Further, whether or not the objection was timely, the trial court ruled on its merits, which would have preserved the issue under *State v. Matsamas*, 808 P.2d 1048 (Utah 1991), and its progeny. Thus, the State treats this claim as preserved.

of the genital . . . opening” of a person over 14; (3) “by any foreign object, . . . including part of the human body other than the mouth or genitals”; (4) “with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person.” Utah Code Ann. § 76-5-402.2. Waldoch disputes the sufficiency of evidence only on the penetration element, asserting that the victim’s testimony of penetration is insufficient because it was contradicted by both her own statements and the physical evidence. Br.Aplt. 25-31. But both the physical evidence and the victim’s consistent accounts support a finding of penetration.

For purposes of rape and object rape, penetration is defined in case law as “entry between the outer folds of the labia.” *State v. Simmons*, 759 P.2d 1152, 1154 (Utah 1988) (citing 65 Am.Jur.2d *Rape* § 3 (1972)). Though Waldoch asserts that it is “questionable whether [this] standard applies to penetration under” the object rape statute, Br.Aplt. 28, the *Simmons* court was clear that this definition applied to all forms of rape, including object rape. See *Simmons*, 759 P.2d at 1154.

When reviewing a jury verdict for sufficiency, this Court reviews all evidence and reasonable inferences in the light most favorable to the verdict and reverses only if the evidence is so “inconclusive or inherently

improbable” that reasonable minds must have had a reasonable doubt. *State v. Johnson*, 821 P.2d 1150, 1156 (Utah 1991) (citation omitted). Contradictory evidence alone “is not sufficient to disturb a jury verdict”; rather, to justify reversal, the evidence must be physically impossible or obviously false. *State v. Maestas*, 2012 UT 46, ¶183, 299 P.3d 892 (citation omitted).

This standard is “highly deferential.” *State v. Jones*, 2015 UT 19, ¶68, 345 P.3d 1195 (citations and quotations omitted). And rightly so. The jury’s role is to determine guilt, and so long as “there is some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made,” appellate review “stops.” *State v. Mead*, 2001 UT 58, ¶67, 27 P.3d 1115 (citation omitted).

There was ample evidence of penetration here. The victim testified at trial that Waldoch repeatedly put his finger or fingers inside her vagina. See R299:165-166, 179. This was consistent with her prior accounts. She told the physician’s assistant at the hospital that Waldoch penetrated her vagina with his fingers. R298:74, 79, 83-85. She told the sexual assault nurse examiner that Waldoch penetrated her vagina with his hand. R298:98-99. And she told police that Waldoch penetrated her with his fingers, though he could not get very far because she was wearing a tampon. State’s Exh. 21 at

2. Her testimony was also consistent with the physical evidence—the victim had abrasions on her inner labia and vagina consistent with digital penetration. R298:100-03, 116. All this was plainly sufficient to support a finding of penetration—that is, that Waldoch’s finger at least entered “between the outer folds of the labia.” *Simmons*, 759 P.2d at 1154.

In arguing to the contrary, Waldoch points to various pieces of evidence, none of them availing. First, he points to DNA testing excluding him as a contributor to the DNA from a swab of the victim’s neck. Br.Aplt. 25; *see also* R298:126; State’s Exh. 13 at 1-3. This, he asserts, calls “into question the victim’s testimony” that Waldoch “grabbed her and started kissing and sucking on her neck.” Br.Aplt. 25. But calling testimony into question does not render it physically impossible or inherently improbable. *State v. Warden*, 813 P.2d 1146, 1150 (Utah 1991) (“The mere existence of conflicting evidence . . . does not warrant reversal.”). And given that the victim was at home in bed for two days, it is not surprising that Waldoch’s DNA might not have stayed on her neck, particularly where the State’s DNA expert opined that “two or three days” seemed like a “pretty long” time for another’s DNA to remain on someone’s skin. R298:138. The absence of Waldoch’s DNA on the victim’s neck was not enough to justify the trial court in taking the case from the jury.

Waldoch next argues that the victim's testimony of penetration was undermined by (1) the victim saying that he rubbed the outside of her vagina; (2) a medical record allegedly containing no reference to penetration; and (3) his expert's testimony that the victim's injuries were more consistent with external rubbing than internal rubbing. Br.Aplt. 25-26 (citing State's Exh. 20), 29-30. Not so. First, the victim was clear at trial that there were two instances of vaginal rubbing—the first on the outside, and the second on the inside. R299:163-65; *see also* State's Exh. 21. And both the physician's assistant and the sexual assault nurse were clear that the victim *did* report that Waldoch digitally penetrated her, regardless of the content of the written reports. *See* R298:74, 79, 83-85, 98-99.

Second, the very medical record he cites to undermines his argument. Waldoch cites State's Exhibit 20 to support his assertion that it was "unlikely that the qualified sexual assault nurse examiner would have missed writing down the detail of penetration in the patient's description" of the assault. Br.Aplt. 26. Though the victim's description does not specifically address penetration, a separate question on the form states, "Was there penetration?" State's Exh. 20. The nurse examiner marked "yes" for this and wrote a note stating, "by hand to vagina." *Id.*

Third, the defense expert's testimony that the victim's vaginal abrasions were more consistent with outside rubbing than inside rubbing did not mean that the jury had to speculate to find penetration. The victim testified that Waldoch digitally penetrated her, and she reported digital penetration to medical and police personnel. R299:165. The sexual assault also nurse opined that her injuries were consistent with digital penetration. R298:116.

Neither did the defense expert's testimony render the victim's account incredible—it merely rendered credibility a jury question. Though the defense expert testified that the victim's injuries were not in the expected places, she did opine on cross-examination that the injuries were equally consistent with both the victim's story and Waldoch's story. R229:226-29, 232-33. The State's expert opined that the victim's injuries were consistent with the victim's account. R298:116. Though the State's expert was not as experienced as the defense expert, Waldoch cites no case—and the State is aware of none—that a jury must believe the expert with greater experience. *See* Br.Aplt. 30. A mere difference of opinion or experience between experts cannot justify taking the case from the jury. *Cf. Maestas*, 2012 UT 46, ¶200 (“[C]ourts are not bound to accept the testimony of an expert and [are] free to judge the expert testimony as to its credibility

and its persuasive influence in light of all the other evidence in the case.”) (citation and quotation omitted). Indeed, a “jury is not required to believe an expert witness even when that expert’s opinion is unchallenged by the opinion of an opposing expert.” *Lyon v. Bryan*, 2011 UT App 256, ¶10, 262 P.3d 1199.

In arguing this point, Waldoch also cites *State v. Pullman*, 2013 UT App 168, 306 P.3d 827, and *State v. Simmons*, 759 P.2d 1152 (Utah 1988). But both cases are inapposite. In *Pullman*, the teenage victim testified that Pullman “tried to take [her] panties off and stick his dick into [her] butt,” but that she pushed him away before he could do so. 2013 UT App 168, ¶13. The victim also testified that “[i]t hurt” “there.” *Id.* This Court held that this testimony was not sufficient to prove that Pullman touched the victim’s anus—as opposed to her buttocks. *Id.* at ¶16.

In *Simmons*, the victim testified that Simmons “put the tip of his penis ‘on’ her labia.” 759 P.2d at 1154. The Utah Supreme Court held that this was not sufficient to prove penetration—that is, entry beyond the “outer folds of the victim’s labia.” *Id.*

In both *Pullman* and *Simmons*, the victims’ testimony specifically established *lack* of penetration. Here, the victim repeatedly stated that Waldoch put his finger or fingers “in” her vagina. In the context of female

genitalia, “in” can mean nothing less than penetration as defined in *Simmons*. See *State v. Peterson*, 2015 UT App 129, ¶5, 787 Utah Adv. Rep. 39 (holding female child victim’s testimony that defendant put his finger “in” her “front private” sufficient to prove penetration as defined in *Simmons*). Further, in her written statement to police, the victim was even more descriptive, stating that Waldoch “did penetrate [her] with his fingers but couldn’t [get] very far be[cause] of [her] tampon.” State’s Exh. 21 at 2 (emphasis in original).

In sum, the evidence was plainly sufficient to prove penetration, and thus the trial court did not err in denying Waldoch’s motion for arrest of judgment after the jury convicted of object rape.

II.

Defendant has not proven plain error or ineffective assistance on any of his jury-related claims.⁵

Waldoch next argues that the trial court plainly erred or that counsel was ineffective for letting spouses sit as jurors and by not fully admonishing the jury before each recess not to discuss the case or form opinions until the case was submitted to them. Br.Aplt. 32-37, 42; see also Utah R. Crim. P. 17(k).

⁵ This point responds to portions of Waldoch’s points B and D.

A. Jury selection and admonishments.

The jury venire included two married couples: James and Susan Rasmussen and Dennis and Pat Crofts. *See* R298:4, 6, 19-20, 23-24, 26-27. During jury selection, the potential jurors were questioned about their citizenship; age; ability to understand English; criminal history; physical or mental disabilities; family; employment; address; education; hobbies; relationships with the parties, witnesses, counsel, the court, and law enforcement; opinions on punishment; ability to judge fairly and impartially; undue hardship they might have; opinions on alcohol; and willingness to follow instructions. *Id.* at 7-45.

The trial court then asked both counsel if there were “any questions that” they “would like to ask to the jury as a whole or to any individual juror.” R298:45. The State declined. *Id.* The trial court asked defense counsel if there were “any questions that [he] would like to address.” *Id.* at 46. Defense counsel replied, “No, your honor.” *Id.* Counsel then exercised their peremptory challenges. *Id.* at 46-47. Of the four spouses in the venire, three remained for trial: Pat Crofts⁶ and James Rasmussen as jurors, and Susan Rasmussen as an alternate.

⁶ In the jury list read by the court, Mrs. Crofts name appears as “Matt Crofts.” R298:47. Because there was no Matt Crofts in the venire, it appears that the transcriber mistook “Pat” for “Matt.”

The court took nine recesses and admonished the jurors five times over the course of a two-day trial. The admonishments had two aspects: (1) not to discuss the case and (2) not to form an opinion about the case.

Recesses	Admonishments	
Day 1	Not discuss case	Not form opinion
1. Ten-minute bathroom break during jury selection. R298:45.	Potential jurors told "not to talk about the case with anyone while [they were] on break." R298:45.	None.
2. Lunch break, no evidence yet taken. R298:49-50.	Jurors told not to talk about the case with other jurors or anyone else until they had "retired to deliberate," and that this same injunction would apply to "any other recesses that we take." R298:49.	None.
	Opening jury instructions told jury that during recesses to "not talk about this case with anyone; not family, friends, or even each other," and not to learn about the case from media, and that these restraints were "necessary for a fair trial." (R310-11)	Opening jury instructions told jury to "keep an open mind," to not "form an opinion about the ultimate issues in this case until [they] had listened to all the evidence and the lawyer's summaries, along with the instructions on the law," and to

		<p>"[k]eep an open mind until then." (R311)</p> <p>Also told jurors to "consider each other's opinion," to "reach [their] own decision," and to not "make a decision just to agree with everyone else." (R303)</p>
3. Ten-minute recess because a juror stood up. (R298:104)	None.	None.
4. Five-minute recess for defense counsel to confer with expert. (R298:108)	None.	None.
5. End of first day. (R298:147)	<p>Jurors admonished "not to talk about the case with anyone and not try and learn about the case outside the courtroom." (R298:147)</p>	None.
Day 2	Not discuss case	Not form opinion
6. Fifteen-minute recess at close of State's case for defense to confer with expert. (R299:206-07)	None.	None.
7. One-minute recess at defense request. (R299:231).	None.	None.
8. Lunch break. (R299:242-43)	<p>Jurors admonished "not to talk about the case with anyone, and not try and learn about it outside the courtroom."</p>	None.

	(R299:242-43)	
9. Close of evidence, one hour and fifteen minute break before jury instructions (R299:269)	None.	None.

Waldoch did not object to any of the admonishments – or lack thereof – nor did he request that the court ask the jurors after recesses if they had followed the admonishments. Susan Rasmussen was excused from the jury after closing arguments and did not participate in deliberations. R299:301, 306.

B. These claims are unpreserved and inadequately briefed.

As Waldoch appears to acknowledge, his jury selection and admonishment claims are unpreserved. Br.Aplt. 39. Waldoch attempts to overcome his preservation failures by claiming (1) plain error; (2) ineffective assistance; and (3) exceptional circumstances. *Id.* at 40-41. But he does not adequately brief any of them.

“It is well established that a reviewing court will not address arguments that are not adequately briefed.” *State v. Thomas*, 961 P.2d 299, 304 (Utah 1998). The rules of appellate procedure require the argument section of a brief to contain “the contentions and reasons of the appellant with respect to the issues presented, *including the grounds for reviewing any issue not preserved in the trial court*, with citations to the authorities, statutes,

and parts of the record relied on.” Utah R. App. P. 24(a)(9) (emphasis added). An appellant may not just baldly cite authority, but must develop that authority and provided “reasoned analysis based on that authority.” *Thomas*, 961 P.2d at 305. And for each unpreserved issue, an appellant must brief not only the facts and law governing the underlying claim, but explain why it merits consideration due to exceptional circumstances, or merits relief when viewed “through the lens” of plain error or ineffective assistance. *State v. Rhinehart*, 2007 UT 61, ¶21, 167 P.3d 1046. “[A]ppellants who fail to follow rule 24’s substantive requirements will likely fail to persuade the court of the validity of their position.” *State v. Roberts*, 2015 UT 24, ¶18, 779 Utah Adv. Rep. 139.

Defendant’s analysis of his jury claims fails to meet the requirements of rule 24, and thus fails to meet his burden of persuasion. His discussion of plain error, ineffective assistance, and exceptional circumstances spans about four pages of his forty-four page brief, and is largely conclusory. This does not meet the requirement that he brief each unpreserved issue “through the lens” of these doctrines. *Rhinehart*, 2007 UT 61, ¶21; *see also State v. Isom*, 2015 UT App 160, ¶18, 789 Utah Adv. Rep. 21 (holding exceptional circumstances argument inadequately briefed because it lacked authority and “reasoned analysis based on” it). In any event, even if this

Court were to overlook his briefing failures, these arguments independently fail.

C. Defendant has not shown that spouse jurors constitute an exceptional circumstance excusing his preservation failures.

Waldoch appears to argue that having spouses on the jury qualifies as an exceptional circumstance excusing his failure to object to any incomplete or missing jury admonitions. Br.Aplt. 40 (calling spouse jurors a “rare procedural anomaly”). As a threshold matter, Waldoch has not even shown that spouses sat on the jury together, given that Mrs. Rasmussen was excused as an alternate before jury deliberations. *Cf. State v. Miller*, 674 P.2d 130, 131 (Utah 1983) (holding that where alternate juror dismissed before deliberations, the alternate “had no bearing on the jury’s verdict”). But even assuming that an alternate juror qualifies as a juror for purposes of this argument, Waldoch misapprehends the exceptional circumstances doctrine.

The exceptional circumstances doctrine is not an independent basis for relief, but a basis on which to consider the merits of a claim where some “rare procedural anomal[y]” outside the appellant’s control rendered preservation impossible. *See State v. Nelson-Waggoner*, 2004 UT 29, ¶23, 94 P.3d 186 (quoting *Dunn*, 850 P.2d at 1209 n.3). Few circumstances fit this bill. *See, e.g., State v. Munguia*, 2011 UT 5, ¶26, 253 P.3d 1082 (rejecting prison sentence as exceptional circumstance); *Nelson-Waggoner*, 2004 UT 29,

¶24 (rejecting amendment to information as exceptional circumstance); *State v. Carter*, 2015 UT App 109, ¶11 n.6, 785 Utah Adv. Rep. 17 (rejecting change in trial judge as exceptional circumstance); *State v. Finlayson*, 2014 UT App 282, ¶55, __ Utah Adv. Rep. __ (rejecting self-representation as exceptional circumstance); *State v. Irwin*, 924 P.2d 5, 11 (Utah App. 1996) (rejecting failure to object to prosecutor remarks as exceptional circumstance). Those that do include where “a change in law or the settled interpretation of law color[s] the failure to have raised an issue at trial” — such as an amendment to a governing statute during the appeal process, *In re T.M.*, 2003 UT App 191, ¶16, 73 P.3d 959 (citation omitted)—or where a trial judge effectively usurps the function of counsel. *State v. Beck*, 2006 UT App 177, ¶10, 136 P.3d 1288.

Waldoch cites no authority for the proposition that having spouse jurors—particularly in rural jurisdictions—is at all “rare,” let alone one that presumptively results in injustice. Indeed, the jury venire here had two married couples: the Rasmussens and the Crofts. See R298:19-20, 23-24, 26-27. And the great weight of case law from other jurisdictions shows that having spouses on juries does not constitute error. See, e.g., *Childs v. State*, 357 S.E.2d 48, 56-57 (Ga. 1987); *State v. Richie*, 960 P.2d 1227, 1244 (Haw. 1998); *Harris v. Commonwealth*, 313 S.W.3d 40, 49-50 (Ky. 2010); *Savoie v.*

McCall's Boat Rentals, 491 So.2d 94, 102 (La. Ct. App. 1986); *State v. Miracle*, No. CA 85-11-091, 1986 WL 13268, *2 (Ohio Ct. App., Nov. 24 1986) *Russell v. State*, 560 P.2d 1003, 1003 (Okla. Crim. App. 1977) (per curiam); *State v. Wilkins*, 56 A.2d 473, 473-74 (Va. 1948); *Helmick v. Potomac Edison Co.*, 406 S.E.2d 700, 709 (W.Va. 1991).

Because he has not shown an exceptional circumstance, Waldoch can only get relief by showing (1) that the trial court plainly erred in (a) conducting voir dire or (b) in its admonishments; or (2) that counsel rendered ineffective assistance by (a) not insisting on a more extensive voir dire or exercising a peremptory challenge to excuse one of the spouse jurors, or (b) not insisting on full admonishments before each recess. He has shown none of these, because he has not proven prejudice.

D. Defendant bears the burden to prove prejudice on these unpreserved claims.

Waldoch argues that the incomplete or missing admonishments relieve him of his prejudice burden. Br.Aplt. 40. Waldoch is mistaken.

Where a claim is unpreserved – as Waldoch concedes that this is – the burden is always on the appellant to show prejudice, even if he alleges structural error. *See Maestas*, 2012 UT 46, ¶¶51, 158 (requiring defendant to show prejudice on unpreserved failure to admonish claim and prosecutorial misconduct claim); *see also Kimmelman v. Morrison*, 477 U.S. 365, 382 n.7

(1986) (explaining that “when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review” under harmless-beyond-a-reasonable-doubt standard, and must instead bear the burden of showing *Strickland* prejudice); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989) (applying *Strickland* prejudice to unpreserved alleged public trial violation); *State v. Alfatlawi*, 2006 UT App 511, ¶17 n.1, 153 P.3d 804 (“*Kimmelman* suggests that unpreserved constitutional claims brought collaterally under an ineffective assistance of counsel argument must satisfy the *Strickland* actual prejudice standard” rather than *Chapman*’s presumed prejudice standard); *State v. Malaga*, 2006 UT App 103, ¶11, 132 P.3d 703 (“Defendant has the burden of demonstrating prejudice despite the fact that he has alleged structural error.”) (citing cases); *cf. State v. Cruz*, 2005 UT 45, ¶18, 122 P.3d 543 (discussing federal rule that “a defendant claiming constitutional error who did not object at trial may only argue plain error or ineffective assistance of counsel on appeal and thus must prove prejudice, even if the constitutional error claimed on appeal is structural in nature”).

Waldoch relies on *Maestas* for the proposition that this Court may presume prejudice. Br.Aplt. 40. In *Maestas*, the court addressed a failure to admonish claim in a two-week trial during which the trial court properly admonished the jury seventeen times and failed to properly admonish them

nine times. 2012 UT 46, ¶53. *Maestas* asked the court to presume harm whenever a trial court misses an admonishment. *Id.* at ¶52. The supreme court declined to adopt that rule, and found no harm from the failures to admonish where there was no evidence that the jurors did not follow the admonitions that the court did give. *Id.* at ¶54.

The *Maestas* court noted in dicta that it did not “foreclose the possibility that a presumption of harm may be warranted based upon the particular circumstances of a case.” *Id.* at ¶53. To support this possibility, the court cited *United States v. Hart*, 729 F.2d 662, 668 (10th Cir. 1984). *Maestas*, 2012 UT 46, ¶53 n.36. *Hart*—which also found no prejudice from a failure to admonish—distinguished *Hart*’s circumstances from those in *United States v. Williams*, 635 F.2d 744 (8th Cir. 1980). *Hart*, 729 F.2d at 668. In *Williams*, the Eighth Circuit presumed prejudice where the trial court did not admonish the jury at any time. 635 F.2d at 746.

Unlike in *Williams*, the trial court here gave one full—and several partial—admonishments. See Section II.A. Moreover, *Williams* is an outlier—the vast majority of cases involving a failure to admonish require a showing of prejudice. See, e.g., *Maestas*, 2012 UT 46, ¶53 (no prejudice from nine failures to admonish); *United States v. Richardson*, 817 F.2d 886, 889-90 (D.C. Cir. 1987) (no prejudice from two failures to admonish); *United States*

v. Viale, 312 F.2d 595, 602 (2d Cir. 1963) (no prejudice from failure to admonish); *United States v. Nelson*, 102 F.3d 1344, 1347-48 (4th Cir. 1996) (no prejudice from total lack of admonishments); *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968) (no prejudice from failure to admonish prior to lunch recess); *United States v. Weatherd*, 699 F.2d 959, 962 (8th Cir. 1983) (no prejudice from single failure to admonish); *Hart*, 729 F.2d at 668 (no prejudice from two failures to admonish); *People v. Campbell*, 63 Cal.App.3d 599, 610 (Cal. Ct. App. 1976) (no prejudice from three failures to admonish); *People v. Bean*, 560 N.E.2d 258, 280-81 (Ill. 1990) (no prejudice from failure to admonish before weekend recess); *State v. Ralls*, 515 P.2d 1205, 1209-10 (Kan. 1973) (no prejudice from failure to admonish); *People v. Curtis*, case no. 318699, 2015 WL 630396, *4 (Mich. Ct. App. Feb. 12, 2015) (no prejudice from failures to admonish); *State v. Deck*, 136 S.W.3d 481, 486-87 (Mo. 2004) (no prejudice from multiple failures to admonish); *Blake v. State*, 121 P.3d 567, 579 (Nev. 2005) (no prejudice from six failures to admonish); *State v. Thibodeaux*, 459 S.E.2d 501, 507 (N.C. 1995) (no prejudice from failure to admonish); *cf. State v. Hines*, 307 P.2d 887, 889 (Utah 1957) (presuming regularity of proceedings where record did not show admonishment prior to dinner break). *But see Carter v. United States*, 252 F.2d 608, 612 (D.C. Cir.

1957) (holding prejudice from failure to admonish where no admonishment given prior to week-long recess).

Waldoch thus bears the burden of showing prejudice.

The prejudice standard in most ineffective assistance and plain error claims is that in *Strickland*: a reasonable likelihood of a different result absent the error. See *State v. Verde*, 770 P.2d 116, 124 n.15 (Utah 1989), *overruled on other grounds by State v. Hamilton*, 827 P.2d 232, 239-40 (Utah 1992). But in matters of jury selection and jury admonition, the prejudice standards are different.

For a jury selection claim, Waldoch must show that an actually biased juror sat. *State v. King*, 2008 UT 54, ¶¶15-36, 190 P.3d 1283; see also *State v. Sessions*, 2014 UT 44, ¶31, 342 P.3d 738 (showing of “actual juror bias” required to prove ineffective assistance for lacking neutral ground for peremptory challenge); *State v. Arriaga*, 2012 UT App 295, ¶13, 288 P.3d 588 (counsel’s deficient performance during jury selection prejudicial only if biased juror sat). Showing “actual bias,” of course, requires more than merely showing potential or even presumptive bias. See *King*, 2008 UT 54, ¶¶18, 30-39 (explaining that requiring showing of mere potential bias would be “illogical” and “lead to perverse results”). For example, though two jurors in *King* had “made disclosures that suggested potential bias,” *King*

could not show prejudice without showing that his counsel's failure to remove the jurors "allowed the seating of an *actually biased juror*." *Id.* at ¶¶19, 47 (emphasis added).

For a failure to admonish claim, Waldoch must show that the jurors actually violated the admonitions they received. *See, e.g., Maestas*, 2012 UT 46, ¶54 (holding failures to admonish harmless where "there is nothing in the record to indicate that the failures to admonish played any role in the juror's conduct"); *see also Bean*, 560 N.E. 2d at 280 ("[W]ithout any evidence that the jurors acted improperly we cannot find that the risk" of discussing the case or hearing news reports "resulted in an unfair death penalty hearing or a prejudiced jury"); *Ralls*, 515 P.2d at 1210 (requiring proof of "prejudicial misconduct on the part of jurors" from lack of admonition); *Thibodeaux*, 459 S.E.2d at 507 (holding no prejudice where defendant did "not content, and did not show, that jurors engaged in any improper conduct or conversation" that "tainted in any way" their deliberations).

Waldoch has not met these burdens on any of his claims.

- E. Defendant has not shown plain error or ineffective assistance during jury selection because Defendant passed the jurors for cause, no law required inquiry about bias between jurors, and he has not shown that a biased juror sat.

Waldoch first faults the trial court for not sua sponte striking one of the spouse jurors during voir dire, or at least asking the jurors whether their

relationships with other jurors biased them. Br.Aplt. 32-33. As explained above, these arguments are inadequately briefed and should be rejected for Defendant's failure to meet his burden of persuasion. But they also fail on the merits.

No plain error. Waldoch argues that the trial court should have inquired during voir dire into "the relationship of jurors with each other or the impact upon their ability to render an independent decision," or alternatively "should have eliminated [Mrs. Rasmussen] and avoided the potential risk" that she and her husband would discuss the case or have their judgment impaired based on their spouse's opinions. Br.Aplt. 33, 40.

Because these claims are unpreserved, Waldoch must show plain error. But plain error review is unavailable to a party who invites error. *State v. Winfield*, 2006 UT 4, ¶15, 128 P.3d 1171. Waldoch invited any error in jury selection by passing the jurors for cause. R298:46-47. This Court should affirm on this basis alone.

But in any event, Waldoch has not shown plain error. Plain error requires obvious, prejudicial error. *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). Error is only obvious if there is controlling law on the subject. *See, e.g., State v. Weeks*, 2002 UT 98, ¶25, 61 P.3d 1000 (holding error not

obvious “where the alleged basis for that error is an ambiguous appellate decision”).

There is no statute or decision in Utah requiring courts to inquire into potential bias between jurors. And the general rule nationwide appears to be that bias goes to a juror’s relationships with the parties, counsel, or the judge—not each other. *See Challenges for Cause in Jury Selection Process*, §5 58 Am.Jur. Proof of Facts 3d 395 (Westlaw 2015) (discussing sources of bias, but not mentioning juror relationships with each other); Wayne R. LaFave, Jerold H. Israel, Nancy J. King, and Orris S. Kerr, *Criminal Procedure*, §22.3(c) (3d ed. 2007) (discussing potential sources of bias, not mentioning juror relationships with each other). “With no controlling appellate decision on the issue in Utah and no settled rule across the country, any alleged error in this case could not have been obvious to the trial court.” *State v. Zaelit*, 2010 UT App 208U, *3 n.6.

Likewise, no law in Utah forbids spouses from serving on juries together and—as shown above—the great weight of authority from other jurisdictions permits spouses to serve together as jurors.

Neither has Waldoch shown prejudice, because he has not shown that a biased juror sat. *King*, 2008 UT 54, ¶¶15-36.

No ineffective assistance. Waldoch alternatively claims that counsel was ineffective during jury selection for not asking the jurors whether their relationships with each other would bias them or by not striking one of the spouse jurors.⁷ Br.Aplt. 33, 40. Ineffective assistance requires that counsel (1) perform deficiently in a way that (2) prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The prejudice standard for plain error and ineffective assistance is the same. *State v. Litherland*, 2000 UT 76, ¶31 n.14, 12 P.3d 92.

Waldoch has not shown deficient performance because counsel could have reasonably decided that there was no need to ask the jurors about any bias stemming from their relationships with each other, particularly where no established law required it. *See State v. Hall*, 946 P.2d 712, 720 (Utah App. 1997) (noting that “if an error was not obvious to the trial court, it most likely was not obvious to trial counsel”). Moreover, counsel could have reasonably decided that he had enough information dispelling bias from the

⁷ Waldoch appears to concede that he cannot challenge his counsel’s decision to not use a peremptory challenge on one of the spouse jurors based on the “cure or waive” rule in *State v. Wach*, 2001 UT 35, ¶36 n.3, 24 P.3d 948. The State notes, however, that the supreme court repudiated this rule in favor of showing actual bias in *Turner v. University of Utah Hosp. & Clinics*, 2013 UT 52, ¶¶25-32, 310 P.3d 1212. Even if Waldoch had challenged his counsel’s use of peremptory challenges, his claim would still fail for the same reasons his voir dire claim fails: lack of prejudice because no biased juror sat.

questions that were asked. See R298:7-45. And as stated, Waldoch has not proven prejudice because he has not shown that a biased juror sat. *King*, 2008 UT 54, ¶¶15-36.

F. Defendant has not shown plain error or ineffective assistance regarding jury admonishments because he has not shown that the jury violated the court's admonitions.

No plain error. Waldoch next argues that the trial court plainly erred by not fully admonishing the jury before each recess. Br.Aplt. 40, 42. Though the error here was likely plain, it was not prejudicial.

Rule 17(k), Utah Rules of Criminal Procedure requires that at "each recess of the court, . . . the jurors . . . be admonished by the court that it is their duty not to converse among themselves, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them." *Maestas* held that rule 17(k) "clearly imposes a mandatory requirement on the trial court." 2012 UT 46, ¶51 n.34. Thus, the trial court's missing or incomplete admonishments constituted obvious error, at least for those recesses of longer than a few minutes.⁸

⁸ Because the court found no prejudice, *Maestas* did not reach the State's argument in that case that the meaning of "recess" under the rule should not include breaks of short length. *Maestas*, 2012 UT 46, ¶51 n.34.

But Waldoch has not proven prejudice—that is, that the jurors violated the admonishments they did receive. *Maestas*, 2012 UT 46, ¶54. Waldoch speculates that they *might* have discussed the case or been prejudiced by another juror’s views. Br.Aplt. 33 (discussing “potential risk” and “heightened risk” from missing admonitions arising from spouse jurors). But proof of prejudice must be real, not speculative. *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); *see also Allen v. Friel*, 2008 UT 56, ¶21, 194 P.3d 903 (“[P]roof of ineffective assistance of counsel cannot be a speculative matter, but must be a demonstrable reality.”) (citation and quotation omitted). Waldoch’s plain error arguments thus fail.

No ineffective assistance. Waldoch alternatively claims that counsel was ineffective for not objecting to inadequacies in the court’s admonishments or lack of “follow-up” on them. Br.Aplt. 40, 42. He has not shown deficient performance because counsel could have decided that the opening instructions adequately instructed the jury on their duties during recesses, and that the jury would not have had much opportunity to violate the admonitions given where the trial lasted only two days and about half of the recesses were fifteen minutes or less. *Cf. Maestas*, 2012 UT 46, ¶53 (explaining in failure-to-admonish case that most recesses were brief and

the “jury would have had little opportunity to forget prior admonitions, engage in discussion, or be exposed to extraneous information”).

And again, Waldoch has not shown prejudice because he has not demonstrated that the jurors actually violated the admonitions given. *See, e.g., Maestas*, 2012 UT 46, ¶53 (no prejudice from nine failures to admonish); *Richardson*, 817 F.2d at 889-90 (no prejudice from two failures to admonish); *Viale*, 312 F.2d at 602 (no prejudice from failure to admonish); *Nelson*, 102 F.3d at 1347-48 (no prejudice from total lack of admonishments); *Rotolo*, 404 F.2d at 317 (no prejudice from failure to admonish before lunch recess); *Weatherd*, 699 F.2d at 962 (no prejudice from single failure to admonish); *Hart*, 729 F.2d at 668 (no prejudice from two failures to admonish); *Campbell*, 63 Cal.App.3d at 610 (no prejudice from three failures to admonish); *Bean*, 560 N.E.2d at 280-81 (no prejudice from failure to admonish before weekend recess); *Ralls*, 515 P.2d at 1209-10 (no prejudice from failure to admonish); *Curtis*, 2015 WL 630396, *4 (no prejudice from failures to admonish); *Deck*, 136 S.W.3d at 486-87 (no prejudice from multiple failures to admonish); *Blake*, 121 P.3d at 579 (no prejudice from six failures to admonish); *Thibodeaux*, 459 S.E.2d at 507 (no prejudice from failure to admonish); *cf. Hines*, 307 P.2d at 889 (presuming regularity of proceedings where record did not show admonishment before dinner break); *Miracle*, 1986 WL 13268,

*2 (holding no prejudice from husband and wife sitting on jury where no evidence that they discussed case during recesses). Tellingly, Waldoch has not moved for remand under rule 23B, Utah Rules of Appellate Procedure, to make a record of any violation.

In sum, Waldoch has failed to establish plain error or ineffective assistance regarding jury selection or admonishment.

III.

Defendant has not shown plain error or ineffective assistance in the prosecutor's closing argument because the prosecutor merely argued permissible inferences from the evidence.

Waldoch next argues that the trial court plainly erred and counsel rendered ineffective assistance by not interrupting the prosecutor's closing argument on the ground that it "vouched for the truthfulness of the victim" and appealed to the jurors' "passion and prejudice" by asking them to "put themselves in the victim's place." Br.Aplt. 37-39. He further argues that the trial court should have sua sponte admonished the jury before closing arguments that they were the judges of credibility, the statements of counsel were not evidence, that it was not "appropriate" to feel "sorry for the victim or resentful of" him. *Id.* at 37.

These arguments are all unpreserved and inadequately briefed. At any rate, Waldoch has not shown plain error or ineffective assistance.

A. Closing arguments on the victim's credibility.⁹

Both parties addressed the victim's credibility in closing. The prosecutor based his credibility argument on the credibility factors in the jury instructions. See R306. First, the prosecutor briefly addressed Waldoch's and the victim's respective "personal interest[s]": Waldoch had an interest in avoiding conviction due to potential jail time and sex offender registration, and the victim had an interest in not being branded a liar because she "probably wouldn't feel very good about that." R299:274-75. When the prosecutor started to ask that the jury weigh those respective interests, defense counsel asked to approach the bench. *Id.* at 275. After the unrecorded bench conference, the prosecutor moved on to discuss "other bias," stating that Waldoch had a motive to lie because he had told his wife that "he just cheated on her," but it would "[p]robably" affect his marriage if "actually he sexually assaulted another woman." *Id.* at 276. For the victim's part, the prosecutor reasserted that the victim had an interest in being considered truthful. *Id.* at 275.

The prosecutor then discussed demeanor, arguing that a show of emotion was a good way "to tell if" someone was "lying or not." R299:276. He alluded to the victim's demeanor on the stand, saying that if she were

⁹ The closing arguments are attached as Addendum B.

lying, her emotion would “have to be fake, totally made up,” but that if she were telling the truth, then it was “was legitimate and sincere.” *Id.* He suggested that the jury ask themselves “how [they felt] about that.” *Id.* The prosecutor then argued that the victim had told a consistent and reasonable story, as evidenced by both her statements and her actions. *Id.* at 276-77. Finally, the prosecutor argued that the victim was believable because she had subjected herself to the embarrassment of a pelvic exam and participating in the case for over two-and-a-half years. *Id.* at 277.

In response, defense counsel argued that the victim had not reacted consistently with her story because she did not stop and run away or try get help. *Id.* at 288-91. He also argued that alleged inconsistencies in her accounts, her taking Waldoch home, and her refusing medication at the hospital belied her story. *Id.* at 291-94.

In rebuttal, the prosecutor responded that “every rape victim, every sexual assault victim is different in how they respond” to abuse, and not to “blame her for what happened to her.” *Id.* at 295. He also responded that small inconsistencies in the victim’s account did not render it incredible. *Id.* at 296-99.

B. These claims are unpreserved and inadequately briefed.

As explained, rule 24(a)(9), Utah Rules of Appellate Procedure, requires an appellant to present the “contentions and reasons” for overturning a judgment, including the grounds for reaching unpreserved arguments. *See Rhinehart*, 2007 UT 61, ¶21 (requiring unpreserved claims to be briefed “through the lens” of an exception).

Waldoch argues these claims as if they were preserved. They were not—he did not object below to the prosecutor’s closing argument, nor did he request any curative instruction. *See* R299:274-86 (prosecutor closing), 295-301 (prosecutor rebuttal). Waldoch appears to claim that these issues are preserved because “[t]hese matters were likely discussed as defense counsel requested that the attorneys approach the bench.” Br.Aplt. 37.¹⁰ But there is no record of what occurred during that bench conference. *See* R299:275.

An appellant may not found preservation on speculation. Rather, he must make a complete record of objections, and where no record exists of an actual objection, an appellant must supplement or complete the record. *See* Utah R. App. P. 11(c) (describing appellant’s burden to ensure an adequate record on appeal); Utah R. App. P. 11(h) (providing for record completion

¹⁰ In support of this, Waldoch cites R299:175. This appears to be a typo. R299:175 contains no bench conference, but R299:275 does.

where something is missing from the record due to “error” or “accident”); Utah R. App. P. 23B (providing for record supplementation in support of ineffective assistance of counsel claims). In the absence of a record, the presumption of regularity attaches and record gaps are construed in favor of the judgment below. See *In re Adoption of Connor*, 2007 UT 33, ¶16, 158 P.3d 1097 (“When faced with questions about proceedings in the trial court that are not adequately challenged on appeal, we apply a presumption of regularity,” which assumes that “the evidence and process employed were sufficient”); *Litherland*, 2000 UT 76, ¶17 (holding that record inadequacies are construed in favor of counsel’s effective performance).

Because Waldoch assumes that these issues were preserved, he does not argue plain error or ineffective assistance. For these reasons alone, his claim is inadequately briefed, and fails to meet his burden of persuasion on appeal. *Roberts*, 2015 UT 24, ¶18. But even if this Court were to overlook Waldoch’s briefing failures, he could only prevail on this claim—as with his other unpreserved claims—by showing plain error or ineffective assistance. Waldoch has not shown either.

C. A prosecutor does not err, let alone commit misconduct, by arguing permissible inferences from the evidence.

Waldoch styles this claim as one of prosecutorial misconduct. Br.Aplt. 37. Granted, that label has been employed to describe a broad

range of alleged prosecutor errors, from the remarkable to the mundane. But it is a misnomer to speak of prosecutorial “misconduct” outside of “those extreme—and thankfully rare—instances where a prosecutor’s conduct actually violates the rules of professional conduct.” *People v. McCrary*, Docket No. 308237, 2013 WL 2662752, *3 (Mich. Ct. App. Jun. 13, 2013) (per curiam).

True prosecutorial misconduct “is not merely the result of legal error, negligence, mistake, or insignificant impropriety. . . .” *Pool v. Superior Court*, 677 P.2d 261, 271-72 (Ariz. 1984). Rather, it is conduct that, “taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.” *Id.* Thus, most “misconduct claims” are “better and more fairly described as claims of ‘professional error’ with only the most extreme cases rising to the level of ‘prosecutorial misconduct.’” *McCrary*, 2013 WL 2662752, *3; see generally Utah R. Prof’l Conduct 3.8 (special responsibilities of prosecutors).

Waldoch alleges error in the prosecutor’s closing argument. On a preserved claim, a defendant proves error only if a prosecutor’s closing remarks (1) “call to the attention of the jurors matters they would not be justified in considering in determining their verdict,” and, (2) a reasonable

likelihood of a different result absent the remark(s). *State v. Tillman*, 750 P.2d 546, 555 (Utah 1987). But because this claim is unpreserved, Waldoch must show not just error, but obvious and prejudicial error from the allegedly improper remarks. *See, e.g., State v. Clark*, 2014 UT App 56, ¶39, 322 P.3d 761 (holding no plain error from prosecutor's remarks). Alternatively, he must show ineffective assistance of counsel, which as explained, requires both (1) deficient performance and (2) prejudice.

Both prosecutors and defense counsel have "considerable latitude" in closing argument and "may discuss fully from their viewpoints the evidence and the inferences and deductions therefrom." *Tillman*, 750 P.2d at 560 (citation omitted). Even if the remarks are "colloquial, vigorous, and colorful," they may nevertheless fall "within the wide latitude permitted to counsel in presenting closing arguments to the jury." *State v. Bryant*, 965 P.2d 539, 550 (Utah App. 1998); *see also Tillman*, 750 P.2d at 556 (holding no misconduct where prosecutor responded to "vigorous attack" on credibility of State's witness with "unwise and hyperbolic" remark referencing Mormon Tabernacle Choir).

A prosecutor crosses the line if he gives a personal opinion on the strength of the evidence or a witness's credibility, *see, e.g., State v. Hopkins*, 782 P.2d 475, 479 (Utah 1989) (holding improper prosecutor's remark that he

was “plainly impressed” with the case evidence); *State v. Thompson*, 2014 UT App 14, ¶57, 318 P.3d 1221 (holding improper prosecutor’s remark that he thought witness was credible); or appeals to the jury’s sympathies by asking them to put themselves in the victim’s shoes. *See, e.g., State v. Todd*, 2007 UT App 349, ¶19, 173 P.3d 170.

But he is well in-bounds to argue reasonable inferences from the evidence. *See, e.g., State v. Lafferty*, 749 P.2d 1239, 1255-56 (Utah 1988) (holding no error from prosecutor’s argument containing “nothing more than his inferences drawn from the evidence”); *Thompson*, 2014 UT App 14, ¶¶51-55 (same, where prosecutor argued that the jury “had an opportunity to view” the victim and “see that she was forthright,” and “told . . . the truth”).

When a defendant objects, the trial court must decide whether the remarks were proper or not. But in the absence of an objection, the need to show deference to counsel’s strategy has made appellate courts “hesitant to set a rule which would require the trial judge to intervene in a closing argument whenever the judge believes a misstatement of the evidence . . . has occurred.” *State v. Palmer*, 860 P.2d 339, 344 (Utah App. 1993). That is the province of opposing counsel. *Id.* A court invades that province only when it can articulate no reasonable basis for not objecting. *See State v.*

Haga, 954 P.2d 1284, 1289 (Utah App. 1998) (citing multiple reasonable bases for not objecting). Moreover, plain error requires that the error be obvious. Because “[t]he line which separates acceptable from improper advocacy is often difficult to draw,” the challenged remark must be “so obviously improper” that the trial court had to intervene sua sponte. *State v. Larsen*, 2005 UT App 201, ¶5, 113 P.3d 998 (citations and additional quotation marks omitted). This same standard applies to whether counsel performed deficiently in not objecting. *Hall*, 946 P.2d at 720 (noting that “if an error was not obvious to the trial court, it most likely was not obvious to trial counsel”).

In assessing the prejudice of improper remarks, this Court considers all the evidence and the arguments of counsel, as well as any ameliorative measures, such as defense counsel’s addressing the allegedly improper remarks in their closing and any curative instruction from the trial court. *Larsen*, 2005 UT App 201, ¶¶6-10. Considering the totality of evidence is important because “[i]solated passages of a prosecutor’s argument, billed in advance to the jury as a matter of opinion not of evidence, . . . are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear.” *Donnelly*, 416 U.S. at 646-47; see also *United States v. Robinson*, 485 U.S. 25, 33

(1988). “[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974). And the trial court and counsel hold an advantaged position in evaluating the impact of any statements on the jury. *See State v. Longshaw*, 961 P.2d 925, 927 (Utah App. 1998). Thus, appellate courts do not “lightly overturn[]” a criminal conviction “on the basis of a prosecutor’s statements standing alone.” *Larsen*, 2005 UT App 201, ¶6.

In sum, to get reversal on plain error, Waldoch must show that the prosecutor so obviously misstated the evidence or argued something so obviously improper that the trial court was required to interrupt and correct the argument without being invited to rule on an objection first. *See State v. Bair*, 2012 UT App 106, ¶35, 275 P.3d 1050. He must then show a reasonable likelihood of a different result absent the allegedly improper arguments. *Tillman*, 750 P.2d at 555.

And as stated, to prove ineffective assistance on these same claims, Waldoch must show both (1) deficient performance and (2) the same sort of prejudice applicable to his plain error claim.

D. Defendant has not shown plain error or ineffective assistance because the prosecutor properly argued the victim's credibility based on permissible inferences from the evidence.

Waldoch alleges that two improprieties in the prosecutor's closing required the trial court and/or counsel to act: (1) that the prosecutor "went too far endorsing the victim's position and arguing that the Appellant was not credible," thereby expressing a "personal opinion"; and (2) appealed "to how the victim would feel if" the jury "determined that she was lying and having them relive this shocking experience from her point of view." Br.Aplt. 38-39. Waldoch has not shown any error, let alone plain error, because the prosecutor did not offer personal credibility opinions or appeal to the jury's sympathies, but rather argued reasonable inferences from the evidence. *State v. Bakalov*, 1999 UT 45, ¶57, 979 P.2d 799 (holding that the prosecutor can make "assertions about what the jury should infer from the evidence during their deliberations."). For these same reasons, he has not shown ineffective assistance.

No plain error. It was reasonable to infer the victim's candor based on her demeanor, her consistent account, and her enduring an embarrassing pelvic exam and drawn-out legal proceedings. R299:276-77; *see Thompson*, 2014 UT App 14, ¶¶53-55 (holding proper prosecutor's remarks that jury had "opportunity to view" the victim and could "see that she was

forthright,” “had nothing to gain from lying,” and “told . . . the truth”). Likewise, it was reasonable to infer Waldoch’s lack of candor from the legal and marital consequences he faced if found guilty. *See, e.g., Clark*, 2014 UT App 56, ¶¶37-38 (holding no plain error in prosecutor’s “suggesting that Defendant had a motive to lie and that Defendant’s account was fabricated and absurd”); *Thompson*, 2014 UT App 14, ¶59 (holding prosecutor fairly argued that defendant was “lying, lying,” because he had “a lot at stake,” and “everything to gain by lying”). It was also reasonable to infer from the evidence that the victim arguably had a motive to lie because—assuming she had lied from the get-go—she would need to continue the lie in order to avoid being found out. *Cf. Isom*, 2015 UT App 160, ¶¶30-31 (holding no plain error in alleged appeal to jury sympathy where prosecutor encouraged jury to “walk in [the victim’s] shoes” as a seven-year-old witness). Being found out and branded as a liar would make most people feel badly. Thus, there was no error, let alone obvious error, in the prosecutor’s argument.

Waldoch also argues—without citation to any authority—that the trial court ought to have instructed the jurors before closing arguments that (1) the statements of the prosecutor were not evidence; (2) they were the judges of witness credibility; and (3) that “any appeal to emotion . . . was

not appropriate.” Br.Aplt. 37. There was no error—let alone obvious error—here, because the trial court’s opening instructions effectively covered this ground.

The jurors were instructed that it was their role to “decide the factual issues and to not be influenced by the opinions of the court or counsel; that closing arguments represented counsels’ summary of their “respective views of the evidence”; that they should base their verdict only on facts in evidence; that “[w]hat the lawyers say is not evidence”; and to [c]onsider the evidence fairly *without any bias or sympathy toward either side*” See R306-10 (second emphasis added). Particularly in the absence of a request from counsel to cover it again, it would not have been obvious that the jurors would have forgotten their charge the day before. And even if the jurors had been re-instructed as Waldoch claims they should have been, it would have made no difference in the result where the victim’s story was consistent with her injuries and behavior, and Waldoch showed no plausible motive for her to fabricate the allegations against him. See Statement of Facts.

In sum, Waldoch has shown no error, let alone obvious error. And even if there were some error, the remarks that Waldoch appears to challenge would have made no difference in the result where the remarks

were brief, Waldoch had an opportunity to respond to them, the jury was instructed that the statements of counsel were not evidence, and the evidence of Waldoch's guilt was strong. R307; *see generally* *Larsen*, 2005 UT App 201, ¶¶6-10.

No ineffective assistance. Because the prejudice standard for ineffective assistance is the same as that for plain error, Waldoch's ineffective assistance argument fails on the same bases. Further, Waldoch has shown neither deficient performance nor prejudice because the prosecutor's argument was proper, rendering any objection futile. *State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance of counsel."). And even if there were some arguable impropriety, counsel could also have reasonably chosen not to object in order to avoid drawing attention to the remark or being seen as obstructionist. *See Isom*, 2015 UT App 160, ¶¶36-40 (holding no ineffective assistance from failure to object to proper argument and discussing possible strategic purposes for withholding objection).

IV.

Trial counsel effectively used a highly-qualified expert to support the defense of consent, and any alleged deficiencies are entirely speculative.

Waldoch finally argues that his counsel was ineffective because he did not "not fully appreciate or make use of" his expert's "impressions

about consensual versus nonconsensual findings” where she “had more to say.” Br.Aplt. 40, 42. This argument is inadequately briefed under the standards discussed above. Though Waldoch cites to the correct standard for ineffective assistance, he does not adequately apply it to the facts of this case because he does not explain what counsel left undone and why counsel was constitutionally required to ask more than he did. *See* Br.Aplt. 40-41. And though he addresses prejudice relating to his other arguments, *see, e.g.*, Br.Aplt. 43, he does not even cursorily address prejudice on this argument. Under the standards discussed above, this falls well short of meeting his burden of persuasion under rule 24.

At any rate, the record shows that counsel adequately used his highly-qualified expert to support a consent defense. Ms. Byner-Brown was a longtime forensic nurse examiner who had conducted more than 4,000 rape exams over 20 years and helped to design the Code-R kit used on the victim here. R299:210-12. Counsel consulted her during the State’s case to prepare for cross-examination. *See* R298:104; R299:206-07. Her testimony helped to counter the emergency room doctor’s opinion that the victim’s vital signs were abnormally high; explained that the victim’s bruises could have been accidental and unrelated to the alleged abuse; and minimized the State’s nurse expert’s testimony about the seriousness of the victim’s

vaginal injuries and the extent to which they were consistent with her story.
R299:217-30.

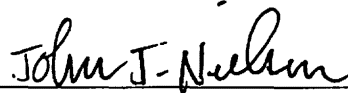
This far surpasses counsel's efforts in *State v. Lenkart*, 2011 UT 27, 262 P.3d 1, to which Waldoch compares this case. Br.Aplt. 41-42. In *Lenkart*, counsel was held to be ineffective for failing to test a Code-R kit and hire an expert to opine on the significance of the results, which supported the defense. *Lenkart*, 2011 UT 27, ¶¶35, 41. Here, counsel hired a highly-qualified expert and had her extensively opine on the extent of the victim's injuries, their consistency with her story, and the validity of other medical providers' opinions. Because anything else the expert would or could have said is unknown, it is speculative to find counsel's performance either deficient or prejudicial. *See Chacon*, 962 P.2d at 50 (explaining that ineffective assistance claim must not be speculative).

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on July 13, 2015.

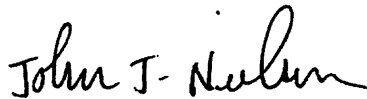
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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1), Utah R. App. P., this brief contains 11,693 words, excluding the table of contents, table of authorities, and addenda. I further certify that in compliance with rule 27(b), Utah R. App. P., this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 13 point.



JOHN J. NIELSEN
Assistant Attorney General

CERTIFICATE OF SERVICE

I certify that on July 13, 2015, two copies of the Brief of Appellee were

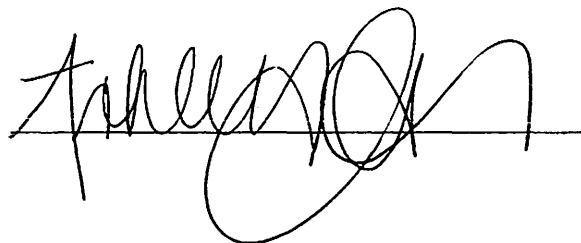
☒ mailed ☐ hand-delivered to:

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Cedar City, UT 84721-0519

Also, in accordance with Utah Supreme Court Standing Order No. 8,
a courtesy brief on CD in searchable portable document format (pdf):

☒ was filed with the Court and served on appellant.

☐ will be filed and served within 14 days.

A handwritten signature in black ink, appearing to read "J. Bryan Jackson", is written over a horizontal line.

Addenda

Addenda

Addendum A

West's Utah Code Annotated
State Court Rules
Utah Rules of Criminal Procedure

Utah Rules of Criminal Procedure Rule 17

RULE 17. THE TRIAL

Currentness

(a) In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

(a)(1) In prosecutions of misdemeanors and infractions, defendant may consent in writing to trial in his absence;

(a)(2) In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and

(a)(3) The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) Cases shall be set on the trial calendar to be tried in the following order:

(b)(1) misdemeanor cases when defendant is in custody;

(b)(2) felony cases when defendant is in custody;

(b)(3) felony cases when defendant is on bail or recognizance; and

(b)(4) misdemeanor cases when defendant is on bail or recognizance.

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and the consent of the prosecution.

(d) All other cases shall be tried without a jury unless the defendant makes written demand at least ten days prior to trial, or the court orders otherwise. No jury shall be allowed in the trial of an infraction.

(e) In all cases, the number of members of a trial jury shall be as specified in Section 78-46-5, U.C.A. 1953.

(f) In all cases the prosecution and defense may, with the consent of the accused and the approval of the court, by stipulation in writing or made orally in open court, proceed to trial or complete a trial then in progress with any number of jurors less than otherwise required.

(g) After the jury has been impaneled and sworn, the trial shall proceed in the following order:

(g)(1) The charge shall be read and the plea of the defendant stated;

(g)(2) The prosecuting attorney may make an opening statement and the defense may make an opening statement or reserve it until the prosecution has rested;

(g)(3) The prosecution shall offer evidence in support of the charge;

(g)(4) When the prosecution has rested, the defense may present its case;

(g)(5) Thereafter, the parties may offer only rebutting evidence unless the court, for good cause, otherwise permits;

(g)(6) When the evidence is concluded and at any other appropriate time, the court shall instruct the jury; and

(g)(7) Unless the cause is submitted to the jury on either side or on both sides without argument, the prosecution shall open the argument, the defense shall follow and the prosecution may close by responding to the defense argument. The court may set reasonable limits upon the argument of counsel for each party and the time to be allowed for argument.

(h) If a juror becomes ill, disabled or disqualified during trial and an alternate juror has been selected, the case shall proceed using the alternate juror. If no alternate has been selected, the parties may stipulate to proceed with the number of jurors remaining. Otherwise, the jury shall be discharged and a new trial ordered.

(i) **Questions by jurors.** A judge may invite jurors to submit written questions to a witness as provided in this section.

(i)(1) If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

(i)(2) If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.

(i)(3) The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

(j) When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, he will suffer no person other than the person so appointed to speak to them nor to do so himself on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time.

(k) At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(l) Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(m) When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under his charge shall not allow any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(n) After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(o) If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(p) At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

Credits

[Amended effective November 1, 2001; November 1, 2002.]

Editors' Notes

ADVISORY COMMITTEE NOTE

Paragraph (I). The committee recommends amending paragraph (I) to establish the right of jurors to take notes and to have those notes with them during deliberations. The committee recommends removing depositions from the paragraph not in order to permit the jurors to have depositions but to recognize that depositions are not evidence. Depositions read into evidence will be treated as any other oral testimony. These amendments and similar amendments to the Rules of Civil Procedure will make the two provisions identical.

Notes of Decisions (339)

Rules Crim. Proc., Rule 17, UT R RCRP Rule 17
current with amendments received through April 15, 2015.

End of Document

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West's Utah Code Annotated

Title 76. Utah Criminal Code

Chapter 5. Offenses Against the Person (Refs & Annos)

Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-402.2

§ 76-5-402.2. Object rape

Currentness

(1) A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is a first degree felony, punishable by a term of imprisonment of:

(a) except as provided in Subsection (1)(b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection (1)(c) or (2), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the object rape the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the object rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the object rape, the defendant was previously convicted of a grievous sexual offense.

(2) If, when imposing a sentence under Subsection (1)(b), a court finds that a lesser term than the term described in Subsection (1)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

(3) The provisions of Subsection (2) do not apply when a person is sentenced under Subsection (1)(a) or (c).

(4) Imprisonment under Subsection (1)(b), (1)(c), or (2) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1983, c. 88, § 19; Laws 1984, c. 18, § 8; Laws 2007, c. 339, § 14, eff. April 30, 2007; Laws 2008, c. 340, § 1, eff. May 5, 2008; Laws 2013, c. 81, § 6, eff. May 14, 2013.

Notes of Decisions (6)

U.C.A. 1953 § 76-5-402.2, UT ST § 76-5-402.2

Current through 2014 General Session.

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Addendum B

FILED
KANE COUNTY
CLERK
NOV 21 2014

IN THE SIXTH JUDICIAL DISTRICT COURT-KANAB
OF KANE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

vs.

PAUL DUBRAE WALDOCH,

Defendant.

Case No. 111600055 FS

ORIGINAL

Jury Trial
Electronically Recorded on
February 19, 2014

BEFORE: THE HONORABLE MARVIN D. BAGLEY
Sixth District Court Judge

APPEARANCES

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UTAH APPELLATE COURTS

NOV 24 2014

20140851-CA

1 if you were going to decide the case, because you still may,
2 all right?

3 How closing arguments works is we first hear from the
4 prosecution. He will speak to you, Mr. VanDyke, and then
5 Mr. Leigh and the defense will speak to you. Then Mr. VanDyke
6 has the opportunity to speak to you again. The reason he gets
7 to chances -- there are two reasons for that. One is that the
8 State bears the burden of proof. So he gets two opportunities;
9 and second is because in fairness each side should have the
10 opportunity to respond to what the other side has said. So
11 first we'll hear from Mr. VanDyke and then from Mr. Leigh.

12 Mr. VanDyke.

13 MR. VANDYKE: Thank you, your Honor. Thank you all for
14 being here. Thanks for coming back. Again, your participation
15 makes sure that we have the greatest criminal justice system,
16 which we do. So thanks for being here and paying attention,
17 even though it was difficult, not just to give up two days in
18 your lives, but because of what you had to listen to while you
19 were here.

20 It's my chance to -- it's my last chance to persuade
21 you, to help you see the important things that I've seen come
22 through, and to help you as you later deliberate, maybe some of
23 the things you should discuss.

24 This has turned out a little bit interesting, I think.
25 You've heard a lot of people testify that weren't there, that

1 don't know what happened, but they gathered some evidence.
2 That's a little bit helpful for you in making your decision.
3 There's DNA evidence that's pretty conclusive that defendant
4 was there and he ejaculated. There's some injuries that
5 occurred. They support the victim's story, the alleged
6 victim's story; but you could also disregard that stuff.
7 According to the vic -- the expert that testified today,
8 you could also disregard a lot of those injuries. So that
9 is going to be up to you to decide how important all that
10 (inaudible) is.

11 So the crux of the case comes down to who are you
12 going to believe? Are you going to believe the defendant and
13 the story that he told you today, or are you going to believe
14 the alleged victim and the story that she told you?

15 If you look in your instructions, on No. 12 there's
16 an instruction that helps you to think about some of the things
17 on how to make that decision. I'm asking you to believe the
18 victim, the alleged victim and not the defendant, obviously.
19 Here's some good things to think about, okay?

20 Personal interest. Does the witness have a personal
21 interest in how the trial comes out? Does the defendant have
22 a personal interest in how this trial comes out? Absolutely.
23 Right? There's so much at stake for him. He's personally
24 interested in the outcome today. So does that mean he has a
25 propensity to not tell the truth? Absolutely he does.

1 The victim, the alleged victim, Melissa Sorenson, does
2 she have a personal interest in how the trial comes out? Yeah,
3 she probably does, because she's made a statement. She's made
4 that same statement here in Court. She's claiming that she was
5 sexually assaulted, and if you decided that she was a liar then
6 she would probably feel like she was a liar or she probably
7 wouldn't feel very good about that. So she kind of has a
8 personal interest, too.

9 Now, weigh that against the defendant's interest of,
10 you know, not going to jail, not being a sex offender. You get
11 to think about that and weigh that out. Otherwise, does the
12 witness have some other bias or --

13 MR. LEIGH: Your Honor, may we approach.

14 (Discussion at the bench off the record)

15 MR. VANDYKE: Okay, other bias. Does Melissa Sorenson
16 have some other bias to testify a certain way? Does she have
17 another bias or motive to testify a certain way? Okay, some
18 bias that would make her lie today. I supposed that could
19 exist. I mean, she's told friends, she's told people what
20 happened to her. If she lied to them, she'd probably have to
21 keep the same story, right, because she probably wouldn't want
22 to make people think she's a liar. So she's probably going to
23 keep the same story. So sure, maybe she has some other bias,
24 if she lied the very first time, right?

25 Does the defendant have some other bias or motive to

1 testify a certain way? Sure. He told his wife. Apparently he
2 told his wife about this circumstance and played it off to her
3 that he just cheated on her. Now, if it came out today that
4 no, actually he sexually assaulted another woman, is that going
5 to affect his relationship with his wife? Probably.

6 Demeanor. You saw both of them testify today. There's
7 not really a good way, just by looking at somebody, to tell if
8 they're lying or not. Sometimes we have impressions, especially
9 when people get emotional. That's often -- you know, you can
10 tell if that emotion is fake or real.

11 So remember what you saw from Ms. Sorenson and how
12 she acted on the stand; and if she was lying, that would all
13 have to be fake, totally made up by her, all of the emotion
14 that she displayed to you, completely fake. If she was telling
15 the truth, then the emotion she showed to you was legitimate
16 and sincere. So ask yourself how you feel about that.

17 Consistency. Look and see if their statements --
18 if their stories were consistent, acknowledging memory and
19 reasonableness. You know, reasonableness is going to be one
20 to think about. Go through the story and ask which one of them
21 is reasonable. So that's something you can consider.

22 So in regards to Melissa Sorenson, if she were lying,
23 and she initiated the sexual contact, why would she later be --
24 stay at home in bed for two days over at Atkinsons? Why would
25 she then when she was contacted by friends tell them that she

1 was sexually assaulted?

2 Why would she then go to the emergency room, subject
3 herself to this really horrible exam, you know, even the expert
4 witness that you listened to today said that was terrible.
5 You know, you get up there, you're sitting in stirrups while
6 somebody's examining your pelvic area. Why would she subject
7 herself to that if she were lying? What motivation could she
8 have for that? I want you to think about that.

9 Why would she -- I mean, it happened in 2011, Memorial
10 Day 2011. Here it is, start of 2014. She's been involved -- I
11 mean, this has been an outstanding case since that time. Why
12 would she subject herself to that if she -- if this was all a
13 lie? That's a question I think that's really important for you
14 to discuss and think about.

15 There's a lot of evidence in this case, a lot of
16 exhibits, a lot of stuff for you to look through, and you'll
17 have that opportunity. You'll have the opportunity to read
18 everybody's statements, go over everybody's reports.

19 Let me talk for a minute about the DNA report, okay?
20 It's really confusing. I've read it through myself several
21 times. You know, I've sat -- you listened to the expert, and
22 she did a really good job of explaining that to you. When you
23 read that report it's not going to be as easy to understand.
24 So let me go back over that part.

25 The important thing to remember from the DNA evidence

1 is that there were two different submissions. The important
2 part from the first submission, that rape kit, is the neck
3 swab, and then the second submission with the sweater.

4 The first test that the DNA expert goes over is the
5 serology, but that's just to determine if there are bodily
6 fluids, okay? On the next swab she found that there was
7 saliva; and on the sweater she found (inaudible). Then the
8 second part of the test is to determine that there's -- if
9 there's DNA that match -- well, not that it (inaudible), but
10 to match the DNA.

11 So she had a control sample from Melissa Sorenson,
12 that she knew that it was Melissa Sorenson, that she had her
13 DNA. She also had the mouth swab from the defendant that she
14 had to see if his DNA compared, okay? The next swab that shows
15 saliva showed Melissa Sorenson's DNA is a match, and some other
16 person. The minor profile is how she -- Melissa Sorenson was
17 the major profile, and someone else was the minor profile,
18 okay? We don't know if it was saliva or skin that those DNA
19 came from. We just know that those two DNA came from the
20 sweater.

21 When they did -- when she did the DNA sample of the
22 sweater, the seminal fluid, okay, she separates that into two
23 because she found -- on that one she could determine yes, there
24 is DNA from specifically seminal fluid. So that's the seminal
25 fraction, and there's also DNA from the skin, an epithelial

1 fraction. Because of the way they can test, they can tell.
2 Unlike the DNA from the saliva when they can't tell where the
3 DNA comes from on this, on the sweater they can tell, yes, this
4 is from the seminal fluid, the sperm, and this is from skin
5 cells, right?

6 The sperm came back as a match to Paul Waldoch, and
7 then the skin, there was Melissa Waldoch and someone else's
8 (inaudible). Please don't get too concerned about that, okay?
9 If I rubbed my hand on your shoulder, my skin DNA would get on
10 your clothes. That's what the DNA experts told us, okay?

11 You know, maybe the defense attorney's going to get up
12 here and say, "Oh, well, there was some huge orgy going on, and
13 there must have been all sorts of people, you know, brushing
14 up against her and doing all sorts of things." Well, first of
15 all, there's no evidence of that. The defendant himself says,
16 "Yeah, (inaudible) party. We sat, you know, we watched TV and
17 we drank. Then in the morning we left," okay? So put that out
18 of your mind, okay? His sperm is on her sweater. That's the
19 important part, okay?

20 Some other important instructions for you to review is
21 starting at 29, Count I and the elements that I have to prove;
22 30 is Count II; 31 is Count III. On each one of them I have to
23 prove that the defendant Paul Waldoch -- that's proven, okay,
24 no question about it.

25 On each count I have to prove that it was with the

1 intent to arouse or gratify the sexual desire of any person,
2 okay? Both witnesses, both Melissa Sorenson and Paul Waldoch
3 have told you that he ejaculated, okay? There's -- I mean, I'm
4 not (inaudible) -- you know, go back to sex ed 101, but when
5 that happens to a male, that's usually because of a sexual
6 gratification, right? So that's pretty easy to determine,
7 right?

8 On object rape I have to prove that Paul Waldoch
9 caused the penetration however slight of the genital opening.
10 So when they were there at the Zion's Call Center and Melissa
11 Sorenson said, "This time when he stuck his hand in my pants he
12 put his finger inside my vagina," that's Count I for you there.
13 She's another person. She's over 14 years of age. If you're
14 finally wondering why I asked if she was over 14, that's why,
15 okay?

16 So critical element on Count I, without the victim's
17 consent, okay? Then I come back to (inaudible). The defendant
18 says, "She initiated this with me," and while he claims that he
19 didn't put his finger in her vagina --" on Count I, okay --
20 that's really (inaudible).

21 On Count II, the specific act, while they were driving
22 he takes his hand -- he's rubbing on her. He sticks his hand
23 under her shirt and touches both of her breasts. He even
24 touches the nipples, according to her testimony, okay? So
25 on element two that's satisfied by "touched the breast of a

1 female."

2 On Count III, this is where they're also at the parking
3 lot. He has his penis out. He grabs her hand, sticks her hand
4 on his penis, he has his hand around her hand and he's going up
5 and down and he ejaculates on her, okay? Under element No. 2,
6 that's -- the last part of that sentence, "he caused another to
7 take indecent liberties with the actor or another." There's an
8 additional instruction that tells you how to determine what an
9 indecent liberty is. Please don't spend time on that, right?
10 That's an indecent liberty, if there ever was one.

11 So what happened? What happened? On May 29th of 2011
12 Melissa Sorenson went to work that evening at a restaurant.
13 She had a whole shift that day, she was tired. On her way
14 home she stopped at a gas station and saw her friend Bill,
15 and with Bill was the defendant Paul Waldoch. They had a
16 brief conversation where Bill invited Melissa to his house
17 for some drinks.

18 Melissa is -- she has some kids that live with her
19 and they weren't with her at that time. They were spending
20 some time with their dad. So she had a free weekend. So she
21 decided to go to Bill's house. She first went home to freshen
22 up, and then went to her friend Bill's house -- Bill's mom's
23 house, just to the north end of Kanab.

24 She had some drinks enough that she didn't feel
25 comfortable driving home. She tried to get a ride home, but

1 Bill's mother was asleep, and so she waited it out. She drank
2 some water, and then at 7 a.m. she felt comfortable enough
3 to drive home. The defendant Paul Waldoch was there and he
4 couldn't drive home because he was -- he still had too much
5 alcohol in his system, so he asked for a ride home. He gets
6 in the car with Melissa, and they come out -- (inaudible)?

7 MR. HANNA: Yes. Judge ordered me, sorry.

8 THE COURT: Sorry, Mr. Hanna, you close your eyes and
9 I know you may or may not be, but it looks like you're fighting
10 to doze off, so --

11 MR. VANDYKE: I'm trying to be interesting here.

12 MR. HANNA: No, no, no, no.

13 MR. VANDYKE: Okay, so they get out on the road and
14 he says, "Take a left," on Highway 89. What's that direction?
15 Nothing. Ask yourself why he asked -- why he told her to go
16 that direction. She's not a dummy. She's heard before that
17 he lives on the other side of town. So she turns right, and
18 essentially right at that point he starts to assault her. He's
19 rubbing her and he's touching her and he says -- what does he
20 say? He says, "I've been waiting for this since the first time
21 I saw you."

22 She's driving. She drives. She's all over the road.
23 She keeps saying, "No, don't touch me." They keep drive -- she
24 stops a couple times. Where does she remember stopping? The
25 one place she remembers stopping was at Houston's Trail's End,

1 a restaurant down here in town. Now, why does Houston's -- why
2 did she remember stopping there? She's -- she's a waitress,
3 right? She's at restaurants all the time, so she remembers
4 stopping in front of a restaurant, okay?

5 They keep driving. He keeps, you know, putting his
6 hand down her shirt, putting his hand down her pants. Eventu-
7 ally they pull into this parking lot here at the Zion's Call
8 Center, okay? What's past that? Not much. Okay. So if
9 you're wondering why do they stop there? There at the other
10 side of Kanab and maybe subconsciously she knows "I can't drive
11 past that point. There's nothing out there." This whole time
12 she's looking at other people, looking at cars. Those are the
13 two thoughts that are going through her head, okay?

14 Eventually she gets to a point where she stops, and
15 that's where Mr. Waldoch puts his hand inside of her vagina,
16 and he pulls out his penis, grabs her hand, sticks her hand
17 on his penis, and eventually ejaculates. He still won't get
18 out of her car, but he kind of indicates where to go towards
19 his house. She drives a little bit further and drops him off.

20 Now, were there -- do you think there were no people
21 out there that morning and no cars out at all? Now, she drove
22 past quite a lot of businesses, right, at 7 a.m. That's not
23 too early, okay? Now, the defendant also says, "Yeah, there
24 were no people," but he says there were cars. I'm sure there
25 were cars. I'm sure there were lots of cars, okay?

1 But what happens when people are in shock? Are you
2 thinking clearly? When a situation like that happens, you're
3 not prepared for it, are you thinking clearly? Probably not,
4 okay? There's two thoughts in her mind which is keep driving,
5 look for cars and people; but as she's fighting to keep him
6 off her, do you think she's going to see a car, she's able to
7 distinguish cars or distinguish people? It's probably extremely
8 difficult for her, okay? So, yeah, that's probably one point
9 where she's wrong. There probably were some cars out there,
10 here and there, but don't hold that against her, because she
11 was in shock, okay?

12 Let me -- let me talk a little bit about that. Police
13 officers are a group of people that do a lot of training so
14 they can act correctly when they're in stressful situations
15 when things are happening that are unexpected, okay? So like a
16 police officer will go out to the shooting range and he doesn't
17 just get his weapon and start shooting and try to be accurate,
18 right? They train for conditions where they're going to be
19 shot at, okay? So, you know, they'll -- they'll be shooting
20 and then take two steps, and shoot, and take two steps, right?
21 Because they're training their body to do that.

22 Why is that important? Because if somebody's shooting
23 at you, you don't want to be a standing target, right? So
24 you've got to move around. So they train that way, but in that
25 situation, that's what they do, that they automatically react.

1 If you played sports, you practice over and over again, you
2 know, like basketball, they practice free throws, you know,
3 that same motion, that same motion over and over again, so when
4 you're in a game and it's a stressful situation, you don't have
5 to think about it. Your body already knows, and so already
6 knows what to do.

7 There's a really interesting story about training,
8 it's also about police officers. About 50 years ago there
9 was a string of bank robberies across the country. The FBI
10 was involved, and on a couple of situations they -- they got
11 the robbers right at the bank, and there was a shootout.

12 After everything calmed down, there were some FBI
13 agents that were shot and killed, and they found them laying
14 on the ground with the copper bullet casings in their hand.
15 Everyone thought this was so strange at the time. After they
16 were shot did they fall on the ground and start picking them
17 up? I mean, what's going on?

18 Well, they went back and they looked at how these
19 officers trained. When you shoot a gun, you know, the bullet
20 casing comes out. It just flies out, and it pretty much just
21 falls on the ground. Then afterwards, if you're responsible,
22 you have to go and pick it up. That's really annoying, right?
23 Because you're done with your training and then you have to go
24 out, and there could be hundreds of bullet casings that you've
25 got to go pick up.

1 So these off -- these FBI agents had got in the habit
2 of after they shot, they could catch the bullet casings in
3 their hand, and they had trained that way. So when they got to
4 the bank robbery and that instinct kicked in, in that stressful
5 situation, they caught the bullet casings. While they were --
6 somebody was shooting at them, they still caught the bullet
7 casings; and when they were shot and killed, the bullet casings
8 were still in their hands.

9 Do you think Melissa Sorenson was trained to know what
10 to have to do when (inaudible), or do you think that her body
11 was in shock? Her mind was stressed, and she probably did some
12 weird things. You might think that why didn't she just park
13 that car and get out and run and yell and scream? Yeah, why
14 didn't she do that? I don't know.

15 She was really stressed out. There's also a really
16 big guy in her car. He probably would have caught her anyway.
17 Why -- why didn't she stop the first time instead of continuing
18 to drive? We don't know why. We do know that she was stressed
19 out and she was shocked by being sexually assaulted.

20 I'm asking you to go in that room and really think
21 about the evidence, who to believe here today. At the end of
22 your deliberations I'm asking you to find the defendant Paul
23 Waldoch guilty of Count I, object rape; Count II, forcible
24 sexual abuse; and Count III, forcible sexual abuse. Thank you.

25 THE COURT: Mr. Leigh.

1 MR. LEIGH: Thank you, your Honor. Your Honor, Mr. Van
2 Dyke, ladies and gentlemen of the jury, thank you for your time
3 (inaudible). Perhaps (inaudible) situation is that (inaudible)
4 sit there for eight hours each day and going through all this
5 and listening to all this evidence, we are grateful for you
6 serving on this jury this day.

7 As you look at this case I want you to remember some
8 things. First is there's some -- there's various burdens that
9 the State -- well, that there are in the legal field. The
10 first one is reasonable suspicion. It's way down here. It's
11 when police officers just kind of suspect something's going
12 on, and the police just kind of believes that.

13 Then a little bit higher is the probable cause
14 standard. It's possible something has happened and probably
15 is happening. That's still a criminal standard. It's just a
16 little bit higher up here. Then you've got a little bit higher
17 that's required and that's in most civil actions and it's kind
18 of a balancing thing, you know, which one weighs -- which one
19 weighs the most. Then you've got a little bit higher here in
20 civil cases and certain types of civil cases, and that's clear
21 and convincing evidence. It's (inaudible) a lot of emphasis on
22 one side that outweighs the other.

23 Criminal cases the evidence has to be clear up here.
24 Has to be beyond a reasonable doubt. It has to be crystal
25 clear. It has to be crystal clear. Really what this amounts

1 to is we want to protect the innocent from an injustice, and
2 prevent a miscarriage of justice. That's why it's such a
3 (inaudible).

4 Mr. VanDyke mentioned (inaudible) not to spend a lot
5 of time I think on the definitions, but you need to spend some
6 time on this case, including the definitions. The more time
7 you spend, the more you realize that there is reasonable doubt
8 in this case. You really need to look at the big picture, the
9 big picture here.

10 Let's go through some things. Let's go through this
11 driving route that we have here. It started at the Victorian
12 Inn over here, proceeded on Highway 89. Ms. Sorenson was
13 driving the vehicle. She started driving across from Victorian
14 (inaudible). She turned right onto 89. She stated once you
15 turn on 89, that's what started to take place. Very early on.
16 This is not way down 89, but this is right when she turned onto
17 there.

18 She claimed that she was looking for any person to
19 find that she could contact, but she couldn't see anyone. Now,
20 Mr. VanDyke, he ultimately says, "Well, we've got -- there's
21 probably people out there," but she said -- he said, "Well, she
22 probably wasn't focused." He went into police officers and how
23 they're focused (inaudible). She says, "If I found a public
24 place where I could see people," that he would be scared. She
25 said, "I was frantically trying to find a person to help." She

1 was looking for a way out, in her own words there.

2 She stated that she stopped several times along the
3 way, three times. That's what she put on the -- sat on the
4 witness stand and reported several times. She said she stopped
5 in front of Houston's. This was the morning of the 31st, some-
6 time 7 o'clock -- between 7 and 7:30. Houston's is open at
7 7 o'clock in the morning.

8 There's no evidence that he was grabbing her, holding
9 her, preventing her from leaving that car. In fact, she stated
10 that she could have left, she could have ran away, she could
11 have ran to those places, but she didn't do that. She chose
12 not to do that. She could have left harm's way. She could
13 have gotten out of that situation. You need to look at that.
14 Why didn't she get out of this situation? She was trying to
15 find someplace to do that. Well, because she really wasn't.
16 This was a consensual situation we had, and not a rape.

17 She had numerous opportunities to pull into places
18 where -- and I went through those with her. Keep in mind
19 that this was between 7 and 7:30 on May 30th. This was the
20 tourist season. This was (inaudible). She passed several of
21 these places and claimed she didn't see anyone at any of these
22 places. Day's Inn, (Inaudible), Four Seasons Motel, Sinclair
23 Service station, Treasure Trail Motel, Best Western Motel,
24 Aikin's Lodge, Shell Gas Station, Perry Lodge. Of real
25 significance is she passed the police station, the police

1 station. Where would we go for safety?

2 Now, she would -- she had -- she claimed (inaudible)
3 she had such an awareness that she said, "Oh, I didn't see nay
4 cars over there. So I wasn't going to go there." (Inaudible0
5 police station, you go there. If you pull into a police station
6 is someone going to stick around and assault -- would they
7 stick around after you pull into a police station? Of course
8 not.

9 She went by Samco, right on the corner there. She
10 could have easily pulled into Samco, open 24 hours a day. She
11 could have pulled right there, she could have run in there and
12 got out of harm's way. She could have been -- she could have
13 pulled into Glazier's Market, Honey's Market, went in there and
14 got away. Did she do that? No.

15 She could have pulled into any of these businesses and
16 attacked her attacker. She could have bit him, she could have
17 hit him, scratched him, any way to get out of harm's way. She
18 didn't do that. All of these things she forgot to do. That's
19 because this is a consensual (inaudible).

20 (Inaudible) no DNA of my client found on the victim's
21 neck. It was her DNA, Melissa's DNA, but no DNA from my client.
22 There was apparently unknown contributor on the neck as well.
23 Also, the DNA expert testified that in seminal swab that was
24 found on the sweater, there was also an unknown DNA and it was
25 likely that the two matched up.

1 Where did they come from? Melissa, she didn't know
2 how it got on there; but from the time of this alleged incident
3 until she went into the emergency room she didn't shower or
4 bathe. If my client were to (inaudible), she would have --
5 or there would have been DNA (inaudible). She claimed he was
6 sucking hard on her neck. The purpose of the swab itself, when
7 they took the swab, was to -- the nurse mentioned it. She took
8 the swab right where Melissa claimed he was sucking on the
9 neck, and that was the purpose of that.

10 There was the vaginal swab. No male DNA was detected
11 on the vaginal swab. She claims that my client had his finger
12 in her vagina rubbing vigorously. She claimed that he was
13 rubbing vigorously when they were stopped. However, she had
14 contradicting testimony about en route to when they stopped,
15 as I recall it. She initially testified yeah, he was rubbing
16 vigorously as they were moving, but then she contradicted that
17 and says, "Oh, no, he was just trying to insert his finger in
18 my vagina, but there was no rubbing. The rubbing hadn't
19 started to take place. Inconsistent testimonies.

20 My client doesn't deny that he ejaculated, but he
21 claims what happened was consensual sex. That was his testi-
22 mony. These facts bear it out. If you look at what happened
23 from the time that party until the time they got to Zion's
24 Call Center, the facts bear out this was consensual activity.
25 Clearly if she wanted to get out of this situation, she could

1 have at any time. There was no injuries or abrasions found on
2 the neck, and no bruises or abrasions found in her pubic area,
3 just on her labia, but she claimed he was vigorously inserting
4 himself down the front of her pants. Hard to (inaudible).

5 The SANE nurse in the reports and the testimony,
6 there was never any complaint to them about anymore bruises
7 or lacerations. The expert testified that these bruises and
8 lacerations were not (inaudible).

9 One (inaudible) is that Ms. Sorenson refused medication
10 (inaudible) to deal with venereal diseases and those type of
11 diseases. She was kissing -- he was kissing her, (inaudible)
12 sticking his tongue in her mouth in and out, in and out several
13 times. He had his finger in her vagina (inaudible).

14 If she claimed that she was beaten by him why did she
15 decline medications? She didn't know what type of disease he
16 may have had. If you're being violated or been violated you
17 would want medications. You may even beg for medications,
18 something to take so you wouldn't get some type of disease,
19 AIDS or whatever it may be.

20 She admitted on the witness stand that (inaudible)
21 there was no penetration. It's in her own words. In the
22 emergency room PA's report -- and this was what was reported
23 from her, and this was word-for-word from his report -- "She
24 believes that the assailant would have been more forceful and
25 penetration would have occurred if the patient was not on her

1 period at that time."

2 Now, the PA got on the witness stand and he tried to
3 say, "Oh, that was her - or that was his penis that he was
4 talking about." No, there was never anything mentioned of
5 penis. It was digital penetration. She believed the assailant
6 would have been more forceful and that penetration would have
7 occurred if the patient was not on her period at that time.
8 Now, those were her words. Never anything about penis. It
9 was always digital penetration.

10 She also stated in her words, that is written in the
11 report from the PA, that she hesitated in coming and reporting
12 the incident because there was no actual penetration. That she
13 was convinced by her friends that it was an assault that should
14 have been reported.

15 Another significant thing is when she was talking to
16 the SANE nurse, the SANE nurse asked her to give a narrative
17 about what had happened. No mention of penetration was made
18 at that point. Only when the SANE nurse started asking her
19 specific things did she mention, "Oh, yeah, penetration."

20 I can relate that to the way that questioning are
21 done with children. With children, they don't have leading
22 questions, "Well, what about this? What about this? What
23 about this?" No, when they question children, they don't
24 lead them. They just ask, "Tell me what happened about that,"
25 or something to that effect. "Tell me what happened about

1 that." They don't get into the specifics, "Well, did this
2 happen? Did this happen? Did this happen? Did this happen?

3 That's the situation we have here with the SANE nurse
4 when she was asked what happened. Did she mention penetration?
5 No. The nurse mentioned from that witness stand there was no
6 mention of that penetration (inaudible).

7 Now to that labia injury. The expert testified that
8 the age of the abrasion was (inaudible) two days old. So is it
9 possible it could have been (inaudible)? Likely not two days
10 ago. She said, "These type of injuries heal fast." Appears to
11 -- then she stated, "This appears to be a fresh injury." She
12 also gave other scenarios (inaudible).

13 When she reported things to the medical people she
14 said that she -- in the reports, the police reports, say she
15 took him home after the (inaudible). She took him home, which
16 (inaudible). Doesn't make sense. Doesn't make sense. All of
17 these acts occurred when she's driving him home. Again, she
18 could have gotten out (inaudible).

19 Mr. Waldoch's testimony was pretty consistent. It's
20 more consistent that Ms. Sorenson's. These were consensual
21 acts (inaudible). She did nothing to get out of harm's way.
22 She even took my client home, according to (inaudible). After
23 she claims she was violated, her story (inaudible).

24 What this case amounts to is a miscarriage of justice
25 against Paul Waldoch. Fortunately our Founding Fathers provided

1 citizens for the jury system. Reasonable doubt has been shown
2 these two days that adds up to a not guilty verdict, because
3 the State hasn't proven its case. Thank you.

4 THE COURT: Mr. VanDyke.

5 MR. VANDYKE: Thank you, your Honor. You know, in
6 the 1950's one of the elements of rape wasn't just that it was
7 without consent of the victim, but the victim had to show that
8 she had resisted by force. Okay, now what does that mean?
9 That means if some guy walked up to a girl and said, "Hey,
10 let's have sex," and the girl says, "No," and he made her do
11 it anyway, that it wouldn't be a crime if she didn't try to
12 resist him, okay?

13 Let's not go back to that, okay? "No" means no; we've
14 all heard that, right? If Mr. Leigh wants to -- I think he
15 wants you to believe that because she didn't bite and scratch
16 and yell and scream and do all sorts of other things, that it's
17 not believable. Well, let me tell you, every rape victim, every
18 sexual assault victim is different in how they respond. Don't
19 blame her for what happened to her.

20 Now, Mr. Leigh says his client doesn't deny that he
21 ejaculated. Well, of course he doesn't deny that. How could
22 he deny that when you've got this DNA expert that says, "Yeah,
23 his sperm is on her. There's one in 700 quintillion people
24 that it could have been." Yeah, it was him. Of course he's
25 not going to deny that. His story lines up with everything

1 that could -- that he couldn't possibly deny; but all that
2 stuff that he couldn't deny, he would have probably if he
3 could have denied that, but the DNA evidence was conclusive
4 so his story had to match. Of course he doesn't deny that.

5 Now, the unknown sample of DNA that's skin DNA from
6 the stain on the sweater may have come from skin, and that --
7 it's from the neck swabbing that could be saliva and could be
8 skin. The DNA expert says, "Yeah, I can't tell you if that's
9 the same person, but it could be the same person."

10 What's the most reasonable explanation for that? It
11 was probably one of her kids. She has a sweater that she wears
12 and she's at home with her kids and they brush up against her.
13 Yeah, their skin's going to be all over her sweater, okay? If
14 she's a good mom and she loves her kids, their DNA is going to
15 be all over (inaudible), okay?

16 We don't -- on her neck we don't know if that was
17 saliva or skin that came from the unknown person, okay? It
18 could have been her saliva. She laid in bed for two days.
19 She cried a lot. Maybe she had snot running down her face
20 because she was crying. Probably her own saliva. The skin
21 probably came from her own face. We don't know. So let's not
22 try and say that there is some other random person out there
23 that committed this assault. It was the defendant right here.

24 Mr. Leigh wants to try and point out differences
25 in stories, discrepancies here and there. Let me tell you

1 about something that happened to me. When I was a freshman in
2 college, I went to the College of Eastern Utah, and my family
3 lived in Orem, and I'd often go home on the weekends to see
4 them.

5 One time I had to get back to college and my car
6 wasn't working, so I borrowed my brother's car, and I had
7 another friend with me, and you know, we were driving way too
8 late at night, and we were driving through a really dangerous
9 canyon. We came out around a corner and then there was a
10 straight-of-way, a long straight-of-way. It was at the wrong
11 time of year, and there was a semi coming the other direction,
12 and my friend looks out and says, "There's people in the road.
13 I think there's people walking across the road."

14 I was driving way too fast. We get closer and it's
15 hard to see because of the semi coming the other way. It kind
16 of blinded me from what was in the road, and I passed the semi
17 and wham, a huge elk, right, the biggest elk I'd ever seen in
18 my life, and it comes and hits the front windshield and flips
19 over and I slammed on my brakes and the elk lands on top of my
20 hood. At first it's just knocked out. I'm sitting there, I'm
21 in total shock, and I'm quiet for a minute, then I just scream.

22 Then after a few minutes this elk comes to, and it
23 gets off of my car and it starts to stand but its back is
24 broken and it can't -- it can't walk too well. Eventually
25 another semi comes by and hits its head and kills it. I'm

1 still just sitting in the car just shocked. My friend gets
2 out and pulls the deer off the road and then we wait for
3 somebody to pick us up and take us home, right?

4 Now, when we got to Price, to the college, I had to
5 talk to a police officer and make a police report. Do you
6 think I told him that same story that I just told you? To
7 the police officer it was just facts, okay? I was driving.
8 Probably didn't tell him I was speeding. You know, I told
9 him just the facts.

10 Then after I met with the police officer I got back
11 to my dorm, and you know, it was freshman dorms, so you know,
12 it was like 2 or 3 in the morning, there was still tons of kids
13 out there. They could tell that I was still upset. They asked
14 me what happened. So I went and told them the story.

15 Partway into the story they started to laugh because
16 of how I was telling it. It just seem -- you know, at that
17 point it seemed like, oh, this funny thing, and my friend just
18 getting out of the car and pulling the deer off the road. Do
19 you think I told the story exactly the same as I did just now,
20 or the same way I told it to the police officer?

21 Does that mean it didn't happen? Does that mean I'm
22 lying to you right now, or did I actually hit that deer? Did I
23 actually total my brother's car? When I told him the story do
24 you think I told him a little bit different? Does that mean it
25 didn't happen? Does that mean that Melissa Sorenson wasn't

1 sexually assaulted?

2 Let's talk a little bit about the standard of proof
3 beyond a reasonable doubt, okay? Let's talk about it. Let me
4 talk about that standard. I live with that standard every day.
5 As a prosecutor if I can't prove beyond a reasonable doubt that
6 a crime occurred, it doesn't matter. It's not something I
7 should pursue. I have -- I have to meet that standard, okay?

8 A lot of defense attorneys like Mr. Leigh want you
9 to think that that's kind of an impossible standard for me to
10 reach, okay? So let me -- let me kind of explain how I view
11 that standard. I was a kid growing up -- and if you're getting
12 a little tired this is my last story, so just hang in there --
13 we often had big family parties at New Year's, and I had one
14 uncle who always did a jigsaw puzzle.

15 I didn't really care for doing them. I was too little
16 to (inaudible) these little teeny tiny pieces, 5,000, trying to
17 make a (inaudible), but it was always interesting, you know,
18 to come and see him start and putting the edges of the puzzle
19 together and start to form a picture. Then I would go, you
20 know, play with some cousins, do some -- watch a movie, do
21 something else, come back a little bit later, (inaudible) more
22 pieces of the puzzle would start to form, okay, what's this
23 picture.

24 I would leave, come back, there's more puzzle pieces.
25 Then at some point he's not finished, there's not every single

1 puzzle piece in there, but you can tell what the puzzle is,
2 right? You can tell that this is, you know, a sunset off the
3 coast of California; you can tell (inaudible), right, without
4 ever seeing a puzzle piece in there. You can tell that it was,
5 you know, a cat playing with a ball (inaudible). Do you need
6 every single puzzle piece to know beyond a reasonable doubt
7 what that puzzle -- what that picture is? Absolutely not.
8 No, you (inaudible), right?

9 Now, in this case there's lots of puzzle pieces.
10 There's DNA evidence, there's -- you know, from her sweater,
11 the actual sweater you can see where the DNA sample's cut off
12 of the sweater. Is that conclusive in and of itself that this
13 crime occurred? No, but that's a puzzle piece. We've got
14 his hat that was left in her car. Is that super important?
15 Probably not super important, but it's a little puzzle piece,
16 okay?

17 All of these little pieces of evidence, what you've
18 heard today, are all little puzzle pieces, all of the pictures
19 for documentation from the SANE example. That she told her
20 story to several different people and was consistent in the
21 fact that she was sexually assaulted. Those are -- that's
22 a lot of puzzle pieces.

23 When you put those puzzle pieces together -- hopefully
24 I've helped you enough to put those puzzle pieces together,
25 but when you do, you're not going to have every single puzzle

1 piece because you weren't there. You don't know what happened
2 because you weren't there; but you have enough puzzle pieces
3 today to find the defendant guilty of object rape and two
4 counts of forcible sexual abuse. That's what I ask you to do
5 today. Thank you.

6 THE COURT: All right, ladies and gentlemen, we will
7 now excuse Mr. Franklin and Ms. Rasmussen. Can I ask the
8 bailiff to -- do you need to talk to him?

9 MR. LEIGH: Just making sure I did something on the
10 (inaudible).

11 THE COURT: We're going to have the bailiff gather up
12 the exhibits and he'll bring to you in the jury room. I'm
13 going to put the bailiff under oath to take -- keep track of
14 you. I'll ask the clerk to do that now.

15 COURT CLERK: Do you solemnly swear that you will take
16 this jury to some convenient and private place to deliberate,
17 allowing no one to speak to them, nor to do so yourself unless
18 ordered, and to return them into Court when they have reached a
19 verdict or when ordered (inaudible)?

20 COURT CLERK: I do.

21 THE COURT: All right, I do release you from the order
22 not to talk and instruct you to start talking to each other.
23 All right, Mr. Bailiff, will you take them.

24 MR. VANDYKE: Your Honor, there is a -- the DVD video
25 is already in there.