

2015

## **Salt Lake City, Plaintiff/Appellee, v. Joseph Howe, Defendant/ Appellant : Brief of Appellee**

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah.

---

### **Recommended Citation**

Brief of Appellee, *Salt Lake City v Howe*, No. 20141013 (Utah Court of Appeals, 2015).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/3243](https://digitalcommons.law.byu.edu/byu_ca3/3243)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs (2007– ) by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

RICHARD JORGENSEN #9987  
Senior Assistant City Prosecutor  
PADMA VEERU-COLLINGS #7005  
SALT LAKE CITY PROSECUTORS OFFICE  
349 South 200 East Suite 500  
Salt Lake City, Utah 84114  
Telephone: 801-535-7767  
Attorneys for Plaintiff/Appellee

---

IN THE UTAH COURT OF APPEALS

---

|                      |   |   |
|----------------------|---|---|
| SALT LAKE CITY,      | : |   |
| Plaintiff/Appellee,  | : |   |
| v.                   | : |   |
| JOSEPH HOWE,         | : | Case No. 20141013 -CA<br>Dist. Ct. Case No. 131911063MO |
| Defendant/Appellant. | : | Defendant is not incarcerated                           |

---

**BRIEF OF APPELLEE**

Appeal from the Sentence, Judgment, and Commitment for one count of Lewdness involving a child, a class A misdemeanor, in violation of Utah Code § 76-9-702.5, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judge Deno Himonas, presiding.

AMY N. FOWLER (13987)  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 East 500 South, Suite 200  
Salt Lake City, Utah 84111  
Attorney for Defendant/Appellant

RICHARD JORGENSEN (9987)  
Senior Assistant City Prosecutor  
PADMA VEERU-COLLINGS (7005)  
Salt Lake City Prosecutor  
349 South 200 East, Suite 500  
Salt Lake City, Utah 84114-5500  
Attorneys for Plaintiff/Appellee

FILED  
UTAH APPELLATE COURTS

AUG 05 2015

---

NO ORAL ARGUMENT REQUESTED

RICHARD JORGENSEN #9987  
Senior Assistant City Prosecutor  
PADMA VEERU-COLLINGS #7005  
SALT LAKE CITY PROSECUTORS OFFICE  
349 South 200 East Suite 500  
Salt Lake City, Utah 84114  
Telephone: 801-535-7767  
Attorneys for Plaintiff/Appellee

---

IN THE UTAH COURT OF APPEALS

---

|                      |   |                                |
|----------------------|---|--------------------------------|
| SALT LAKE CITY,      | : |                                |
| Plaintiff/Appellee,  | : |                                |
| v.                   | : |                                |
| JOSEPH HOWE,         | : | Case No. 20141013 -CA          |
|                      | : | Dist. Ct. Case No. 131911063MO |
| Defendant/Appellant. | : | Defendant is not incarcerated  |

---

**BRIEF OF APPELLEE**

Appeal from the Sentence, Judgment, and Commitment for one count of Lewdness involving a child, a class A misdemeanor, in violation of Utah Code § 76-9-702.5, in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Judge Deno Himonas, presiding.

RICHARD JORGENSEN (9987)  
Senior Assistant City Prosecutor  
PADMA VEERU-COLLINGS (7005)  
Salt Lake City Prosecutor  
349 South 200 East, Suite 500  
Salt Lake City, Utah 84114-5500  
Attorneys for Plaintiff/Appellee

AMY N. FOWLER (13987)  
SALT LAKE LEGAL DEFENDER ASSOC.  
424 East 500 South, Suite 200  
Salt Lake City, Utah 84111  
Attorney for Defendant/Appellant

---

NO ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

|   |    |
|---|----|
| TABLE OF AUTHORITIES .....  | iv |
| JURISDICTIONAL STATEMENT .....  | 1  |
| STATEMENT OF ISSUES, STANDARD OF REVIEW, PRESERVATION .....   | 1  |
| RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS .....  | 2  |
| STATEMENT OF THE CASE .....   | 2  |
| STATEMENT OF THE FACTS .....  | 3  |
| SUMMARY OF THE ARGUMENT .....   | 5  |
| ARGUMENT .....  | 6  |
| I.    This Court Should Decline to Address the Specific Challenges to the<br>Evidence as Defendant Did Not Preserve The Issue With His Generic<br>Directed Verdict Motion .....     | 6  |
| II.   The Trial Court Did Not Err Denying the Directed Verdict Motion and the<br>Evidence was sufficient to Support a Conviction for Lewdness Involving a<br>child. ....            | 8  |
| A - <i>The district court properly found that a reasonable jury could reasonably<br/>infer, from the evidence presented, that Defendant committed an act of<br/>lewdness.</i> ..... | 10 |
| B- <i>Defendant was in the presence children when he committed the Lewd Act.<br/>Nothing in the Statute requires the children to have any other<br/>involvement</i> .....           | 12 |
| CONCLUSION .....  | 14 |
| CERTIFICATE OF COMPLIANCE .....   | 15 |
| CERTIFICATE OF DELIVERY .....   | 16 |

## INDEX TO ADDENDA

Addendum A: Utah Codes §76-9-702.5; §76-3-203.9; §76-3-203.10;

§76-5-109.1

## TABLE OF AUTHORITIES

### Cases

|   |            |
|---|------------|
| <i>Baby E.Z. v T.I.Z.</i> 2011 UT 38, 266 P.3d 702 .....                  | 11         |
| <i>Ferguson v. Williams &amp; Hunt, Inc</i> 2009 UT 49, 221 P.3d 205..... | 2          |
| <i>State v. A.T. (in Re A.T.)</i> 2001 UT 82, 34 P.3d 228 .....           | 10         |
| <i>State v. Cases</i> 2013 UT 55, 82 P.3d 1106 .....                      | 8          |
| <i>State v. Clark</i> , 2004 UT 25, 89 P.3d 162. ....                     | 2          |
| <i>Salt Lake City v. Gallegos</i> , 2015 UT App 78, 347 P.3d 842.....     | 10, 11, 17 |
| <i>State v. Cristobal</i> , 2010 UT App 228 , 238 P.3d 1096.....          | 9          |
| <i>State v. Gonzales</i> , 2015 UT 10, 345 P.3d 1168 .....                | 6, 7       |
| <i>State v. Hansen</i> , 2002 UT 114, 61 P.3d 1062 .....                  | 6          |
| <i>State v. Isom</i> , 2015 UT app 160 789 Utah Adv. Rep. 21.....         | 6, 7       |
| <i>State v. Ireland</i> 2006 UT 17, 133 P.3d 396 . ....                   | 11         |
| <i>State v. Lows</i> , 2008 UT 58, 192 P.3d 867 .....                     | 6          |
| <i>State v. Kihlstrom</i> , 199 UT App 289, 988 P.2d 949 .....            | 2          |
| <i>State v. Maestas</i> , 2012 UT 46, 299 P.3d 892 .....                  | 8          |
| <i>State v. Montoya</i> , 2004 UT 5, 84 P.3d 1183.....                    | 6, 9       |
| <i>State v. Schofield</i> , 2002 UT 132, 63 P.3d 667.....                 | 2          |
| <i>State v. Weaver</i> , 2005 UT 49, 122 P.3d 566 .....                   | 6          |
| <i>State v. Vogt</i> 824 P.2d 455.....                                    | 11         |
| <i>Weiser v. Union Pac. R.R. Co.</i> 2010 UT 4, 247 P.3d 357 .....        | 5          |

## **Statutes**

|                              |           |
|------------------------------|-----------|
| Utah Code §76-3-203.9 .....  | 11        |
| Utah Code §76-3-203.10 ..... | 11        |
| Utah Code §76-5-109 .....    | 16, 17    |
| Utah Code §76-9-702.5 .....  | 2, 10, 11 |
| Utah Code §77-27-21.8 .....  | 11        |
| Utah Code § 77-37-4 .....    | 12        |

---

IN THE UTAH COURT OF APPEALS

---

SALT LAKE CITY, :  
Plaintiff/Appellee, :  
v. :  
JOSEPH HOWE, : Case No. 20141013 -CA  
Dist. Ct. Case No. 131911063MO  
Defendant/Appellant. :

---

**JURISDICTIONAL STATEMENT**

Defendant appealed his Conviction for Lewdness Involving a Child, a class A misdemeanor, in violation of Utah Code §76-9-702.5. This Court has jurisdiction pursuant to Utah Code §78A-4-103(2)(e) wherein the Court is granted jurisdiction in appeals from a court of record in criminal cases.

**STATEMENT OF ISSUES, STANDARD OF REVIEW, PRESERVATION**

**A. Issues:**

**1. Whether the non-specific motion for directed verdict preserved the specific grounds for appeal.**

**Standard of review:** To the extent that Defendant did not preserve his claims before the trial court, he must establish plain error, ineffective assistance of counsel, or exceptional circumstances to warrant review by this court. *See State v. Low*, 2008 UT 58, ¶ 19, 192 P.3d 867; *State v. Kozlov*, 2012 UT App 114, ¶ 28, 276 P.3d 1207, 1218.



“Each basis for such review of an unpreserved issue presents a legal question that we review for correctness.” *See State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162.

**2. The trial court was correct in denying the motion for a directed verdict when the testimony established that the defendant was observed in an act characterized as masturbating by three witnesses.**

**Standard of review:** The review of a denial of a motion for directed verdict is correctness of the trial court’s conclusion that the evidence established a prima facie case. *State v. Kihlstrom*, 1999 UT App 289, 988 P.2d 949. We review a trial court’s ruling on a motion for directed verdict for correctness. *Ferguson v. Williams & Hunt, Inc.*, 2009 UT 49, ¶ 19, 221 P.3d 205.

### **CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES**

Utah Code 76-9-702.5:

A person is guilty of lewdness involving a child if the person under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, sexual abuse of a child, aggravated sexual abuse of a child, or an attempt to commit any of those offenses, intentionally or knowingly does any of the following to, or in the presence of, a child who is under 14 years of age:

...

(c) masturbates;

...

(d) performs any other act of lewdness

Utah Code Ann. § 76-9-702.5

### **STATEMENT OF THE CASE**

Appellee is satisfied with the Defendant’s statement of the case.

## **STATEMENTS OF FACTS<sup>1</sup>**

On September 14, 2013 at a park located in Salt Lake City, Mr. And Mrs. Lindsley and Mr. Buie observed a man sitting near a tree next to a playground adjacent to an off leash dog park. All witnesses identified the defendant as the man sitting near the tree. Mr. Lindsley testified that he thought the defendant's position with his jacket draped over the front of him seemed a "little bit odd." R. 64:59 Mr. Lindsley continued to state that he couldn't see underneath what the defendant had draped over him, but "seemed to be moving in a manner" that lead Mr. Lindsley to believe "he might be touching himself." R. 64:60. Mr. Lindsley was concerned and called the police. He stated that the defendant was ten to fifteen feet from the playground. *Id.* Mr. Lindsley stated that the defendant's same actions continued for about 15 minutes until the police arrived. R. 64:61. He stated that there were "about a dozen kids playing" in the playground and Mr. Lindsley's two minor children were with him. R. 64:58. The defendant remained fixated on "looking at the children playing" despite other activity going on around the park. R. 64:63.

Mrs. Lindsley had similar testimony, but specifically stated "Umm, what I believed to be [occurring] was the defendant masturbating. Though his lap was covered, it appeared as if he was sitting, facing –to me it looked like he was facing the children with something of a fixated expression on his face and it looked to me as if he

---

<sup>1</sup> The City agrees with the defendant that the evidence to be considered should only be the evidence presented prior to the motion for directed verdict, and will not cite to testimony or facts that were introduced after the motion for directed verdict. The City objects to Defendant's use of his own testimony which was not presented to the court at the time the trial court ruled on his motion for directed verdict. See App. Brief pg 8.

was masturbating underneath some kind of cover because his hands were invisible and there was a bit of a gyrating motion that I witnessed.” R. 64: 65-66. She stated that her own minor children were with her and that the defendant was ten to fifteen feet from the playground which had fifteen to twenty children present. R. 64:67-68. Mrs. Lindsley testified that this activity occurred for ten to twenty minutes. *Id.*

Mr. Buie testified that he “saw a man sitting next to a tree right in front of the playground area and he had a jacket over his waist area and it looked like he was masturbating.” R. 64:73. When asked why it appeared the defendant was masturbating, Mr. Buie replied “[b]ecause there was pretty vigorous movement underneath the jacket that looked like it was masturbating. It wasn’t the whole body moving, ... it appeared to be just the arm moving underneath the jacket in the crotch area.” *Id.* Mr. Buie testified that the children in the area appeared to be between the ages of four and eight. R. 64:74

Officer Southworth testified that when he arrived the defendant became very nervous and slowly removed the jacket and “[the defendant] looked down at his pants with particular interest ...[at] a wet spot on his pants.” The spot was on the defendant’s genital area. R. 64:78. Officer Southworth on cross examination stated that the wet spot was small, and if it was urine it was not a lot. R. 64:81. When asked by Officer Livsey, the defendant stated that his “penis leaked.” R. 64:85. Officer Livsey when asked by defense counsel if it could have been urine, he testified that it would have been a small amount, and in his experience “[t]ypically when people urinate themselves there’s quite a bit more liquid than that.” R. 64:89.

After the testimony of Officer Livsey, the City rested. The Defendant upon the Court asking if there were any motions stated:

“Yes, Your Honor, I would move for a directed verdict. I do not believe the city has met their burden to prove that a reasonable jury would be able to find beyond a reasonable doubt that this offense actually occurred. I would submit.” R. 64:94.

The Court denied the motion for directed verdict.

### **SUMMARY OF THE ARGUMENT**

Defendant failed to specifically challenge the evidence and made only a pro forma motion for directed verdict. By summarily challenging that the City has not met their burden without providing specifics that the court could rule on, Defendant failed to preserve his claim that the evidence failed to show he had the intent or did not commit a lewd act in the presence of children.

The defendant challenging a denial of a directed verdict must overcome a substantial burden on appeal to show that the trial court erred in denying the motion for a directed verdict. The City presented sufficient evidence in its case-in-chief through witnesses, who stated they believed the defendant to be masturbating, that the defendant was in the park committing a lewd act in the presence of children.

## ARGUMENT

### **I. This Court should decline to address the specific challenges to the evidence as Defendant did not preserve the issue with his generic directed verdict motion.**

"To preserve an issue for appellate review, a party must first raise the issue in the trial court, giving that court an opportunity to rule on the issue." *Weiser v. Union Pac. R.R. Co.*, 2010 UT 4, ¶ 14, 247 P.3d 357. Defendant failed to preserve the issue with specificity that the court could address each of the three elements Defendant raises on appeal. Defendant does not address any of the necessary elements to challenge an issue which is not preserved. "When a party fails to preserve an issue for appeal, we will address the issue only if (1) the appellant establishes that the district court committed "plain error," (2) "exceptional circumstances" exist, or (3) in some situations, if the appellant raises a claim of ineffective assistance of counsel in failing to preserve the issue. *State v. Weaver*, 2005 UT 49, ¶ 18, 122 P.3d 566; *State v. Hansen*, 2002 UT 114, ¶ 21 n.2, 61 P.3d 106.2 as cited in *State v. Low*, 2008 UT 58, ¶ 19, 192 P.3d 867, 874. In the present case Defendant simply stated that he "move[s] for a directed verdict." Defendant without specificity argued, "I do not believe the City has met their burden to prove that a reasonable jury would be able to find beyond a reasonable doubt that this offense actually occurred." R. 64:94. This argument is insufficient for the court to rule on as a motion. "When evaluating a motion for a directed verdict 'the court is not free to weigh the evidence and thus invade the province of the jury, whose prerogative it is to judge the facts.' Rather, the court's role is to determine whether the state has produced 'believable evidence' on each element

of the crime from which a jury, acting reasonably, could convict the defendant.” *State v. Montoya*, 2004 UT 5, ¶ 32, 84 P.3d 1183, 1190-91(internal citations omitted). In the present case the testimony was consistent that it appeared to the ‘civilian’ witnesses that the defendant was masturbating, and the officers’ testimony supported those witnesses’ reasonable belief.

“A generic motion for directed verdict will preserve a specific ground for appeal when "the specific ground for an objection is clear from its context." *State v. Gonzalez*, 2015 UT 10, ¶ 26, 345 P.3d 1168, cited in *State v. Isom*, 2015 UT App 160, ¶ 22 789 Utah Adv. Rep. 21. It is not clear in the present case as it was clear in *Gonzales* what the defendant’s theory of the case was. In *Gonzales* the Defendant’s opening statement made it clear to the court that his theory was self defense. When Gonzales moved for a directed verdict, “the trial court would necessarily have understood from the context that [the defendant] was asserting that the State had failed to meet its burden of showing that he had not acted in self-defense.” *Id.* The opening statement made by Defendant in the present case focused on illusions, magic tricks, and burdens of proof. R64:54-56. The theory of the defendant’s case was not made clear to the court, and the court would have no understanding of the context of the generic motion for directed verdict.

"As a general rule, claims not raised before the trial court may not be raised on appeal." In deciding whether a motion made in the trial court was sufficient to preserve an argument made on appeal, we look to rule 12 of the Utah Rules of Criminal Procedure, which requires a motion to "state succinctly and with particularity the grounds upon which it is made and the relief sought." Where the grounds upon which a motion is made before the trial court differ from the grounds argued on appeal, appellate courts will generally dismiss those arguments as unpreserved.

*State v. Gonzales* 2015 UT 10 ¶ 24 345 P.3d 1168 at 1175.(internal citations omitted)

Defendant has not raised any plain error, exceptional circumstances or ineffective assistance claims in his brief, which would be necessary for this Court to review an unpreserved issue.

**II. The Trial Court did not err denying the directed verdict motion, and evidence was sufficient to support a conviction for Lewdness Involving a Child.**

Defendant has not shown that the evidence could not support a conviction nor has he showed that the City failed to establish a *prima facie* case against Defendant.

A defendant must overcome a substantial burden on appeal to show that the trial court erred in denying a motion for directed verdict. We will uphold a trial court's denial of a motion for directed verdict "based on a claim of insufficiency of the evidence" if, when viewed in the light most favorable to the State, "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Montoya*, 2004 UT 5, ¶ 29, 84 P.3d 1183 (internal quotation marks omitted). [Defendant] must therefore show that, when viewed in the light most favorable to the State, no evidence existed from which a reasonable jury could find beyond a reasonable doubt that [defendant committed the crime].

*Gonzalez v. State*, 2015 UT 10, ¶ 27, 345 P.3d 1168, 1176

Defendant has failed to state evidence that would show that the trial court erred in denying his motion for directed verdict. The City in this case presented evidence that the witnesses concluded that Defendant was "touching himself" or "masturbating" and children were present. R. 64:60, 65-66, 73. The only disputing evidence<sup>2</sup> the trial court

---

<sup>2</sup> Other evidence was presented by the Defendant after the motion for directed verdict. The City maintains that it is not proper for this Court to review evidence not known to the trial court at the time when reviewing a denial of Defendant's motion for directed verdict.

could consider regarding the motion for directed verdict was elicited through statements Defendant made to Officer Livsey stating that Defendant was a religious person, would never do something like that [masturbate] and that "he could have been scratching himself". R. 64:84.

Testimony was presented that Defendant was alone at the time and that his actions were his own and voluntary. This court has recognized that "a defendant's mental state can be proven by circumstantial evidence, including the nature and extent of the criminal act" *State v. Maestas*, 2012 UT 46, ¶ 179, 299 P.3d 892. The evidence presented was that the defendant was engaged in this act that was described as masturbation. There was no evidence presented that the defendant was not acting intentionally or that he was not in control of his arms. Defendant stated to Officer Livsey that he was intentionally sitting under that tree. R64:87. "It is well established that "criminal intent is seldom proved by direct evidence but must be instead inferred from the circumstances of the given facts." *State v. Cases* 2003 UT 55 ¶ 48, 82 P.3d 1106 citing *State v. Castonguay*, 663 P.2d 1323, 1326 (Utah 1983). The City concedes that it did not present direct proof that Defendant was masturbating. None of the witnesses saw Defendant manually manipulating his bare genitals for sexual gratification. It would be nearly impossible for a prosecution to show with direct evidence that a masturbatory act was done for gratification as gratification can only exist in the mind of the individual. The prosecution can show circumstantial evidence that the act is pleasurable (such as a wet spot or facial expression), but without a



statement from a defendant that the act was gratifying, the prosecution must rely on circumstantial evidence.

In the present case, Defendant maintained his demeanor, posture and activity for ten to twenty minutes. R. 64:70. His activity was more than a casual scratch or rub. Defendant continued the same fixated expression and gyrating motion during that time. R. 64: 65-66. Defendant's "vigorous movement underneath the jacket that looked like [he] was masturbating" R. 64:73.

Given the evidence that Defendant continued this activity longer than 10 minutes, it is proof that Defendant's motions under his jacket were more than a casual or inadvertent motion; Defendant was intentionally moving his arm in a masturbatory manner. The trial court did not err when it denied Defendant's motion for directed verdict as a *prima facie* case was presented.

A. *The district court properly found that a reasonable jury could reasonably infer, from the evidence presented, that Defendant committed an act of lewdness.*

The trial court correctly denied Defendants motion for a directed verdict based on the evidence presented.

[T]he distinction between reasonable inference and speculation is intensely fact-based. When evidence supports only one possible conclusion, the quality of the inference rests on the "reasonable probability that the conclusion flows from the proven facts." Id. When the evidence supports more than one possible conclusion, none more likely than the other, the choice of one possibility over another can be no more than speculation; while a reasonable inference arises when the facts can reasonably be interpreted to support a conclusion that one possibility is more probable than another.

*State v. Cristobal*, 2010 UT App 228, ¶ 16, 238 P.3d 1096, 1101.

The City presented sufficient evidence to prove Defendant was engaged in a

lewd act, masturbation, or that Defendant was simulating masturbation. There was no other explanation presented to explain why the observations of the witnesses could not support a conclusion that Defendant was engaged in a lewd act.

In reviewing the denial of a motion for a directed verdict based on a claim of insufficiency of the evidence, we will uphold the trial court's decision if, upon reviewing the evidence and all inferences that can be reasonably drawn from it, we conclude that some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt. Therefore, a motion for a directed verdict made at the close of the state's case may be denied if the trial court finds that the state has established a prima facie case against the defendant by producing 'believable evidence of all the elements of the crime charged.' The evidence is to be viewed in the light most favorable to the state.

State v. Montoya, 2004 UT 5, ¶ 29, 84 P.3d 1183, 1190 (internal quotations and citations omitted)

The evidence presented at the time of the motion for directed verdict supports the conclusion that Defendant was either masturbating or in an act similar to masturbation which is a lewd act. "To an objective viewer, [the defendant] conveyed the appearance of masturbation. ... It is precisely this type of conduct that the legislature intended to prohibit in enacting the statute." *State v. A.T.* (in Re A.T.), 2001 UT 82, ¶ 10, 34 P.3d 228, 232. In *State v. A.T.*, the defendant grabbed his crotch over his clothes in a manner that was a deliberate simulation of masturbation. *Id.* Defendant in the present case was in public, although he draped a jacket over him, and was staring fixatedly at the playground and moving his arms in a manner which led the witnesses to conclude that he was engaged in the act of masturbation. The Officers observing a wet spot on the groin area of Defendant's pants supports the conclusions of the witnesses.

B. *Defendant was in the presence of children when he committed the Lewd act. Nothing in the statute requires the children to have any other involvement.*

Lewdness involving a child specifically states in sub part 1 “A person is guilty of lewdness involving a child if... intentionally or knowingly does any of the *following to, or in the presence of*, a child who is under 14 years of age” UCA §76-9-702.5 (emphasis added). The text of the statute makes clear the acts that are prohibited being done “to or in the presence of” a child. This court need not determine if the statute is lacking clarity, as it is unambiguous that any of the acts committed upon or in the presence of a child are a violation of the statute. It is clear from the wording that the alternative of “or in the presence” does not require the crime be committed upon the child directly, but that it occurred with the child present. “Only if we find the statutory language to be ambiguous may we turn to secondary principles of statutory construction or look to the statute's legislative history” *State v. Ireland*, 2006 UT 17, ¶ 11, 133 P.3d 396, 399. “Our overall goal is to give effect to the legislative intent, as evidenced by the statute's plain language, in light of the purpose the statute was meant to achieve. Further, we assume the legislative body used each term advisedly and in accordance with its ordinary meaning.” *Baby E.Z. v. T.I.Z.*, 2011 UT 38, ¶ 15, 266 P.3d 702, 707 (internal citation and quotations omitted). The wording of the statute is construed to prohibit exposing a child, who may or may not know what the act is, from sexual activity.

“This wording of the lewdness involving a child statute proscribes the exposing of a child to sexual activity, and the general term “any other act of gross lewdness”<sup>3</sup> is

---

<sup>3</sup> The statute was amended in 1994 House Bill 335 to remove the word “gross” from “any other act of lewdness”

restricted to a sense analogous to such wording. These acts are committed either by the actor upon him or herself, or committed by the actor with or upon a person ***other than the victim, in the presence of the victim*** who must be under fourteen years of age.

*State v. Vogt*, 824 P.2d 455, 458 (Utah Ct. App. 1991) (emphasis added)

Utah Code defines “in the presence of a child” in three places: §76-3-203.9 and §76-3-203.10 (violent offenses committed in presence of a child), and §76-5-109.1 (domestic violence in the presence of a child). In all three definitions the consistent language in the statute is “having knowledge that a child is present and *may see or hear* [the act]”. (emphasis added) Utah code does not provide a definition specifically for the sections §76-9-702.5 (the charge in this case) nor Sex Offender in the Presence of a Child (§77-27-21.8). “[T]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with *other statutes under the same and related chapters*.” *State v. Schofield*, 2002 UT 132, ¶ 8, 63 P.3d 667, 669-70 (internal citations and quotations omitted. Emphasis added). Reading the “in the presence” language in harmony with other chapters of Title 76 of the Utah Code provide clear direction that “in the presence” means that a child is present and may see or hear the act.

Reading the statute as Defendant proposes would require involvement of the child is contrary to Utah law about how child victims relate to criminal conduct. Utah Code §77-37-4 (2) (Victims’ Rights – Additional rights – Children) states “Children are not responsible for the inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, not to have allegations made, implying this responsibility...” UCA §77-37-4 (2010). Construing the statute as Defendant suggests would require the child who was in the presence when the act occurred be

'involved' would require that the child "be included in some activity... and take part in" the inappropriate behavior of the adult. See App. Brief 18.

The trial court did not err in denying Defendant's motion for directed verdict as the statute is unambiguous and clearly stated that the prohibited conduct must not be done to or in the presence of a child. The other sections of the code defining "in the presence of a child" are consistent that the child must be present and may see or hear the act. Lewdness involving a child does not require 'involvement' of a child, as the child is not responsible for the behavior of the adult.

### CONCLUSION

For the reasons set forth herein, this Court should affirm the district court's denial of Defendant's motion for a directed verdict.

SUBMITTED this 3<sup>rd</sup> day of August, 2015

Attorney for Plaintiff/ Appellee



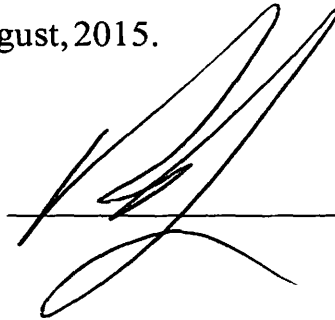
---

Richard J. Jorgensen

## CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,967 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2007 in Times New Roman 13 point.

DELIVERED this 3 day of August, 2015.

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, positioned above a horizontal line.

CERTIFICATE OF DELIVERY

I, RICHARD JORGENSEN, certify that I have caused to be hand-delivered the original and seven copies of the foregoing brief to the Utah Court of Appeals, 450 South State, 5th Floor, Salt Lake City, Utah 84114-0230, and four copies to the Salt Lake City Prosecutor's Office, 349 South 200 East, Suite 500, Salt Lake City, Utah 84114,

this            day of August, 2015.

---

INDEX TO ADDENDA

Addendum A: Utah Code §76-9-702.5 §76-3-203.9; §76-3-203.10;

§76-5-109.



## ADDENDUM A

#### **76-9-702.5. Lewdness involving a child.**

(1) A person is guilty of lewdness involving a child if the person under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, sexual abuse of a child, aggravated sexual abuse of a child, or an attempt to commit any of those offenses, intentionally or knowingly does any of the following to, or in the presence of, a child who is under 14 years of age:

(a) performs 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:

(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;

(c) masturbates;

(d) under circumstances not amounting to sexual exploitation of a child under Section 76-5b-201, causes a child under the age of 14 years to expose his or her genitals, anus, or breast, if female, to the actor, with the intent to arouse or gratify the sexual desire of the actor or the child; or

(e) performs any other act of lewdness.

(2) (a) Lewdness involving a child is a class A misdemeanor, except under Subsection (2)(b).

(b) Lewdness involving a child is 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; or

(ii) the person has previously been convicted of a violation of this section.

**76-3-203.9. Violent offense committed in presence of a child -- Aggravating factor.**

(1) As used in this section:

(a) "In the presence of a child" means:

- (i) in the physical presence of a child younger than 14 years of age; or
- (ii) having knowledge that a child younger than 14 years of age is present and

may see or hear a violent criminal offense.

(b) "Violent criminal offense" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt to commit a criminal offense involving violence or physical harm.

(2) The sentencing judge or the Board of Pardons and Parole shall consider as an aggravating factor in their deliberations that the defendant committed the violent criminal offense in the presence of a child.

(3) The sentencing judge or the Board of Pardons and Parole shall also consider whether the penalty for the offense is already increased by other existing provisions of law.

(4) This section does not affect or limit any individual's constitutional right to the lawful expression of free speech or other recognized rights secured by the Constitution or laws of Utah or by the Constitution or laws of the United States.

(5) This section does not affect or restrict the exercise of judicial discretion under any other provision of Utah law.

Enacted by Chapter 347, 2007 General Session

**76-3-203.10. Violent offense committed in presence of a child -- Penalties.**

(1) As used in this section:

(a) "In the presence of a child" means:

(i) in the physical presence of a child younger than 14 years of age; and

(ii) having knowledge that the child is present and may see or hear the

commission of a violent criminal offense.

(b) "Violent criminal offense" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt to commit a criminal offense involving violence or physical harm that is not a domestic violence offense as defined in Section 77-36-1.

(2) A person commits a violent criminal offense in the presence of a child if the person:

(a) commits or attempts to commit criminal homicide, as defined in Section 76-5-201, against a third party in the presence of a child;

(b) intentionally causes or attempts to cause serious bodily injury to a third party or uses a dangerous weapon, as defined in Section 76-1-601, or other means or force likely to produce death or serious bodily injury, against a third party in the presence of a child; or

(c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits a violent criminal offense in the presence of a child.

(3) A person who violates Subsection (2) is guilty of a class B misdemeanor.

Enacted by Chapter 359, 2010 General Session

**76-5-109.1. Commission of domestic violence in the presence of a child.**

(1) As used in this section:

- (a) "Cohabitant" has the same meaning as defined in Section 78B-7-102.
- (b) "Domestic violence" has the same meaning as in Section 77-36-1.
- (c) "In the presence of a child" means:
  - (i) in the physical presence of a child; or
  - (ii) having knowledge that a child is present and may see or hear an act of domestic violence.

(2) A person commits domestic violence in the presence of a child if the person:

- (a) commits or attempts to commit criminal homicide, as defined in Section 76-5-201, against a cohabitant in the presence of a child; or
- (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon, as defined in Section 76-1-601, or other means or force likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or
- (c) under circumstances not amounting to a violation of Subsection (2)(a) or (b), commits an act of domestic violence in the presence of a child.

(3) (a) A person who violates Subsection (2)(a) or (b) is guilty of a third degree felony.

(b) A person who violates Subsection (2)(c) is guilty of a class B misdemeanor.

(4) A charge under this section is separate and distinct from, and is in addition to, a charge of domestic violence where the victim is the cohabitant. Either or both charges may be filed by the prosecutor.

(5) A person who commits a violation of this section when more than one child is present is guilty of one offense of domestic violence in the presence of a child regarding each child present when the violation occurred.