

2015

State of Utah v Arthur Jacob Rackham :Brief of Appellant

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee,

v.

ARTHUR JACOB RACKHAM,
Defendant and Appellant.

BRIEF OF APPELLANT

On appeal from the Second Judicial District Court, Weber County,
Honorable Noel S. Hyde, District Court No. 111902819

Mr. Rackham is not incarcerated.

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UTAH APPELLATE COURTS

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Statement of Jurisdiction

The district court entered judgment against Defendant Arthur Jacob Rackham ("A.J.") for sexual battery, a class A misdemeanor. (Addendum A.) A.J. filed a timely notice of appeal. (R.432-33.) This court has jurisdiction pursuant to Utah Code section 78A-4-103(2)(e).

Statement of the Issues

The State charged A.J. with sexual battery for brushing his sixteen-year-old niece's clothed breast while she was vacuuming her mother's car. The statute required the State to prove intent and knowledge. A.J. denied the touching. At trial, the State presented evidence that years ago, when A.J. was a juvenile, he inappropriately touched his cousins under their clothing; it also presented evidence of gut feelings, inadmissible hearsay, and a misdemeanor conviction. The issues on appeal address the inadmissibility of the evidence as follows.

Issue 1: Whether the district court erred under Utah Rules of Evidence 404(b) and 403 in allowing the State to prove the formal element of "knowledge" with evidence of other acts, even though knowledge was not a controverted element at trial.

Preservation: A.J. preserved the issue at R.218; 258; 438:14-15,19-20.

Standard of review: "A trial court's admission of prior bad acts evidence is reviewed for abuse of discretion, but the evidence must be scrupulously examined by trial judges in the proper exercise of that discretion." *State v. Verde*,

2012 UT 60, ¶13, 296 P.3d 673 (quotations omitted); *id.* ¶19 ("A district court's decision to admit evidence under rule 404(b) is entitled to some deference. But such a decision can withstand ... review only if the evidence falls within the bounds marked by the legal standards").

Issue 2: Whether counsel provided ineffective assistance for failing to object under Utah Rules of Evidence 401-403, and 609, to the State's evidence designed to appeal to jurors' emotions and to the State's cross-examination of A.J. on collateral details attendant to a prior misdemeanor conviction, which details the prosecution then referenced improperly in closing argument. Also, whether counsel was ineffective for failing to ask the district court to strike inadmissible hearsay evidence.

Preservation: The second issue was not preserved and is raised under the ineffective-assistance-of-counsel doctrine. *State v. Larrabee*, 2013 UT 70, ¶18, 321 P.3d 1136.

Standard of Review: Claims for ineffective assistance of counsel present questions of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

Determinative Provisions

The following provisions are relevant to the issues on appeal and attached at Addendum B: U.S. Const. amend. VI; Utah Rules of Evidence 401-404, and 609; Utah Code § 76-9-702(3) (2011).

Statement of the Case

1. Nature of the Case and Course of the Proceedings

On Friday, July 23, 2010, sixteen-year-old Kylee was at home in Roy where she lived with her parents, Kimberlee and Casey. (R.436:3-4; 442:117-18.) Three of Kylee's uncles – A.J., David, and Colby¹ – were planning to drive with a friend to Lava Hot Springs for the weekend. (R.436:5; 442:118-19.) Kylee wanted to go with them, but her mother told her she could not go. (R.436:5; 442:119,136.) To try to change her mother's mind, Kylee vacuumed her mother's car, which was in the garage. (R.436:5; 442:119,136-37.)

Kylee testified that while she was "bent over vacuuming," twenty-four-year-old A.J. entered the garage, came up behind her, put his hands on her stomach, and made a "w-e-e-e" sound in her ear. (R.442:119.) Kylee pushed him away, but A.J. laughed and "came back again," put his hand under her shirt, and brushed her breast over her bra. (R.442:119,127.) Kylee again pushed him away, told him to never touch her again, and went inside to report the incident to her parents. (R.436:6; 442:119-20,137-39.) A.J. acknowledged that he spoke with Kylee while she was vacuuming but denied that he touched her. (R.443:90-91.)

Months later, the State charged A.J. with sexual battery, a class A misdemeanor, based on Kylee's accusation. (R.1-2.) Under section 76-9-702(3), the

¹ A.J. and David are brothers; Kylee's mother, Kimberlee, is their half-sister. (R.436:3-4; 442:118,121). Colby and Casey are brothers. (R.436:5; 442:152.)

State was required to prove both intent and knowledge. (Add. B.)

During pretrial proceedings, the State filed a motion in limine to admit evidence of other acts under Utah Rule of Evidence 404(b). (R.73-98,180-213.) The State argued that the evidence should be admitted to show A.J.'s knowledge that touching Kylee would cause affront or alarm, to show intent and lack of accident or mistake, and to demonstrate that under the doctrine of chances Kylee was not fabricating her story. (R.80-92,192-207.) The district court heard testimony that A.J. had engaged in other acts with Kylee and her sister, Taylee, and with A.J.'s cousins, Kalin, Angela, and Meagan. (R.436.) It then ruled that the evidence was admissible to support A.J.'s knowledge that his conduct would likely cause "affront or alarm to Kylee"; and it was admissible under rule 402 and the *Shickles* factors² because the "evidence would not be unfairly prejudicial." (R.258-62.)³

In June 2014, the court held a two-day jury trial. The State presented one witness to testify to the alleged act at issue: Kylee. She stated that A.J. brushed her clothed breast. (R.442:119,127.) She also testified to other acts. (R.442:122-26.) After Kylee presented her testimony, the State called several witnesses to present evidence of other acts and "gut" feelings. (R.442;443.) The prosecution then cross-examined A.J. about collateral details attendant to his Davis County conviction,

² *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988), *abrogated on other grounds by State v. Doporto*, 935 P.2d 484 (Utah 1997).

³ The court later rejected the State's argument for admitting the other-acts evidence under the doctrine of chances. (R.443:11-14.) The State did not renew its request to present the evidence to support intent or lack of accident or mistake.

and the prosecution relied on those details to discredit A.J. in closing argument. (R.443:98,150-51.) At the conclusion of trial, the court provided an instruction for the other-acts evidence, and the jury found A.J. guilty as charged. (R.370,378 (a set of instructions is attached as Addendum C); 443:157.) The district court sentenced A.J. to serve a jail term with work release and it ordered three years' probation. (R.424-25.) A.J. timely appealed. (R.432-33.)

A.J. is challenging the admissibility of the other-acts evidence under rules 404(b) and 403; the admissibility of additional evidence under rules 401-403, and 609 and the prosecution's closing argument relating to that evidence; and counsel's failure to request that the district court instruct the jury to disregard inadmissible evidence. The other-acts evidence and the additional challenged evidence overwhelmed the testimony of the single act at issue, thereby confusing and misleading the jury and unfairly prejudicing A.J.

2. Statement of Facts

The State presented one witness to testify to the alleged sexual battery in this case: Kylee. She testified that in July 2010, when she was sixteen, her Uncle A.J. came into the garage and slid his arm around her waist and brushed her breast under her shirt and over her bra while she was vacuuming her mother's car. (R.442:119,127.) A.J. has denied the allegations. (R.85; 87; 443:47.) Kylee also testified that after A.J. brushed her breast, she went into the house and told her parents, Kimberlee and Casey, that A.J. "grabbed my boob." (R.442:138-39.)

In response, Casey had several conversations with family members about A.J. First, he held a “family council” with his daughters, Kylee and Taylee. (R.442:165.) He told them “the risk was there,” “they couldn’t be alone with A.J.” and to lock the doors and “don’t answer” if A.J. comes to the house. (*Id.*) Second, he spoke to A.J. and to Neil, A.J.’s father. (R.442:166-67.) Casey told Neil, “if you’re not going to deal with it, I’m at least going to let the family know this occurred so that they can keep an eye on their daughters.” (R.443:21.) And third, Casey had discussions with Neil’s brothers, Chad and Dale, and A.J.’s half-brother, Joel. (R.442:169,174-75.)⁴ He reported the conduct to them and talked about A.J.’s prior acts with A.J.’s cousins, Kalin, Meagan, and Angela. (*Id.*)

The State also presented other-acts evidence purportedly to support that A.J. knew that touching Kylee would cause affront or alarm to her. The State presented evidence that when A.J. was a juvenile he inappropriately touched his cousins, evidence that he touched Kylee’s stomach and buttocks on prior occasions, and evidence that he touched Taylee’s stomach. (R.442; 443.) In addition, the State presented evidence from Joel about his reactions to allegations against A.J., his concerns for his daughter based on “gut” feelings, and details of a Davis County charge and conviction. (*Id.*)

At the conclusion of trial, and notwithstanding the strict limitations that

⁴ Casey learned in 2008 — two years earlier — that A.J. had inappropriately touched Dale’s and Chad’s daughters. (R.436:143-44; 442:204-05; 443:21,47.)

the court placed on the State's use of the other-acts evidence, the State made several references to the evidence in closing argument. First, the prosecution listed details involving the other-acts evidence—including the evidence of Joel's gut feelings—and asked the jury to "[l]ook[] at this [evidence] as a whole," to ask whether there is "a distinction between cousins and nieces," and to find that A.J. had "problems" with both. (R.443:138-39.) Notably, the prosecution made that statement separate from any discussion about "knowledge," the *only* justification for the court's ruling to admit the other acts in evidence. (See R.443:141-42.)

Second, in direct contravention of the district court's order limiting the use of the evidence, the prosecution recounted the details involving the acts with Kalin and asked the jury to "discount [A.J.'s] credibility." (R.443:150-51.) Third, the prosecution referenced the misdemeanor conviction in Davis County to discount A.J.'s credibility and to complain that A.J. "got a sweet deal." (R.443:150-51.)

Fourth, the prosecution relied on testimony of A.J.'s conduct with Meagan and Angela, and asked the jury to consider that A.J. was never held accountable for those actions. The prosecution stated, "[y]ou have no evidence that he was ever charged with the Nevada case." (R.443:151.)

After deliberations, the jury returned a guilty verdict. (R.443:157.)

In what follows, A.J. summarizes the other-acts and additional evidence that he is challenging on appeal. In addition, he summarizes the evidence he presented in his defense to support that he did not touch Kylee.

2.1 The other-acts evidence and the additional evidence

The State presented evidence of other acts through several witnesses, including Kylee and Taylee (A.J.'s nieces); Kalin and Meagan (A.J.'s cousins); Kimberlee, Casey, Emilee, and Joel (A.J.'s siblings and brother-in-law); Dale and Chad (A.J.'s uncles); and an investigator, Craig Webb. (R.442; 443.) In addition, the State elicited evidence of collateral details attendant to a misdemeanor conviction (R.443:98), evidence of Joel's reactions to the allegations (R.442:180-83), and inadmissible hearsay (R.442:181).

2.1.1 Kylee testified that A.J. tickled her stomach and grabbed her buttocks

After the State presented evidence from Kylee that A.J. brushed her breast (R.442:119-20,127), the State introduced evidence of other purported acts. Kylee and her Aunt Emilee testified that two years earlier, when Kylee was fourteen, she was home on the couch watching television when A.J. walked in. (R.442:122.) A.J. started to lift her shirt and tickle her stomach. (*Id.*) Kylee told him to stop but he "didn't, he just laughed it off" until Emilee walked into the room.

(R.442:122,191.) Emilee asked about Kylee's parents, and, upon hearing they were not home, Emilee sensed Kylee's discomfort and decided to wait with her for their return. (R.442:191,194.) When Emilee left to get her children, A.J. stood over Kylee and lifted her shirt again and tickled her stomach. (R.442:122.) Emilee returned and remained until Kylee's parents came home. (R.442:122,191-92.)

Kylee also described an incident when she was cutting the grass at her

grandfather's home. She was fourteen and with a friend. They were performing handstands. (R.442:123.) According to Kylee, A.J. "kept pushing us over and tickling us and grabbing our butts and thinking that it was funny." (*Id.*) They told him to "knock it off" and he laughed. (*Id.*)

2.1.2 Taylee testified that A.J. touched her stomach

Shortly after Kylee reported to her parents that A.J. brushed her breast, Casey held "family council" and told both Kylee and her sister, Taylee, that "they couldn't be alone with A.J." (R.442:165.) A few days later, Taylee and several others went to a bicycle race in Ogden in which Casey was participating. (R.436:34-35; 442:140-41,196.) Taylee and Kylee were at the registration table with their mother and quite a few people. (R.442:140,196.) According to Taylee's mother, Kimberlee, A.J. was also present. (R.442:141.)

Taylee testified that A.J. approached her at the table, whispered her name, started to rub her stomach, and moved his hand toward, but did not touch, her pant line. (R.135; 436:35-36,40-41 (he touched her over her shirt); 442:197.) Taylee moved away but said nothing to A.J. (R.442:197.) Notably, Kimberlee did not report seeing contact between Taylee and A.J. although she was nearby. (R.442:140-41.) Taylee reported the incident to both parents. (R.442:141,197-98.) They testified at trial to the incident, as did others. (R.442:140-41,166-67.)

2.1.3 A.J.'s cousins testified that at least nine and seventeen years ago, A.J. touched them when he was a juvenile

The State presented evidence that A.J. inappropriately touched his cousins — Meagan, Angela, and Kalin — years earlier when he was a juvenile. Meagan testified that when she was eight years old in 2001, she traveled with her family to visit A.J.'s family in Nevada. (R.442:220-21.) While there, Meagan, Angela, and A.J. — who was fourteen — were watching a movie in Meagan and Angela's family van. (R.442:221; 443:27,86.) A.J. was in the backseat and offered to give each girl a back rub. (R.442:221.) Meagan testified that during the back rub, A.J. touched her chest and genitals under her clothing. (*Id.*)

Notably, Angela had no specific recollection of the events from several years ago. During a pretrial hearing, she stated that A.J. rubbed her back under her shirt, and that his hands "started to go" down her pants but she did not recall that he touched her anywhere. (R.436:75-76,82.) The State did not call Angela to testify at trial. Instead, Angela's father, Chad, testified that he spoke with Angela and asked if she had been inappropriately touched and she verified that she had. (R.443:18-19.) Chad also testified that he spoke to A.J. in 2001 and asked him to apologize to his daughters. (R.443:19-20.)

Kalin is also A.J.'s cousin. The State presented evidence that more than seventeen years ago (in 1997), when A.J. was approximately eleven and Kalin was seven, A.J. began touching Kalin's breasts and genitals over and under her clothes, and the touching continued for seven or eight years until about 2005

when A.J. turned eighteen or nineteen. (R.241; 436:128-29,134; 442:209-10.) The touching usually began with A.J. tickling or rubbing Kalin's back and whispering in her ear. (R.436:128-29; 442:210-11.) She testified that he "pushed the limits." (R.442:210.) The prosecution asked whether Kalin ever expressed discomfort or "anything to that effect," and she said, "Yes, a lot of the time I would tell him that I didn't like it." (R.442:211.) Kalin also testified that during a family sleepover, she "woke up to him with [her] pants off." (R.442:212.) She went into the bathroom where she locked the door and spent the night. (*Id.*)

A.J. later confessed to his LDS mission president that he had touched Kalin and he was sent home from his mission as a result. (R.442:211; 443:83-85.) Several individuals were aware of A.J.'s conduct with his cousins and made reference to the conduct in their testimony. (R.442:142-43 (Kimberlee); 442:166-69 (Casey); 442:182-85 (Joel); 442:198,200 (Taylee); 442:203-04 (Dale); 442:208-213 (Kalin); 442:223 (Meagan); 443:20,22 (Chad); 443:24-28 (Investigator Webb).)

2.1.4 The State presented evidence from A.J.'s brother, Joel, that he reacted to the allegations against A.J. and had "gut" feelings

A.J.'s half-brother, Joel, testified that he and his children, Brenson and Masey, had a good relationship with A.J. (R.442:180.) Joel also testified that before he learned of A.J.'s conduct with his cousins, Joel felt that A.J. should not tickle Masey or give her shoulder rides. (R.442:180-82.) He stated he had "[a] gut feel[ing] at that point." (R.442:183.)

Joel described “one particular incident where [A.J.] took [Masey] into play with the cat” and Joel “didn’t think anything of it but my wife jumped off the couch and said [‘]something’s weird, you need to go get Masey, I’m not comfortable with this[’] and after that moment my wife said [‘]no more alone time, he can’t be alone with Masey I don’t know what it is but my gut says we just need-[’].” (R.442:181.) At that point, defense counsel objected to the evidence as inadmissible hearsay. (*Id.*) The State agreed and the court sustained the objection. (*Id.*) But counsel failed to ask the court to strike the testimony or to admonish the jury to disregard it. (*Id.*)

Sometime later, Joel learned about the allegations against A.J. (R.442:182-84.) He expressed concern to the jury that Masey may have been “a victim,” although the State presented no evidence to support that suggestion. (*Id.*) And he asked Neil, “why didn’t [you] make us aware of the prior problems to help protect my daughter and my nieces[?]” (R.442:185.)

2.2 A.J. presented evidence to support that he did not touch Kylee; and he knew that touching a teenage girl would cause affront or alarm to her

Because the State relied on several witnesses to present evidence of other sexual acts, A.J. addressed that evidence in cross-examinations and in his defense. “Given the fact that the prosecution had already introduced a great deal of specific evidence [related to other acts, defendant] clearly was entitled, indeed required as a practical matter, to rebut or explain that evidence by his

testimony." *State v. Saunders*, 1999 UT 59, ¶22, 992 P.2d 951. A.J.'s evidence did not "open the door" to the State's other-acts evidence; rather, A.J. was entitled to address it. *Id.*; (R.443:96.)

A.J. admitted that he had inappropriately touched his cousins, Kalin, Meagan, and Angela; and he testified that at the bicycle race in July 2010, he pinched Taylee in the side. (R.443:82-86; 443:95.) Neil and David testified that Kylee and Taylee were playful. They liked to poke, tease, tickle, and goof off. (R.443:40-42,75,88.) A.J. testified that he knew that "tickling and poking your nieces that are in the age of maturing is definitely not appropriate." (R.443:96.) He acknowledged that, in the past, he and Kylee tickled each other: it was mutually acceptable. (R.443:88,107.) Also, he tickled Kylee one afternoon as she watched television and Emilee walked in. (R.443:93.)

With respect to Kylee's allegation that A.J. brushed her breast, A.J. consistently denied the allegation both before and during trial. (R.443:87,91-93,97; see 443:47,103-05,106-07.) A.J. testified that he went to Kimberlee and Casey's house on July 23, 2010, to help Casey's brother, Colby, with his motorhome. (R.443:89-90.)⁵ He saw Kylee vacuuming her mother's car in the garage and he

⁵ Colby confirmed A.J.'s testimony. He testified that he had asked A.J. to "come over and give me a hand in replacing my alternator." (R.442:156.) Colby then stated that A.J. arrived at the house "and *helped me out with it* and he didn't stay long at the motor home at all." (R.442:156 (emphasis added).) During A.J.'s cross-examination, the prosecution asked, "Now you were here and you heard the testimony of all of the State's witnesses including Colby's testimony, is that correct?" (R.443:97.) A.J. answered yes. The prosecution then asked, "He had testified that you didn't help him work on the motor home. So is it your

walked up to her to talk. (R.443:90-91.) He did not touch her. (R.443:91.) A.J. testified that he spoke to Casey later about Kylee's allegations, and he denied touching Kylee. (R.443:104.)

Neil and David both saw Kylee shortly after A.J. had talked to her in the garage on July 23, 2010, and she was still vacuuming the car "to get in her mom's good graces" for permission to go to Lava Hot Springs. (R.443:45-46; 443:72-74.) Two months later, Casey called authorities to press charges against A.J. for purportedly touching Kylee. (R.442:169-71; 443:69.)

Summary of Argument

In a case for simple sexual battery, the State called several witnesses to present other-acts evidence dating back nine to seventeen years. In addition, the State presented innuendo to suggest that A.J. molested others, when he did not. The other-acts evidence was distinguishable from and more shocking than the charged conduct. Also, the State presented it to support the uncontroverted element of knowledge. Under the circumstances, the evidence violated rule 404(b), it overwhelmed the case, and it was unfairly prejudicial. The district court committed reversible error in allowing the State to present evidence of other acts.

Next, defense counsel provided ineffective assistance when she failed to

testimony today that he was telling a lie?" (R.443:98.) The prosecution's question was both factually inaccurate and legally inappropriate. "[I]t is improper to ask a criminal defendant to comment on the veracity of another witness." *State v. Emmett*, 839 P.2d 781, 787 (Utah 1992). Such questioning is improper "because it is argumentative and seeks information beyond the witness's competence." *Id.*

object to inadmissible evidence of Joel's emotional reactions, failed to object to the prosecution's cross-examination of A.J. concerning details of a prior misdemeanor conviction and related closing argument, and failed to ask the court to strike inadmissible hearsay. The evidence of Joel's reactions violated rules 401-403; the evidence of details attendant to a prior conviction violated rule 609(a); and the inadmissible hearsay should have been stricken. Defense counsel's failure to object fell below an objective standard of reasonableness and resulted in prejudicial error, warranting reversal for a new trial.

Argument

1. The district court erred when it allowed the State to present evidence of other acts to support knowledge

The rule against improper use of character evidence works to ensure that a defendant is convicted only because he committed the charged offense, and not "because the jury is convinced of his proclivity to commit bad acts or of his cumulative bad behavior. *State v. Verde*, 2012 UT 60, ¶17, 296 P.3d 673; *Daines v. Vincent*, 2008 UT 51, ¶43, 190 P.3d 1269 (evidence is admissible under rule 404(b) if it is offered "for a legitimate purpose other than to show the defendant's propensity to commit the crime charged" (quotations omitted)); *State v. Holder*, 694 P.2d 583, 584 (Utah 1984) ("[E]vidence of the commission of other crimes must be used with extreme caution"). Evidence that a defendant engaged in bad acts is not admissible if the effect is "to besmirch, disgrace or prejudice the defendant in the eyes of the jury." *State v. Gibson*, 565 P.2d 783, 786 (Utah 1977); "

State v. Lopez, 451 P.2d 772, 775 (Utah 1969) (evidence is not admissible “to disgrace the defendant as a person of evil character”).

To be admissible under Utah Rule of Evidence 404(b), evidence of prior acts “must be relevant and offered for a genuine, noncharacter purpose; furthermore, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.” *State v. Lucero*, 2014 UT 15, ¶13, 328 P.3d 841. “Fidelity to the rule requires a threshold determination of whether proffered evidence of prior misconduct is aimed at proper or improper purposes.” *Verde*, 2012 UT 60, ¶17. Also, the district court must determine whether “the jury could reasonably find” that the factual condition for the evidence is fulfilled “by a preponderance of the evidence.” *Lucero*, 2014 UT 15, ¶19 (quotations omitted). Evidence that does not meet these requirements “must be excluded.” *State v. Decorso*, 1999 UT 57, ¶21, 993 P.2d 837.

The Utah Supreme Court has set forth a three-step process for assessing whether other-acts evidence is admissible. Under that process, the court must examine whether the evidence (1) supports a proper, noncharacter purpose, (2) is relevant under Utah Rule of Evidence 402, and (3) does not pose a “danger for unfair prejudice that substantially outweighs its probative value.” *State v. Killpack*, 2008 UT 49, ¶45, 191 P.3d 17 (quotations omitted).

As the proponent of the evidence, the prosecution is required to establish a proper noncharacter purpose for other-acts evidence and to “articulate how that

evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.” *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 191 (3d Cir. 2000). Once the prosecution establishes a proper noncharacter purpose for the evidence, the district court must engage in a scrupulous examination of the evidence to assess its admissibility for that purpose. *Verde*, 2012 UT 60, ¶13.

If the evidence may satisfy both a proper and an improper inference, the court must balance the two against each other under rule 403 and exclude the evidence “if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference” or if there may be “jury confusion about its real purpose.” *Id.* ¶18. The careful analysis is “essential to preserve the integrity of rule 404(b).” *Id.*

Here, the State sought to introduce other-acts evidence from several witnesses to establish that by touching Kylee, A.J. would cause affront or alarm to her; to show intent or lack of accident or mistake; and to demonstrate that, under the doctrine of chances, Kylee did not fabricate the touching. (See R.192-207.)⁶ A.J. opposed admissibility of the evidence at trial. He denied that he

⁶ The State also argued in the district court that the other-acts evidence was admissible to establish lack of consent. (R.196-97.) But lack of consent is not an element of sexual battery. Utah Code § 76-9-702(3) (2011). In addition, the prosecutor acknowledged that his argument for lack of consent “is one way the State can prove [A.J.’s] knowledge that his touching would cause affront or alarm to ... Kylee.” (R.197.) Thus, lack of consent is not an independent basis for admitting the other-acts evidence.

engaged in the conduct and opposed admissibility of the evidence because knowledge and intent were not controverted elements in the case (R.218-19; 438:14,19); because evidence of other acts was distinguishable from, and shared no striking similarities to, the charged conduct (R.218,221; 438:14-15); because the evidence supported collusion between family members (R.438:16); and because the evidence was irrelevant and its probative value was substantially outweighed by the danger of unfair prejudice (R.214-31).

The district court ruled the evidence was admissible to show knowledge. (R.258.) It did not address intent or lack of accident or mistake as a basis for the evidence,⁷ and it specifically rejected the State's argument that the evidence was admissible under the doctrine of chances to refute fabrication. (R.443:11-14.)

Thereafter, at trial, the State presented other-acts evidence from A.J.'s cousins (Kalin and Meagan), his nieces (Kylee and Taylee), his uncles (Dale and Chad), and his siblings and brother-in-law (Kimberlee, Casey, Emilee, and Joel). At the close of evidence, the district court provided an instruction, which advised the jury to consider the defendant's "intentional[]" acts with "other females" as proof of his "knowledge that this type of conduct was likely to cause affront or alarm to the person touched or attempted to be touched." (R.370.) In other

⁷ While the State raised intent and lack of accident or mistake as grounds for the evidence, the district court did not engage in a scrupulous examination under those theories, and the State did not urge the court to do so. *See Verde*, 2012 UT 60, ¶63 (reversing and remanding the verdict and directing the district court to consider the alternative theory).

words, the instruction directed the jury to consider A.J.'s knowledge about touching "other females." (*Id.*) It did not address A.J.'s knowledge that *touching Kylee would cause affront or alarm.* (*Id.*)⁸

In addressing the issue on appeal, A.J. proceeds as follows. First, the district court erred under rule 404(b) in admitting evidence of other acts to show knowledge because knowledge was not a controverted issue at trial and the other-acts evidence was distinguishable from the charged conduct. Second, the court erred under rule 402 in admitting the evidence at trial. Third, it erred under rule 403 in admitting the evidence. Fourth, A.J. was prejudiced by the error and asks this court to reverse the conviction.

1.1 Rule 404(b) did not support admissibility of the State's other-acts evidence because the issue of "knowledge" was not genuinely controverted

Rule 404(b) allows the admissibility of other acts evidence under specific circumstances. The rule states, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character." Utah R. Evid.

⁸ The instruction also advised the jury that the other-acts evidence was "not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crime charged in this case, and for that crime only. You may not convict a person simply because you believe he may have committed some other acts at another time." (R.370.) That part of the instruction does not cure any confusion in the first part of the instruction, which plainly advised the jury that A.J. engaged in "intentional[]" conduct with "other females" and the jurors should consider whether he knew that those females were affronted and alarmed. (*Id.*)

404(b)(1). Rather, such evidence may be admitted to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” *Id.* 404(b)(2). The list is not exclusive and the admissibility of such evidence “depends on its avowed purpose.” *Verde*, 2012 UT 60, ¶15.

Other-acts evidence is troublesome because it “often will yield dual inferences – and thus betray both a permissible purpose and an improper one.” *Id.* ¶16. For example, “evidence of a person’s past misconduct may plausibly be aimed at establishing motive or intent, but that same evidence may realistically be expected to convey a simultaneous inference that the person behaved improperly in the past and might be likely to do so again in the future.” *Id.* To distinguish between these competing inferences, courts must make a “‘threshold determination’ of the genuine underlying purpose for admission of the evidence.” *Lucero*, 2014 UT 15, ¶14 (quoting *Verde*, 2012 UT 60, ¶17). As the Utah Supreme Court has instructed, “the evidence must have real probative value, not just possible worth.” *Id.* (quotations omitted).

State v. Verde illustrates the inquiry for determining whether the district court has admitted other-acts evidence for a proper purpose. Verde was charged with sexually abusing twelve-year-old N.H. *Verde*, 2012 UT 60, ¶2. The State was required to prove intent as an element of the crime, and to do so, it sought to admit evidence that Verde had engaged in improper sexual conduct with others. *Id.* ¶6. The trial court ruled that the other-acts evidence was admissible to prove

intent, and this court agreed. *Id.* ¶¶3,11.

The Utah Supreme Court reversed and concluded that evidence of Verde's prior acts was not properly admissible to establish the formal element of intent "despite the fact that [Verde's] not-guilty plea technically put his intent at issue." *Id.* ¶24. The court found it "difficult to characterize the true purpose of the 404(b) evidence introduced at trial as permissibly aimed at establishing Verde's intent" because Verde did not contest that element at trial. *Id.* ¶25. Rather, he denied sexually abusing N.H. and contended that N.H. fabricated the assertion of abuse. *Id.* The court also pointed out that Verde even offered to stipulate to intent, and the intent element was inferable from proof of the *actus reus* "that Verde groped N.H.'s genitalia." *Id.* Based on the circumstances, the court stated, "it's hard to imagine a jury that would conclude that Verde committed the *actus reus* but with an innocent intent." *Id.*

The court ruled that, under the circumstances, the other-acts evidence was "largely tangential and duplicative" because the formal element of intent was "uncontested and readily inferable from other evidence." *Id.* ¶26. For this reason, the court could not "characterize its purpose as properly aimed at establishing intent. In context, it seems much more likely that it was aimed at sustaining an impermissible inference that Verde acted in conformity with the bad character suggested by his prior bad acts." *Id.* The court reversed Verde's felony conviction and remanded the case for a new trial. *Id.* ¶32.

As in *Verde*, the district court here likewise abused its discretion in admitting evidence of A.J.'s other acts for the purpose of establishing the formal element of knowledge. The district court abused its discretion for two independent reasons, and each reason rendered the evidence inadmissible. First, knowledge was not a controverted issue. Second, the other-acts evidence failed to establish knowledge as it related to acts with Kylee.

1.1.1 A.J. did not controvert the knowledge element

A.J. was charged with one count of sexual battery under Utah Code § 76-9-702(3). (R.1-2.) The statute required the State to prove that A.J. engaged in conduct that he knew or should have known would "likely cause affront or alarm" to Kylee. Utah Code § 76-9-702(3) (2011). The district court ruled that the other-acts evidence should be admitted for the purpose of establishing knowledge because "[t]he 404(b) evidence would show that [A.J.] knew how younger female relatives reacted to his similar conduct, having alarmed and affronted them." (R.258.) It also ruled that "just because a Defendant may claim that the conduct did not occur does not eliminate the State's burden of proving the material element of Defendant's knowledge." (R.258.) But in this regard, the district court misunderstood the supreme court's holding in *Verde*. While the State still had the burden to prove the knowledge element, the other-acts evidence had no particular relevance to the formal element to justify its admissibility, particularly because A.J. did not controvert the element.

Before other-acts evidence may be admissible to support knowledge that an action would cause affront or alarm, the defendant's mental state must be a genuinely controverted issue in the case. See *Verde*, 2012 UT 60, ¶¶22-26; *Riley v. United States*, 790 A.2d 538, 539-40 (D.C. Cir. 2002) ("The defendant's intent must be genuinely in issue, not merely in the sense that it is an element of the offense, but in the sense that it is genuinely controverted." (quotations omitted)).

A.J. did not controvert the element of knowledge at trial. That is, he did not contest that he knew or should have known that touching his teenage niece's clothed breast under her shirt would cause affront or alarm. Rather, A.J. maintained that he did not touch Kylee for any reason. (R.443:91; see also 438:14,19.) Moreover, he testified that he knew that "tickling and poking your nieces that are in the age of maturing is definitely not appropriate." (R.443:96.) Thus, if the jury concluded that A.J. touched Kylee, it is difficult to imagine that the jury would also conclude that A.J. lacked knowledge.

Because the element of knowledge was not controverted, just as the formal element of intent was not controverted in *Verde*, the purpose of the other-acts evidence is difficult to characterize as "properly aimed" at proving the element. In context, it seems "more likely that it was aimed at sustaining an impermissible inference that [defendant] acted in conformity with the bad character suggested by his prior bad acts." *Verde*, 2012 UT 60, ¶26. It was distracting, tangential, unnecessary, and improper. The evidence "[was] not plausibly linked" to any

controverted element and it lacked real probative value for that purpose. *Id.* ¶29.

If other-acts evidence may be admissible simply because the “State[has the] burden of proving the material element of Defendant’s knowledge,” as the district court ruled (R.258), such evidence would be admissible in every case because the State always has the burden of proof in a criminal case.⁹ Rule 404(b) would be a nullity and criminal trials would be transformed into a series of bad acts limited only by rule 403.¹⁰

When the district court ruled that the evidence was admissible because the State has the burden “of proving the material element of Defendant’s knowledge” (R.258), it misunderstood the supreme court’s holding in *Verde*. 2012 UT 60, ¶¶21-32. Because it misunderstood that holding, it allowed the State to present evidence at trial from several witnesses that A.J. inappropriately touched Meagan and Angela, and he touched Kalin from the time he was a juvenile until

⁹ The State urged the district court to admit the evidence because the State filed the charge, the evidence purportedly relates to an element of the charge, and “the charged offense opens the door to this very type of evidence.” (R.238.) The State’s argument for admissibility relied only on the fact that the State charged the offense; in that regard, its argument is broader than the “not-guilty” rule, which the supreme court expressly repudiated in *Verde*. 2012 UT 60, ¶¶21-24.

¹⁰ While Casey apparently initially reported that A.J. denied the conduct (R.84,87), he testified at trial that A.J. admitted to him that he touched Kylee “but he didn’t intentionally do it.” (R.442:166; 436:58.) That evidence does not support the determination that the formal element of “knowledge” was in dispute. If anything, Casey’s testimony goes to the “intentionally touches” element. Utah Code § 76-9-702(3) (2011). The “intentionally touches” element requires proof that an actor *intentionally touched* the breast of a female person; and the knowledge element requires proof that the actor “knows or should know” that touching likely will cause “affront or alarm to the person touched.” *Id.*

he was about eighteen or nineteen years old. The district court abused its discretion in admitting evidence of A.J.'s other acts to prove the knowledge element for the sexual battery charge. *State v. Petersen*, 810 P.2d 421, 425 (Utah 1991) (“[T]rial courts do not have discretion to misapply the law.”).

1.1.2 The other-acts evidence failed to establish knowledge

The district court abused its discretion in admitting other-acts evidence to establish A.J.'s knowledge because that evidence did not support the element.

The statute required the State to prove that A.J. engaged in conduct that he knew or should have known would “likely cause affront or alarm.” Utah Code § 76-9-702(3) (2011). In interpreting that language, courts do not focus on whether others were in fact affronted or alarmed. *See Roosevelt City v. Anderson*, 2008 UT App 464U, para. 5 (“It should seem obvious that exposing one’s genitals, licking a female’s exposed nipple, and soliciting other women to expose their breasts and then playing around with them would likely cause affront or alarm when done a few feet from three children ages six through eleven.”) (quotations and ellipses omitted) (attached at Addendum D); *State v. Hirschi*, 2007 UT App 255, ¶24, 167 P.3d 503 (defendant “knew or should have known that groping [the victim’s] buttocks would have caused affront or alarm given that she repeatedly told him to stop touching her”) .

In this case, Kylee testified that on previous occasions she told A.J. to stop touching her. (*Supra* St. of Facts § 2.1.1.) A.J. does not contest the admissibility of

that evidence on appeal. *State v. Reed*, 2000 UT 68, ¶¶24,26, 8 P.3d 1025 (evidence of other acts is admissible to establish a pattern of conduct toward one particular person, “the victim”). Also, A.J. admitted that he knew that touching sixteen-year-old Kylee would cause affront or alarm. (R.443:96.) Thus, evidence that A.J. touched others cannot properly be characterized as permissibly aimed at establishing a controverted element for the offense. In addition, the circumstances surrounding the other-acts evidence fails to support admissibility.

First, A.J. touched Taylee above her pant line sometime *after* he allegedly touched Kylee. (R.135; 436:34-35; 442:140-41,196.) That evidence cannot logically be used to establish A.J.’s knowledge that brushing Kylee’s clothed breast days earlier would cause affront or alarm. *See State v. Moore*, 90 S.W.3d 64, 68 (Mo. 2002). On this basis alone, the district court should have excluded evidence of the incident with Taylee. (*Supra* St. of Facts § 2.1.2.)

Second, the incident with Angela and Meagan does not demonstrate that A.J. knew that touching Kylee would cause affront or alarm. Meagan testified that in 2001 when she was eight (and Angela was nine), fourteen-year-old A.J. improperly touched her under her clothes on one occasion. (*Supra* St. of Facts § 2.1.3.) The affront and alarm from that conduct says nothing about brushing the covered breast of sixteen-year-old Kylee. Indeed, the affront or alarm that Meagan and Angela may have experienced as children is not comparable to the conduct Kylee described and has no bearing on A.J.’s knowledge years later. The

district court should have excluded testimony relating to Meagan and Angela.

Third, Kalin testified to sexual conduct that began when both she and A.J. were juveniles and continued for several years. When A.J. confessed to the conduct, he was sent home from his mission. Those facts are not comparable to the conduct that Kylee described and they say nothing about brushing her covered breast years later. The district court should have excluded testimony regarding other acts with Kalin. (*Supra* St. of Facts § 2.1.3.)

Fourth, in addition to Taylee, Meagan, and Kalin, several other witnesses testified to the other acts. For example, Kimberlee, Casey, Joel, Dale, Chad, Investigator Webb, and others testified to A.J.'s conduct with Taylee and the cousins; and Joel testified that he had a gut feeling and a concern that his daughter may have been a "victim," although the State presented no evidence to fulfill the factual condition for that testimony. *See Lucero*, 2014 UT 15, ¶19 (the factual condition must be fulfilled by a preponderance of the evidence). On that basis alone, Joel's testimony was inadmissible. *Id.* The cumulative evidence of conduct involving Taylee, Meagan, Angela, and Kalin, together with evidence of Joel's concerns about his daughter were unwarranted and inadmissible. *State v. Hildreth*, 2010 UT App 209, ¶44, 238 P.3d 444 (cumulative "bad acts evidence may have the tendency to suggest a verdict on an improper, emotional basis").

Fifth, the Utah Supreme Court has cautioned against the use of other-acts evidence in sexual assault cases. "Generally speaking, this court has been highly

skeptical in sexual assault cases of evidence of other unrelated sex crimes by a defendant on trial for a separate offense.” *Reed*, 2000 UT 68, ¶28. “When a person stands accused of a sex crime, this Court has uniformly rejected the admission of evidence that the defendant committed other sex crimes against persons other than the complaining witness.” *Id.* ¶28 n.3. Given the personal nature of the knowledge element in the context of the sexual battery charge — i.e., that the actor knew or should have known that his conduct would alarm or affront a specific person — this court should be skeptical of the admissibility of evidence that the defendant engaged in acts with someone other than that specific person. “[T]he circumstances that would allow such evidence to be admitted are rare and require the highest scrutiny of the trial judge.” *Id.*

In summary, the district court impermissibly allowed other-acts evidence to be presented to the jury. Knowledge was not a controverted element in the case, and the evidence involved innuendo and conduct with persons other than Kylee, years ago, when A.J. was a juvenile. As in *Verde*, the State’s evidence was more likely “aimed at sustaining an impermissible inference that [defendant] acted in conformity with the bad character suggested by his prior acts.” 2012 UT 60, ¶26. Thus, the court erred in admitting the evidence at trial.

1.2 The other-acts evidence was inadmissible under rule 402

The analysis for the admissibility of evidence under rule 404(b) requires the district court to further assess admissibility under rule 402. Rule 402 requires

evidence to be relevant. Utah R. Evid. 402. Relevant evidence tends to make “the existence of any fact of consequence” “more probable or less probable than it would be without the evidence.” *Id.* at 401.

In *Verde*, the court ruled that sometimes the other-acts evidence at issue “has no legitimate narrative value, as in cases where it is not plausibly linked to any charged conduct.” 2012 UT 60, ¶29. Such is the case here.

First, the other-acts evidence involving Taylee fails to support any element of sexual battery for allegedly brushing Kylee’s clothed breast. Even by Taylee’s own testimony, the events she described — while fueled by her parents’ concerns — happened sometime *after* July 23, 2010. (R.442:140-41,196-97.) Those events fail to establish the knowledge element for the conduct at issue.

Second, the evidence at trial of other, more egregious acts — including touching Meagan and Angela when they were children, and repeatedly touching Kalin under her clothes years earlier — were so attenuated from the events of July 23, 2010, as to have no bearing on establishing the criminal elements here, including knowledge. Utah R. Evid. 401-402.

Third, evidence that Joel had concerns and a gut feeling that his daughter could be a “victim” was insufficient under the relevancy standard to support admissibility. The State offered no proof to support that Joel’s daughter was abused. It failed to satisfy the evidentiary standard for admissibility set forth in *Lucero*, 2014 UT 15, ¶¶19,23.

In short, the prosecution relied on the other-acts evidence for an improper narrative—to show a reprehensible and immoral character.

1.3 The other-acts evidence was inadmissible under rule 403

Other-acts evidence may be excluded “if its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Utah R. Evid. 403. The supreme court has ruled that unfair prejudice results if “the evidence has an undue tendency to suggest [a] decision upon an improper basis.” *State v. Reece*, 2015 UT 45, ¶69, ___P.3d___ (quotations omitted). Also,

[W]hen prior misconduct evidence is presented under rule 404(b), the court should carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person’s bad character. And even if the evidence may sustain both proper and improper inferences under rule 404(b), the court should balance the two against each other under rule 403, excluding the bad acts evidence if its tendency to sustain a proper inference is outweighed by its propensity for an improper inference or for jury confusion about its real purpose.

Verde, 2012 UT 60, ¶18.

This court is bound by the text of rule 403 in assessing the admissibility of other-acts evidence and may consider factors set forth in *Shickles*, 760 P.2d at 295-96, for the analysis. *Reese*, 2015 UT 45, ¶69. The *Shickles* factors consider “(1) the strength of the evidence as to the commission of the other bad acts, (2) the similarities between the charged offense and the prior bad acts, (3) the interval of

time that has elapsed between the charged offense and the prior bad acts, (4) the need for the evidence, (5) the efficacy of alternative proof, and (6) the degree to which the evidence will rouse the jury to overmastering hostility.” *State v. Bradley*, 2002 UT App 348, ¶29, 57 P.3d 1139 (quotations and brackets omitted).

Contrary to the district court’s ruling, rule 403 and the *Shickles* factors fail to support admissibility of the other-acts evidence here.

First, the court considered the evidence of other acts to be “strong” in establishing that A.J. understood “the consequences of his conduct,” and that “such conduct in fact occurred.” (R.438:22.) But because *knowledge* was not a controverted element, the other-acts evidence was unnecessary and gratuitous. (*Supra* Arg. §1.1.) Also, contrary to the district court’s ruling, evidence of other acts was weak. For example, Angela did not recall improper touching. (R.436:73-77.) Consequently, the State presented evidence at trial involving Angela through other witnesses and only in the form of innuendo. (See R.442:112,142-43.) Likewise, evidence from Taylee that A.J. touched her stomach was weak because it did not implicate criminal conduct: A.J. did not molest Taylee. In fact, he touched her above her pant line. (R.442:197; 436:41.) Evidence from Joel about his daughter was weak because it was based only on gut feelings. (R.442:183.) Because the State presented weak evidence, the jury was left with the confusing and misleading impression that A.J. improperly touched Taylee, Angela, and Joel’s daughter.

Second, the district court recognized “distinctions between the particular conduct with particular individuals” and “distinguishing characteristics.” (R.438:23.) The circumstances described by Meagan and Kalin — that A.J. touched their genitals and breasts under their clothes when he and they were juveniles, and A.J. sexually touched Kalin — were far from similar to the allegation that A.J. brushed sixteen-year-old Kylee’s clothed breast while she was vacuuming a car. (*Supra* St. of Facts §2.1.3.) Indeed, Kalin and Meagan were prepubescent children and A.J. was a juvenile when he first touched them in ways distinguishable from the charged act at issue. Although Kalin testified that A.J. repeatedly touched her sexually and intimately for several years, Kylee said nothing of the sort.¹¹ (*Id.*) Moreover, the evidence about Angela and about Joel’s daughter was based on innuendo, and evidence that A.J. touched Taylee was distinguishable. A.J. touched Taylee’s stomach over her clothes in public, and she said nothing. (*Supra* St. of Facts §2.1.2.) The evidence fails to show any “peculiarly distinctive” characteristic to be of value. *State v. Cox*, 787 P.2d 4, 6 (Utah Ct. App. 1990). Contrary to the district court’s ruling, the other-acts evidence involved different people at younger ages, different forms of evidence, “different body parts,” and “different types of touching.” *Hildreth*, 2010 UT App 209, ¶¶35-36.

Third, the district court recognized a “substantial period of time involved”

¹¹ Kylee testified that A.J. brushed her clothed breast, and she testified that years earlier, he tickled her stomach on one occasion, and pushed her over, touching her buttocks, when she performed handstands. (R.442:122-23.)

between each act and the charged event. (R.438:23.) But it ruled that the evidence showed “a continuum of activity rather than a segregation of separate activities” to support admission of the other acts evidence. (R.438:24.) The court’s approach to the timing issue was misguided. It seemed to confuse the timing analysis with evidence of a continuous pattern. *See State v. Devey*, 2006 UT App 219, ¶14, 138 P.3d 90 (continuous conduct is admissible if it demonstrates defendant’s ongoing behavior with one person). And the court seemed to believe that all the evidence had to come in to show a continuous story.

Because the State intended to bring evidence of conduct involving several different individuals, those acts should have been assessed individually for admissibility. *See State v. Denos*, 2013 UT App 192, ¶26, 319 P.3d 699 (addressing the interval of time between each individual prior act and the charged offense, and ruling that the interval of time weighed against admissibility for some of the prior acts); *Hildreth*, 2010 UT App 209, ¶44 n.12 (considering several other acts and noting that the greatest lapse in time between an act and the conduct for the charge was “a full three years,” which was “undoubtedly” lengthy). Specifically, the lapse of more than nine years between the act with Meagan (and Angela) and the charged conduct weighed against admissibility, and the lapse of at least five years and more than thirteen years between the acts with Kalin and the charged conduct was too attenuated for a connection. The timing factor weighed against admissibility. *Denos*, 2013 UT App 192, ¶26; *Hildreth*, 2010 UT App 209, ¶44 n.12.

Fourth, the court ruled that no other evidence would “effectively be able to prove” knowledge. (R.438:24.)¹² That is incorrect. Utah courts have ruled that evidence from the complaining witness is sufficient to support each element of the offense. *State v. Robbins*, 2009 UT 23, ¶14, 210 P.3d 288 (“A jury can convict on the basis of the uncorroborated testimony of the victim.” (quotations omitted)). The State admitted as much here. (R.443:134.) Moreover, as stated *supra* Arg. § 1, the State did not need the other-acts evidence to support the knowledge element because that element was not disputed or controverted. Evidence of other acts from several witnesses was unnecessary, gratuitous, repetitive, and cumulative. The evidence had a tendency to suggest a decision on an improper basis and invited the jury to infer that A.J. had a propensity to molest his female relatives. “That is precisely the kind of inference that Rule 404(b) is intended to preclude.” *Hicks v. State*, 913 A.2d 1189, 1196-97 (Del. 2006).

Fifth, the court considered it to be a close call that the “substantial evidence” of other acts would “overshadow the facts of the particular case.” (R.438:24.) Nevertheless, the court ruled that it would not restrict admissibility of the evidence to “one instance or another instance,” because restricting the evidence “would make it substantially more difficult” for the State to prove the

¹² In assessing the *Shickles* factors, Utah courts typically combine the fourth factor (the need for the evidence), and the fifth factor (the efficacy of alternative proof). See *State v. Allen*, 2005 UT 11, ¶¶24,32, 108 P.3d 730; *State v. Burke*, 2011 UT App 168, ¶38, 256 P.2d 1102.

element of knowledge. (R.438:25.) In this regard, the court misapplied the “unfairly prejudicial” standard. The analysis does not ask whether the evidence would make it easier for the State to prove its case. Rather, the analysis considers whether the evidence would unfairly appeal to jurors’ sympathies, arouse their sense of horror, provoke their instinct to punish, and create confusion to A.J.’s detriment. *See State v. Troyer*, 910 P.2d 1182, 1191 (Utah 1995) (requiring a showing of “unusual probative value” if evidence has “an unusually strong propensity to unfairly prejudice, inflame, or mislead a jury”); *State v. Lindgren*, 910 P.2d 1268, 1272 (Utah Ct. App. 1996) (if evidence confuses the jury, appeals to its sympathies, arouses its sense of horror, or provokes its instinct to punish, it may be unfairly prejudicial and inadmissible). For example, in *Lucero*, the supreme court ruled that other acts evidence was *not* unfairly prejudicial so as to incite overmastering hostility in the jury because the other-acts evidence was “tame in comparison” to the charged conduct. 2014 UT 15, ¶33. The opposite must be said of the other-acts evidence and the charged conduct here.

Evidence that A.J. repeatedly engaged in sexual acts with Kalin for several years from the time she was a young girl, and evidence that he was allowed to enter a misdemeanor plea for the conduct would provoke hostility compared to the tamer allegation that A.J. brushed Kylee’s clothed breast. Likewise, the conduct Meagan described was more shocking than the conduct at issue in this case. The prosecution elicited testimony that A.J. improperly touched Angela and

Meagan's chest and genitals under their clothes when they were prepubescent, more than nine years before the events at issue, and yet A.J. was never charged. (R.442:221; 443:18.) As for the evidence relating to Taylee and to Joel's daughter, the jury was left with confusing, misleading, and improper impressions that if A.J. "behaved improperly in the past," he "might be likely to do so again in the future." *Verde*, 2012 UT 60, ¶16; (*supra* St. of Facts §§ 2.1.2; 2.1.4).

The other-acts evidence was cumulative, confusing, distracting, and misleading, and it overwhelmed the case. While the prosecution's examination of Kylee took less than ten pages (R.442:117-26), the prosecution called several witnesses over the course of a two-day trial—resulting in 388 pages of trial transcript—forcing A.J. to focus most of his defense on the other-acts evidence, as opposed to the single charge at issue. *See State v. Winward*, 909 P.2d 909, 913 (Utah Ct. App. 1995) (the bad-acts evidence risked "diverting the jury's attention" from the charge at issue, and forcing the defendant to defend against wide-ranging allegations that were not charged). The other-acts evidence took an inordinate amount of time when compared with the evidence for the charged offense. The district court erred in allowing the State to present it.¹³

¹³ Defense counsel rejected the use of a limiting instruction because it would be ineffectual. (R.231.) Limiting instructions serve no valid purpose if other-acts evidence is inadmissible. On the other hand, if other-acts evidence is admissible, a proper limiting instruction serves a very narrow function but ultimately may not be sufficient to "avoid the potential prejudice to the defendant" under rule 403. *State v. Wetzel*, 868 P.2d 64, 69 (Utah 1993). Other courts have adopted limiting instructions that more properly serve to diminish the danger of any unfair prejudice arising from otherwise admissible other-acts evidence. *See*

1.4 The inadmissible other-acts evidence prejudiced A.J., compelling the entry of an order reversing the conviction

The Utah Supreme Court has articulated the prejudice standard for inadmissible evidence as follows: "If, in the absence of the evidentiary errors, there is a reasonable likelihood of a more favorable outcome for defendant, we must reverse the conviction." *State v. Rimmasch*, 775 P.2d 388, 407 (Utah 1989). In addition, in assessing prejudice, the court will not apply the sufficiency standard; "rather, it focuses on the taint caused by the error." *State v. Mitchell*, 779 P.2d 1116, 1122 (Utah 1989).

Utah courts will reverse a criminal conviction if the jury verdict relied on the credibility of the complaining witness, and the evidentiary error unfairly bolstered the State's case. *State v. Bujan*, 2006 UT App 322, ¶¶31-32, 142 P.3d 581 (finding prejudice where the inadmissible hearsay testimony was used to corroborate K.B.'s account of the rape), *aff'd*, 2008 UT 47, 190 P.3d 1255;

United States v. Franklin, 250 F.3d 653, 659 (8th Cir. 2001) ("You may not use [the evidence of prior criminal conduct] to decide whether the defendant carried out the acts involved in the crimes that are charged in the present indictment... Remember, even if you find that the Defendant committed a similar act in the past, this is not evidence that he committed such an act in this case. You may not convict a person simply because you think or believe that he may have committed similar acts in the past... you may consider evidence of prior acts only on the issues of knowledge and intent.") Notably, the instruction here made no reference to consideration of the evidence only for the purpose of assessing the "knowledge element" as it related to alleged conduct with Kylee. (R.370.) Instead, the instruction advised jurors that they had heard evidence that A.J. "intentionally touched or attempted to touch" "other females before and/or after the act charged in this crime." (*Id.*) And it advised jurors that they could consider those intentional acts with other females as proof that A.J. knew that his conduct would cause affront or alarm to them. (*Id.*) The instruction also advised the jury that it could not convict A.J. "simply because" of the other acts. (*Id.*)

Rimmasch, 775 P.2d at 407-08 (finding prejudice where the inadmissible evidence unfairly bolstered the victim's testimony regarding sexual assault); *Mitchell*, 779 P.2d at 1121 (finding prejudice where hypnosis was used to bolster the witness's testimony); *State v. Sibert*, 310 P.2d 388, 392-93 (Utah 1957) (finding inadmissible testimony from the officer resulted in prejudicial error).

In addition, Utah courts will reverse a conviction if the evidentiary error concerns improper other-acts evidence. In *State v. Cox*, this court stated:

Although the State presented evidence which might be sufficient to sustain a rape conviction, we are nevertheless persuaded that the jury may have reached a different result in the absence of the highly prejudicial evidence of the prior sexual assaults. The evidence of the prior crimes presumptively had a strong tendency to suggest to the jury that defendant was guilty of the charged crime.

787 P.2d at 7 (quotations and citations omitted). Indeed, juries have a tendency to convict when they are informed of additional wrongful conduct in a prosecution. See *State v. Saunders*, 699 P.2d 738, 741 (Utah 1985) (discussing prejudice when the trial court fails to sever charges that should not have been brought in the original prosecution, and stating that evidence of other crimes is prejudicial).

In this case, the only issue for the jury to consider was credibility: Kylee testified at trial that A.J. brushed her breast (R.442:119), and A.J. denied the allegation. (R.443:91,93,105.) Several factors weighed against Kylee's credibility.

First, Kimberlee testified that Kylee came in from vacuuming the car and reported that A.J. "grabbed her boob," which was incorrect even by Kylee's own admission. (See R.442:138-39; and R.442:127.) Second, the only witnesses who

could testify to what happened on July 23, 2010, were Kylee and A.J. Other witnesses originally obtained information through Kylee and Casey. (R.442:138,149,183-84,203; 443:22.) Third, Kylee waited for weeks to contact police. (R.442:128,142-43,169-73.) Fourth, family members testified that Casey was aware of A.J.'s history as early as 2008, and he mobilized others against A.J. (R.436:143-44; 442:203-05; 443:21-22,47.) Fifth, the State presented evidence that A.J. was convicted only of a misdemeanor for conduct with Kalin and he was never charged for conduct with Meagan and Angela. (*See* R.443:98.) Sixth, the prosecution saw the case as an opportunity for all the "victims" to have their day in court to testify against A.J. (R.443:135,138,139 (stating in closing, "it was wrong to touch Angela," "it was wrong to touch Meagan," "Taylee says [he] started moving his hand down her belly towards her groin," and "[Kalin], the individual that he molested for eight years"); 443:139 ("Looking at this as a whole, is there really that big of a distinction between cousins and nieces? What [] we know, ladies and gentlemen, is: all of them are at least four years younger than the defendant; all of them are his relatives, either cousins or nieces; all of them females; all of them were juveniles when they were touched"); 436:147 (urging the court to keep the case moving for the "victims"); 443:160 (advising the court that this is an egregious case, considering the "several victims" involved).)

Given that the knowledge element was uncontroverted and credibility was the central issue in the case, the evidence of prior misconduct "was not properly

admissible to establish [a formal element] – despite the fact that [defendant’s] not-guilty plea technically put his [mental state] at issue.” *Verde*, 2012 UT 60, ¶24. If the other-acts evidence had not been admitted at trial, the prosecution would not have been allowed to draw attention to propensity evidence in closing argument; A.J. would not have been required to address the evidence in cross-examinations or in his case in chief; and given Kylee’s different versions of what happened, there is a reasonable likelihood that the jury would have discredited her testimony to acquit A.J. of the alleged brushing incident. The other-acts evidence permeated the trial and served to “persuade the jury that [the defendant] stood before them” as a sexual predator “who must be given the maximum punishment.” *Grunsfeld v. State*, 813 S.W.2d 158, 172 (Tex. Ct. App. 1991). A.J. respectfully asks this court to reverse the conviction.

2. The State presented other inadmissible evidence at trial

The State presented evidence in its case in chief that Joel reacted to the allegations against A.J., and evidence in A.J.’s cross-examination of collateral details of a prior conviction. The prosecution then relied on those details in closing argument to discredit A.J. Because counsel failed to object, A.J. has addressed the issues under the ineffective-assistance-of-counsel standard. In addition, after the district court sustained an objection to hearsay evidence that Joel’s wife had gut feelings about A.J., counsel failed to ask the district court to strike that testimony. Consequently, the court failed to admonish the jury to

disregard it. That was error.

A.J. will address the claims under the ineffective-assistance-of-counsel doctrine as follows. First, he will address the inadmissibility of the evidence of Joel's reactions to the allegations against A.J., and he will address Joel's wife's hearsay statement. Second, he will address the prosecution's improper cross-examination into the collateral details of A.J.'s misdemeanor conviction and the prosecution's references to those details in closing argument. Third, he will address counsel's ineffective assistance for failing to take steps to exclude both inadmissible evidence and impermissible closing argument.

2.1 Defense counsel failed to take measures to object to inadmissible evidence, failed to object to improper statements, and failed to ask the district court to strike inadmissible hearsay

The Utah Supreme Court is "acutely aware of the heinous nature" of sexual offenses against juveniles, the covert nature of such crimes, and "the evidentiary difficulties" that confront both parties. *State v. Saunders*, 1999 UT 59, ¶12, 992 P.2d 951. In cases involving a charging witness's word against the defendant's word, "adherence to the rules designed to sift truth from error is critical." *Id.* In this case, defense counsel failed to guard against the unfair nature of evidence the State elicited through Joel of his reaction to the allegations against A.J. In addition, when Joel testified to hearsay evidence, counsel failed to ask the court to strike it.

Before evidence may be admitted at trial, it must satisfy basic foundational

prerequisites. It must be based on personal knowledge or observation, and it must make a fact that "is of consequence in determining the action" "more or less probable than it would be without the evidence." Utah R. Evid. 401. In addition, as stated above, rule 403 balances the admissibility of potentially unfair or confusing evidence against its probative value. *Id.* 403. If evidence creates "an undue tendency to suggest [a] decision on an improper basis, commonly but not necessarily an emotional one, such as bias, sympathy, hatred, contempt, retribution or horror," it will "be deemed inadmissible." *State v. Kell*, 2002 UT 106, ¶30, 61 P.3d 1019; *State v. Maurer*, 770 P.2d 981, 984 (Utah 1989). Also, evidence is unfairly prejudicial and confusing "if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case." *State v. Bartley*, 784 P.2d 1231, 1237 (Utah Ct. App. 1989) (quotations omitted).

In this case, the State called Joel, A.J.'s half-brother, to testify that after he became aware of A.J.'s conduct with Kylee, he was "upset" and "concerned" to think his own daughter may have been "a victim," although there was nothing to support that she had been molested; he told his brother-in-law, Casey, to get the word out to family members "because the behavior isn't normal"; and he asked why his father "didn't make us aware of the prior problems to help protect my daughter and nieces." (R.442:183-86.) He stated to Neil, "you've got to get

counseling for us all, family counseling,” and “if you don’t get us help this is going to be the last time that we’re going to be together as a family.” (*Id.*)

Evidence of Joel’s statements and concerns *after the fact* was irrelevant, distracting, and misleading. The evidence was intended to appeal to jurors’ emotions and did nothing to make a fact of consequence to the alleged offense “more or less probable than it would be without the evidence,” and nothing to support any element of the offense. *See* Utah Code § 76-9-702(3) (2011); Utah R. Evid 401, 403. The evidence had no probative value.

Next, the State elicited inadmissible hearsay evidence from Joel about his wife’s gut feelings. Joel testified that long before the alleged conduct at issue here, his wife “jumped off the couch” when A.J. took Masey inside to play with a cat and said, “[]something’s weird, you need to go get Masey, I’m not comfortable with this[]” and after that moment my wife said []no more alone time, he can’t be alone with Masey I don’t know what it is but my gut says we just need –[]” (R.442:181.) Although defense counsel objected to the admissibility of the evidence on hearsay grounds, counsel failed to ask the district court to strike the evidence or to admonish the jury to disregard it.¹⁴

It is axiomatic that “[t]he ruling sustaining an objection does not, by itself, strike the evidence from the record.” Roger C. Park, *Trial Objections Handbook* 2d

¹⁴ The preliminary jury instructions advised jurors to disregard evidence that has been objected to and stricken. (R.337.)

§ 1:16 (2014). A witness's answer to a question when an objection has been sustained "may remain in the record unless the objection is followed by a motion to strike." 75 Am. Jur. 2d *Trial* § 326. In fact, sustaining an objection does not have the effect of striking the testimony and the testimony remains in the record to be considered." *State ex rel. Fulton v. Scheetz*, 166 N.W.2d 874, 882 (Iowa 1969). In that instance, "a motion to strike is important." Park, *supra*; see also Stephen B. Nebeker, *Trial Objections*, 8 Utah B.J. 25, 29 (Nov. 1995).

Because defense counsel did not make a motion to strike and the district court did not admonish the jury to disregard the inadmissible hearsay evidence, the inadmissible hearsay remained on the record for the jury to consider.

2.2 Counsel failed to object to evidence of collateral details attendant to the misdemeanor conviction

Under Utah law, evidence of a previous conviction is admissible in very narrow circumstances. Rule 609(a) requires the State to admit evidence of a prior conviction to impeach the credibility of a testifying defendant if that conviction is for a crime "punishable by death or by imprisonment for more than one year" or the conviction is for a crime requiring proof of "a dishonest act or false statement." Utah R. Evid. 609(a). The rule does not allow the State to admit the evidence for any other purpose. *State v. Emmett*, 839 P.2d 781, 785-86 (Utah 1992). If the previous conviction is for a misdemeanor offense and does not involve proof of dishonesty, under rule 609, evidence of that conviction is inadmissible. *State v. Bruce*, 779 P.2d 646, 653-54 (Utah 1989); *Zappe v. Bullock*, 2014 UT App 250,

¶¶14-15, 338 P.3d 242.

In those circumstances where evidence of a prior conviction is admissible, the law further limits the details that may be elicited in cross-examination about that conviction. “[G]enerally, a Rule 609(a) inquiry should be limited to the nature of the crime, the date of the conviction and the punishment.” *State v. Tucker*, 800 P.2d 819, 822 (Utah Ct. App. 1990)¹⁵; *State v. Colwell*, 2000 UT 8, ¶33, 994 P.2d 177 (where defendant did not try to explain away his conviction, the prosecutor was not entitled to elicit other details or circumstances); *State v. Williams*, 656 P.2d 450, 453 (Utah 1982) (it is improper to inquire into details surrounding conviction). “A prosecutor may not parade the details of the prior crime in front of the jury.” *Tucker*, 800 P.2d at 822.

In this case, the district court allowed the State to present evidence of A.J.’s other acts with Kalin to prove knowledge. (*Supra* Arg. §1.) If that other-acts evidence is inadmissible (*id.*), all evidence of the misdemeanor conviction is likewise inadmissible, Utah R. Evid. 609(a). But the State also elicited testimony during its cross-examination of A.J. of the collateral circumstances attendant to the conviction, which evidence was not part of the other-acts evidence. Thus, its admissibility was irrelevant and gratuitous under rule 401, and independently

¹⁵ The *Tucker* court looked to federal law, which limits admissible evidence to the date and place of the conviction, the name of the crime of which the defendant was convicted, and the punishment. 800 P.2d at 822. Other collateral details are inadmissible. *United States v. Tumblin*, 551 F.2d 1001, 1004 (5th Cir. 1977); *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977).

and expressly inadmissible under rule 609(a).

Specifically, because the district court ruled that other-acts evidence was admissible at trial, the defense addressed that evidence during the State's case-in-chief, and A.J. admitted during his direct examination that he engaged in other acts with his cousins, including Kalin. (R.443:83-84); *Saunders*, 1999 UT 59, ¶22 (a defendant may defend against other-acts evidence without opening the door to otherwise inadmissible evidence). A.J. stated during his direct examination that he took responsibility "for molesting [Kalin]." (R.443:84.) He also testified that charges were filed against him in Davis County, he entered a "no contest plea," he has "a criminal record now," and he is on probation and enrolled in sex offender therapy. (R.443:85); *State v. Havatone*, 2008 UT App 133, ¶¶14-15, 183 P.3d 257; R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 429 (2012) (defendant may testify to a conviction without opening the door to inadmissible details). A.J. in no way conveyed the impression in direct examination that he intended to minimize his acts as they related to Kalin. (R.443:84-86). He also admitted that he molested Meagan and Angela. (*Id.*)

In cross examination, the prosecution asked the following: "You said that you admitted to what you had done with [Kalin] and you were criminally charged." (R.443:98.) A.J. answered yes. The prosecution then asked, "Is it correct that you were charged with a second degree felony"; and the charge "was pled down essentially, reduced to a class A misdemeanor"; and "you didn't plead

guilty, correct"? (*Id.*) A.J. answered affirmatively to each question and without objection from defense counsel. (*Id.*) The prosecution ended by saying, "So you're admitting now that you did do it but at the time you pled no contest." (*Id.*) At that point, counsel objected. (*Id.*)

Rule 609(a) recognizes that the fact of a conviction alone is sufficient to impeach credibility. Utah R. Evid. 609(a); see *Colwell*, 2000 UT 8, ¶33. Thus, the prosecution's questions into the collateral circumstances attendant upon the misdemeanor conviction were elicited quite improperly to convey that A.J. should have been more seriously punished for the acts against Kalin. *Havatone*, 2008 UT App 133, ¶14 (cross-examination was impermissible where defendant never attempted in direct "to explain away" actions or minimize guilt respecting the prior conviction). In addition, the evidence was improper because it failed to make a fact of consequence about the alleged touching "more or less probable than it would be without the evidence." Utah R. Evid. 401(a), 402.

The prosecution then used those collateral facts in closing argument to urge the jury to find that A.J.'s testimony lacked candor and forthrightness and that "he got a sweet deal" in Kalin's case. (R.443:150-51). That was improper. *Havatone*, 2008 UT App 133, ¶¶13-16 ("[I]t was plain error for the court to allow the prosecutor at closing to encourage the jury to consider the details of [the] prior conviction as character evidence."); Utah R. Evid. 609(a). The evidence of collateral circumstances attendant to A.J.'s prior misdemeanor conviction and the

prosecution's reliance on that evidence in closing argument was independently inadmissible under the plain language of rule 609(a), as A.J.'s conviction was not "punishable by death or by imprisonment for more than one year," nor did the crime of sexual battery involve or require A.J. to admit "a dishonest act or false statement." Utah R. Evid. 609(a). Likewise, the evidence was irrelevant. Utah R. Evid. 401,402; *Colwell*, 2000 UT 8, ¶33 (the details of the prior conviction are not relevant to defendant's "state of mind at the time of the traffic stop"). Moreover, A.J. "did not testify in such a way as to explain away [his] actions that led to the [sexual battery] charge or to minimize [his] guilt in relation to the charge." *Havatone*, 2008 UT App 133, ¶15. He accepted full responsibility. *Id.*; (R.443:84 ("I do take responsibility for molesting [Kalin]").) In short, the collateral details of A.J.'s prior conviction as elicited in cross-examination were inadmissible for any purpose, including for impeachment, and the prosecution's reference to those circumstances was improper. *Havatone*, 2008 UT App 133, ¶¶13-15.

2.3 Counsel provided ineffective assistance

The Sixth Amendment to the U.S. constitution ensures a criminal defendant's right to the effective assistance of counsel at all stages of a case. *Strickland v. Washington*, 466 U.S. 668, 686, 688 (1984). A defendant raising a claim of ineffective assistance must show that (1) his attorney's performance fell "below an objective standard of reasonableness," and (2) "that but for" the deficient performance, "there is a reasonable probability that the outcome of the

trial would have been different.” *State v. Hales*, 2007 UT 14, ¶68, 152 P.3d 321.

In assessing the reasonableness standard, the court looks to “prevailing professional norms.” *State v. Lenkart*, 2011 UT 27, ¶27, 262 P.3d 1. Under prevailing norms, defense counsel has a duty to make appropriate objections and motions to strike. ABA Standards for Criminal Justice §§ 4-3.6, 4-7.5(c), 4-7.9 (3d ed. 1993) (“ABA Stds”). She must stay current on the law. *State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989). She must consider those procedural steps which may be taken in good faith, including the “obvious step[]” for suppression of evidence when the law supports it. ABA Stds § 4-3.6 & commentary. And she “has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland*, 466 U.S. at 688; *State v. Holland*, 921 P.2d 430, 435 (Utah 1996) (defense counsel owes a duty of loyalty to a client).

Counsel’s performance was deficient. Utah courts have ruled that counsel is ineffective for failing to object to inadmissible evidence. *State v. Ott*, 2010 UT 1, ¶24, 247 P.3d 344. In addition, counsel has a duty to conduct a reasonable investigation of the law and facts. *Strickland*, 466 U.S. at 690-91. Even if Utah courts have not previously decided a particular issue, counsel may be ineffective for failing to address that issue based on the plain language of the rules of evidence. *State v. Ison*, 2006 UT 26, ¶32, 135 P.3d 864 (counsel was ineffective for failing to explore evidentiary issues).

In this case, it should have been plainly obvious to counsel that testimony

admitted in violation of the evidentiary rules was impermissible. *Havatone*, 2008 UT App 133, ¶¶13-16; *State v. Hoyt*, 806 P.2d 204, 211 (Utah Ct. App. 1991). It should have been plainly obvious to counsel that failing to object to evidence of Joel's emotional reactions and failing to object to the prosecution's cross-examination of A.J. into collateral circumstances attendant to the misdemeanor conviction fell below the prevailing professional norm. Utah R. Evid. 401- 403, 609(a). Indeed, defense counsel argued against the admissibility of the other-acts evidence. (R.438.) It is inconceivable that counsel then would fail to object to evidence of Joel's *reactions* to the allegations against A.J.

Likewise, although evidence of the Davis County conviction would be wholly inadmissible but for the district court's ruling allowing other acts evidence relating to Kalin, defense counsel plainly recognized that such evidence must be limited in detail and use. During counsel's direct examination of A.J., A.J. "did not testify in such a way as to explain away [his] actions" or "minimize [his] guilt" on the prior conviction. *Havatone*, 2008 UT App 133, ¶¶15. Counsel took care not to open the door. *See id.* She should have then been vigilant in ensuring that the prosecution's cross-examination did not go "well beyond the limited questions allowed to impeach [defendant]," and that the prosecution did not "encourage the jury [in closing argument] to consider the details of [defendant's] prior conviction as character evidence." *Id.* ¶¶14,16. Because counsel failed to object, her conduct "fell below an objective standard of

reasonableness.” *State v. King*, 2010 UT App 396, ¶33, 248 P.3d 984.

Furthermore, counsel went to the trouble of objecting to inadmissible hearsay evidence (R.442:181), but again failed to take the necessary steps to ensure that the jury would understand it could not consider that inadmissible hearsay evidence for any purpose in deliberations. (*Supra* Arg. §2.1.)

Given the law and centrality of credibility in this case, a reasonable defense lawyer would have made proper individual objections. Joel’s testimony and the cross-examination into details attendant to the misdemeanor conviction were at odds with the rules, and the prosecution’s use in closing argument of improper cross-examination evidence violated Utah law. Yet, counsel made no objection. Likewise, counsel made no motion to strike inadmissible hearsay, an obvious error. *Hoyt*, 806 P.2d at 211 (applying plain error standard to inadmissible evidence); *Havatone*, 2008 UT App 133, ¶16; Utah R. Evid. 401- 403, 609(a). Her failure to object cannot be “a component of any rational defense strategy.” *Ott*, 2010 UT 1, ¶37. “No tactical reason—no reason other than oversight or incompetence... can be assigned” for counsel’s failure to object to the evidence. *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991); *Saunders*, 1999 UT 59, ¶14 (requiring punctiliousness in application of the “evidentiary and procedural rules designed to enable a trier of fact to sort out truth from falsehood”).

In addition, counsel’s deficient performance as to each error was sufficiently and separately prejudicial to warrant reversal. Under the prejudice

analysis, the defendant must show “a reasonable probability” that with the effective assistance of counsel, the jury would have had “a reasonable doubt respecting guilt.” *Hales*, 2007 UT 14, ¶86 (quotations omitted). A reasonable probability is a probability sufficient to undermine confidence in the outcome; it does not require a defendant to show that counsel’s deficient representation “more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. Rather, the standard is met if counsel’s ineffective assistance can render the proceeding “unreliable, and hence the proceeding itself unfair.” *Id.* at 694. Also, Utah courts are more likely to reverse convictions if the central issue involves witness credibility and the error went to that issue, as happened here.

First, while the jury was required to make credibility determinations, it likely discredited A.J.’s testimony because of the inadmissible evidence and the prosecutorial misconduct. Inadmissible evidence from Joel expressing his concerns about family and A.J. molesting his daughter was intended to have a prejudicial and emotional impact on jurors. Even if jurors did not believe Kylee, evidence of Joel’s concerns that A.J. secretly molested others would provoke jurors’ instinct to punish. Second, independent of the unfairly prejudicial and emotional evidence from Joel, the State elicited testimony in cross-examination to discredit A.J.’s credibility and to convey to the jury that it should consider the unfairness of the Davis County proceedings and A.J.’s “sweet deal.” (R.443:150-51.) That evidence would have its own effect on the jury, provoking horror and

hostility. Under the circumstances, the prejudicial impact of each individual error unfairly tipped the balance and harmed A.J. for reversible error. (*See also supra* Arg. §1.4 (additional prejudice analysis).)

The trial proceedings were made unreliable because defense counsel failed to make proper objections to inadmissible testimony (including motions to strike inadmissible hearsay), and failed to object to misconduct in closing. If counsel had objected to the inadmissible evidence and statements in closing argument and taken steps to exclude inadmissible hearsay, the jury likely would have rendered a not-guilty verdict here. *State v. Tarafa*, 720 P.2d 1368, 1370 (Utah 1986) (the prejudicial impact of having the jury listen to inadmissible evidence “cannot be underestimated”); *Hales*, 2007 UT 14, ¶86 (some errors have a pervasive effect and alter the evidentiary picture).¹⁶ The ineffective assistance of counsel warrants reversal where it rendered the proceedings “unreliable, and hence the proceeding itself unfair.” *Strickland*, 466 U.S. at 694. Also, the prosecutor’s misconduct went to the critical issues in the case and cannot be condoned.

Each individual error was prejudicial and compels reversal for a new trial. Moreover, for the reasons stated above, the cumulative effect of the errors supports reversal. *Havatone*, 2008 UT App 133, ¶17 (applying cumulative-error

¹⁶ Although the court failed on an earlier occasion to strike Casey’s testimony of inadmissible double hearsay about Neil’s statements based on conversations with church authorities (*see* R.442:169-70), A.J. has not raised that issue on appeal because Neil denied making those statements. Thus, the error was not prejudicial. Indeed, jurors may have believed Neil and convicted A.J. based on their emotional reactions to inadmissible evidence.

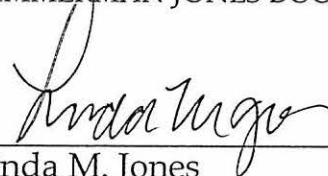
doctrine because several errors combined "undermine our confidence that [defendant] received a fair trial.").

Conclusion

A.J. Rackham respectfully asks this court to reverse the conviction and remand the case for a new trial due to trial errors, and also, due to the ineffective assistance of counsel.

DATED this 22nd day of April, 2015.

ZIMMERMAN JONES BOOHER LLC

A handwritten signature in cursive script, appearing to read "Linda M. Jones", written over a horizontal line.

Linda M. Jones

Erin Bergeson Hull

*Attorneys for Appellant Arthur Jacob
Rackham*

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 13,975 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 22nd day of April, 2015.



Certificate of Service

This is to certify that on the 22nd day of April, 2015, I caused two true and correct copies of the Brief of Appellant to be served on the following via first class mail, postage prepaid:

Michelle Jeffs
Jeffrey G. Thomson, Jr.
Weber County Attorney's Office
2380 Washington Blvd., Suite 230
Ogden, UT 84401



Tab A

SECOND DISTRICT COURT - OGDEN
WEBER COUNTY, STATE OF UTAH

FILED
SEP 19 2014

SECOND
DISTRICT COURT

STATE OF UTAH,
Plaintiff,

: MINUTES
: APP SENTENCING
: SENTENCE, JUDGMENT, COMMITMENT
:

vs.
ARTHUR JACOB RACKHAM,
Defendant.

: Case No: 111902819 MO
: Judge: NOEL S HYDE
: Date: September 9, 2014

SEP 19 2014

PRESENT

Clerk: danellez
Prosecutor: THOMSON, JEFFREY G
Defendant
Defendant's Attorney(s): TANGARO, CARA M
Agency: Adult Probation and Parole

DEFENDANT INFORMATION

Date of birth: May 21, 1986

Audio

Tape Number: 3C 090914 Tape Count: 12:32-1:19

CHARGES

1. SEXUAL BATTERY - Class A Misdemeanor
Plea: Guilty - Disposition: 06/12/2014 Guilty

HEARING

Time set for sentencing.
Victim addresses the court.
Court hears from counsel and proceeds with sentencing.

The issue of restitution shall remain open.

SENTENCE JAIL

Based on the defendant's conviction of SEXUAL BATTERY a Class A Misdemeanor, the defendant is sentenced to a term of 365 day(s). The total time suspended for this charge is 95 day(s).

SENTENCE JAIL RELEASE TIME NOTE

Court grants the defendant work release so long as he abides by all the terms and conditions of the program. Treatment release authorized.

Case No: 111902819 Date: Sep 09, 2014

SENTENCE JAIL SERVICE NOTE

Final 90 days of jail sentence to be served in the day reporting program.

SENTENCE FINE

Charge # 1 Fine: \$603.00
 Suspended: \$0.00
 Surcharge: \$303.00
 Due: \$603.00

 Total Fine: \$603.00
 Total Suspended: \$0
 Total Surcharge: \$303.00
Total Principal Due: \$603.00
 Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 36 month(s).
Probation is to be supervised by Adult Probation and Parole.
Defendant to serve 270 day(s) jail.

Defendant is to pay a fine of 603.00 which includes the surcharge.
Interest may increase the final amount due.

PROBATION CONDITIONS

The defendant shall enter into an agreement with the Utah State Department of Adult Probation & Parole and comply strictly with its terms and conditions.
The defendant shall report to the Department of Corrections and to the court whenever required.
The defendant shall violate no law, either federal, state or municipal.
The defendant shall commit no like offenses.
The defendant shall not consume or possess any alcohol or illegal drugs.
The defendant shall not frequent establishments where alcohol is the chief menu item nor associate with persons using alcohol or illegal drugs.
The defendant shall have no contact, directly or indirectly, with the victim(s).
The defendant shall provide a DNA sample, to be obtained by the Weber County Jail, paying all costs. Written proof of compliance shall be filed with the court.
The defendant shall abide by a curfew as deemed necessary by Adult Probation & Parole.
The defendant shall submit to warrantless search, seizure and chemical testing.
The defendant shall obtain and maintain full-time verifiable employment or an education program, with the preference being given to the educational program.
The defendant shall pay restitution as may be determined at a later

Printed: 09/10/14 09:52:48

Page 2

000430

Case No: 111902819 Date: Sep 09, 2014

date.

The defendant shall abide by all sex offender Group A conditions.
The defendant shall successfully complete sex offender treatment.
The defendant shall have a discussion with the probation agent
regarding sex offender treatment and Group A conditions as soon as
possible.

The court imposes a zero tolerance as to any sex offenses.
The defendant shall pay all financial obligations through Adult
Probation and Parole.

To the Weber County Sheriff: The defendant is remanded into your
custody for transportation to the Weber County Jail, where the
defendant will be confined.

Date: Sep. 15, 2014



NOEL S HYDE
District Court Judge

Tab B

United States Code Annotated
Constitution of the United States
Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

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

Notes of Decisions (5187)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials

Current through P.L. 113-296 (excluding P.L. 113-235, 113-287, and 113-291) approved 12-19-2014

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West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 401

RULE 401. TEST FOR RELEVANT EVIDENCE

Currentness

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Credits

[Amended effective December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is comparable in substance to Rule 1(2), Utah Rules of Evidence (1971), but the former rule defined relevant evidence as that having a tendency to prove or disprove the existence of any "material fact." Avoiding the use of the term "material fact" accords with the application given to former Rule 1(2) by the Utah Supreme Court. *State v. Peterson*, 560 P.2d 1387 (Utah 1977).

Notes of Decisions (66)

Rules of Evid., Rule 401, UT R REV Rule 401
Current with amendments received through 2/1/15

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 402

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

Currentness

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

Credits

[Amended effective December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

The text of this rule is Rule 402, Uniform Rules of Evidence (1974) except that prior to the word "statute" the words "Constitution of the United States" have been added.

Notes of Decisions (114)

Rules of Evid., Rule 402, UT R REV Rule 402
Current with amendments received through 2/1/15

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 403

**RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE,
CONFUSION, WASTE OF TIME, OR OTHER REASONS**

Currentness

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Credits

[Amended effective December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also *Smith v. Estelle*, 445 F.Supp. 647 (N.D.Tex.1977) (surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. *Terry v. Zions Coop. Mercantile Inst.*, 605 P.2d 314 (Utah 1979); *State v. Johns*, 615 P.2d 1260 (Utah 1980); *Reiser v. Lohner*, 641 P.2d 93 (Utah 1982).

Notes of Decisions (402)

Rules of Evid., Rule 403, UT R REV Rule 403

Current with amendments received through 2/1/15

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article IV. Relevance and Its Limits

Utah Rules of Evidence, Rule 404

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

Currentness

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(1) *Permitted Uses.* In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(2) *Disclosure.* If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

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

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

Credits

[Amended effective October 1, 1992; February 11, 1998; November 1, 2001; April 1, 2008; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of *State v. Doporto*, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the

accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in *State v. Shickles*, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

Notes of Decisions (685)

Rules of Evid., Rule 404, UT R REV Rule 404
Current with amendments received through 2/1/15

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West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Utah Rules of Evidence, Rule 609

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION

Currentness

(a) **In General.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.

(b) **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) **Effect of a Pardon, Annulment, or Certificate of Rehabilitation.** Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if:

- (1) it is offered in a criminal case;
- (2) the adjudication was of a witness other than the defendant;
- (3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
- (4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an Appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Credits

[Amended effective October 1, 1992; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and changes Utah law by granting the court discretion in convictions not involving dishonesty or false statement to refuse to admit the evidence if it would be prejudicial to the defendant. Current Utah law mandates the admission of such evidence. *State v. Bennett*, 30 Utah 2d 343, 517 P.2d 1029 (1973); *State v. Van Dam*, 554 P.2d 1324 (Utah 1976); *State v. McCumber*, 622 P.2d 353 (Utah 1980).

There is presently no provision in Utah law similar to Subsection (d).

The pendency of an appeal does not render a conviction inadmissible. This is in accord with Utah case law. *State v. Crawford*, 60 Utah 6, 206 P. 717 (1922).

This rule is identical to Rule 609 of the Federal Rules of Evidence. The 1990 amendments to the federal rule made two changes in the rule. The comment to the federal rule accurately reflects the Committee's view of the purpose of the amendments.

Notes of Decisions (75)

Rules of Evid., Rule 609, UT R REV Rule 609

Current with amendments received through 2/1/15

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 9. Offenses Against Public Order and Decency
Part 7. Miscellaneous Provisions

U.C.A. 1953 § 76-9-702

§ 76-9-702. Lewdness--Sexual battery--Public urination

Currentness

(1) A person is guilty of lewdness if the person under circumstances not amounting to rape, object rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, or an attempt to commit any of these offenses, performs any of the following acts in a public place or under circumstances which the person should know will likely cause affront or alarm to, on, or in the presence of another who is 14 years of age or older:

(a) an act of sexual intercourse or sodomy;

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;

(c) masturbates; or

(d) any other act of lewdness.

(2)(a) A person convicted the first or second time of a violation of Subsection (1) is guilty of a class B misdemeanor, except under Subsection (2)(b).

(b) A person convicted of a violation of Subsection (1) is guilty of a third degree felony if at the time of the violation:

(i) the person is a sex offender as defined in Section 77-27-21.7;

(ii) the person has been previously convicted two or more times of violating Subsection (1); or

(iii) the person has previously been convicted of a violation of Subsection (1) and has also previously been convicted of a violation of Section 76-9-702.5.

(3) A person is guilty of sexual battery if the person under circumstances not amounting to rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, aggravated sexual assault, or an attempt to commit any of these offenses intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another person, or the breast of a female, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched.

(4) Sexual battery is a class A misdemeanor.

(5) A person is guilty of public urination if the person urinates or defecates:

(a) in a public place, other than a public rest room; and

(b) under circumstances which the person should know will likely cause affront or alarm to another.

(6) Public urination is a class C misdemeanor.

(7) A woman's breast feeding, including breast feeding in any location where the woman otherwise may rightfully be, does not under any circumstance constitute a lewd act, irrespective of whether or not the breast is covered during or incidental to feeding.

Credits

Laws 1973, c. 196, § 76-9-702; Laws 1983, c. 88, § 32; Laws 1989, c. 52, § 1; Laws 1994, c. 131, § 1; Laws 1995, c. 131, § 4, eff. May 1, 1995; Laws 1996, c. 137, § 6, eff. April 29, 1996; Laws 1999, c. 302, § 6, eff. May 3, 1999; Laws 2000, c. 128, § 4, eff. May 1, 2000; Laws 2003, c. 325, § 2, eff. May 5, 2003; Laws 2007, c. 350, § 1, eff. April 30, 2007; Laws 2009, c. 354, § 1, eff. May 12, 2009; Laws 2009, c. 366, § 1, eff. May 12, 2009.

Current through 2011 Third Special Session.

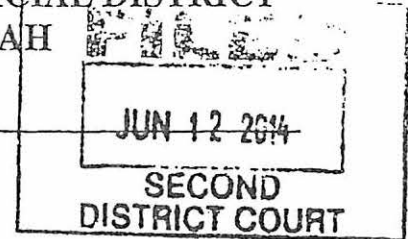
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Tab C

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
COUNTY OF WEBER, STATE OF UTAH



STATE OF UTAH,

Plaintiff,

vs.

ARTHUR JACOB RACKHAM,

Defendant.

JURY INSTRUCTIONS

JUN 13 2014

Case No. 111902819

Judge Noel S. Hyde

INSTRUCTIONS TO THE JURY

000331

INSTRUCTION NO. 1

Members of the jury, we are about to begin the trial of this case. You have heard some details about this case during the process of jury selection. Before the trial begins, however, there are certain instructions you should have to better understand what will be presented to you and how you should conduct yourself during the trial.

The party who brings a lawsuit is called the plaintiff. In this action the plaintiff is the State of Utah. The party against whom the suit is brought is called the defendant. In this action the defendant is ARTHUR JACOB RACKHAM.

This is a criminal case. The defendant is charged with the crime of SEXUAL BATTERY. The elements of this crime will be explained to you later.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty to the Information. The State, therefore, has the burden of proving each of the essential elements of the charges beyond a reasonable doubt. It is your solemn responsibility to determine if the State has proved its accusations beyond a reasonable doubt against the defendant. Your verdict must be based solely on the evidence, or lack of evidence, and the law.

The accusing document is called an "Information." The Information is not evidence, and is not to be considered by you as any proof of guilt.

000333

INSTRUCTION NO. 3

By your verdict, you will decide disputed issues of fact. I will decide all questions of law that arise during the trial. Before you retire to deliberate at the close of the case, I will instruct you on the law that you must follow and apply in deciding your verdict.

Since you will be called upon to decide the facts of this case, you should give careful attention to the testimony and evidence presented for your consideration. During the trial, however, you should keep an open mind and should not form or express any opinion about the case one way or the other until you have heard all of the testimony and evidence, the closing arguments of the lawyers, and my instructions to you on the law.

While the trial is in progress, you must not discuss the case in any manner among yourselves or with anyone else, nor should you permit anyone to discuss it in your presence.

INSTRUCTION NO. 4

From time to time during the trial, I may be called upon to make rulings of law on objections or motions made by the lawyers. It is the duty of the lawyer on each side of a case to object when the other side offers testimony or other evidence that the lawyer believes is not properly admissible. You should not be angry at a lawyer or the client because the lawyer has made objections. You should not infer or conclude from any ruling or other comment I may make that I have any opinion on the merits of the case favoring one side or the other. And if I sustain an objection to a question that goes unanswered by the witness, you should not draw any inference or conclusion from the question itself.

During the trial it may be necessary for me to confer with the lawyers out of your hearing with regard to questions of law or procedure that require consideration by me. On some occasions you may be excused from the courtroom for the same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to determine, and should be patient even though the case may seem to go slowly.

000335

INSTRUCTION NO. 5

The case will proceed in the following order:

1. The plaintiff's lawyer may make an opening statement outlining the case. The defendant's lawyer may also make an opening statement outlining the case immediately after the plaintiff's statement, or may defer making an opening statement until the conclusion of the plaintiff's case. Neither party is required to make an opening statement. What is said in the opening statement is not evidence, but is simply designed to provide you with an introduction to the evidence the party making the statement intends to produce.

2. The plaintiff will introduce evidence through testimony of witnesses and exhibits. At the conclusion of the plaintiff's case, the defendant may introduce evidence. The defendant, however, is not obliged to introduce any evidence or to call any witnesses. If the defendant introduces evidence, the plaintiff may then introduce rebuttal evidence.

3. I will instruct you on the law which you are to apply in reaching your verdict.

4. The parties may present closing arguments to you as to what they contend the evidence has shown and the inferences which they contend you should draw from the evidence. What is said in a closing argument, just as what is said in an opening statement, is not evidence. The arguments are designed to present to you the contentions of the parties based on the evidence introduced. The plaintiff has the right to open and to close the argument.

INSTRUCTION NO. 6

The evidence in the case will consist of the sworn testimony of the witnesses, regardless of who may have called them; all exhibits received in evidence, regardless of who may have introduced them; and all facts which may have been judicially noticed, and which I instruct you to take as true for the purposes of this case.

Statements and arguments of lawyers are not evidence in the case, unless made as an admission or stipulation of fact. When the lawyers on both sides stipulate or agree to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

I may take judicial notice of certain facts. When I declare that I will take judicial notice of some fact, you may, but are not required to, accept that fact as true.

Any evidence as to which I sustain an objection, and any evidence I order to be stricken, must be entirely disregarded.

INSTRUCTION NO. 7

Anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

Some evidence is admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

INSTRUCTION NO. 8

You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experience.

000339

INSTRUCTION NO. 9

After the evidence has been heard and arguments and instructions are concluded, you will retire to consider the evidence and arrive at your verdict. You will determine the facts from all the testimony you hear and the other evidence that is received. You are the sole judges of the facts. Neither I nor anyone else may invade your responsibility to act as judges of the facts.

On the other hand, and with equal emphasis, I instruct you that you are bound to accept the rules of law that I give you whether you agree with them or not.

INSTRUCTION NO. 10

During this trial I will permit you to take notes. Many courts do not permit note-taking by jurors, and a word of caution is in order. There is always a tendency to attach undue importance to matters which one has written down. Some testimony that is considered unimportant at the time presented, and thus not written down, may take on greater importance later in the trial in light of all the evidence presented. Therefore, your notes are only a tool to aid your own individual memory, and you should not compare your notes with those of other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

000341

INSTRUCTION NO. 11

The procedures by which the defendant is placed on trial are accusations only and not evidence. You must not infer guilt or make any presumption because the defendant is held for trial.

000342

INSTRUCTION NO. 12

Our laws and constitution require you to presume the innocence of a person accused of a crime. You must persevere in this presumption unless and until the prosecutor has proved the defendant guilty beyond a reasonable doubt. So long as a reasonable doubt exists, you must find the defendant "not guilty." This presumption of innocence is binding upon you and may not be disregarded by you, but may be overcome only by proof beyond a reasonable doubt. The presumption is intended to guard against the danger of an innocent person being punished.

000343

INSTRUCTION NO. 13

You will not be required to remain together while we are in recess. It is important that you obey the following instructions with reference to the recesses of the court:

1. Do not discuss the case either among yourselves or with anyone else during the trial. In fairness to the parties to this lawsuit, you should keep an open mind throughout the trial, reaching your conclusion only during your final deliberations. Only after all the evidence is in and you have heard the lawyers' summations and my instructions to you on the law, and only after an interchange of views with each other may you reach your conclusion.

2. Do not permit any person to discuss the case in your presence. If anyone does so, despite your telling them not to, report that fact to me as soon as you are able. You should not, however, discuss with your fellow jurors either that fact, or any other fact that you feel necessary to bring to my attention.

3. Though it is a normal human tendency to converse with other people, please do not converse with any of the parties or their lawyers or any witness. By this, I mean not only do not converse about the case, but do not converse at all, even to pass the time of day. In no other way can all the parties be assured of the absolute impartiality they are entitled to expect from you as jurors.

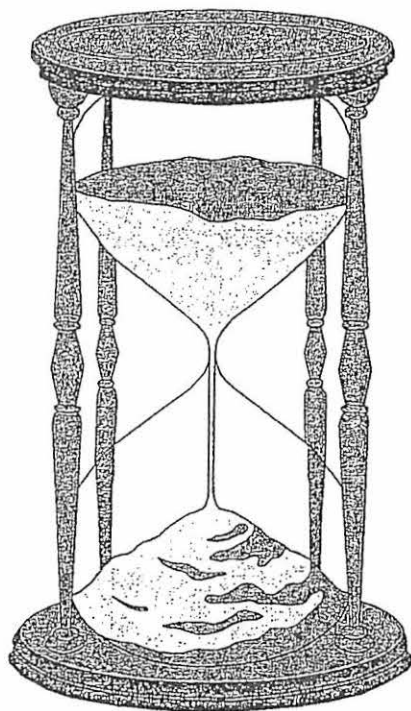
4. Do not do any research or make any investigation about the case on your own.

5. If media coverage occurs prior to your rendering a verdict, please avoid radio, television, and newspaper comments about the trial.

6. Finally, I instruct you again—do not make up your mind about what the verdict

should be until after you have gone to the jury room to decide the case and you and your fellow jurors have discussed the evidence. Keep an open mind until then.

Now, we will begin by giving the lawyers for each side an opportunity to make their opening statements in which they may explain the issues in the case and summarize the facts they expect the evidence will show. These statements are intended to help you understand the issues and the evidence as it comes in, as well as the positions taken by both sides. So I ask that you now give the lawyers your close attention as I recognize them for purposes of opening statements.



STOP. THE REST OF THE INSTRUCTIONS ARE GIVEN AFTER THE EVIDENCE.

000346

INSTRUCTION NO. 14

Members of the jury, I would like to thank you for your attention during this trial. I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions, what we call your deliberations. Please pay attention to the legal instructions I am about to give you. This is an extremely important part of this trial.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. The order in which the instructions are given has no significance as to their relative importance. If a direction or an idea is stated more than once, or in varying ways, no emphasis is intended and none must be inferred by you.

You will take these instructions with you into the jury room for further reference.

INSTRUCTION NO. 15

It is my duty to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I state it to you, regardless of what you personally believe the law is or ought to be. Even if you do not like the laws that must be applied, you must use them. On the other hand, it is your exclusive duty to determine the facts in this case, and to consider and weigh the evidence for that purpose. Your responsibility must be exercised with sincere judgment, sound discretion and honest deliberation.

INSTRUCTION NO. 16

This case must not be decided for or against anyone because you feel sorry for anyone or angry at anyone. It is your sworn duty to decide this case based on the facts and the law, without regard to sympathy, passion or prejudice.

000349

INSTRUCTION NO. 17

The weight of the evidence is not to be determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater believability.

000350

INSTRUCTION NO. 18

You may believe that a witness, on some former occasion, made statements inconsistent with that witness' testimony given here in this case.

That does not necessarily mean that you are required to entirely disregard the present testimony. The effect of such evidence upon the credibility of the witness is for you to determine.

000351

INSTRUCTION NO. 19

If you believe any witness has willfully testified falsely as to any material matter, you may disregard the entire testimony of that witness.

000352

INSTRUCTION NO. 20

This case must be decided only upon the evidence which you have heard from the witnesses, and have seen in the form of documents, photographs or other tangible things admitted into evidence.

Anything you may have seen or heard from any other source may not be considered by you in arriving at your verdict.

You should not consider as evidence any statement of the lawyers made during the trial.

INSTRUCTION NO. 21

Remember, the lawyers are not on trial. Your feelings about them should not influence your decision in this case. The lawyers are here to represent the best interests of their clients. It is the duty of the lawyer on each side of a case to object when the other side offers evidence which the lawyer believes is not admissible. You should not speculate as to the reasons for the objections, nor should you allow yourself to become angry at a party because a party's lawyer has made objections.

INSTRUCTION NO. 22

It has never been my intention to give any hint that you should return one verdict or another in this case. Please understand that I do not wish in any way to influence your verdict. It would be improper for me to do so. Deciding a proper verdict is exclusively your job. I cannot participate in that decision in any way. Please disregard anything that I may have said or done if it made you think that I preferred one verdict over another, that I believed one witness over another, or that I considered any piece of evidence more important than another.

You are the exclusive judges of the facts and the evidence. It is your duty to render a just verdict based upon the facts and the evidence.

000355

INSTRUCTION NO. 23

You are the exclusive judges of the credibility of the witnesses and the weight of the evidence. In judging the weight of the testimony and credibility of the witnesses, you have a right to take into consideration any biases, any interest in the result, and any motive or lack of motive to testify fairly. You may consider the witnesses' conduct while testifying before you, the reasonableness of their statements, their apparent frankness or candor, or the want of it, their opportunity to know, their ability to understand, and their capacity to remember. You should consider these matters you believe have a bearing on the truthfulness or accuracy of the witnesses' statements.

000356

INSTRUCTION NO. 24

A defendant who wishes to testify is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

000357

INSTRUCTION NO. 25

Two classes of evidence are recognized and admitted in courts of law. A jury may lawfully use either or both classes of evidence to make findings of fact. One is direct evidence, and the other is circumstantial evidence.

Direct evidence of the commission of a crime consists of the testimony of every witness who, with any of his or her own physical senses, perceived any of the conduct constituting the crime, and who testifies regarding what was perceived.

Circumstantial evidence consists of facts or circumstances that give rise to reasonable inferences of the truth of the facts sought to be proved.

The law accepts both circumstantial and direct evidence as reasonable methods of proof. Either will support a verdict of guilty or not guilty if it carries the convincing quality required by law as stated in my instructions.

INSTRUCTION NO. 26

A defendant in a criminal action is presumed to be innocent until the contrary is proved. All presumptions of law, independent of evidence, are in favor of innocence. If you have a reasonable doubt as to whether a defendant's guilt is satisfactorily shown, that defendant is entitled to a verdict of not guilty. The presumption of innocence places the burden upon the State to prove each element of each charge for each defendant beyond a reasonable doubt. In other words, the State has the burden of proving the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 27

Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that the defendant is not guilty, you must give him the benefit of the doubt and find him not guilty.

ELEMENTS

000361

INSTRUCTION NO. 28

The defendant is charged with the following crime:

(Count I) SEXUAL BATTERY

To this charge, the defendant has entered a plea of not guilty. This plea casts upon the State the burden of proving beyond a reasonable doubt all of the elements of the crime charged. These elements are set forth in the following instructions.

000362

INSTRUCTION NO. 29

Before you can convict the defendant of the crime of SEXUAL BATTERY, on or about July 23, 2010, in Weber County, State of Utah, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime:

- (1) That defendant, ARTHUR JACOB RACKHAM;
- (2) under circumstances not amounting to rape, forcible sodomy, forcible sexual abuse, aggravated sexual assault, or an attempt to commit any of these crimes;
- (3) intentionally touched, whether or not through clothing:
 - a) the anus,
 - b) buttocks,
 - c) or any part of the genitals of another person, OR
 - d) the breast of a female person;

AND

- (4) the defendant's conduct was under circumstances that the defendant
 - a) knows OR
 - b) should know
 - c) would likely cause affront or alarm to the person touched.

If you believe that the evidence established each and all of the essential elements of the offense beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence failed to establish one or more of said elements, you should find the defendant not guilty.

000363

DEFINITIONS OF ELEMENTS

000364

INSTRUCTION NO. 30

The term "elements of the offense" means:

- (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense; and
- (b) The culpable mental state required.

INSTRUCTION NO. 30

The term **"elements of the offense"** means:

- (a) The conduct, attendant circumstances, or results of conduct proscribed, prohibited, or forbidden in the definition of the offense; and
- (b) The culpable mental state required.

INSTRUCTION NO. 31

As you determine whether the defendant acted with the required mental state, consider the following:

A person engages in conduct *intentionally*, or *with intent* or *willfully* with respect to the nature of the person's conduct or to a result of the person's conduct, when it is the person's conscious objective or desire to engage in the conduct or cause the result.

A person engages in conduct *knowingly*, or *with knowledge*, with respect to the person's conduct or to circumstances surrounding the person's conduct when the person is aware of the nature of the person's conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of the person's conduct when the person is aware that the person's conduct is reasonably certain to cause the result.

INSTRUCTION NO. 32

The intent with which an act is done denotes a state of mind and connotes a purpose in so acting. Intent being a state of mind is seldom susceptible of proof by direct and positive evidence and must ordinarily be inferred from acts, conduct, statements and circumstances.

000368

INSTRUCTION NO. 33

Intent and motive should never be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which an act is done or omitted.

Motive is not an element of any offense, and hence need not be proven. The motive of an accused is immaterial, except insofar as evidence of motive may aid in your determination of state of mind or intent.

INSTRUCTION NO. 34

You have heard evidence that the defendant intentionally touched or attempted to touch the anus, buttocks, any part of the genitals, or breasts of other females before and/or after the act charged in this crime. You may consider this evidence, if at all, for the limited purpose of showing proof of Defendant's knowledge that this type of conduct was likely to cause affront or alarm to the person touched or attempted to be touched.. This evidence was not admitted to prove a character trait of the defendant or to show that he acted in a manner consistent with such a trait. Keep in mind that the defendant is on trial for the crime charged in this case, and for that crime only. You may not convict a person simply because you believe he may have committed some other acts at another time.

000370

INSTRUCTION NO. 35

Upon retiring to the jury room, you will select one of you to act as a foreperson, who will preside over your deliberations and sign the verdict to which you agree. The foreperson should not dominate the jury, but the foreperson's opinion should be given the same weight as the opinions of the other members of the jury.

INSTRUCTION NO. 36

In your deliberations, the subject of penalty or punishment is not to be discussed or considered by you and must not in any way affect your verdict.

000372

INSTRUCTION NO. 37

Your attitude and conduct at the outset of your deliberations is very important. It will not be productive for any of you, upon entering the jury room, to make an emphatic expression of your opinion on the case, or to announce a determination to stand for a certain verdict. When that happens, your sense of pride may be aroused, and you may hesitate to recede from an announced position even if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges. Your deliberations in the jury room are for the ascertainment and declaration of the truth and the administration of justice.

000373

INSTRUCTION NO. 38

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if your individual judgment allows such agreement. You each must decide the case for yourself, but only after consideration of the case with your fellow jurors. You should not hesitate to change an opinion when convinced that it is wrong. However, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors.

000374

INSTRUCTION NO. 39

After counsel have completed their closing arguments, the bailiff will escort you to the jury room, and you may commence your deliberations. When you have agreed and the verdict has been signed, notify the bailiff that you have agreed, but do not reveal your verdict to him. The foreperson shall keep the verdict in his/her possession until I instruct you otherwise.

000375

INSTRUCTION NO. 40

Your verdict must be in writing, signed by your foreperson, and, when found, must be returned by you into court.

Your verdict in this case must be:

As to Count I,

NOT GUILTY, as your deliberations may result; OR

GUILTY as to SEXUAL BATTERY.

This being a criminal case, it requires a unanimous concurrence of all jurors (i.e., all voting the same) to find a verdict.

000376

INSTRUCTION NO. 41

I have dated and signed these instructions, and you may take them with you to the jury room for further consideration; but I request that you return them into court with your verdict so they may be filed in this case as required by law.

DATED this 12th day of June, 2014.

A handwritten signature in black ink, appearing to read "Noel S. Hyde", written in a cursive style.

NOEL S. HYDE
District Court Judge

Tab D

2008 WL 5257138

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Appeals of Utah.

ROOSEVELT CITY, Plaintiff and Appellee,

v.

Jeremiah ANDERSON, Defendant and Appellant.

No. 20070936-CA. | Dec. 18, 2008.

Eighth District, Roosevelt Department, 071000129; The
Honorable John R. Anderson.

Attorneys and Law Firms

Julie George, Salt Lake City, for Appellant.

Clark B. Allred and Bradley D. Brotherson, Roosevelt, for
Appellee.

Before Judges THORNE, BILLINGS, and McHUGH.

MEMORANDUM DECISION
(Not For Official Publication)

McHUGH, Judge:

*1 Jeremiah Anderson appeals his conviction on three counts of lewdness involving a child, a class A misdemeanor, *see* Utah Code Ann. § 76-9-702.5 (Supp.2008).¹ Anderson argues that the evidence was insufficient to support his convictions. We affirm.

“Because we are asked to review the results of a bench trial for sufficiency of evidence, we will only reverse if the trial court’s findings were clearly erroneous.” *State v. Briggs*, 2008 UT 75, ¶ 10, 616 Utah Adv. Rep. 18. “[W]e must sustain the trial court’s judgment unless it is against the clear weight of the evidence, or if [we] otherwise reach[] a definite and firm conviction that a mistake has been made.” *Id.* (second and third alterations in original) (internal quotation marks omitted).

The Utah Code defines the crime of lewdness involving a child as follows:

(1) A person is guilty of lewdness involving a child if the person ... intentionally or knowingly does any of the following to, or in the presence of a child who is under 14 years of age:

....

(b) exposes his or her genitals, the female breast below the top of the areola, the buttocks, the anus, or the pubic area;

(i) in a public place; or

(ii) in a private place:

(A) under circumstances the person should know will likely cause affront or alarm; or

(B) with the intent to arouse or gratify the sexual desire of the actor or the child;

....

(e) performs any other act of lewdness.

Utah Code Ann. § 76-9-702.5(1).

“Anderson asserts that the whole basis of his defense was that he did not expose his genitals at all” and that there is insufficient evidence to prove otherwise. We disagree. One of the children testified that she saw Anderson pulling down his pants and saw his “private areas” “a couple of times,” “[a]nd ... [was] sure that [she] saw [Anderson].” Another child testified that her “dad and [his friends] were showing their bad spots” and clarified her testimony by indicating that she meant “down there,” “in their crotch area,” “between their legs.” Moreover, even if Anderson did not expose his genitals, there was still sufficient evidence to support Anderson’s conviction. The video recorded during the event demonstrates that in between joking that he was “a pro” at making pornography and loudly bragging about his and his wife’s sexual activities, Anderson licked a beer bottle that he held at his friend’s crotch and caressed the bare nipple of one of the other males. Anderson also solicited the women, including the children’s stepmother, to expose their breasts, and then, as one child explained, “[T]he boys ... c[ame] over and play[ed] around like really gross with them.” Moreover, Anderson lifted his own wife’s breast out of her shirt, held it in his hands, and licked her nipple. In short, there was sufficient evidence that Anderson not only exposed his genitals, *see id.* § 76-9-702.5(1)(a), but also exposed “the female breast below the top

of the areola,” *id.*, or “perform[ed] any other act of lewdness,” *id.* § 76–9–702.5(1)(e).

*2 Anderson further argues that “[t]he statute specifically [requires] that ... [he acted] intentional[ly] and knowing[ly] to cause affront or alarm or to satisfy a sexual desire” and that the State failed to prove that element. We disagree with Anderson’s reading of the statute. Utah Code section 76–9–702.5 requires proof that a defendant “intentionally or knowingly” “exposes his or her genitals, the female breast below the top of the areola, ... or the pubic area.” *Id.* § 76–9–702.5(1)(b). If that exposure occurred in a private place, the State must then prove that “under [the] circumstances the person *should know* [the exposure] will likely cause affront or alarm” or that the defendant acted “with the intent to arouse or gratify the sexual desire of the actor or the child.” *Id.* § 76–9–702.5(1)(b)(ii) (emphasis added). Thus, even if we accept Anderson’s argument that he did not act with the intent to cause affront or alarm or satisfy a sexual desire, the evidence was still sufficient if it established that, under the circumstances, Anderson should have known his actions would likely cause affront or alarm, *see id.* § 76–9–702.5(1)(b)(ii)(A).

It should seem obvious that exposing one’s genitals, licking a female’s exposed nipple, and soliciting other women to expose their breasts and then “playing around ... with them” would likely cause affront or alarm when done a few feet from three children ages six through eleven. Even if it were not obvious, Anderson certainly should have known the offensive nature of his activities in this case. After Anderson exposed, fondled, and licked his wife’s bare breast, she reminded him that children were watching. Moreover, one child specifically told Anderson and the other adults that “they were being gross.”² Given this evidence and the graphic and disturbing nature of Anderson’s actions, there is ample evidence that Anderson “should [have] known [n his actions] w[ould] likely cause affront or alarm,” *id.*

Affirmed.

WE CONCUR: WILLIAM A. THORNE JR., Associate Presiding Judge, and JUDITH M. BILLINGS, Judge.

Parallel Citations

2008 UT App 464

Footnotes

- 1 Although section 76–9–702.5 was amended after the unlawful activity occurred, that amendment does not affect Anderson’s arguments on appeal. We therefore cite the current version of the code for the reader’s convenience.
- 2 Apparently, the only response came from Anderson’s wife, who retorted, “Shut up, you moron.”