AMENDED OPINION*

This opinion is subject to revision before final publication in the Pacific Reporter

2021 UT 02

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

LONNIE NORTON,
Petitioner.

No. 20180514
Heard May 13, 2019
Filed July 13, 2020
Amended Opinion Filed January 7, 2021

On Certiorari to the Utah Court of Appeals

Third District, West Jordan
The Honorable Bruce C. Lubeck
No. 131400015

Attorneys:

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JUSTICE PETERSEN authored the opinion of the Court with respect to Parts I–IV in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined, and wrote separately in Part V in which

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* After this opinion issued on July 13, 2020, Norton petitioned for rehearing. We have considered the arguments in the petition and address them in amended paragraphs 85–104.

ASSOCIATE CHIEF JUSTICE LEE joined.

CHIEF JUSTICE DURRANT filed an opinion concurring in part and concurring in the judgment, in which JUSTICE HIMONAS and JUSTICE PEARCE joined.

JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

¶1 A jury convicted Lonnie Norton of breaking into the home where his estranged wife was staying, kidnapping her, assaulting her, and then raping her—all while she had a protective order against him. He appealed his convictions and the court of appeals affirmed. He petitions this court for a review of each claim he raised before the court of appeals. We affirm on all but one issue.

BACKGROUND[1]

¶2 Norton and H.N. had been married for twenty-one years when H.N. moved out of the marital home with their four children. She stayed in a domestic violence shelter, then moved into her parents' home. She obtained a protective order against Norton, which prohibited him from contacting her except to discuss marriage counseling and their children. The protective order permitted Norton to visit his three younger children, but only if a supervisor was present.

¶3 One evening, H.N.'s three youngest children went to the marital home for a weekend visitation with Norton. The events of that night led to Norton's arrest.

¶4 At the trial on the resulting charges, both H.N. and Norton testified. They gave vastly different accounts of what happened that night.

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[1] "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346 (citation omitted). "We present conflicting evidence only as necessary to understand issues raised on appeal." *Id.*

The Two Conflicting Accounts

H.N.'s Account

¶5 At trial, H.N. testified that before going to bed that night, she put chairs under the doorknobs of the front and back doors of her parents' home, as she did each night. She had previously placed a dryer in front of the basement door, which remained there. After H.N. went to bed, she was awakened by a "loud bang." She grabbed the phone and dialed 911 before noticing Norton standing at the end of her bed. He grabbed the phone and punched her in the face. Norton also wound duct tape around H.N.'s head, covering her mouth.

¶6 The next thing H.N. remembered was sitting in Norton's car at an intersection. Although it was snowing, she did not have any shoes on. H.N. noticed that Norton had a gun in his lap, which he picked up and pointed at her. H.N. thought Norton was driving to his office at the University of Utah, but instead he drove to a building in Fort Douglas. When they arrived, Norton was still holding the gun and told H.N. that she "needed to be quiet or he would shoot [her]."

¶7 H.N. and Norton went into the building, up some stairs, and into a bathroom. Norton ripped the duct tape off H.N.'s head and talked to her about reconciling their marriage. After he finished talking, Norton told H.N. to take off her shirt. When H.N. said "no," Norton pointed the gun at her and again told her to take off her shirt. She finally acquiesced, and Norton squeezed her breasts.

¶8 Next, Norton led H.N. into an office and told her to take off her pants. She again said "no," and he again pointed the gun at her, forcing her to comply. While she did so, Norton undressed, removed the magazine from the gun, and put the magazine and gun in a filing cabinet. Then, he told H.N. that they were going to have sex. She said "no," but Norton responded that "yes" they were. "So you're going to rape me?" she asked. Norton replied, "You can't rape somebody that you're married to."

¶9 He then lay on the ground and pulled H.N. on top of him. He grabbed H.N.'s hands, flipped her so that she was underneath him, and raped her. While Norton was on top of her, H.N. grabbed his penis as hard as she could, but was unsure how hard that was because she has rheumatoid arthritis. In response, Norton again grabbed her hands and held them over her head.

¶10 After raping H.N., Norton took her into the bathroom. He told her to rinse off, but she struggled because her hands were shaking. Norton complained that she "wasn't doing a good enough job," and inserted his fingers into H.N.'s vagina to try to "rinse himself out" of her. Afterwards, H.N. dried herself off with paper towels and dressed. She then noticed that Norton was dressed with the gun in his hand.

¶11 Back in the office, Norton set up two chairs so that they were facing each other and told H.N. to sit. She sat, and Norton put the gun to his head and threatened to kill himself. H.N. tried to dissuade him, but Norton pointed the gun at H.N. and threatened to shoot her, too. Eventually H.N. got mad and told Norton to "go ahead and shoot himself," at which point he got up and took her back to the car.

¶12 Norton drove to the marital home. There, H.N. checked on the children and then convinced Norton to take her back to her parents' home. When they arrived, Norton entered the house, leaving only after H.N. told him she would not tell anyone what had happened.

¶13 After Norton left, H.N. called one of Norton's neighbors and asked the neighbor to get her children out of the marital home. H.N. also called 911, told a police officer what happened, and asked the officer to check on her children. The police arrived at H.N.'s parents' home, spoke with her, and then drove her to the hospital.

Norton's Account

¶14 Norton testified at trial and gave a very different version of these events. He claimed that H.N. told him to visit her over the weekend so they could discuss their marriage. After their children were asleep, Norton drove to H.N.'s parents' house to see her. While driving over, he received a phone call from H.N., which he missed. He arrived at H.N.'s parents' home and waited outside until she exited the house and got in the car. Norton said he could not remember whether H.N. was wearing shoes, but that "she might have come running out in stocking feet" and he thought he "gave her a pair of Reeboks to wear."

¶15 H.N. suggested they go to Norton's office to talk. While driving, Norton decided it would be better to go to a building in the Fort Douglas area.

¶16 After arriving at the building, Norton unlocked the door and proceeded upstairs with H.N. where they sat down and talked about reconciliation. H.N. said she needed time, and Norton started talking about when they first met and when they were first married. H.N. then came over, sat on Norton's lap, put her arms around him, and the two started kissing. They moved to the floor where they continued to kiss and touch each other. They took off their clothes, continued to kiss, and then H.N. "climbed on top" of Norton and they began "to have sex." Afterwards, they went into the bathroom where H.N. "rinsed" and "dried herself off."

¶17 After dressing, Norton and H.N. sat down and continued to discuss reconciliation. H.N. told Norton she did not want to live with him anymore. He replied that if they were not going to reconcile he thought it "would be fair" if they had joint custody of their children. The two argued, and H.N. slapped Norton and then he backhanded her. H.N. tried to hit Norton more, but he grabbed her hands and the two "rastled." H.N. went into the bathroom, shut the door, and stayed there for about ten minutes. When H.N. left the bathroom, they went back to the car and she told Norton she wanted to look in on their children.

¶18 Norton drove to the marital home and they checked on the children. He then took H.N. back to her parents' home. When they got there, H.N. told Norton that the door was locked, so he pushed through a locked gate and went to one of the back doors and pushed it open. He went inside and opened a different door to let H.N. into the home. Then, he again brought up having joint custody of their children. This started another argument. H.N. then claimed that he had broken into her parents' home and beaten her up, and she threatened to call the police. Norton got scared and left. Later that morning, the police came and arrested him.

District Court Proceedings

Jury Instructions

¶19 The State charged Norton with aggravated kidnapping, aggravated burglary, aggravated assault, violation of a protective order, damage to or interruption of a communication device, and three counts of aggravated sexual assault. The three aggravated sexual assault charges were based on Norton squeezing H.N.'s breasts, raping her, and inserting his fingers into her vagina, respectively. The case proceeded to trial. When it came time to

instruct the jury, Norton asked the court for instructions on a number of lesser included offenses. The court agreed to some of these instructions but denied others.

Verdict

¶20 On the charge of violation of a protective order and the two charges of aggravated sexual assault relating to rape and digital penetration, the jury found Norton guilty as charged. On the aggravated kidnapping, aggravated burglary, and aggravated assault charges, the jury found Norton guilty of the lesser included offenses of kidnapping, burglary, and assault. The jury acquitted him of interruption of a communication device and aggravated sexual assault related to squeezing H.N.'s breasts.

Sentencing

¶21 At sentencing, the most serious punishment Norton faced was for his two convictions of aggravated sexual assault. He made two arguments to persuade the district court to reject the presumptive punishment tier of fifteen years to life in favor of a lower punishment tier.[2]

¶22 First, Norton argued that the district court should not apply the higher sentencing tier applicable to aggravated sexual assault based on rape and forcible sexual abuse because the jury had not been given a special verdict form to indicate the type of sexual assault upon which they relied. Norton observed that the court had instructed the jury that sexual assault could be based on rape, attempted rape, forcible sexual abuse, or attempted forcible sexual abuse. But the court did not provide the jury with a special verdict form to indicate which underlying sexual assault offense formed the basis of either conviction.

¶23 In light of this, Norton argued there was no evidence these convictions were based on anything more than the least

[2] The statutory sentencing range for aggravated sexual assault varies based on the type of sexual assault involved in the offense. If the underlying offense is rape or forcible sexual abuse, the presumptive sentence is fifteen years to life. UTAH CODE § 76-5-405(2)(a)(i). If the underlying offense is attempted rape, the presumptive sentence is ten years to life. *Id.* § 76-5-405(2)(b)(i). And if the underlying offense is attempted forcible sexual abuse, the presumptive sentence is six years to life. *Id.* § 76-5-405(2)(c)(i).

serious offense of attempted forcible sexual abuse. So he reasoned the district court could sentence him only to six years to life, the sentencing range corresponding to aggravated sexual assault based on attempted forcible sexual abuse. UTAH CODE § 76-5-405(2)(c)(i). The court rejected this argument and concluded the presumptive range for the two counts of aggravated sexual assault should be fifteen years to life, the tier corresponding to aggravated sexual assault based on completed acts of rape and forcible sexual abuse. *Id.* §§ 76-5-405(2)(a)(i), -405(2)(b)(i).

¶24 Second, Norton argued that the district court should depart from the higher sentencing tier in the "interests of justice" due to his history, distressed state at the time of the crime, and commitment to improving. The State countered that fifteen years to life was an appropriate sentence because Norton committed "a terrible crime" and had never accepted responsibility for his actions. The court acknowledged that this was a "very difficult case" and that Norton had a "good past" and might be "entitled to some mercy." However, the court noted Norton's "inability and unwillingness to follow the truth" and that his actions were the "kind of conduct that simply cannot be accepted in our society." The court sentenced Norton to fifteen years to life in prison on both counts of aggravated sexual assault, to run concurrently.

¶25 In total, the district court sentenced Norton to fifteen years to life in prison on both aggravated sexual assault convictions, one to fifteen years in prison for kidnapping, one to fifteen years in prison for burglary, 180 days for assault, and 365 days for violation of a protective order. The court ran each prison term concurrently.

Court of Appeals' Decision

¶26 Norton appealed, making five claims. Two of Norton's claims centered on the district court's jury instructions. He argued that the instructions on aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse misstated the law because they did not make clear that Norton had to act intentionally or knowingly with regard to H.N.'s nonconsent. *State v. Norton*, 2018 UT App 82, ¶¶ 25, 28, 427 P.3d 312. He also argued that the district court erred in rejecting some of his requests for instructions on lesser included offenses. *Id.* ¶ 26.

¶27 Norton also challenged his sentence. He argued that the district court's decision to apply the fifteen-to-life sentencing tier for his aggravated sexual assault convictions "violated his rights

to due process and a jury trial" because the jury had not been given a special verdict form to indicate the type of sexual assault forming the basis of these convictions. *Id.* ¶ 57. He reasoned that this "impermissibly increased the penalty he would have received had he been sentenced according to the facts that he claims were reflected in the jury's verdict." *Id.* ¶ 59. He also argued that the court abused its discretion when it failed to properly conduct the interests of justice analysis required by *LeBeau v. State*, 2014 UT 39, 337 P.3d 254. *Norton*, 2018 UT App 82, ¶ 67.

¶28 Finally, Norton argued that the court of appeals should reverse his convictions under the cumulative error doctrine. *Id.* ¶ 87.

¶29 The court of appeals rejected each argument. First, the court concluded that even if the jury instructions regarding aggravated sexual assault, rape, and forcible sexual abuse were erroneous as to the required mental state for H.N.'s nonconsent, any such error did not prejudice Norton. *Id.* ¶ 40. Second, the court of appeals determined that the district court did not err in refusing to give certain lesser included offense instructions that Norton had requested. *Id.* ¶¶ 49, 53, 56. It further concluded that at sentencing, the district court correctly determined the presumptive sentencing tier for the aggravated sexual assault convictions and properly considered all the evidence and argument presented by the parties. *Id.* ¶ 86. It also declined to reverse on cumulative error grounds. *Id.* ¶ 87.

¶30 We granted Norton's petition for certiorari on each of these claims. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

¶31 "On certiorari, we review for correctness the decision of the court of appeals . . . ." *State v. Levin*, 2006 UT 50, ¶ 15, 144 P.3d 1096.

ANALYSIS

¶32 We granted certiorari to consider whether the court of appeals erred in (1) concluding that any error in the jury instructions on aggravated sexual assault, rape, and forcible sexual abuse did not prejudice Norton; (2) affirming the district court's refusal to instruct the jury on additional lesser included offenses of aggravated sexual assault, aggravated burglary, and aggravated kidnapping; (3) affirming the district court's sentence

of fifteen years to life on both convictions of aggravated sexual assault; (4) concluding that the district court conducted a proper interests of justice analysis at sentencing; and (5) rejecting Norton's claim of cumulative error. We address each issue in turn.

I. JURY INSTRUCTIONS

¶33 Norton contends that the jury instructions on aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse were incorrect. He argues that the instructions did not adequately explain that to convict, the jury must find that he acted knowingly and intentionally with regard to H.N.'s nonconsent. He further contends that if the jury had been properly instructed, there was a reasonable probability it would have acquitted him on these charges. Norton did not object to these instructions at trial, so he asks us to review this claim for plain error,[3] manifest injustice,[4] and ineffective assistance of counsel.

¶34 The court of appeals assumed without deciding that the jury instructions were incorrect, and it disposed of this issue based on lack of prejudice. *State v. Norton*, 2018 UT App 82, ¶¶ 30–40, 427 P.3d 312. We agree with the court of appeals that even

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[3] The State argues that we should not conduct a plain error review because Norton invited any error in these instructions. At trial, the district court told counsel that if they did not object to an instruction, the court would assume they approved of it. Norton's counsel did not object to these instructions, and the State argues this is tantamount to invited error. We decline to address the State's argument because we must still analyze prejudice to determine Norton's ineffective assistance of counsel claim. And because we agree with the court of appeals that, even assuming these jury instructions were erroneous, they did not prejudice Norton, his claim fails whether we review it for ineffective assistance, manifest injustice, or plain error.

[4] Our precedent holds that in many instances "'manifest injustice' and 'plain error' are operationally synonymous." *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989); *see also State v. Johnson*, 2017 UT 76, ¶ 57 n.16, 416 P.3d 443; *State v. Maestas*, 2012 UT 46, ¶ 37, 299 P.3d 892. Norton has not argued otherwise; therefore, we review his argument under the plain error standard.

assuming Norton's criticism of these instructions is right, he has not shown prejudice.

¶35 To show plain error or ineffective assistance of counsel, Norton must prove he was prejudiced by the alleged error. *See State v. Jimenez*, 2012 UT 41, ¶ 20, 284 P.3d 640. The prejudice standards for plain error and ineffective assistance are the same. *State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699. Prejudicial error occurs when "there is a reasonable probability" that but for the alleged errors, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶36 Norton argues that the jury instructions did not clearly explain the requisite mens rea regarding H.N.'s nonconsent. At trial, the district court instructed the jury that the State had to "prove a mental state as to each of the . . . counts charged." It then defined the mental states "intentionally"[5] and "knowingly."[6]

¶37 Regarding aggravated sexual assault, the district court instructed the jury that it could find Norton guilty if it found beyond a reasonable doubt that:

> 1. [Norton] raped or attempted to rape or committed forcible sexual abuse or attempted forcible sexual abuse against [H.N.]; and
>
> 2. That in the course of that rape or attempted rape or forcible sexual abuse or attempted forcible sexual abuse [Norton]
>
> (a) used or threatened [H.N.] with the use of a dangerous weapon; or
>
> (b) compelled, or attempted to compel, [H.N.] to submit to rape or forcible sexual abuse by

[5] The district court instructed the jury that a "person acts intentionally . . . when his conscious objective is to cause a certain result or to engage in certain conduct." *See* UTAH CODE § 76-2-103(1).

[6] The district court instructed the jury that a "person acts knowingly . . . when the person is aware of the nature of his conduct or is aware of the particular circumstances surrounding his conduct," and when the person is "aware that his conduct is reasonably certain to cause the result." *See id.* § 76-2-103(2).

rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19 (1999). Here, we ask specifically whether a reasonable jury could have found, based on the "totality of the evidence in the record," that the defendant did not have the required mental state as to the victim's nonconsent. *Barela*, 2015 UT 22, ¶ 31.

¶42 We agree with the court of appeals that a reasonable jury could not have found that Norton mistook H.N.'s conduct for consent based on the totality of the evidence. *Norton*, 2018 UT App 82, ¶¶ 37–40. Because the jury acquitted Norton of the charge of aggravated sexual assault related to squeezing H.N.'s breasts, only the counts based on the nonconsensual intercourse (rape) and digital penetration (forcible sexual abuse) are at issue.

¶43 The trial evidence with respect to these two incidents could not support a finding that Norton may have mistakenly interpreted H.N.'s behavior to indicate consent. With regard to the intercourse, Norton's testimony did not describe ambiguous behavior that he could have believed was consent. Rather, he testified that H.N. initiated sexual activity by sitting on his lap and later climbing on top of him. And in his version of events, the digital penetration never happened. He claimed she fabricated her claims against him. Specifically, he testified that after he returned her to her parents' home he again tried to discuss custody of the children and she threatened to call the police and accuse him of breaking into the house and beating her up.

¶44 And H.N.'s testimony similarly left no room for a finding that Norton mistook her conduct for consent. H.N. had a protective order against Norton. She testified that she had pulled a dryer in front of the basement door when she first moved into her parents' home. And each night she secured the front and back doors by positioning chairs under the doorknobs. Despite her efforts to create a barricade, H.N. testified that Norton broke into the house, punched her in the face, wrapped duct tape around her head and over her mouth, took her into the snowy night with no shoes on, took her to an empty building, and forced her inside at gun point. Once inside, he commanded her to undress at gun point and then raped her. He then tried to get rid of the evidence by directing her to clean up and inserting his fingers into her vagina to "rinse himself out." H.N. testified that she told him "no" multiple times.

¶45 Other evidence corroborated her version of events. The police found strands of hair that resembled H.N.'s in a bathtub in

> threat of kidnap[p]ing, death, or serious bodily injury to be inflicted imminently; and
>
> 3. That [Norton] did such acts knowingly or intentionally.

¶38 The district court then instructed the jury on rape and forcible sexual abuse. Regarding rape, it instructed the jury that it could convict Norton if it found beyond a reasonable doubt that:

> 1. [Norton] had sexual intercourse with [H.N.]; and
>
> 2. That such conduct was without the consent of [H.N.]; and
>
> 3. That said conduct was done intentionally or knowingly.

¶39 With regard to forcible sexual abuse, the district court instructed the jury that it could convict Norton if it found beyond a reasonable doubt that:

> 1. [Norton] touched the anus, buttocks, breasts, or any part of the genitals of H.N.; and
>
> 2. That such conduct was done with the intent to either
>
> > (a) cause substantial emotional or bodily pain to [H.N.], or
> >
> > (b) arouse or gratify the sexual desires of any person; and without the consent of [H.N.]; and
>
> 3. That said conduct was done intentionally or knowingly.

¶40 Norton relies on *State v. Barela* to argue that the rape and forcible sexual abuse instructions are incorrect because they "implied that the mens rea requirement . . . applied only to the act of sexual intercourse and not to the alleged victim's nonconsent." 2015 UT 22, ¶ 26, 349 P.3d 676. If these instructions are incorrect, so too is the aggravated sexual assault instruction because it incorporates the instructions for these associated offenses.

¶41 The court of appeals declined to decide whether these instructions were erroneous, instead holding that even if they were, it was not prejudicial error. To determine whether the omission of an element from a jury instruction is prejudicial, we analyze "whether the record contains evidence that could

the Fort Douglas building they searched, a wad of duct tape with hair in it in the dumpster behind the building, a mark on H.N.'s lower back, swelling and the beginning of bruising on H.N.'s face, and bruising on her inner thighs and labia.

¶46 Norton points to H.N.'s testimony that she squeezed his penis as evidence that could have persuaded a jury that Norton believed she was consenting. But this incident was characterized by both sides as an act of protest. H.N. testified that in response, Norton grabbed both her hands and pinned them above her head. And Norton did not say in his testimony that he believed the squeeze indicated participation. Rather, he did not mention it. And Norton's counsel argued during closing that the squeeze refuted H.N.'s claim that she was "totally terrified of him" and indicated she was "not afraid to use force" and "not afraid to be confrontational." And even if somehow a reasonable jury could have seen H.N.'s isolated act of squeezing Norton's penis as ambiguous, any ambiguity vanishes when this act is viewed along with the rest of the trial evidence.

¶47 A comparison with the facts in *Barela* helps demonstrate why the jury instructions here were not prejudicial. In *Barela*, a woman claimed her massage therapist raped her. 2015 UT 22, ¶ 6. The therapist claimed the sex was consensual. *Id.* ¶ 5. After a jury convicted the therapist of rape, he challenged on appeal a jury instruction that did not clearly state the required mens rea for the victim's nonconsent. *Id.* ¶¶ 15–16. We agreed and reversed the defendant's convictions. *Id.* ¶ 32.

¶48 This court found that the evidence was such that a jury could have "thought that the truth fell somewhere in between the two accounts." *Id.* ¶ 30. While the victim in that case said the defendant had suddenly instigated and perpetrated the intercourse without her consent, she testified that she "froze," "neither actively participating in sex nor speaking any words," and otherwise expressed no reaction. *Id.* ¶ 29. This court concluded that a jury could have believed that although the victim did not consent, the defendant may have mistakenly thought she did. *See id.* ¶¶ 30–32. Accordingly, we held that it was "reasonably likely" that a proper jury instruction regarding the requisite mental state as to the victim's nonconsent could have affected the outcome of the trial. *Id.* ¶¶ 31–32.

¶49 In contrast, a reasonable jury could not look at the totality of the trial evidence here and find that, under either version of events, Norton may have mistaken H.N.'s conduct for consent.

Norton claims H.N. initiated the sexual activity and then manufactured and exaggerated her claims against him. H.N. claims Norton kidnapped her and then raped her at gunpoint. This case does not involve behavior that the jury could have viewed as a close call in either direction.

¶50 Accordingly, this case does not turn on whether Norton may have mistaken H.N.'s conduct for consent. Rather, H.N.'s and Norton's versions of the events in question were mutually exclusive, and the jury had to decide who to believe. We agree with the court of appeals that even assuming the jury instructions were erroneous, it was not reasonably likely that absent the errors the outcome of the trial would have been different.

¶51 While the jury instruction here could have been clearer, *see State v. Newton*, 2020 UT 24, ¶ 29, --- P.3d --- (identifying Model Utah Jury Instruction CR1605 as an example of a clear jury instruction for the offense of rape), we conclude that Norton did not show he was prejudiced by the instruction, and consequently that he failed to establish manifest injustice, plain error, or ineffective assistance of counsel.

II. LESSER INCLUDED OFFENSES

¶52 Norton argues that the court of appeals erred in affirming the district court's refusal to instruct on additional lesser included offenses of aggravated kidnapping, aggravated burglary, and two of the counts of aggravated sexual assault.

¶53 Relevant here, an offense constitutes a lesser included offense when it is "established by proof of the same or less than all the facts required to establish the commission of the offense charged" or is "specifically designated by a statute as a lesser included offense." UTAH CODE § 76-1-402(3)(a), (c).

¶54 When a defendant requests an instruction on a lesser included offense, we use the evidence-based standard codified in Utah Code section 76-1-402(4) to determine whether such an instruction is required. *See State v. Powell*, 2007 UT 9, ¶ 24, 154 P.3d 788. We first ask whether the charged offense and the lesser included offense have "some overlap in the statutory elements." *State v. Baker*, 671 P.2d 152, 159 (Utah 1983). We then inquire whether the trial evidence "provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Id.* at 159 (citation omitted) (internal quotation marks omitted); *see also Powell*, 2007 UT 9, ¶ 24; UTAH CODE § 76-1-402(4). We must determine whether there is "a

sufficient quantum of evidence presented to justify sending the question to the jury." *Baker*, 671 P.2d at 159. And we view the evidence "in the light most favorable to the defendant requesting the instruction." *Powell*, 2007 UT 9, ¶ 27.

¶55 The court of appeals carefully analyzed each of Norton's claims of entitlement to an instruction on a lesser included offense. We affirm the court of appeals' decision with regard to all but one of those claims.

A. Aggravated Kidnapping

¶56 Norton argues that the court of appeals erred in affirming the district court's refusal to instruct on unlawful detention as a lesser included offense of aggravated kidnapping. We agree with the court of appeals' decision.

¶57 At trial, both parties requested an instruction on kidnapping as a lesser included offense of aggravated kidnapping. Additionally, Norton requested an instruction on unlawful detention. The district court instructed the jury on kidnapping but not unlawful detention. Ultimately, the jury acquitted Norton of aggravated kidnapping but convicted him of kidnapping.

¶58 The State's aggravated kidnapping charge was based on Norton abducting H.N. from the home, duct-taping her head and mouth, and taking her to Fort Douglas where he sexually assaulted her and periodically held her at gunpoint. In contrast, Norton testified that H.N. willingly left her home and accompanied him to the Fort Douglas building. However, he claimed that when they arrived at the empty building they argued, H.N. hit Norton, and he responded by backhanding her. He then restrained H.N.'s hands to prevent her from hitting him again. On appeal, Norton identifies his testimony that he temporarily restrained H.N.'s hands as being sufficient to require the district court to instruct on unlawful detention.

¶59 Unlawful detention is statutorily defined as a lesser included offense of aggravated kidnapping.[7] UTAH CODE

[7] To prove aggravated kidnapping, the State must show in relevant part that "in the course of committing unlawful detention or kidnapping," a person "(a) possesses, uses, or threatens to use a dangerous weapon," or (b) acts with intent "(vi) to commit a sexual offense." UTAH CODE § 76-5-302(1)(a), (1)(b)(vi) (2012). (We (continued . . .)

§ 76-5-306(2); *see also id.* § 76-1-402(3). But the conduct identified by Norton is a separate act that is not included within the conduct that constituted the greater offense of aggravated kidnapping here. "Even if there is overlap in the statutory elements, if the convictions rely on materially different acts, then one crime will not be a lesser included offense of another." *State v. Garrido*, 2013 UT App 245, ¶ 31, 314 P.3d 1014 (internal quotation marks omitted).

¶60 Norton's testimony that he restrained H.N.'s hands at Fort Douglas is separate, uncharged conduct. As to the conduct that is the basis for the aggravated kidnapping charge—abducting H.N. from the home, taking her to the Fort Douglas building, periodically holding her at gunpoint, and sexually assaulting her—Norton claims it was all voluntary and consensual. Based on the trial evidence, the choice for the jury was to either convict him of aggravated kidnapping or kidnapping based on H.N.'s testimony, or acquit him based on his testimony. If the jury believed Norton's version of events, it could not convict him of restraining H.N.'s hands—a separate act for which he was not charged.

¶61 We also note that Norton's testimony does not appear to even establish the offense of unlawful detention. Unlawful detention requires restraint or detention "without authority of law." UTAH CODE § 76-5-304(1) (2012). But Norton claimed he restrained H.N.'s hands in self-defense to stop her from hitting him, and we must look at the evidence in the light most favorable to him without weighing credibility. *See Powell*, 2007 UT 9, ¶ 27. Restraining another's hands in self-defense is not unlawful. *See* UTAH CODE § 76-2-402(1)(a) (2012) (providing that a "person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against

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cite to the version of the statute in effect at the time of the events in question for this and other statutory provisions that have been substantively amended since that time.) To prove unlawful detention, the State must prove only that an actor "intentionally or knowingly, without authority of law, and against the will of the victim, detains or restrains the victim under circumstances not constituting a violation of: (a) kidnapping . . . or (c) aggravated kidnapping." *Id.* § 76-5-304(1) (2012).

another person's imminent use of unlawful force"). So Norton's evidence does not amount to unlawful detention.

¶62 Fundamentally, the evidence before the jury provided no rational basis for a verdict acquitting Norton of aggravated kidnapping and instead convicting him of unlawful detention. *See id.* § 76-1-402(4). Accordingly, we agree with the court of appeals that the district court was not obligated to instruct the jury on unlawful detention.[8]

B. Aggravated Burglary

¶63 Norton argues that he was entitled to instructions on aggravated assault, assault, and criminal trespass as lesser included offenses of aggravated burglary. We agree with the court of appeals that these "are not lesser included offenses of aggravated burglary under the facts of this case." *Norton*, 2018 UT App 82, ¶ 55.

¶64 At trial, the district court instructed on burglary as a lesser included offense of aggravated burglary. But the court did not instruct on aggravated assault, assault, or criminal trespass.

¶65 Aggravated burglary, aggravated assault, and assault do have overlapping statutory elements.[9] But again, Norton relies on

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[8] The State agrees with the court of appeals that an instruction on unlawful detention was not required here but disagrees with that court's analysis. The State reasons that because the kidnapping was an ongoing crime that continued at Fort Douglas, the evidence of Norton restraining H.N.'s hands was not a separate act. We appreciate the State's point, but we ultimately agree with the court of appeals' analysis for the reasons explained above, *supra* ¶¶ 56–62. The evidence Norton identifies provides a rational basis for a verdict acquitting him of aggravated kidnapping, but not for one convicting him of unlawful detention because the restraint was a separate uncharged act. *See* UTAH CODE § 76-1-402(4).

[9] At the time of the conduct at issue, aggravated burglary occurred when a person "in attempting, committing, or fleeing from a burglary . . . (a) cause[d] bodily injury to any person who [was] not a participant in the crime; (b) use[d] or threaten[ed] the immediate use of a dangerous weapon against any person who [was] not a participant in the crime; or (c) possesse[d] or (continued . . .)

evidence of a materially separate, uncharged act to argue that the district court should have instructed on these offenses.

¶66 The State's aggravated burglary charge was based on the events surrounding Norton breaking into H.N.'s parents' home at the beginning of the night in question. These events included H.N. waking to a "loud bang"—presumably caused by one of the objects she had used to barricade the doors—and finding Norton standing at the end of her bed. He then punched her in the face.

¶67 At trial, Norton denied all of this. He claimed that he did not break into H.N.'s parents' home at the beginning of the night, but that he waited in his car outside of the home for her to willingly join him. However, he points to his testimony that he backhanded H.N. and injured her face at Fort Douglas as supporting instructions on aggravated assault and assault as lesser included offenses of aggravated burglary.

¶68 This is an uncharged act that is separate from the conduct forming the basis of the aggravated burglary charge—Norton breaking into H.N.'s parents' home and punching her in the face. As the court of appeals aptly concluded, "Because the facts and evidence developed to establish the greater offense of aggravated burglary were different from the facts and evidence relied upon by Norton to claim entitlement to the lesser included offense instructions of aggravated assault and assault, those lesser offenses were not included within the greater offenses." *Id.* ¶ 56.

¶69 Norton's testimony about this uncharged conduct provides a basis for an additional offense but not a lesser offense included within the conduct for which he was actually charged.

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attempt[ed] to use any explosive or dangerous weapon." *Id.* § 76-6-203(1).

An aggravated assault occurred if a person "commit[ed] assault" and used "(a) a dangerous weapon . . . or (b) other means or force likely to produce death or serious bodily injury." *Id.* § 76-5-103(1).

And an assault was "(a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that cause[d] bodily injury to another or create[d] a substantial risk of bodily injury to another." *Id.* § 76-5-102(1) (2012).

Accordingly, the evidence at trial did not provide a rational basis for a verdict acquitting Norton of aggravated burglary or burglary and instead convicting him of aggravated assault or assault. So the district court was not required to give the lesser included offense instructions he requested.

¶70 Norton also argued to the court of appeals that he was entitled to an instruction on criminal trespass because he went to H.N.'s residence at the end of the night, which the protective order prohibited. *See id.* ¶ 56 n.13. Because Norton's trial counsel did not request a criminal trespass instruction, Norton raises this argument based on ineffective assistance of counsel. *See id.*

¶71 The court of appeals concluded again that because of the different underlying conduct that Norton relied on to make his argument, "criminal trespass was not an included offense of aggravated burglary under the circumstances of this case, and Norton's counsel was therefore not ineffective for failing to request criminal trespass as a lesser included instruction." *Id.*

¶72 The court of appeals was correct. Norton's testimony about going to H.N.'s parents' home at the end of the night is separate from his breaking into the house at the beginning of the night. It is uncharged conduct. If it did support a conviction for criminal trespass, that conviction would not be in lieu of burglary but in addition to it. Accordingly, the district court was not required to instruct on criminal trespass and Norton's counsel was not ineffective for not requesting such an instruction.

C. Aggravated Sexual Assault Based on Rape

¶73 Norton argues that the district court erred in declining to instruct the jury on sexual battery as a lesser included offense of aggravated sexual assault based on rape. But we agree with the court of appeals that the district court did not err in refusing to give such an instruction.

¶74 At trial, Norton and the State requested instructions on rape, forcible sexual abuse, and sexual battery as lesser included offenses of aggravated sexual assault based on rape. The district court did instruct the jury on rape and forcible sexual abuse, but not on sexual battery. Although the jury was instructed on two lesser included offenses, it convicted Norton of aggravated sexual assault as charged.

¶75 The offenses of aggravated sexual assault based on the underlying offense of rape and sexual battery have overlapping elements.[10] Norton argues that he was entitled to a sexual battery instruction because the jury could have disbelieved H.N. or found that she exaggerated her allegations to gain an advantage in the custody battle. Norton also asserts that her testimony about the rape was ambiguous because she did not struggle after he initiated sex, except to squeeze his penis. And he argues that in light of his testimony that the sex was consensual, the jury could have found that no rape occurred, but when Norton held her hands above her head, that particular sexual position might have caused her momentary affront or alarm.

¶76 This is pure speculation. Norton has not identified a quantum of evidence presented at trial that would support instructing the jury on sexual battery. Norton testified that the sexual intercourse was entirely consensual and that H.N. was an active participant. The only testimony about him pinning H.N.'s hands above her head came from her. And she testified that she did not consent to any sexual activity, and that when he held her hands above her head it was in response to her squeezing his penis. There was no evidence to support a finding that the

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[10] The relevant statutory language provides, "A person commits aggravated sexual assault if: (a) in the course of a rape . . . or forcible sexual abuse, the actor: (i) uses, or threatens the victim with the use of, a dangerous weapon" or "(ii) compels, or attempts to compel, the victim to submit to rape . . . or forcible sexual abuse[] by threat of kidnap[p]ing, death, or serious bodily injury to be inflicted imminently on any person." UTAH CODE § 76-5-405(1).

"A person commits rape when the actor has sexual intercourse with another person without the victim's consent." *Id.* § 76-5-402(1).

"A person is guilty of sexual battery if the person, under circumstances not amounting to" rape, forcible sexual abuse, attempted rape, or attempted forcible sexual abuse, "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 person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched." *Id.* § 76-9-702.1(1).

intercourse was consensual, but Norton should have known that H.N. intermittently experienced affront or alarm. Accordingly, the evidence did not provide a rational basis to acquit Norton of rape and instead convict him of sexual battery. *See* UTAH CODE § 76-1-402(4). So no such instruction was required.

D. Aggravated Sexual Assault Based on Forcible Sexual Abuse

¶77 Norton also argues that the court of appeals erred in affirming the district court's refusal to instruct on sexual battery as a lesser included offense of aggravated sexual assault based on forcible sexual abuse. We agree with Norton that an instruction on sexual battery was required.

¶78 First, aggravated sexual assault based on forcible sexual abuse and sexual battery have "some overlap in the statutory elements." *Baker*, 671 P.2d at 159. Both offenses require that the actor touches the anus, buttocks, or any part of the genitals of another. *See* UTAH CODE §§ 76-5-404(1), 76-5-405(1), and 76-9-702.1(1) (2012). But they have different requisite mental states. Forcible sexual abuse requires that the defendant act with the intent to cause substantial emotional or bodily pain or to gratify the sexual desire of any person. *Id.* § 76-5-404(1) (2012). But sexual battery requires only that the defendant's conduct be under circumstances that the defendant knows or should know would cause affront or alarm to the person touched. *Id.* § 76-9-702.1(1).

¶79 Second, we conclude that "the evidence offered provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Baker*, 671 P.2d at 159 (citation omitted) (internal quotation marks omitted); *see also* UTAH CODE § 76-1-402(4). Here, both the State and Norton rely on H.N.'s testimony that Norton inserted his finger into her vagina to wipe away his DNA. Norton's testimony was that this touch did not happen. But relying on H.N.'s testimony that the touch occurred, Norton argues that the evidence, if believed, would support a finding that Norton "touched [H.N.] under circumstances he knew or should have known would likely cause affront or alarm" (the mental state required for sexual battery), rather than with intent to cause substantial emotional or bodily pain or to gratify his sexual desire (the mental state required for forcible sexual abuse).

¶80 We agree. H.N.'s testimony indicates Norton was attempting to conceal his crime. While a jury could infer that in doing so he also intended to gratify his sexual desire or cause

H.N. emotional or bodily pain, a jury could also infer from the same evidence that Norton touched H.N.'s vagina only under circumstances he knew or should have known would likely cause her affront or alarm. The trial evidence therefore provides a rational basis for a verdict acquitting Norton of aggravated sexual assault based on forcible sexual abuse and convicting him of sexual battery.

¶81 We must now determine whether this error prejudiced Norton. An error is prejudicial if there is a "reasonable likelihood that the error affected the outcome of the proceedings." *State v. Reece*, 2015 UT 45, ¶ 33, 349 P.3d 712 (citation omitted).

¶82 We conclude this error did prejudice Norton because had the jury been instructed on sexual battery, the evidence supported a conviction on the less serious charge and an acquittal on both aggravated sexual assault and the lesser included offense on which the district court instructed—forcible sexual abuse. Here, although the district court instructed on the lesser included offense of forcible sexual abuse, the jury convicted Norton on aggravated sexual abuse as charged. Generally,

> [w]here a jury is instructed on, and has the opportunity to convict a defendant of, a lesser included offense, but refuses to do so and instead convicts the defendant of a greater offense, failure to instruct the jury on another lesser included offense, particularly an offense that constitutes a lesser included offense of the lesser included offense that the jury was instructed on, is harmless error.

State v. Daniels, 2002 UT 2, ¶ 28, 40 P.3d 611.

¶83 However, this is a distinct situation and causes us to depart from our more general precedent. If the jury were to infer from H.N.'s testimony that Norton acted under circumstances that he knew would cause her affront or alarm, but did not intend to gratify his sexual desire or cause her emotional or physical pain, that would lead to acquittal of both aggravated sexual assault and forcible sexual abuse and conviction of sexual battery. Thus, there is a reasonable likelihood that the error affected the outcome of the proceedings. Accordingly, we conclude that the district court's error prejudiced Norton and reverse the court of appeals' affirmance of Norton's conviction of aggravated sexual assault based on digital penetration.

III. SENTENCING

¶84 The longest potential terms of imprisonment Norton faced at sentencing were for his two aggravated sexual assault convictions. The district court sentenced him to fifteen years to life in prison on both counts. He argues that this was error and that the court of appeals should have reversed for two reasons.[11]

A. Special Verdict Form

¶85 Norton argues that the district court should not have applied the sentencing tier applicable to aggravated sexual assault based on a completed act of rape because the jury was not given a special verdict form to indicate which underlying sexual assault offense formed the basis of the conviction. Norton relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013), to argue that in the instance of a tiered sentencing structure, where the jury is instructed on versions of the offense that qualify for more than one tier, a special verdict form is required. Norton argues that in the absence of a special verdict form, the district court was permitted to sentence him only to the lowest term of six years to life—the sentencing range corresponding to an aggravated sexual assault conviction based on attempted forcible sexual abuse. UTAH CODE § 76-5-405(2)(c)(i).

¶86 The court of appeals held that the district court did not err because there was no factual basis "to support a conclusion that the jury could have determined that the sexual acts underlying [the charge] constituted only attempted forcible sexual abuse." *State v. Norton*, 2018 UT App 82, ¶ 61, 427 P.3d 312. While we affirm the court of appeals' conclusion that the district court applied the correct sentencing tier, we do so on an alternative basis. We conclude that Norton did not preserve this issue in the district court.

¶87 Aggravated sexual assault occurs when a person commits a sexual assault such as rape, forcible sexual abuse, attempted rape, or attempted forcible sexual abuse, and does so under

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[11] As we have reversed the conviction for aggravated sexual assault based on forcible sexual abuse, only the conviction for aggravated sexual assault based on rape remains. Consequently, we analyze Norton's argument only with respect to the remaining count. In the jury instructions, this count was referred to as Count 3.

certain aggravating circumstances. UTAH CODE § 76-5-405(1). The presumptive sentence for aggravated sexual assault varies based on the underlying offense from which it arises. *Id.* § 76-5-405(2). If the underlying offense is rape or forcible sexual abuse, the presumptive sentence is fifteen years to life. *Id.* § 76-5-405(2)(a)(i). If the underlying offense is attempted rape, the presumptive sentence is ten years to life. *Id.* § 76-5-405(2)(b)(i). And if the underlying offense is attempted forcible sexual abuse, the presumptive sentence is six years to life. *Id.* § 76-5-405(2)(c)(i). A court may impose a lesser term if it finds that doing so is in the interests of justice and states the reasons for that finding on the record. *Id.* § 76-5-405(3)(a), (4)(a), (5)(a).

¶88 At trial, Norton faced three counts of aggravated sexual assault. The jury instructions explained the underlying allegations that related to each of the three counts of aggravated sexual assault, including that Count 3 was based on the allegation of nonconsensual sexual intercourse. Specifically, instruction 33 stated, "In counts 2, 3, and 4, the defendant is charged with Aggravated Sexual Assault. One of the counts concerns the allegation of the touching of the breast (Count 2), and *one concerns the allegation of sexual intercourse (Count 3)*, and one concerns the penetration of the vagina by defendant's fingers (Count 4)." (Emphasis added.) Instruction 35 gave the elements of aggravated sexual assault "as charged in Counts 2, 3[,] or 4."

¶89 The fact that Count 3 was based on the underlying offense of rape was reinforced by the lesser included offense related to that count. Instruction 34 identified the lesser included offenses within each aggravated sexual assault count. The instruction stated that "in the count where sexual intercourse is alleged (Count 3), the lesser included offense would be rape." Instruction 37 gave the elements of rape, explaining again that "[r]ape is a lesser include[d] offense of Count 3."

¶90 The district court provided the jury with a general verdict form. With regard to Count 3, it stated:

> As to Count 3, AGGRAVATED SEXUAL ASSAULT:
>
> _____ NOT GUILTY
> _____ GUILTY
> _____ GUILTY of the lesser included offense of Rape

¶91 The district court reviewed the jury instructions with Norton and the State, and Norton did not object that the instructions were ambiguous as to which underlying sexual

assault offense related to each count of aggravated sexual assault. Further, neither party requested a special verdict form.

¶92 The jury found Norton guilty of Count 3. At sentencing, Norton argued that without a special verdict form, there was no indication the jury found him guilty of aggravated sexual assault based upon anything but the least serious offense of attempted forcible sexual abuse. He asserted that consequently he should be sentenced only under the corresponding sentencing tier of six years to life.

¶93 In response, the State argued that all evidence presented at trial was of completed, not attempted, sexual assaults. So Norton should be sentenced in accordance with the tier corresponding to aggravated sexual assault based on a completed act of rape. The district court agreed that fifteen years to life was the presumptive punishment tier, given the evidence presented at trial.

¶94 Norton argues that the use of a general verdict form deprived him of the due process guarantee of "the right to a jury trial on every element of the offense." But Norton did not raise this argument until sentencing, and that was too late.

¶95 "As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. During trial, the parties met with the district court to finalize the jury instructions. If Norton felt that the instructions were not clear that the underlying offense applicable to Count 3 was rape, then Norton needed to object to the jury instructions. Likewise, if Norton thought the general verdict form permitted ambiguity in the jury's verdict, he should have raised it when the district court had an opportunity to address the issue. But Norton made no mention of a special verdict form. Rather, Norton raised the issue at sentencing when it was too late for the district court to modify the jury instructions or the verdict form.

¶96 Norton argues that his objection was timely because an error under *Apprendi* or *Alleyne* occurs at sentencing.[12] In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490

[12] Norton raised this argument in a Petition for Rehearing.

(emphasis added). In *Alleyne*, the Supreme Court extended this holding to any fact that increases the statutory *mandatory minimum* sentence. 570 U.S. at 108. Thus, under this precedent, a sentencing court errs when it sentences a defendant to a higher statutory maximum or mandatory minimum that was triggered by a specific fact—for example, a drug amount—and that fact was not determined by the jury beyond a reasonable doubt. *See, e.g.*, *United States v. Ellis*, 868 F.3d 1155, 1171 (10th Cir. 2017) ("The district court did not commit an *Alleyne* error until it subjected Ellis to an increased mandatory-minimum sentence without the jury's attributing at least 280 grams of crack cocaine to Ellis individually." (footnote omitted)).

¶97 But Norton simply assumes that *Apprendi* and *Alleyne* apply here. He has not provided any analysis as to why that is the case. The tiered sentencing structure at issue here is different than those in *Apprendi* and *Alleyne*. The sentencing tiers here have the same statutory maximum: life. UTAH CODE § 76-5-405(2). And the ranges are presumptive, not mandatory. The sentencing court can impose a lower sentence if it finds it is in the interests of justice to do so. *Id.* § 76-5-405(3)(a), (4)(a), (5)(a). Yet Norton has not analyzed why *Apprendi* and *Alleyne* should extend to the circumstances here.

¶98 Further, Norton does not explain why this is a sentencing issue rather than a jury instruction issue. There is no question that the elements of the underlying offense upon which an aggravated sexual assault charge is based must be found by the jury beyond a reasonable doubt. If Norton thought the jury instructions did not make this clear, he needed to object to the jury instructions. He did not; nor has he challenged the jury instructions on this basis on appeal.

¶99 Our preservation rules ensure that issues are addressed and, if appropriate, corrected when they arise. *Holgate*, 2000 UT 74, ¶ 11. Had Norton objected to the jury instructions or requested a special verdict form at trial, the district court could have responded to his concerns. But at sentencing, it was too late for the district court to do so. Accordingly, Norton's claim is unpreserved. *See State v. Cram*, 2002 UT 37, ¶ 11, 46 P.3d 230 (concluding that an objection was not preserved because it could have been raised at trial but was instead raised at a scheduling conference for a retrial when the error could no longer be corrected).

¶100 Having found that this argument is unpreserved, we next consider whether Norton can successfully show an exception to the preservation requirement. Norton argues that we should review his claim for both plain error and ineffective assistance of counsel.

¶101 To establish plain error, Norton must show that "(i) [a]n error exists; (ii) the error should have been obvious to the trial court; and (iii) the error [was] harmful . . . ." *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993), *abrogated on other grounds by State v. Silva*, 2019 UT 36, ¶ 20, 456 P.3d 718. To establish ineffective assistance, Norton must show that (i) counsel's performance was deficient and (ii) the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The prejudice analysis is the same for claims of plain error and ineffective assistance of counsel. *State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699. An error is prejudicial or harmful if the defendant shows "there is a reasonable probability that, but for [the] error[], the result of the proceeding would have been different." *Id.* ¶ 27 (quoting *Strickland*, 466 U.S. at 694).

¶102 Norton cannot prevail under either the doctrine of plain error or ineffective assistance of counsel because he cannot show prejudice. We agree with the court of appeals that there is no factual basis in the record "to support a conclusion that the jury could have determined that the sexual acts underlying Count[] 3 . . . constituted only attempted forcible sexual abuse." *Norton*, 2018 UT App 82, ¶ 61. Further, "there is no evidence in the record to support a conclusion that the jury's guilty verdict reflected a finding beyond a reasonable doubt of an underlying aggravated sexual assault offense other than rape." *Id.* ¶ 62.

¶103 The district court instructed the jury that Count 3 concerned the "allegation of sexual intercourse." And the evidence at trial was undisputed that the sexual intercourse occurred and was not merely "attempted." Both Norton and H.N. testified that sexual intercourse took place. And Norton's semen was found in H.N.'s vagina. We agree with the court of appeals that Norton cannot "point[] to any evidence that potentially created any ambiguity as to the factual question of whether the sexual assault was an attempted forcible sexual abuse as opposed to a completed rape." *Id.* ¶ 63.

¶104 Given the unequivocal evidence at trial, if there would have been a special verdict form requiring the jury to specify the type of sexual assault giving rise to Count 3, there is no reasonable

likelihood that the jury would have specified anything other than rape. Accordingly, Norton cannot show plain error or ineffective assistance of counsel.

B. Interests of Justice

¶105 Norton also argues that the district court erred in not sentencing him to a lesser sentence "in the interests of justice." UTAH CODE § 76-5-405(3)(a). Specifically, Norton claims that in sentencing him to the presumptive sentence of fifteen years to life on his aggravated assault sexual conviction, *see id.* § 76-5-405(2)(a)(i), the district court did not conduct the interests of justice analysis or make the explicit findings required by *LeBeau v. State*, 2014 UT 39, 337 P.3d 254. He argues this was an abuse of discretion.

¶106 "We traditionally afford the trial court wide latitude and discretion in sentencing." *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997). We will not set aside a sentence unless the district court abused its discretion by "fail[ing] to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990) (*abrogated on other grounds by State v. Smith*, 2005 UT 57, 122 P.3d 615) (footnote omitted) (internal quotation marks omitted).

¶107 But relying on our holding in *LeBeau*, Norton argues the district court should have *sua sponte* analyzed the proportionality of his sentence and his potential for rehabilitation. In determining proportionality, Norton argues that the court should have considered both the gravity of his conduct in relation to the severity of the sentence imposed on him, and the severity of his sentence relative to sentences imposed for other crimes in Utah. And he argues that in analyzing his rehabilitative potential, the district court should have considered the Board of Pardons' role in monitoring his behavior and progress toward rehabilitation, his age, any ties between the crime and alcohol or drug addiction and his treatment prospects, the existence of a criminal history of violence, and the "Sentencing Commission's guidelines." (Citing *LeBeau*, 2014 UT 39, ¶¶ 52, 54.)

¶108 However, as we made clear in *State v. Martin*, the district court does not have an obligation to consider anything the defendant does not raise. 2017 UT 63, ¶ 62, 423 P.3d 1254 ("[W]hen a sentencing court commits an error that was not objected to below, an appellant must . . . show the existence of plain error or exceptional circumstances that would justify the

exercise of our review."). Rather, the district court need only consider the arguments and issues the defendant raises at sentencing.

¶109 And as the court of appeals correctly observed, the district court considered all of the evidence and arguments Norton presented at sentencing. The district court acknowledged letters describing Norton as a good person, as well as letters describing Norton as a violent person. The court also acknowledged Norton was going through a devastating divorce but determined Norton's behavior was still "way, way, way over the line." Further, the court noted that a factor of the sentence was Norton's "inability and unwillingness to follow the truth." Ultimately, the district court decided Norton was "entitled to some mercy, but not what [his] lawyer [was] asking for."

¶110 But Norton argues that the district court failed to consider whether his sentence was proportional to sentences for other similar crimes. And he contends that he raised this at sentencing when he argued his conduct did not "rise to the level of the kinds of egregious cases where we have individuals who suffered significant loss of life or impairment." But this is not enough. In *Martin*, we held a similar sentencing issue was unpreserved because counsel did not object to the analysis the district court used or identify the other offenses the court should take into consideration. *Id.* ¶¶ 64–66. Comparing sentences is "daunting" and "certainly not a task that we can require our district courts to perform without prompting or guidance from counsel." *Id.* ¶ 66. Norton did not ask the district court to compare his sentence to sentences imposed for other offenses or identify what those other offenses might be. Accordingly, this issue is unpreserved.

¶111 The district court adequately addressed the arguments Norton raised at sentencing. We affirm the court of appeals' decision that the district court did not abuse its discretion by declining to reduce the presumptive sentence on the basis of the "interests of justice."

IV. CUMULATIVE ERROR

¶112 Norton argues that the court of appeals erroneously rejected his cumulative error argument. An appellate court will reverse if "the cumulative effect of the several errors undermines [the court's] confidence . . . that a fair trial was had." *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (second alteration in original)

(citation omitted). However, we have identified only one error in Norton's trial. A "single accumulable error cannot warrant reversal under the cumulative error doctrine." *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 48, 428 P.3d 1038. We thus reject his cumulative error argument.

V. *LEBEAU* SHOULD BE OVERRULED

¶113 Although *LeBeau v. State*, 2014 UT 39, 337 P.3d 254 does not determine the outcome in this case, I write this section separately because I conclude *LeBeau* should be explicitly overturned. The holding in *LeBeau* contradicts the applicable statute's plain language. And in so doing it takes the legislature's policy choice to give judges discretion to sentence below the presumptive statutory tier and replaces it with a rigid, mandatory framework that applies even when a judge imposes the presumptive sentence.

¶114 I agree with Justice Lee's dissent in *LeBeau*, but I will not duplicate his analysis here. Instead, I add my own observations and apply the law outlined in *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553, to argue that *LeBeau* should be overruled.

¶115 When considering whether precedent should be overturned, we evaluate: "(1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down." *Id.* ¶ 22.

¶116 The first consideration—the persuasiveness of the authority and reasoning on which *LeBeau* is based—counsels in favor of overturning it. The opinion did not derive from prior authority. It was a fresh interpretation of a provision of Utah's aggravated kidnapping statute, which I conclude is incorrect. *Lebeau*, 2014 UT 39, ¶ 25.

¶117 The *LeBeau* court interpreted the sentencing scheme within the aggravated kidnapping statute.[13] *Id.* ¶¶ 20–22; *see also* UTAH CODE § 76-5-302(3), (4) (2014). Subsection 302(3) of the statute establishes presumptive sentencing tiers for variations of aggravated kidnapping. Subsection 302(4) then states in relevant part,

[13] To be consistent with *LeBeau v. State*, 2014 UT 39, 337 P.3d 254, I cite the 2014 version of the statute.

> If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a [lesser] term of imprisonment . . . .

UTAH CODE § 76-5-302(4) (2014).

¶118 Reading subsections 302(3) and (4) together, the *LeBeau* court held that the district court was required to conduct "the interests-of-justice analysis laid out in subsection (4)."[14] *Lebeau*, 2014 UT 39, ¶ 21. And the *LeBeau* court defined the phrase "interests of justice" by looking to Eighth Amendment jurisprudence, *see id.* ¶¶ 38–41, and another provision of the criminal code setting forth "general goals of Utah's criminal code." *Id.* ¶ 34 (quoting UTAH CODE § 76-1-104 (2014)). These sources led the court to conclude that an "interests-of-justice analysis" required the sentencing court to consider a checklist of particulars: (1) proportionality, including "the gravity of the offense and the harshness of the penalty," and "the sentence being imposed [compared to] sentences imposed for other crimes in Utah" and (2) the defendant's capacity for rehabilitation, including deference to the role of the Board of Pardons and Parole, the defendant's age at the time of the crime, the extent that alcohol or drug addiction caused the offense, the presence of violence in the defendant's criminal history, relevant Sentencing Commission guidelines, and "all relevant factors" to the defendant's rehabilitative potential. *Id.* ¶¶ 42–55.

¶119 But I find it unnecessary to go beyond the language of the statute to determine its meaning. Subsection 302(4) is straightforward. It directs that if the sentencing court finds it is "in the interests of justice" to sentence a defendant to a "lesser term"

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[14] The *LeBeau* court reasoned that because the provisions within subsection 302(3) (establishing the presumptive sentencing tiers for aggravated kidnapping) state that they are to be imposed "except as provided in Subsection . . . (4)" (the "interests of justice" provision), then courts must always conduct an interests of justice analysis to determine whether subsection (4) applies. *LeBeau*, 2014 UT 39, ¶ 21. And the court concluded that an "interests of justice analysis" required a judge to consider specific factors as described above, *supra* ¶ 107.

rather than the presumptive term, the court may do so if it states the reasons for this finding on the record.

¶120 Two things seem clear from the plain language of this statute. First, it applies only if "a court finds that a *lesser* term" is in the interests of justice. Where, as here and in *LeBeau*, a judge sentences a defendant to the presumptive term, subsection 302(4) should not come into play.

¶121 And second, this provision is permissive, not mandatory, and it does not require judges to consider a list of particulars. It states that judges "may" sentence below the presumptive sentencing tier if they determine it is in the "interests of justice." The sole intent is to give judges discretion to impose a lesser term of imprisonment rather than making the presumptive tier mandatory.

¶122 "May" is, of course, a permissive term. In this context it means to "be permitted to" or to "be a possibility." *May*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¶123 And the phrase "interests of justice" is merely a "general placeholder for a principle of broad judicial discretion." *LeBeau*, 2014 UT 39, ¶ 87 (Lee, J., dissenting). The *LeBeau* majority observed the many times that the phrase "interests of justice" can be found in the civil code, criminal code, rules of evidence, and rules of procedure. *Id.* ¶ 28. This reinforces my point. Various statutes and rules invoke the "interests of justice" to signal that judges have the discretion to consider whatever information is before them and do what is fair, proper, or just under the circumstances. *See id.* ¶ 90 (Lee, J., dissenting); *see, e.g.*, UTAH CODE § 75-7-204(2)(b) (providing that a court "may entertain a proceeding regarding any matter involving a trust if . . . the interests of justice would be seriously impaired"); *id.* § 77-8a-1(2)(d) ("When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion on motion or otherwise orders separate trials consistent with the interests of justice."); *id.* § 78B-1-136 ("It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor, to be detained only so long as the interests of justice require it . . . .").

¶124 However, *LeBeau* turns this statutory language on its head. It transforms the grant of discretion inherent in the phrase "interests of justice" into a prescribed analysis that judges must undertake. And it requires judges to perform this analysis even

when they have applied the presumptive sentence. *LeBeau*, 2014 UT 39, ¶ 55. These mandates are not found in the statute's language.

¶125 In determining whether precedent should be overturned, we also ask how firmly the precedent has become established in the law since it was handed down. To do so, we look to both the age of the precedent and the "extent to which people's reliance on the precedent would create injustice or hardship if it were overturned." *Eldridge*, 2015 UT 21, ¶¶ 22, 35. Other relevant considerations are how well the precedent has worked in practice and "whether the precedent has become inconsistent with other principles of law." *Id.* ¶ 40.

¶126 *LeBeau* was decided in 2014 and was not based on "any significant precursors in Utah law." *Id.* ¶ 34. Since that time, it "has not been necessary to the outcome of many cases." *Id.* ¶ 36. In its six years of existence, *LeBeau* has been cited approximately twenty-five times by this court, the court of appeals, and Utah's federal courts.

¶127 Prior to this case, this court has conducted a *LeBeau* interests of justice analysis only one time in *State v. Martin*, 2017 UT 63, 423 P.3d 1254. There, we declined to reverse a district court that had not undertaken a formal proportionality analysis on the record as required by *LeBeau*. *Id.* ¶ 66. We recognized the "daunting task" involved in undertaking a proportionality analysis: "[I]t is certainly not a task that we can require our district courts to perform without prompting or guidance from counsel." *Id.*

¶128 Our court of appeals has handled most of the cases involving a *LeBeau* claim. Eighteen court of appeals opinions cite *LeBeau*. One is this case, and nine others cite *LeBeau* for other propositions—not the interests of justice analysis. That means there have been eight court of appeals cases involving a *LeBeau* interests of justice claim. The court of appeals has only once concluded that *LeBeau* warranted a holding that a district court abused its discretion. *See State v. Jaramillo*, 2016 UT App 70, ¶ 44, 372 P.3d 34. In every other case, the court of appeals either declined to conduct the *LeBeau* interests of justice analysis or decided there was no abuse of discretion. *See, e.g., State v. Alvarez*, 2017 UT App 145, ¶ 4, 402 P.3d 191 (assuming "that the sentencing court duly considered the proportionality of [the defendant's] sentence" because the defendant did not demonstrate "that [the court's] presumption of appropriate

sentencing consideration is inapplicable"); *State v. Scott*, 2017 UT App 103, ¶ 13, 400 P.3d 1172 (presuming "that the court fully considered all the information presented to it" and took into account "the relevant factors in determining [the defendant's] sentence"); *State v. Beagles*, 2017 UT App 95, ¶ 9, 400 P.3d 1096 (holding that the district court "balanced the aggravating and mitigating factors" and that its sentencing decision was within its discretion).

¶129 And the court of appeals has sharply criticized *LeBeau*. In *State v. Coombs*, where a defendant raised an ineffective assistance of counsel claim because his counsel had not argued at sentencing that the district court should conduct the interests of justice analysis required by *LeBeau*, the court critiqued *LeBeau*: "In our view, *LeBeau* constitutes blatant policy-based ad hoc review of legislative action not typically undertaken by the judicial branch. We would hope that, given the appropriate opportunity, our supreme court will revisit whether *LeBeau*'s approach should continue." 2019 UT App 7, ¶ 22 n.4, 438 P.3d 967 (citation omitted). The court of appeals concluded, "We cannot read *LeBeau* and *Martin* as removing from defense counsel the discretion *not* to make certain arguments at sentencing. Every case is different and defense counsel must retain wide discretion in determining what arguments will best benefit a client under the totality of the circumstances." *Id.* ¶ 21 n.3 (citation omitted).

¶130 It appears that in the time since *LeBeau* was decided, appellate courts have responded to it by applying it narrowly. This suggests *LeBeau*'s mandates are not workable as written.[15]

¶131 On balance, the trouble with *LeBeau* is not so much its mandate that judges consider the interests of justice before imposing a sentence. After all, this is what judges already do. They receive and consider any testimony, evidence, or information that either party desires to present. UTAH CODE § 77-18-1(7). They give the defendant an opportunity to make a statement and present any mitigating information. And they give the prosecution a similar opportunity to present any information "material to the imposition of sentence." UTAH R. CRIM. P. 22(a). They receive information about any victims of the offense. *See* UTAH CODE § 77-38-4(1); *see also id.* § 77-18-1(5)(b)(i). They read

[15] Without published opinions, it is more difficult to determine how district courts have responded to its requirements.

any materials that have been submitted, such as a presentence report or letters. *Id.* § 77-18-1(5)(a)-(b). And defense counsel and the prosecutor use their professional judgment to choose which arguments to make and which information to highlight in support of their respective sentencing positions. Judges consider all of this, along with any applicable statutes and the sentencing guidelines, and impose the sentence they deem to be just under all the circumstances. *State v. Russell*, 791 P.2d 188, 192 (Utah 1990).

¶132 Rather, the more serious problem with *LeBeau* is that instead of reading the "interests of justice" as a grant of discretion, the *LeBeau* court concluded this phrase requires judges to go through a prescribed checklist of factors at sentencing, and that judges must do so whether they impose a sentence less than the presumptive range or within it.

¶133 This transforms a particular legislative policy decision into something else entirely. Here and in similarly worded statutes, the legislature has determined that Utah judges should have the discretion to sentence below the presumptive statutory term when they determine it is in the interests of justice—in other words, fair and just—to do so. This is a significant policy choice, which stands in contrast to other jurisdictions that have chosen to enact statutory mandatory minimum sentencing schemes that are binding upon judges in all but narrow circumstances. *See, e.g.*, 18 U.S.C. § 3553(e) (granting federal sentencing court authority to impose sentence below the statutory minimum only upon a government motion stating that the defendant gave "substantial assistance" in the investigation or prosecution of another person who has committed an offense); *id.* § 3553(f) (requiring a court to sentence without regard to a statutory minimum sentence when a defendant meets specific criteria). Instead of observing this fundamental aspect of the sentencing scheme enacted by the legislature, *LeBeau* transforms this general grant of discretion into something detailed and specific, which is not found in the text of the relevant statutes.

¶134 Because I advocate for *LeBeau* to be overturned even though it does not determine the result in this case, the concurrence asserts that my analysis is an "act of judicial overreach." *See infra* ¶ 130. I agree with the concurrence that the doctrine of *stare decisis* is deeply rooted in our law. We should be extremely reluctant to overturn precedent. And generally, that means we will not revisit precedent when it does not dictate our holding in a particular case.

¶135 But I conclude that the fact that *LeBeau* does not govern here—indeed, the fact that it "has not been necessary to the outcome of many cases," *Eldridge*, 2015 UT 21, ¶ 36—indicates that it has not become firmly "established in the law since it was handed down," *id.* ¶ 22. This, along with the court of appeals' criticism of *LeBeau* and explicit request that this court "revisit whether *LeBeau*'s approach should continue," *Coombs*, 2019 UT App 7, ¶ 22 n.4, suggests that *LeBeau* has not been workable in practice and weighs in favor of overruling it.

¶136 For these reasons, I am persuaded that this is one of the rare occasions when we should overturn precedent.

CONCLUSION

¶137 We affirm all but one of the court of appeals' determinations in this case. We conclude that any error in the jury instructions for aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse did not prejudice Norton. Further, the district court was not required to instruct on any of the lesser included offenses Norton requested, except for sexual battery. And we determine that at sentencing, the district court did not err in imposing a punishment of fifteen years to life for aggravated sexual assault and properly considered all of the arguments and evidence before it.

¶138 With regard to our holding that the district court erred in not instructing the jury on sexual battery as a lesser included offense of the aggravated sexual assault charge based on forcible sexual abuse, we reverse the conviction and remand to the district court for a new trial.

CHIEF JUSTICE DURRANT, concurring in part and concurring in the judgment:

¶139 Writing for the majority, Justice Petersen does an able and thorough iob of addressing each of Mr. Norton's challenges to his conviction. And she appropriately dismisses his *LeBeau* challenge to his sentence as unpreserved. So far so good. We are therefore pleased to concur in the analysis and conclusions she sets forth in parts I through IV of her opinion. But then, she takes a surprising step. She goes on to address the question of whether

the rule established in *LeBeau*[16] should be overturned. This, despite the fact that the resolution of this question makes not one wit of difference to Mr. Norton's case. Justice Petersen explicitly acknowledges as much, writing that *LeBeau* "does not determine the outcome in this case."[17] But the fact that this is done in plain sight makes it no less an act of judicial overreach.

¶140 And Justice Petersen further disregards judicial restraint by not just reaching the issue unnecessarily, but then advocating to overturn *LeBeau*, a significant case that, whether right or wrong, is established precedent.[18] The doctrine of *stare decisis* is deeply rooted in our law. There are reasons why we respect precedent. There are reasons why we are circumspect in overturning it. Precedent promotes predictability and stability in the incremental development of the law. It promotes faith in our judicial system. It underpins and informs virtually every decision we make as judges. This is not to say it is wholly inviolate. We, of course, do on occasion overturn a case. But we do not do it lightly. We do it reluctantly, cautiously, and with compelling reasons. And we should never do it gratuitously as Justice Petersen suggests we do here. For these reasons, we decline to join in part V of Justice Petersen's opinion.

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[16] *LeBeau v. State*, 2014 UT 39, 337 P.3d 254.

[17] *Supra* ¶ 115.

[18] *See State v. Rowan*, 2017 UT 88, ¶ 24, 416 P.3d 566 (Himonas, J., concurring) (explaining, in a concurrence joined by a majority of the court, that "our court declines to revisit established precedent unnecessarily").

ADDENDUM B

This opinion is subject to revision before final publication in the Pacific Reporter

2020 UT 46

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Respondent,

v.

LONNIE NORTON,
Petitioner.

No. 20180514
Heard May 13, 2019
Filed July 13, 2020

On Certiorari to the Utah Court of Appeals

Third District, West Jordan
The Honorable Bruce C. Lubeck
No. 131400015

Attorneys:

Sean D. Reyes, Att'y Gen., Christopher D. Ballard, Asst. Solic. Gen., Salt Lake City, for respondent

Lori J. Seppi, Salt Lake City, for petitioner

JUSTICE PETERSEN authored the opinion of the Court with respect to Parts I–IV in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined, and wrote separately in Part V in which ASSOCIATE CHIEF JUSTICE LEE joined.

CHIEF JUSTICE DURRANT filed an opinion concurring in part and concurring in the judgment, in which JUSTICE HIMONAS and JUSTICE PEARCE joined.

JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

¶1 A jury convicted Lonnie Norton of breaking into the home where his estranged wife was staying, kidnapping her, assaulting her, and then raping her—all while she had a protective order against him. He appealed his convictions and the court of appeals affirmed. He petitions this court for a review of each claim he raised before the court of appeals. We affirm on all but one issue.

BACKGROUND[1]

¶2 Norton and H.N. had been married for twenty-one years when H.N. moved out of the marital home with their four children. She stayed in a domestic violence shelter, then moved into her parents' home. She obtained a protective order against Norton, which prohibited him from contacting her except to discuss marriage counseling and their children. The protective order permitted Norton to visit his three younger children, but only if a supervisor was present.

¶3 One evening, H.N.'s three youngest children went to the marital home for a weekend visitation with Norton. The events of that night led to Norton's arrest.

¶4 At the trial on the resulting charges, both H.N. and Norton testified. They gave vastly different accounts of what happened that night.

The Two Conflicting Accounts

H.N.'s Account

¶5 At trial, H.N. testified that before going to bed that night, she put chairs under the doorknobs of the front and back doors of her parents' home, as she did each night. She had previously placed a dryer in front of the basement door, which remained there. After H.N. went to bed, she was awakened by a "loud bang." She grabbed the phone and dialed 911 before noticing Norton standing at the end of her bed. He grabbed the phone and

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[1] "On appeal, we review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Holgate*, 2000 UT 74, ¶ 2, 10 P.3d 346 (citation omitted). "We present conflicting evidence only as necessary to understand issues raised on appeal." *Id.*

punched her in the face. Norton also wound duct tape around H.N.'s head, covering her mouth.

¶6 The next thing H.N. remembered was sitting in Norton's car at an intersection. Although it was snowing, she did not have any shoes on. H.N. noticed that Norton had a gun in his lap, which he picked up and pointed at her. H.N. thought Norton was driving to his office at the University of Utah, but instead he drove to a building in Fort Douglas. When they arrived, Norton was still holding the gun and told H.N. that she "needed to be quiet or he would shoot [her]."

¶7 H.N. and Norton went into the building, up some stairs, and into a bathroom. Norton ripped the duct tape off H.N.'s head and talked to her about reconciling their marriage. After he finished talking, Norton told H.N. to take off her shirt. When H.N. said "no," Norton pointed the gun at her and again told her to take off her shirt. She finally acquiesced, and Norton squeezed her breasts.

¶8 Next, Norton led H.N. into an office and told her to take off her pants. She again said "no," and he again pointed the gun at her, forcing her to comply. While she did so, Norton undressed, removed the magazine from the gun, and put the magazine and gun in a filing cabinet. Then, he told H.N. that they were going to have sex. She said "no," but Norton responded that "yes" they were. "So you're going to rape me?" she asked. Norton replied, "You can't rape somebody that you're married to."

¶9 He then lay on the ground and pulled H.N. on top of him. He grabbed H.N.'s hands, flipped her so that she was underneath him, and raped her. While Norton was on top of her, H.N. grabbed his penis as hard as she could, but was unsure how hard that was because she has rheumatoid arthritis. In response, Norton again grabbed her hands and held them over her head.

¶10 After raping H.N., Norton took her into the bathroom. He told her to rinse off, but she struggled because her hands were shaking. Norton complained that she "wasn't doing a good enough job," and inserted his fingers into H.N.'s vagina to try to "rinse himself out" of her. Afterwards, H.N. dried herself off with paper towels and dressed. She then noticed that Norton was dressed with the gun in his hand.

¶11 Back in the office, Norton set up two chairs so that they were facing each other and told H.N. to sit. She sat, and Norton put the gun to his head and threatened to kill himself. H.N. tried to dissuade him, but Norton pointed the gun at H.N. and threatened to shoot her, too. Eventually H.N. got mad and told

Norton to "go ahead and shoot himself," at which point he got up and took her back to the car.

¶12 Norton drove to the marital home. There, H.N. checked on the children and then convinced Norton to take her back to her parents' home. When they arrived, Norton entered the house, leaving only after H.N. told him she would not tell anyone what had happened.

¶13 After Norton left, H.N. called one of Norton's neighbors and asked the neighbor to get her children out of the marital home. H.N. also called 911, told a police officer what happened, and asked the officer to check on her children. The police arrived at H.N.'s parents' home, spoke with her, and then drove her to the hospital.

Norton's Account

¶14 Norton testified at trial and gave a very different version of these events. He claimed that H.N. told him to visit her over the weekend so they could discuss their marriage. After their children were asleep, Norton drove to H.N.'s parents' house to see her. While driving over, he received a phone call from H.N., which he missed. He arrived at H.N.'s parents' home and waited outside until she exited the house and got in the car. Norton said he could not remember whether H.N. was wearing shoes, but that "she might have come running out in stocking feet" and he thought he "gave her a pair of Reeboks to wear."

¶15 H.N. suggested they go to Norton's office to talk. While driving, Norton decided it would be better to go to a building in the Fort Douglas area.

¶16 After arriving at the building, Norton unlocked the door and proceeded upstairs with H.N. where they sat down and talked about reconciliation. H.N. said she needed time, and Norton started talking about when they first met and when they were first married. H.N. then came over, sat on Norton's lap, put her arms around him, and the two started kissing. They moved to the floor where they continued to kiss and touch each other. They took off their clothes, continued to kiss, and then H.N. "climbed on top" of Norton and they began "to have sex." Afterwards, they went into the bathroom where H.N. "rinsed" and "dried herself off."

¶17 After dressing, Norton and H.N. sat down and continued to discuss reconciliation. H.N. told Norton she did not want to live with him anymore. He replied that if they were not going to reconcile he thought it "would be fair" if they had joint custody of

their children. The two argued, and H.N. slapped Norton and then he backhanded her. H.N. tried to hit Norton more, but he grabbed her hands and the two "rastled." H.N. went into the bathroom, shut the door, and stayed there for about ten minutes. When H.N. left the bathroom, they went back to the car and she told Norton she wanted to look in on their children.

¶18 Norton drove to the marital home and they checked on the children. He then took H.N. back to her parents' home. When they got there, H.N. told Norton that the door was locked, so he pushed through a locked gate and went to one of the back doors and pushed it open. He went inside and opened a different door to let H.N. into the home. Then, he again brought up having joint custody of their children. This started another argument. H.N. then claimed that he had broken into her parents' home and beaten her up, and she threatened to call the police. Norton got scared and left. Later that morning, the police came and arrested him.

District Court Proceedings

Jury Instructions

¶19 The State charged Norton with aggravated kidnapping, aggravated burglary, aggravated assault, violation of a protective order, damage to or interruption of a communication device, and three counts of aggravated sexual assault. The three aggravated sexual assault charges were based on Norton squeezing H.N.'s breasts, raping her, and inserting his fingers into her vagina, respectively. The case proceeded to trial. When it came time to instruct the jury, Norton asked the court for instructions on a number of lesser included offenses. The court agreed to some of these instructions but denied others.

Verdict

¶20 On the charge of violation of a protective order and the two charges of aggravated sexual assault relating to rape and digital penetration, the jury found Norton guilty as charged. On the aggravated kidnapping, aggravated burglary, and aggravated assault charges, the jury found Norton guilty of the lesser included offenses of kidnapping, burglary, and assault. The jury acquitted him of interruption of a communication device and aggravated sexual assault related to squeezing H.N.'s breasts.

Sentencing

¶21 At sentencing, the most serious punishment Norton faced was for his two convictions of aggravated sexual assault. He made two arguments to persuade the district court to reject the

presumptive punishment tier of fifteen years to life in favor of a lower punishment tier.[2]

¶22 First, Norton argued that the district court should not apply the higher sentencing tier applicable to aggravated sexual assault based on rape and forcible sexual abuse because the jury had not been given a special verdict form to indicate the type of sexual assault upon which they relied. Norton observed that the court had instructed the jury that sexual assault could be based on rape, attempted rape, forcible sexual abuse, or attempted forcible sexual abuse. But the court did not provide the jury with a special verdict form to indicate which underlying sexual assault offense formed the basis of either conviction.

¶23 In light of this, Norton argued there was no evidence these convictions were based on anything more than the least serious offense of attempted forcible sexual abuse. So he reasoned the district court could sentence him only to six years to life, the sentencing range corresponding to aggravated sexual assault based on attempted forcible sexual abuse. UTAH CODE § 76-5-405(2)(c)(i). The court rejected this argument and concluded the presumptive range for the two counts of aggravated sexual assault should be fifteen years to life, the tier corresponding to aggravated sexual assault based on completed acts of rape and forcible sexual abuse. *Id.* §§ 76-5-405(2)(a)(i), -405(2)(b)(i).

¶24 Second, Norton argued that the district court should depart from the higher sentencing tier in the "interests of justice" due to his history, distressed state at the time of the crime, and commitment to improving. The State countered that fifteen years to life was an appropriate sentence because Norton committed "a terrible crime" and had never accepted responsibility for his actions. The court acknowledged that this was a "very difficult case" and that Norton had a "good past" and might be "entitled to some mercy." However, the court noted Norton's "inability and unwillingness to follow the truth" and that his actions were the

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[2] The statutory sentencing range for aggravated sexual assault varies based on the type of sexual assault involved in the offense. If the underlying offense is rape or forcible sexual abuse, the presumptive sentence is fifteen years to life. UTAH CODE § 76-5-405(2)(a)(i). If the underlying offense is attempted rape, the presumptive sentence is ten years to life. *Id.* § 76-5-405(2)(b)(i). And if the underlying offense is attempted forcible sexual abuse, the presumptive sentence is six years to life. *Id.* § 76-5-405(2)(c)(i).

"kind of conduct that simply cannot be accepted in our society." The court sentenced Norton to fifteen years to life in prison on both counts of aggravated sexual assault, to run concurrently.

¶25 In total, the district court sentenced Norton to fifteen years to life in prison on both aggravated sexual assault convictions, one to fifteen years in prison for kidnapping, one to fifteen years in prison for burglary, 180 days for assault, and 365 days for violation of a protective order. The court ran each prison term concurrently.

Court of Appeals' Decision

¶26 Norton appealed, making five claims. Two of Norton's claims centered on the district court's jury instructions. He argued that the instructions on aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse misstated the law because they did not make clear that Norton had to act intentionally or knowingly with regard to H.N.'s nonconsent. *State v. Norton*, 2018 UT App 82, ¶¶ 25, 28, 427 P.3d 312. He also argued that the district court erred in rejecting some of his requests for instructions on lesser included offenses. *Id.* ¶ 26.

¶27 Norton also challenged his sentence. He argued that the district court's decision to apply the fifteen-to-life sentencing tier for his aggravated sexual assault convictions "violated his rights to due process and a jury trial" because the jury had not been given a special verdict form to indicate the type of sexual assault forming the basis of these convictions. *Id.* ¶ 57. He reasoned that this "impermissibly increased the penalty he would have received had he been sentenced according to the facts that he claims were reflected in the jury's verdict." *Id.* ¶ 59. He also argued that the court abused its discretion when it failed to properly conduct the interests of justice analysis required by *LeBeau v. State*, 2014 UT 39, 337 P.3d 254. *Norton*, 2018 UT App 82, ¶ 67.

¶28 Finally, Norton argued that the court of appeals should reverse his convictions under the cumulative error doctrine. *Id.* ¶ 87.

¶29 The court of appeals rejected each argument. First, the court concluded that even if the jury instructions regarding aggravated sexual assault, rape, and forcible sexual abuse were erroneous as to the required mental state for H.N.'s nonconsent, any such error did not prejudice Norton. *Id.* ¶ 40. Second, the court of appeals determined that the district court did not err in refusing to give certain lesser included offense instructions that Norton had requested. *Id.* ¶¶ 49, 53, 56. It further concluded that at sentencing, the district court correctly determined the

presumptive sentencing tier for the aggravated sexual assault convictions and properly considered all the evidence and argument presented by the parties. *Id.* ¶ 86. It also declined to reverse on cumulative error grounds. *Id.* ¶ 87.

¶30 We granted Norton's petition for certiorari on each of these claims. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

¶31 "On certiorari, we review for correctness the decision of the court of appeals . . . ." *State v. Levin*, 2006 UT 50, ¶ 15, 144 P.3d 1096.

ANALYSIS

¶32 We granted certiorari to consider whether the court of appeals erred in (1) concluding that any error in the jury instructions on aggravated sexual assault, rape, and forcible sexual abuse did not prejudice Norton; (2) affirming the district court's refusal to instruct the jury on additional lesser included offenses of aggravated sexual assault, aggravated burglary, and aggravated kidnapping; (3) affirming the district court's sentence of fifteen years to life on both convictions of aggravated sexual assault; (4) concluding that the district court conducted a proper interests of justice analysis at sentencing; and (5) rejecting Norton's claim of cumulative error. We address each issue in turn.

I. JURY INSTRUCTIONS

¶33 Norton contends that the jury instructions on aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse were incorrect. He argues that the instructions did not adequately explain that to convict, the jury must find that he acted knowingly and intentionally with regard to H.N.'s nonconsent. He further contends that if the jury had been properly instructed, there was a reasonable probability it would have acquitted him on these charges. Norton did not object to these instructions at trial, so he asks us to review this claim for plain error,[3] manifest injustice,[4] and ineffective assistance of counsel.

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[3] The State argues that we should not conduct a plain error review because Norton invited any error in these instructions. At trial, the district court told counsel that if they did not object to an instruction, the court would assume they approved of it. Norton's counsel did not object to these instructions, and the State argues

(continued . . .)

¶34 The court of appeals assumed without deciding that the jury instructions were incorrect, and it disposed of this issue based on lack of prejudice. *State v. Norton*, 2018 UT App 82, ¶¶ 30–40, 427 P.3d 312. We agree with the court of appeals that even assuming Norton's criticism of these instructions is right, he has not shown prejudice.

¶35 To show plain error or ineffective assistance of counsel, Norton must prove he was prejudiced by the alleged error. *See State v. Jimenez*, 2012 UT 41, ¶ 20, 284 P.3d 640. The prejudice standards for plain error and ineffective assistance are the same. *State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699. Prejudicial error occurs when "there is a reasonable probability" that but for the alleged errors, "the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¶36 Norton argues that the jury instructions did not clearly explain the requisite mens rea regarding H.N.'s nonconsent. At trial, the district court instructed the jury that the State had to "prove a mental state as to each of the . . . counts charged." It then defined the mental states "intentionally"[5] and "knowingly."[6]

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this is tantamount to invited error. We decline to address the State's argument because we must still analyze prejudice to determine Norton's ineffective assistance of counsel claim. And because we agree with the court of appeals that, even assuming these jury instructions were erroneous, they did not prejudice Norton, his claim fails whether we review it for ineffective assistance, manifest injustice, or plain error.

[4] Our precedent holds that in many instances "'manifest injustice' and 'plain error' are operationally synonymous." *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989); *see also State v. Johnson*, 2017 UT 76, ¶ 57 n.16, 416 P.3d 443; *State v. Maestas*, 2012 UT 46, ¶ 37, 299 P.3d 892. Norton has not argued otherwise; therefore, we review his argument under the plain error standard.

[5] The district court instructed the jury that a "person acts intentionally . . . when his conscious objective is to cause a certain result or to engage in certain conduct." *See* UTAH CODE § 76-2-103(1).

[6] The district court instructed the jury that a "person acts knowingly . . . when the person is aware of the nature of his conduct or is aware of the particular circumstances surrounding

(continued . . .)

¶37 Regarding aggravated sexual assault, the district court instructed the jury that it could find Norton guilty if it found beyond a reasonable doubt that:

> 1. [Norton] raped or attempted to rape or committed forcible sexual abuse or attempted forcible sexual abuse against [H.N.]; and
>
> 2. That in the course of that rape or attempted rape or forcible sexual abuse or attempted forcible sexual abuse [Norton]
>
> (a) used or threatened [H.N.] with the use of a dangerous weapon; or
>
> (b) compelled, or attempted to compel, [H.N.] to submit to rape or forcible sexual abuse by threat of kidnap[p]ing, death, or serious bodily injury to be inflicted imminently; and
>
> 3. That [Norton] did such acts knowingly or intentionally.

¶38 The district court then instructed the jury on rape and forcible sexual abuse. Regarding rape, it instructed the jury that it could convict Norton if it found beyond a reasonable doubt that:

> 1. [Norton] had sexual intercourse with [H.N.]; and
>
> 2. That such conduct was without the consent of [H.N.]; and
>
> 3. That said conduct was done intentionally or knowingly.

¶39 With regard to forcible sexual abuse, the district court instructed the jury that it could convict Norton if it found beyond a reasonable doubt that:

> 1. [Norton] touched the anus, buttocks, breasts, or any part of the genitals of H.N.; and
>
> 2. That such conduct was done with the intent to either
>
> (a) cause substantial emotional or bodily pain to [H.N.], or

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his conduct," and when the person is "aware that his conduct is reasonably certain to cause the result." *See id.* § 76-2-103(2).

> (b) arouse or gratify the sexual desires of any person; and without the consent of [H.N.]; and
>
> 3. That said conduct was done intentionally or knowingly.

¶40 Norton relies on *State v. Barela* to argue that the rape and forcible sexual abuse instructions are incorrect because they "implied that the mens rea requirement . . . applied only to the act of sexual intercourse and not to the alleged victim's nonconsent." 2015 UT 22, ¶ 26, 349 P.3d 676. If these instructions are incorrect, so too is the aggravated sexual assault instruction because it incorporates the instructions for these associated offenses.

¶41 The court of appeals declined to decide whether these instructions were erroneous, instead holding that even if they were, it was not prejudicial error. To determine whether the omission of an element from a jury instruction is prejudicial, we analyze "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19 (1999). Here, we ask specifically whether a reasonable jury could have found, based on the "totality of the evidence in the record," that the defendant did not have the required mental state as to the victim's nonconsent. *Barela*, 2015 UT 22, ¶ 31.

¶42 We agree with the court of appeals that a reasonable jury could not have found that Norton mistook H.N.'s conduct for consent based on the totality of the evidence. *Norton*, 2018 UT App 82, ¶¶ 37–40. Because the jury acquitted Norton of the charge of aggravated sexual assault related to squeezing H.N.'s breasts, only the counts based on the nonconsensual intercourse (rape) and digital penetration (forcible sexual abuse) are at issue.

¶43 The trial evidence with respect to these two incidents could not support a finding that Norton may have mistakenly interpreted H.N.'s behavior to indicate consent. With regard to the intercourse, Norton's testimony did not describe ambiguous behavior that he could have believed was consent. Rather, he testified that H.N. initiated sexual activity by sitting on his lap and later climbing on top of him. And in his version of events, the digital penetration never happened. He claimed she fabricated her claims against him. Specifically, he testified that after he returned her to her parents' home he again tried to discuss custody of the children and she threatened to call the police and accuse him of breaking into the house and beating her up.

¶44 And H.N.'s testimony similarly left no room for a finding that Norton mistook her conduct for consent. H.N. had a protective order against Norton. She testified that she had pulled a dryer in front of the basement door when she first moved into her parents' home. And each night she secured the front and back doors by positioning chairs under the doorknobs. Despite her efforts to create a barricade, H.N. testified that Norton broke into the house, punched her in the face, wrapped duct tape around her head and over her mouth, took her into the snowy night with no shoes on, took her to an empty building, and forced her inside at gun point. Once inside, he commanded her to undress at gun point and then raped her. He then tried to get rid of the evidence by directing her to clean up and inserting his fingers into her vagina to "rinse himself out." H.N. testified that she told him "no" multiple times.

¶45 Other evidence corroborated her version of events. The police found strands of hair that resembled H.N.'s in a bathtub in the Fort Douglas building they searched, a wad of duct tape with hair in it in the dumpster behind the building, a mark on H.N.'s lower back, swelling and the beginning of bruising on H.N.'s face, and bruising on her inner thighs and labia.

¶46 Norton points to H.N.'s testimony that she squeezed his penis as evidence that could have persuaded a jury that Norton believed she was consenting. But this incident was characterized by both sides as an act of protest. H.N. testified that in response, Norton grabbed both her hands and pinned them above her head. And Norton did not say in his testimony that he believed the squeeze indicated participation. Rather, he did not mention it. And Norton's counsel argued during closing that the squeeze refuted H.N.'s claim that she was "totally terrified of him" and indicated she was "not afraid to use force" and "not afraid to be confrontational." And even if somehow a reasonable jury could have seen H.N.'s isolated act of squeezing Norton's penis as ambiguous, any ambiguity vanishes when this act is viewed along with the rest of the trial evidence.

¶47 A comparison with the facts in *Barela* helps demonstrate why the jury instructions here were not prejudicial. In *Barela*, a woman claimed her massage therapist raped her. 2015 UT 22, ¶ 6. The therapist claimed the sex was consensual. *Id.* ¶ 5. After a jury convicted the therapist of rape, he challenged on appeal a jury instruction that did not clearly state the required mens rea for the victim's nonconsent. *Id.* ¶¶ 15–16. We agreed and reversed the defendant's convictions. *Id.* ¶ 32.

¶48 This court found that the evidence was such that a jury could have "thought that the truth fell somewhere in between the two accounts." *Id.* ¶ 30. While the victim in that case said the defendant had suddenly instigated and perpetrated the intercourse without her consent, she testified that she "froze," "neither actively participating in sex nor speaking any words," and otherwise expressed no reaction. *Id.* ¶ 29. This court concluded that a jury could have believed that although the victim did not consent, the defendant may have mistakenly thought she did. *See id.* ¶¶ 30–32. Accordingly, we held that it was "reasonably likely" that a proper jury instruction regarding the requisite mental state as to the victim's nonconsent could have affected the outcome of the trial. *Id.* ¶¶ 31–32.

¶49 In contrast, a reasonable jury could not look at the totality of the trial evidence here and find that, under either version of events, Norton may have mistaken H.N.'s conduct for consent. Norton claims H.N. initiated the sexual activity and then manufactured and exaggerated her claims against him. H.N. claims Norton kidnapped her and then raped her at gunpoint. This case does not involve behavior that the jury could have viewed as a close call in either direction.

¶50 Accordingly, this case does not turn on whether Norton may have mistaken H.N.'s conduct for consent. Rather, H.N.'s and Norton's versions of the events in question were mutually exclusive, and the jury had to decide who to believe. We agree with the court of appeals that even assuming the jury instructions were erroneous, it was not reasonably likely that absent the errors the outcome of the trial would have been different.

¶51 While the jury instruction here could have been clearer, *see State v. Newton*, 2020 UT 24, ¶ 29, --- P.3d --- (identifying Model Utah Jury Instruction CR1605 as an example of a clear jury instruction for the offense of rape), we conclude that Norton did not show he was prejudiced by the instruction, and consequently that he failed to establish manifest injustice, plain error, or ineffective assistance of counsel.

II. LESSER INCLUDED OFFENSES

¶52 Norton argues that the court of appeals erred in affirming the district court's refusal to instruct on additional lesser included offenses of aggravated kidnapping, aggravated burglary, and two of the counts of aggravated sexual assault.

¶53 Relevant here, an offense constitutes a lesser included offense when it is "established by proof of the same or less than all the facts required to establish the commission of the offense

charged" or is "specifically designated by a statute as a lesser included offense." UTAH CODE § 76-1-402(3)(a), (c).

¶54 When a defendant requests an instruction on a lesser included offense, we use the evidence-based standard codified in Utah Code section 76-1-402(4) to determine whether such an instruction is required. *See State v. Powell*, 2007 UT 9, ¶ 24, 154 P.3d 788. We first ask whether the charged offense and the lesser included offense have "some overlap in the statutory elements." *State v. Baker*, 671 P.2d 152, 159 (Utah 1983). We then inquire whether the trial evidence "provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Id.* at 159 (citation omitted) (internal quotation marks omitted); *see also Powell*, 2007 UT 9, ¶ 24; UTAH CODE § 76-1-402(4). We must determine whether there is "a sufficient quantum of evidence presented to justify sending the question to the jury." *Baker*, 671 P.2d at 159. And we view the evidence "in the light most favorable to the defendant requesting the instruction." *Powell*, 2007 UT 9, ¶ 27.

¶55 The court of appeals carefully analyzed each of Norton's claims of entitlement to an instruction on a lesser included offense. We affirm the court of appeals' decision with regard to all but one of those claims.

A. Aggravated Kidnapping

¶56 Norton argues that the court of appeals erred in affirming the district court's refusal to instruct on unlawful detention as a lesser included offense of aggravated kidnapping. We agree with the court of appeals' decision.

¶57 At trial, both parties requested an instruction on kidnapping as a lesser included offense of aggravated kidnapping. Additionally, Norton requested an instruction on unlawful detention. The district court instructed the jury on kidnapping but not unlawful detention. Ultimately, the jury acquitted Norton of aggravated kidnapping but convicted him of kidnapping.

¶58 The State's aggravated kidnapping charge was based on Norton abducting H.N. from the home, duct-taping her head and mouth, and taking her to Fort Douglas where he sexually assaulted her and periodically held her at gunpoint. In contrast, Norton testified that H.N. willingly left her home and accompanied him to the Fort Douglas building. However, he claimed that when they arrived at the empty building they argued, H.N. hit Norton, and he responded by backhanding her. He then restrained H.N.'s hands to prevent her from hitting him

again. On appeal, Norton identifies his testimony that he temporarily restrained H.N.'s hands as being sufficient to require the district court to instruct on unlawful detention.

¶59 Unlawful detention is statutorily defined as a lesser included offense of aggravated kidnapping.[7] UTAH CODE § 76-5-306(2); *see also id.* § 76-1-402(3). But the conduct identified by Norton is a separate act that is not included within the conduct that constituted the greater offense of aggravated kidnapping here. "Even if there is overlap in the statutory elements, if the convictions rely on materially different acts, then one crime will not be a lesser included offense of another." *State v. Garrido*, 2013 UT App 245, ¶ 31, 314 P.3d 1014 (internal quotation marks omitted).

¶60 Norton's testimony that he restrained H.N.'s hands at Fort Douglas is separate, uncharged conduct. As to the conduct that is the basis for the aggravated kidnapping charge—abducting H.N. from the home, taking her to the Fort Douglas building, periodically holding her at gunpoint, and sexually assaulting her—Norton claims it was all voluntary and consensual. Based on the trial evidence, the choice for the jury was to either convict him of aggravated kidnapping or kidnapping based on H.N.'s testimony, or acquit him based on his testimony. If the jury believed Norton's version of events, it could not convict him of restraining H.N.'s hands—a separate act for which he was not charged.

¶61 We also note that Norton's testimony does not appear to even establish the offense of unlawful detention. Unlawful detention requires restraint or detention "without authority of

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[7] To prove aggravated kidnapping, the State must show in relevant part that "in the course of committing unlawful detention or kidnapping," a person "(a) possesses, uses, or threatens to use a dangerous weapon," or (b) acts with intent "(vi) to commit a sexual offense." UTAH CODE § 76-5-302(1)(a), (1)(b)(vi) (2012). (We cite to the version of the statute in effect at the time of the events in question for this and other statutory provisions that have been substantively amended since that time.) To prove unlawful detention, the State must prove only that an actor "intentionally or knowingly, without authority of law, and against the will of the victim, detains or restrains the victim under circumstances not constituting a violation of: (a) kidnapping . . . or (c) aggravated kidnapping." *Id.* § 76-5-304(1) (2012).

law." UTAH CODE § 76-5-304(1) (2012). But Norton claimed he restrained H.N.'s hands in self-defense to stop her from hitting him, and we must look at the evidence in the light most favorable to him without weighing credibility. *See Powell*, 2007 UT 9, ¶ 27. Restraining another's hands in self-defense is not unlawful. *See* UTAH CODE § 76-2-402(1)(a) (2012) (providing that a "person is justified in threatening or using force against another when and to the extent that the person reasonably believes that force or a threat of force is necessary to defend the person or a third person against another person's imminent use of unlawful force"). So Norton's evidence does not amount to unlawful detention.

¶62 Fundamentally, the evidence before the jury provided no rational basis for a verdict acquitting Norton of aggravated kidnapping and instead convicting him of unlawful detention. *See id.* § 76-1-402(4). Accordingly, we agree with the court of appeals that the district court was not obligated to instruct the jury on unlawful detention.[8]

B. Aggravated Burglary

¶63 Norton argues that he was entitled to instructions on aggravated assault, assault, and criminal trespass as lesser included offenses of aggravated burglary. We agree with the court of appeals that these "are not lesser included offenses of aggravated burglary under the facts of this case." *Norton*, 2018 UT App 82, ¶ 55.

¶64 At trial, the district court instructed on burglary as a lesser included offense of aggravated burglary. But the court did not instruct on aggravated assault, assault, or criminal trespass.

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[8] The State agrees with the court of appeals that an instruction on unlawful detention was not required here but disagrees with that court's analysis. The State reasons that because the kidnapping was an ongoing crime that continued at Fort Douglas, the evidence of Norton restraining H.N.'s hands was not a separate act. We appreciate the State's point, but we ultimately agree with the court of appeals' analysis for the reasons explained above, *supra* ¶¶ 56–62. The evidence Norton identifies provides a rational basis for a verdict acquitting him of aggravated kidnapping, but not for one convicting him of unlawful detention because the restraint was a separate uncharged act. *See* UTAH CODE § 76-1-402(4).

¶65 Aggravated burglary, aggravated assault, and assault do have overlapping statutory elements.[9] But again, Norton relies on evidence of a materially separate, uncharged act to argue that the district court should have instructed on these offenses.

¶66 The State's aggravated burglary charge was based on the events surrounding Norton breaking into H.N.'s parents' home at the beginning of the night in question. These events included H.N. waking to a "loud bang"—presumably caused by one of the objects she had used to barricade the doors—and finding Norton standing at the end of her bed. He then punched her in the face.

¶67 At trial, Norton denied all of this. He claimed that he did not break into H.N.'s parents' home at the beginning of the night, but that he waited in his car outside of the home for her to willingly join him. However, he points to his testimony that he backhanded H.N. and injured her face at Fort Douglas as supporting instructions on aggravated assault and assault as lesser included offenses of aggravated burglary.

¶68 This is an uncharged act that is separate from the conduct forming the basis of the aggravated burglary charge—Norton breaking into H.N.'s parents' home and punching her in the face. As the court of appeals aptly concluded, "Because the facts and evidence developed to establish the greater offense of aggravated burglary were different from the facts and evidence relied upon

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[9] At the time of the conduct at issue, aggravated burglary occurred when a person "in attempting, committing, or fleeing from a burglary . . . (a) cause[d] bodily injury to any person who [was] not a participant in the crime; (b) use[d] or threaten[ed] the immediate use of a dangerous weapon against any person who [was] not a participant in the crime; or (c) possesse[d] or attempt[ed] to use any explosive or dangerous weapon." *Id.* § 76-6-203(1).

An aggravated assault occurred if a person "commit[ed] assault" and used "(a) a dangerous weapon . . . or (b) other means or force likely to produce death or serious bodily injury." *Id.* § 76-5-103(1).

And an assault was "(a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that cause[d] bodily injury to another or create[d] a substantial risk of bodily injury to another." *Id.* § 76-5-102(1) (2012).

by Norton to claim entitlement to the lesser included offense instructions of aggravated assault and assault, those lesser offenses were not included within the greater offenses." *Id.* ¶ 56.

¶69 Norton's testimony about this uncharged conduct provides a basis for an additional offense but not a lesser offense included within the conduct for which he was actually charged. Accordingly, the evidence at trial did not provide a rational basis for a verdict acquitting Norton of aggravated burglary or burglary and instead convicting him of aggravated assault or assault. So the district court was not required to give the lesser included offense instructions he requested.

¶70 Norton also argued to the court of appeals that he was entitled to an instruction on criminal trespass because he went to H.N.'s residence at the end of the night, which the protective order prohibited. *See id.* ¶ 56 n.13. Because Norton's trial counsel did not request a criminal trespass instruction, Norton raises this argument based on ineffective assistance of counsel. *See id.*

¶71 The court of appeals concluded again that because of the different underlying conduct that Norton relied on to make his argument, "criminal trespass was not an included offense of aggravated burglary under the circumstances of this case, and Norton's counsel was therefore not ineffective for failing to request criminal trespass as a lesser included instruction." *Id.*

¶72 The court of appeals was correct. Norton's testimony about going to H.N.'s parents' home at the end of the night is separate from his breaking into the house at the beginning of the night. It is uncharged conduct. If it did support a conviction for criminal trespass, that conviction would not be in lieu of burglary but in addition to it. Accordingly, the district court was not required to instruct on criminal trespass and Norton's counsel was not ineffective for not requesting such an instruction.

C. Aggravated Sexual Assault Based on Rape

¶73 Norton argues that the district court erred in declining to instruct the jury on sexual battery as a lesser included offense of aggravated sexual assault based on rape. But we agree with the court of appeals that the district court did not err in refusing to give such an instruction.

¶74 At trial, Norton and the State requested instructions on rape, forcible sexual abuse, and sexual battery as lesser included offenses of aggravated sexual assault based on rape. The district court did instruct the jury on rape and forcible sexual abuse, but not on sexual battery. Although the jury was instructed on two

lesser included offenses, it convicted Norton of aggravated sexual assault as charged.

¶75 The offenses of aggravated sexual assault based on the underlying offense of rape and sexual battery have overlapping elements.[10] Norton argues that he was entitled to a sexual battery instruction because the jury could have disbelieved H.N. or found that she exaggerated her allegations to gain an advantage in the custody battle. Norton also asserts that her testimony about the rape was ambiguous because she did not struggle after he initiated sex, except to squeeze his penis. And he argues that in light of his testimony that the sex was consensual, the jury could have found that no rape occurred, but when Norton held her hands above her head, that particular sexual position might have caused her momentary affront or alarm.

¶76 This is pure speculation. Norton has not identified a quantum of evidence presented at trial that would support instructing the jury on sexual battery. Norton testified that the sexual intercourse was entirely consensual and that H.N. was an active participant. The only testimony about him pinning H.N.'s hands above her head came from her. And she testified that she did not consent to any sexual activity, and that when he held her hands above her head it was in response to her squeezing his penis. There was no evidence to support a finding that the

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[10] The relevant statutory language provides, "A person commits aggravated sexual assault if: (a) in the course of a rape . . . or forcible sexual abuse, the actor: (i) uses, or threatens the victim with the use of, a dangerous weapon" or "(ii) compels, or attempts to compel, the victim to submit to rape . . . or forcible sexual abuse[] by threat of kidnap[p]ing, death, or serious bodily injury to be inflicted imminently on any person." UTAH CODE § 76-5-405(1).

"A person commits rape when the actor has sexual intercourse with another person without the victim's consent." *Id.* § 76-5-402(1).

"A person is guilty of sexual battery if the person, under circumstances not amounting to" rape, forcible sexual abuse, attempted rape, or attempted forcible sexual abuse, "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 person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched." *Id.* § 76-9-702.1(1).

intercourse was consensual, but Norton should have known that H.N. intermittently experienced affront or alarm. Accordingly, the evidence did not provide a rational basis to acquit Norton of rape and instead convict him of sexual battery. *See* UTAH CODE § 76-1-402(4). So no such instruction was required.

D. Aggravated Sexual Assault Based on Forcible Sexual Abuse

¶77 Norton also argues that the court of appeals erred in affirming the district court's refusal to instruct on sexual battery as a lesser included offense of aggravated sexual assault based on forcible sexual abuse. We agree with Norton that an instruction on sexual battery was required.

¶78 First, aggravated sexual assault based on forcible sexual abuse and sexual battery have "some overlap in the statutory elements." *Baker*, 671 P.2d at 159. Both offenses require that the actor touches the anus, buttocks, or any part of the genitals of another. *See* UTAH CODE §§ 76-5-404(1), 76-5-405(1), and 76-9-702.1(1) (2012). But they have different requisite mental states. Forcible sexual abuse requires that the defendant act with the intent to cause substantial emotional or bodily pain or to gratify the sexual desire of any person. *Id.* § 76-5-404(1) (2012). But sexual battery requires only that the defendant's conduct be under circumstances that the defendant knows or should know would cause affront or alarm to the person touched. *Id.* § 76-9-702.1(1).

¶79 Second, we conclude that "the evidence offered provides a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." *Baker*, 671 P.2d at 159 (citation omitted) (internal quotation marks omitted); *see also* UTAH CODE § 76-1-402(4). Here, both the State and Norton rely on H.N.'s testimony that Norton inserted his finger into her vagina to wipe away his DNA. Norton's testimony was that this touch did not happen. But relying on H.N.'s testimony that the touch occurred, Norton argues that the evidence, if believed, would support a finding that Norton "touched [H.N.] under circumstances he knew or should have known would likely cause affront or alarm" (the mental state required for sexual battery), rather than with intent to cause substantial emotional or bodily pain or to gratify his sexual desire (the mental state required for forcible sexual abuse).

¶80 We agree. H.N.'s testimony indicates Norton was attempting to conceal his crime. While a jury could infer that in doing so he also intended to gratify his sexual desire or cause H.N. emotional or bodily pain, a jury could also infer from the same evidence that Norton touched H.N.'s vagina only under

circumstances he knew or should have known would likely cause her affront or alarm. The trial evidence therefore provides a rational basis for a verdict acquitting Norton of aggravated sexual assault based on forcible sexual abuse and convicting him of sexual battery.

¶81 We must now determine whether this error prejudiced Norton. An error is prejudicial if there is a "reasonable likelihood that the error affected the outcome of the proceedings." *State v. Reece*, 2015 UT 45, ¶ 33, 349 P.3d 712 (citation omitted).

¶82 We conclude this error did prejudice Norton because had the jury been instructed on sexual battery, the evidence supported a conviction on the less serious charge and an acquittal on both aggravated sexual assault and the lesser included offense on which the district court instructed—forcible sexual abuse. Here, although the district court instructed on the lesser included offense of forcible sexual abuse, the jury convicted Norton on aggravated sexual abuse as charged. Generally,

> [w]here a jury is instructed on, and has the opportunity to convict a defendant of, a lesser included offense, but refuses to do so and instead convicts the defendant of a greater offense, failure to instruct the jury on another lesser included offense, particularly an offense that constitutes a lesser included offense of the lesser included offense that the jury was instructed on, is harmless error.

State v. Daniels, 2002 UT 2, ¶ 28, 40 P.3d 611.

¶83 However, this is a distinct situation and causes us to depart from our more general precedent. If the jury were to infer from H.N.'s testimony that Norton acted under circumstances that he knew would cause her affront or alarm, but did not intend to gratify his sexual desire or cause her emotional or physical pain, that would lead to acquittal of both aggravated sexual assault and forcible sexual abuse and conviction of sexual battery. Thus, there is a reasonable likelihood that the error affected the outcome of the proceedings. Accordingly, we conclude that the district court's error prejudiced Norton and reverse the court of appeals' affirmance of Norton's conviction of aggravated sexual assault based on digital penetration.

III. SENTENCING

¶84 The longest potential terms of imprisonment Norton faced at sentencing were for his two aggravated sexual assault convictions. The district court sentenced him to fifteen years to life

in prison on both of them. He argues that this was error and that the court of appeals should have reversed for two reasons.[11]

A. Special Verdict Form

¶85 Norton argues that the district court should not have applied the sentencing tier applicable to aggravated assault based on a completed act of rape because the jury was not given a special verdict form to indicate which underlying sexual assault offense formed the basis of the conviction. In light of this, Norton argues the district court should have sentenced him to the lowest term of six years to life—the sentencing range corresponding to an aggravated sexual assault conviction based on attempted forcible sexual abuse. UTAH CODE § 76-5-405(2)(c)(i).

¶86 The court of appeals held that the district court did not err because there was no factual basis "to support a conclusion that the jury could have determined that the sexual acts underlying [the charge] constituted only attempted forcible sexual abuse." *State v. Norton*, 2018 UT App 82, ¶ 61, 427 P.3d 312.

¶87 While we affirm the court of appeals' conclusion that the district court applied the correct sentencing tier, we do so on an alternative basis. We conclude that Norton did not preserve this issue in the district court.

¶88 At trial, the district court instructed the jury that aggravated sexual assault occurs when a person commits a sexual assault such as rape, forcible sexual abuse, attempted rape, or attempted forcible sexual abuse, and does so under certain aggravating circumstances. UTAH CODE § 76-5-405(1). The presumptive sentence for aggravated sexual assault varies based on the underlying offense from which it arises. *Id.* § 76-5-405(2). If the underlying offense is rape or forcible sexual abuse, the presumptive sentence is fifteen years to life. *Id.* § 76-5-405(2)(a)(i). If the underlying offense is attempted rape, the presumptive sentence is ten years to life. *Id.* § 76-5-405(2)(b)(i). And if the underlying offense is attempted forcible sexual abuse, the presumptive sentence is six years to life. *Id.* § 76-5-405(2)(c)(i). A court may impose a lesser term if it finds that doing so is in the

[11] As we have reversed the conviction for aggravated sexual assault based on forcible sexual abuse, only the conviction for aggravated sexual assault based on rape remains. Consequently, we analyze Norton's argument only with respect to the remaining count.

trial but was instead raised at a scheduling conference where the error could no longer be corrected). Because Norton has not argued any exception to the preservation requirement here, his claim fails.[12]

B. Interests of Justice

¶95 Norton also argues that the district court erred in not sentencing him to a lesser sentence "in the interests of justice." UTAH CODE § 76-5-405(3)(a). Specifically, Norton claims that in sentencing him to the presumptive sentence of fifteen years to life on his aggravated assault sexual conviction, *see id.* § 76-5-405(2)(a)(i), the district court did not conduct the interests of justice analysis or make the explicit findings required by *LeBeau v. State*, 2014 UT 39, 337 P.3d 254. He argues this was an abuse of discretion.

¶96 "We traditionally afford the trial court wide latitude and discretion in sentencing." *State v. Woodland*, 945 P.2d 665, 671 (Utah 1997). We will not set aside a sentence unless the district court abused its discretion by "fail[ing] to consider all legally relevant factors or if the sentence imposed is clearly excessive." *State v. McCovey*, 803 P.2d 1234, 1235 (Utah 1990) (*abrogated on other grounds by State v. Smith*, 2005 UT 57, 122 P.3d 615) (footnote omitted) (internal quotation marks omitted).

¶97 But relying on our holding in *LeBeau*, Norton argues the district court should have *sua sponte* analyzed the proportionality

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[12] In any event, Norton's argument does not persuade us that the absence of a special verdict form was plain error. Norton relies on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Alleyne v. United States*, 570 U.S. 99 (2013) to argue that in the instance of a tiered sentencing structure, where the jury is instructed on versions of the offense that qualify for more than one tier, a special verdict form is required. But this is an extension of *Apprendi* and *Alleyne*. In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490 (emphasis added). In *Alleyne*, the Supreme Court extended the same holding to any fact that increases the mandatory minimum sentence. 570 U.S. at 108. And Norton does not explain why *Apprendi* and *Alleyne* require a special verdict form under the circumstances here.

interests of justice and states the reasons for that finding on the record. *Id.* § 76-5-405(3)(a), (4)(a), (5)(a).

¶89 At trial, defense counsel and the State reviewed the jury instructions and neither requested a special verdict form. So when the jury rendered its verdict, it did not identify the offense underlying the aggravated sexual assault conviction.

¶90 At sentencing, Norton argued that without a special verdict form there was no indication the jury found him guilty of aggravated sexual assault based on anything but the least serious offense of attempted forcible sexual abuse. He asserted that consequently he should be sentenced only under the corresponding sentencing tier of six years to life.

¶91 In response, the State argued that all evidence presented at trial was of completed, not attempted, sexual assaults. So Norton should be sentenced in accordance with the tier corresponding to aggravated sexual assault based on a completed act of rape. The district court agreed that fifteen years to life was the presumptive punishment tier, given the evidence presented at trial.

¶92 Norton argues that this deprived him of the due process guarantee of "the right to a jury trial on every element of the offense." But Norton did not raise this argument until sentencing, and that was too late.

¶93 "As a general rule, claims not raised before the trial court may not be raised on appeal." *State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346. During trial, the parties met with the district court to finalize the jury instructions. This was the appropriate time for Norton to request that a special verdict form be included. But he made no mention of a special verdict form. Rather, Norton raised the issue at sentencing when it was too late for the district court to remedy the issue.

¶94 This conclusion is contrary to that of our court of appeals, which held the issue was preserved because Norton "made these same arguments to the court below." *Norton*, 2018 UT App 82, ¶ 59 n.15. It is correct that Norton made this argument at sentencing. However, our preservation rules ensure that issues are addressed and, if appropriate, corrected when they arise. *Holgate*, 2000 UT 74, ¶ 11. Had Norton requested a special verdict form at trial, the district court could have included a form or denied his request. But at sentencing, it was too late for the district court to do either. Accordingly, Norton's claim is unpreserved. *See State v. Cram*, 2002 UT 37, ¶ 11, 46 P.3d 230 (concluding that an objection was not preserved because it could have been raised at

of his sentence and his potential for rehabilitation. In determining proportionality, Norton argues that the court should have considered both the gravity of his conduct in relation to the severity of the sentence imposed on him, and the severity of his sentence relative to sentences imposed for other crimes in Utah. And he argues that in analyzing his rehabilitative potential, the district court should have considered the Board of Pardons' role in monitoring his behavior and progress toward rehabilitation, his age, any ties between the crime and alcohol or drug addiction and his treatment prospects, the existence of a criminal history of violence, and the "Sentencing Commission's guidelines." (Citing *LeBeau*, 2014 UT 39, ¶¶ 52, 54.)

¶98 However, as we made clear in *State v. Martin*, the district court does not have an obligation to consider anything the defendant does not raise. 2017 UT 63, ¶ 62, 423 P.3d 1254 ("[W]hen a sentencing court commits an error that was not objected to below, an appellant must . . . show the existence of plain error or exceptional circumstances that would justify the exercise of our review."). Rather, the district court need only consider the arguments and issues the defendant raises at sentencing.

¶99 And as the court of appeals correctly observed, the district court considered all of the evidence and arguments Norton presented at sentencing. The district court acknowledged letters describing Norton as a good person, as well as letters describing Norton as a violent person. The court also acknowledged Norton was going through a devastating divorce but determined Norton's behavior was still "way, way, way over the line." Further, the court noted that a factor of the sentence was Norton's "inability and unwillingness to follow the truth." Ultimately, the district court decided Norton was "entitled to some mercy, but not what [his] lawyer [was] asking for."

¶100 But Norton argues that the district court failed to consider whether his sentence was proportional to sentences for other similar crimes. And he contends that he raised this at sentencing when he argued his conduct did not "rise to the level of the kinds of egregious cases where we have individuals who suffered significant loss of life or impairment." But this is not enough. In *Martin*, we held a similar sentencing issue was unpreserved because counsel did not object to the analysis the district court used or identify the other offenses the court should take into consideration. *Id.* ¶¶ 64-66. Comparing sentences is "daunting" and "certainly not a task that we can require our district courts to perform without prompting or guidance from

counsel." *Id.* ¶ 66. Norton did not ask the district court to compare his sentence to sentences imposed for other offenses or identify what those other offenses might be. Accordingly, this issue is unpreserved.

¶101 The district court adequately addressed the arguments Norton raised at sentencing. We affirm the court of appeals' decision that the district court did not abuse its discretion by declining to reduce the presumptive sentence on the basis of the "interests of justice."

IV. CUMULATIVE ERROR

¶102 Norton argues that the court of appeals erroneously rejected his cumulative error argument. An appellate court will reverse if "the cumulative effect of the several errors undermines [the court's] confidence . . . that a fair trial was had." *State v. Kohl*, 2000 UT 35, ¶ 25, 999 P.2d 7 (second alteration in original) (citation omitted). However, we have identified only one error in Norton's trial. A "single accumulable error cannot warrant reversal under the cumulative error doctrine." *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 48, 428 P.3d 1038. We thus reject his cumulative error argument.

V. *LEBEAU* SHOULD BE OVERRULED

¶103 Although *LeBeau v. State*, 2014 UT 39, 337 P.3d 254 does not determine the outcome in this case, I write this section separately because I conclude *LeBeau* should be explicitly overturned. The holding in *LeBeau* contradicts the applicable statute's plain language. And in so doing it takes the legislature's policy choice to give judges discretion to sentence below the presumptive statutory tier and replaces it with a rigid, mandatory framework that applies even when a judge imposes the presumptive sentence.

¶104 I agree with Justice Lee's dissent in *LeBeau*, but I will not duplicate his analysis here. Instead, I add my own observations and apply the law outlined in *Eldridge v. Johndrow*, 2015 UT 21, 345 P.3d 553, to argue that *LeBeau* should be overruled.

¶105 When considering whether precedent should be overturned, we evaluate: "(1) the persuasiveness of the authority and reasoning on which the precedent was originally based, and (2) how firmly the precedent has become established in the law since it was handed down." *Id.* ¶ 22.

¶106 The first consideration—the persuasiveness of the authority and reasoning on which *LeBeau* is based—counsels in favor of overturning it. The opinion did not derive from prior

authority. It was a fresh interpretation of a provision of Utah's aggravated kidnapping statute, which I conclude is incorrect. *Lebeau*, 2014 UT 39, ¶ 25.

¶107 The *LeBeau* court interpreted the sentencing scheme within the aggravated kidnapping statute.[13] *Id.* ¶¶ 20–22; *see also* UTAH CODE § 76-5-302(3), (4) (2014). Subsection 302(3) of the statute establishes presumptive sentencing tiers for variations of aggravated kidnapping. Subsection 302(4) then states in relevant part,

> If, when imposing a sentence under Subsection (3)(a) or (b), a court finds that a lesser term than the term described in Subsection (3)(a) or (b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a [lesser] term of imprisonment . . . .

UTAH CODE § 76-5-302(4) (2014).

¶108 Reading subsections 302(3) and (4) together, the *LeBeau* court held that the district court was required to conduct "the interests-of-justice analysis laid out in subsection (4)."[14] *Lebeau*, 2014 UT 39, ¶ 21. And the *LeBeau* court defined the phrase "interests of justice" by looking to Eighth Amendment jurisprudence, *see id.* ¶¶ 38–41, and another provision of the criminal code setting forth "general goals of Utah's criminal code." *Id.* ¶ 34 (quoting UTAH CODE § 76-1-104 (2014)). These sources led the court to conclude that an "interests-of-justice analysis" required the sentencing court to consider a checklist of particulars: (1) proportionality, including "the gravity of the offense and the harshness of the penalty," and "the sentence being imposed [compared to] sentences imposed for other crimes in Utah" and (2) the defendant's capacity for rehabilitation,

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[13] To be consistent with *LeBeau v. State*, 2014 UT 39, 337 P.3d 254, I cite the 2014 version of the statute.

[14] The *LeBeau* court reasoned that because the provisions within subsection 302(3) (establishing the presumptive sentencing tiers for aggravated kidnapping) state that they are to be imposed "except as provided in Subsection . . . (4)" (the "interests of justice" provision), then courts must always conduct an interests of justice analysis to determine whether subsection (4) applies. *LeBeau*, 2014 UT 39, ¶ 21. And the court concluded that an "interests of justice analysis" required a judge to consider specific factors as described above, *supra* ¶ 97.

including deference to the role of the Board of Pardons and Parole, the defendant's age at the time of the crime, the extent that alcohol or drug addiction caused the offense, the presence of violence in the defendant's criminal history, relevant Sentencing Commission guidelines, and "all relevant factors" to the defendant's rehabilitative potential. *Id.* ¶¶ 42–55.

¶109 But I find it unnecessary to go beyond the language of the statute to determine its meaning. Subsection 302(4) is straightforward. It directs that if the sentencing court finds it is "in the interests of justice" to sentence a defendant to a "lesser term" rather than the presumptive term, the court may do so if it states the reasons for this finding on the record.

¶110 Two things seem clear from the plain language of this statute. First, it applies only if "a court finds that a *lesser* term" is in the interests of justice. Where, as here and in *LeBeau*, a judge sentences a defendant to the presumptive term, subsection 302(4) should not come into play.

¶111 And second, this provision is permissive, not mandatory, and it does not require judges to consider a list of particulars. It states that judges "may" sentence below the presumptive sentencing tier if they determine it is in the "interests of justice." The sole intent is to give judges discretion to impose a lesser term of imprisonment rather than making the presumptive tier mandatory.

¶112 "May" is, of course, a permissive term. In this context it means to "be permitted to" or to "be a possibility." *May*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¶113 And the phrase "interests of justice" is merely a "general placeholder for a principle of broad judicial discretion." *LeBeau*, 2014 UT 39, ¶ 87 (Lee, J., dissenting). The *LeBeau* majority observed the many times that the phrase "interests of justice" can be found in the civil code, criminal code, rules of evidence, and rules of procedure. *Id.* ¶ 28. This reinforces my point. Various statutes and rules invoke the "interests of justice" to signal that judges have the discretion to consider whatever information is before them and do what is fair, proper, or just under the circumstances. *See id.* ¶ 90 (Lee, J., dissenting); *see, e.g.*, UTAH CODE § 75-7-204(2)(b) (providing that a court "may entertain a proceeding regarding any matter involving a trust if ... the interests of justice would be seriously impaired"); *id.* § 77-8a-1(2)(d) ("When two or more defendants are jointly charged with any offense, they shall be tried jointly unless the court in its discretion on motion or otherwise orders separate trials consistent

with the interests of justice."); *id.* § 78B-1-136 ("It is the right of a witness to be protected from irrelevant, improper or insulting questions, and from harsh or insulting demeanor, to be detained only so long as the interests of justice require it . . . .").

¶114 However, *LeBeau* turns this statutory language on its head. It transforms the grant of discretion inherent in the phrase "interests of justice" into a prescribed analysis that judges must undertake. And it requires judges to perform this analysis even when they have applied the presumptive sentence. *LeBeau*, 2014 UT 39, ¶ 55. These mandates are not found in the statute's language.

¶115 In determining whether precedent should be overturned, we also ask how firmly the precedent has become established in the law since it was handed down. To do so, we look to both the age of the precedent and the "extent to which people's reliance on the precedent would create injustice or hardship if it were overturned." *Eldridge*, 2015 UT 21, ¶¶ 22, 35. Other relevant considerations are how well the precedent has worked in practice and "whether the precedent has become inconsistent with other principles of law." *Id.* ¶ 40.

¶116 *LeBeau* was decided in 2014 and was not based on "any significant precursors in Utah law." *Id.* ¶ 34. Since that time, it "has not been necessary to the outcome of many cases." *Id.* ¶ 36. In its six years of existence, *LeBeau* has been cited approximately twenty-five times by this court, the court of appeals, and Utah's federal courts.

¶117 Prior to this case, this court has conducted a *LeBeau* interests of justice analysis only one time in *State v. Martin*, 2017 UT 63, 423 P.3d 1254. There, we declined to reverse a district court that had not undertaken a formal proportionality analysis on the record as required by *LeBeau*. *Id.* ¶ 66. We recognized the "daunting task" involved in undertaking a proportionality analysis: "[I]t is certainly not a task that we can require our district courts to perform without prompting or guidance from counsel." *Id.*

¶118 Our court of appeals has handled most of the cases involving a *LeBeau* claim. Eighteen court of appeals opinions cite *LeBeau*. One is this case, and nine others cite *LeBeau* for other propositions—not the interests of justice analysis. That means there have been eight court of appeals cases involving a *LeBeau* interests of justice claim. The court of appeals has only once concluded that *LeBeau* warranted a holding that a district court abused its discretion. *See State v. Jaramillo*, 2016 UT App 70, ¶ 44,

372 P.3d 34. In every other case, the court of appeals either declined to conduct the *LeBeau* interests of justice analysis or decided there was no abuse of discretion. *See, e.g.*, *State v. Alvarez*, 2017 UT App 145, ¶ 4, 402 P.3d 191 (assuming "that the sentencing court duly considered the proportionality of [the defendant's] sentence" because the defendant did not demonstrate "that [the court's] presumption of appropriate sentencing consideration is inapplicable"); *State v. Scott*, 2017 UT App 103, ¶ 13, 400 P.3d 1172 (presuming "that the court fully considered all the information presented to it" and took into account "the relevant factors in determining [the defendant's] sentence"); *State v. Beagles*, 2017 UT App 95, ¶ 9, 400 P.3d 1096 (holding that the district court "balanced the aggravating and mitigating factors" and that its sentencing decision was within its discretion).

¶119 And the court of appeals has sharply criticized *LeBeau*. In *State v. Coombs*, where a defendant raised an ineffective assistance of counsel claim because his counsel had not argued at sentencing that the district court should conduct the interests of justice analysis required by *LeBeau*, the court critiqued *LeBeau*: "In our view, *LeBeau* constitutes blatant policy-based ad hoc review of legislative action not typically undertaken by the judicial branch. We would hope that, given the appropriate opportunity, our supreme court will revisit whether *LeBeau*'s approach should continue." 2019 UT App 7, ¶ 22 n.4, 438 P.3d 967 (citation omitted). The court of appeals concluded, "We cannot read *LeBeau* and *Martin* as removing from defense counsel the discretion *not* to make certain arguments at sentencing. Every case is different and defense counsel must retain wide discretion in determining what arguments will best benefit a client under the totality of the circumstances." *Id.* ¶ 21 n.3 (citation omitted).

¶120 It appears that in the time since *LeBeau* was decided, appellate courts have responded to it by applying it narrowly. This suggests *LeBeau*'s mandates are not workable as written.[15]

¶121 On balance, the trouble with *LeBeau* is not so much its mandate that judges consider the interests of justice before imposing a sentence. After all, this is what judges already do. They receive and consider any testimony, evidence, or information that either party desires to present. UTAH CODE § 77-

[15] Without published opinions, it is more difficult to determine how district courts have responded to its requirements.

18-1(7). They give the defendant an opportunity to make a statement and present any mitigating information. And they give the prosecution a similar opportunity to present any information "material to the imposition of sentence." UTAH R. CRIM. P. 22(a). They receive information about any victims of the offense. *See* UTAH CODE § 77-38-4(1); *see also id.* § 77-18-1(5)(b)(i). They read any materials that have been submitted, such as a presentence report or letters. *Id.* § 77-18-1(5)(a)–(b). And defense counsel and the prosecutor use their professional judgment to choose which arguments to make and which information to highlight in support of their respective sentencing positions. Judges consider all of this, along with any applicable statutes and the sentencing guidelines, and impose the sentence they deem to be just under all the circumstances. *State v. Russell*, 791 P.2d 188, 192 (Utah 1990).

¶122 Rather, the more serious problem with *LeBeau* is that instead of reading the "interests of justice" as a grant of discretion, the *LeBeau* court concluded this phrase requires judges to go through a prescribed checklist of factors at sentencing, and that judges must do so whether they impose a sentence less than the presumptive range or within it.

¶123 This transforms a particular legislative policy decision into something else entirely. Here and in similarly worded statutes, the legislature has determined that Utah judges should have the discretion to sentence below the presumptive statutory term when they determine it is in the interests of justice—in other words, fair and just—to do so. This is a significant policy choice, which stands in contrast to other jurisdictions that have chosen to enact statutory mandatory minimum sentencing schemes that are binding upon judges in all but narrow circumstances. *See, e.g.*, 18 U.S.C. § 3553(e) (granting federal sentencing court authority to impose sentence below the statutory minimum only upon a government motion stating that the defendant gave "substantial assistance" in the investigation or prosecution of another person who has committed an offense); *id.* § 3553(f) (requiring a court to sentence without regard to a statutory minimum sentence when a defendant meets specific criteria). Instead of observing this fundamental aspect of the sentencing scheme enacted by the legislature, *LeBeau* transforms this general grant of discretion into something detailed and specific, which is not found in the text of the relevant statutes.

¶124 Because I advocate for *LeBeau* to be overturned even though it does not determine the result in this case, the concurrence asserts that my analysis is an "act of judicial overreach." *See infra* ¶ 130. I agree with the concurrence that the

DURRANT, C.J., concurring in part and concurring in the judgment

doctrine of *stare decisis* is deeply rooted in our law. We should be extremely reluctant to overturn precedent. And generally, that means we will not revisit precedent when it does not dictate our holding in a particular case.

¶125 But I conclude that the fact that *LeBeau* does not govern here—indeed, the fact that it "has not been necessary to the outcome of many cases," *Eldridge*, 2015 UT 21, ¶ 36—indicates that it has not become firmly "established in the law since it was handed down," *id.* ¶ 22. This, along with the court of appeals' criticism of *LeBeau* and explicit request that this court "revisit whether *LeBeau*'s approach should continue," *Coombs*, 2019 UT App 7, ¶ 22 n.4, suggests that *LeBeau* has not been workable in practice and weighs in favor of overruling it.

¶126 For these reasons, I am persuaded that this is one of the rare occasions when we should overturn precedent.

CONCLUSION

¶127 We affirm all but one of the court of appeals' determinations in this case. We conclude that any error in the jury instructions for aggravated sexual assault and the underlying offenses of rape and forcible sexual abuse did not prejudice Norton. Further, the district court was not required to instruct on any of the lesser included offenses Norton requested, except for sexual battery. And we determine that at sentencing, the district court did not err in imposing a punishment of fifteen years to life for aggravated sexual assault and properly considered all of the arguments and evidence before it.

¶128 With regard to our holding that the district court erred in not instructing the jury on sexual battery as a lesser included offense of the aggravated sexual assault charge based on forcible sexual abuse, we reverse the conviction and remand to the district court for a new trial.

CHIEF JUSTICE DURRANT, concurring in part and concurring in the judgment:

¶129 Writing for the majority, Justice Petersen does an able and thorough job of addressing each of Mr. Norton's challenges to his conviction. And she appropriately dismisses his *LeBeau* challenge to his sentence as unpreserved. So far so good. We are therefore pleased to concur in the analysis and conclusions she sets forth in parts I through IV of her opinion. But then, she takes

a surprising step. She goes on to address the question of whether the rule established in *LeBeau*[16] should be overturned. This, despite the fact that the resolution of this question makes not one wit of difference to Mr. Norton's case. Justice Petersen explicitly acknowledges as much, writing that *LeBeau* "does not determine the outcome in this case."[17] But the fact that this is done in plain sight makes it no less an act of judicial overreach.

¶130 And Justice Petersen further flouts judicial restraint by not just reaching the issue unnecessarily, but then advocating to overturn *LeBeau*, a significant case that, whether right or wrong, is established precedent.[18] The doctrine of *stare decisis* is deeply rooted in our law. There are reasons why we respect precedent. There are reasons why we are circumspect in overturning it. Precedent promotes predictability and stability in the incremental development of the law. It promotes faith in our judicial system. It underpins and informs virtually every decision we make as judges. This is not to say it is wholly inviolate. We, of course, do on occasion overturn a case. But we do not do it lightly. We do it reluctantly, cautiously, and with compelling reasons. And we should never do it gratuitously as Justice Petersen suggests we do here. For these reasons, we decline to join in part V of Justice Petersen's opinion.

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[16] *LeBeau v. State*, 2014 UT 39, 337 P.3d 254.

[17] *Supra* ¶ 105.

[18] *See State v. Rowan*, 2017 UT 88, ¶ 24, 416 P.3d 566 (Himonas, J., concurring) (explaining, in a concurrence joined by a majority of the court, that "our court declines to revisit established precedent unnecessarily").

ADDENDUM C

2018 UT App 82

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
LONNIE NORTON,
Appellant.

Opinion
No. 20150302-CA
Filed May 3, 2018

Third District Court, West Jordan Department
The Honorable Bruce C. Lubeck
No. 131400015

Lori J. Seppi, Attorney for Appellant

Sean D. Reyes and Christopher D. Ballard, Attorneys
for Appellee

JUDGE JILL M. POHLMAN authored this Opinion, in which JUDGES MICHELE M. CHRISTIANSEN and DIANA HAGEN concurred.

POHLMAN, Judge:

¶1 Lonnie Norton appeals his convictions arising from events that occurred over one night in November 2012 when he broke into his parents-in-law's house, kidnapped his estranged wife (Wife), and sexually assaulted her. Norton alleges several errors related to the jury instructions and sentencing. We affirm.

BACKGROUND

¶2 In October 2012, Wife left Norton, her husband of over twenty years, taking their children with her. After staying in a women's shelter for several days and after a protective order against Norton went into effect, Wife and the children moved

into her parents' then-vacant house. The protective order permitted Norton to have supervised visits with the children and to communicate with Wife via email regarding "parent time, counseling, and school attendance."

¶3 On the date when the events leading to Norton's convictions occurred, Norton had overnight supervised parent time with the children in the marital home. Wife claimed that, on that night, Norton left the children and broke into her parents' house, after which he, among other things, kidnapped and raped her at gunpoint. The State charged Norton with aggravated kidnapping, a first degree felony; three counts of aggravated sexual assault, all first degree felonies; aggravated burglary, a first degree felony; aggravated assault, a third degree felony; violation of a protective order, a class A misdemeanor; and damage to or interruption of a communication device, a class B misdemeanor.

¶4 The case proceeded to a jury trial. Norton and Wife each testified about the events of that night and agreed on the following basic facts. It was snowing. After the children went to sleep, Norton retrieved Wife from her parents' house and drove the two to Fort Douglas on the University of Utah campus. Norton, who worked for the University, accessed a vacant office building with a key he had by virtue of his employment. Once inside the building, the parties had sexual intercourse in an office, after which Wife rinsed off in a bathroom across the hall. Norton then drove Wife first to the marital home to check on the children and then back to her parents' house. Aside from these facts, the parties' accounts differed significantly.

Wife's Account

¶5 Wife testified that, on the night in question, she awoke in the middle of the night to "a loud bang" downstairs in her parents' house, which she "figured . . . was [from] the dryer" that she had previously moved in front of a door to block entry from the basement's outside entrance. Wife grabbed her phone

and dialed 911 when Norton appeared "at the end of [her] bed." He punched her face with a closed fist, grabbed the phone, and duct-taped her head. She passed out, and when she regained consciousness, she was riding in Norton's car with him. She claimed that Norton "had a gun in his lap" and pointed it at her as she tried to open the car door. She realized that they were driving "up to the Fort Douglas area" near Norton's office at the University of Utah. After arriving at a building in the Fort Douglas area, Norton parked the car and told Wife that they were going to enter the building and that she "needed to be quiet or he would shoot [her]." Because she did not have any shoes on, Norton gave her a pair of his shoes and then led Wife toward the building and unlocked the entrance door.

¶6 Wife testified that Norton initially took her to a bathroom, where he "ripped the duct tape off [her] head" and began talking to her about their marriage, going to counseling, and getting back together. Wife rejected Norton's suggestions, and after talking for approximately twenty minutes, Norton told Wife "to take [her] shirt off." When she initially refused, he "pointed the gun at [her]" and again ordered her to take off her shirt. She complied. He then "squeezed [her] breasts" and led her to an office across the hall. Once there, he told her to "take off [her] pants." Again, she refused, and again he "pointed the gun at [her]," and she complied.

¶7 While Wife was undressing, Norton also undressed. Norton then "popped the magazine out of the gun" and put the gun pieces in a drawer. He "told [her] that [they] were going [to] have sex." She again told him, "no," which Norton dismissed, and Wife asked if he was "going to rape [her]." Norton replied, "You can't rape somebody that you're married to," and he laid down on the floor and pulled Wife on top of him. He then vaginally raped her. Wife testified that she made no effort to participate. She testified that at one point she grabbed his penis "really hard," but that because she has rheumatoid arthritis, she did not "know how hard" the squeeze was. Norton responded

by grabbing "both of [her] hands and . . . put[ting] them over [her] head in one of his hands."

¶8 Wife testified that afterward Norton took her back to the bathroom and ordered her "to get in the bathtub and rinse [herself] off." She stated that her "hands were shaking really bad" and that Norton told her that she was not "doing a good enough job," at which point he "shoved his fingers up in [her vagina] and tried to rinse himself out." Wife dried herself off with some paper towels, and they both got dressed.

¶9 Norton, having retrieved the gun, then told Wife to sit down on a chair. While he initially suggested the two reconcile, the conversation took a turn when he told her that "he was going [to] kill himself," and he put the gun to his head. He then pointed the gun at Wife and said, "[M]aybe I'll kill you and then I'll kill myself." Norton "went back and forth" about shooting himself and Wife for a few minutes, after which Wife "got really mad" and "[t]old him to go ahead and shoot himself." At that point, "it just ended," and Norton "took [Wife] back out into the car." Norton then drove them to their marital home and, after insisting that Wife "couldn't tell anybody" what had happened and that she needed to "make up some sort of story" to tell the children about how she hurt herself, he drove her back to her parents' house. Once there, Norton attempted to fix both a locked gate and the basement door through which he had entered earlier. He again told her not to tell anybody what had happened, and she told him she would not tell. After Norton left, Wife called the police, and an officer took her to the hospital.

Norton's Account

¶10 Norton testified at trial that Wife willingly accompanied him to the Fort Douglas office building and that she initiated the sexual conduct that occurred. He claimed that Wife had "told [him] to come over" to her parents' house after their children had gone to sleep and that, after missing her call at approximately two o'clock in the morning, he drove to the house

and parked in front. Though it was snowing, Norton testified that, "[a]fter a couple of minutes," Wife came outside "in stocking feet" and got into the car with him. He gave her some Reeboks to wear. He claimed that as they drove, Wife suggested going to his office to talk. Norton thought that rather than his office, "it might not be a bad idea to . . . go up to one of the buildings that's part of [his] college up in the Fort Douglas area." Accordingly, he parked behind a building there and unlocked the entrance to a unit that used to be an officer's quarters and was recently vacated by its tenant.

¶11 Norton testified that, once inside, the parties went into an office, sat down, and began talking about marriage counseling and possible reconciliation. Norton claimed that as they were reminiscing about when they first married, Wife went over "and sat on [his] lap and put her arms around [him]" and they began kissing. He testified that they eventually moved to the floor, undressed, and that Wife "climbed on top of [him]" and had sex with him.

¶12 Norton testified that afterward they went into the bathroom and that Wife got in the bathtub. Norton said that normally they would shower, but that because the water in the building was cold, he told Wife that he was not going to shower. Instead, he suggested to Wife that she "just rinse off," and he turned on the knob for her. He claimed that after Wife rinsed and dried herself off with paper towels he provided, they then went back into the office and dressed.

¶13 Norton testified that, at this point, the parties resumed their conversation about reconciliation. He stated that Wife indicated that she "didn't really want to reconcile," which prompted him to say that he thought it would be fair for him to have joint custody of their children. Wife responded that she did not want joint custody, and she became angry—calling him names—when he said his attorney told him that he would be able to get joint custody. At one point during the exchange, Wife

slapped Norton, and he claimed that he backhanded her "pretty hard" in response. He testified that Wife then tried to hit him again, and so he "grabbed her hands and [they] rastled for a minute," which caused Wife to start crying. Norton stated that Wife then went into the bathroom, shut the door, and refused to come out for about ten minutes.

¶14 When Wife came out, Norton and Wife left the building and got back into the car. Norton testified that Wife asked to check on their children at the marital home, which they did. Norton then drove Wife to her parents' house. When they arrived, they discovered the front door was locked. Norton testified that he then went around to the back door, and along the way opened a locked gate by pushing it "real hard." He then went and "pushed" the laundry room back door open and walked through the house to let Wife in around front.

¶15 Norton testified that, once inside, he again tried to talk to Wife about joint custody, which angered Wife. Wife then threatened to call the police and accuse him of breaking into the house and beating her up. Norton "got scared" and left.

The Jury Instructions

¶16 The State charged Norton with eight offenses of varying severity related to the events described above, specifically one count each of aggravated burglary, aggravated kidnapping, aggravated assault, violation of a protective order, and damage to or interruption of a communication device. The State also charged him with three counts of aggravated sexual assault, and the court specified which episode of abuse each count referred to in its instructions, referring to them as Count 2, Count 3, and Count 4. Count 2 concerned the "allegation of the touching of [Wife's] breast"; Count 3 concerned "the allegation of sexual intercourse"; and Count 4 concerned "the penetration of [Wife's] vagina by [Norton's] fingers."

¶17 Defense counsel requested lesser included offense instructions for the aggravated burglary charge, the aggravated kidnapping charge, and all counts of the aggravated sexual assault charges. The court permitted only one lesser included offense instruction for each count. For aggravated burglary, the court instructed on the lesser included offense of burglary, but it declined to instruct on both aggravated assault and assault. For the aggravated kidnapping charge, the court instructed on the lesser included offense of kidnapping, but it declined to instruct on unlawful detention. And for the aggravated sexual assault charges, the court permitted lesser included offense instructions related to each particular act. For Counts 2 and 4, it permitted the lesser included offense instruction of forcible sexual abuse. For Count 3, it instructed on rape. It declined counsel's request to instruct on sexual battery for those counts.

The Verdict

¶18 The jury convicted Norton of two of the three charged counts of aggravated sexual assault—the counts pertaining to sexual intercourse and Norton inserting his fingers into Wife's vagina—and acquitted him of the aggravated sexual assault charge related to touching Wife's breasts. In addition, the jury convicted Norton of the lesser offense of kidnapping, the lesser offense of burglary, violation of a protective order, and a class B misdemeanor assault. The jury acquitted Norton of the damage to or interruption of a communication device count.

Sentencing: The Three Tiers

¶19 The court instructed the jury that "[a] person commits aggravated sexual assault" if

> in the course of a rape or attempted rape or forcible sexual abuse, or attempted forcible sexual abuse, a person uses, or threatens the victim with the use of a dangerous weapon or compels, or attempts to compel, the victim to submit by threat of

> kidnaping, death, or serious bodily injury to be inflicted imminently.

(Quotation simplified.) Thus, the jury was instructed that it could convict Norton of aggravated sexual assault based upon the underlying acts of a rape, an attempted rape, forcible sexual abuse, or an attempted forcible sexual abuse. However, at trial, no special verdict form was requested or given. As a result, although the jury convicted Norton of two aggravated sexual assault charges, it did not specify on which underlying offenses it relied to convict Norton of those charges.

¶20 During sentencing, defense counsel requested that the trial court sentence Norton under the lowest tier of the aggravated sexual assault sentencing scheme—the six-years-to-life tier.[1] Counsel explained to the court that because there was not a special verdict form, it was inappropriate to sentence Norton according to the highest tier—the fifteen-years-to-life tier. Counsel asserted that the jury instruction "allow[ed] for the jury to find the defendant guilty . . . for the offense based on an attempted forcible sexual abuse," and contended that "there's no indication or evidence that the jury made a finding other than that." He also contended that, because there was no special

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1. Unless otherwise indicated, we cite the version of the relevant statutes in effect at the time of Norton's offenses. The aggravated sexual assault statute creates a three-tiered sentencing scheme, which is dependent upon the underlying offense for which conviction is entered. Utah Code Ann. § 76-5-405(2) (LexisNexis 2012). If the underlying sexual offense is rape or forcible sexual abuse (as pertinent here), the presumptive prison sentence is fifteen years to life. *Id.* § 76-5-405(2)(a)(i). If the underlying offense is attempted rape, the presumptive prison sentence is ten years to life. *Id.* § 76-5-405(2)(b)(i). And if the underlying offense is attempted forcible sexual abuse, the presumptive prison sentence is six years to life. *Id.* § 76-5-405(2)(c)(i).

verdict form, it would violate Norton's right to a jury trial to find at sentencing that he committed a completed act under the highest tier where the jury could find from the evidence that Norton committed attempted forcible sexual abuse. In response, the State argued that Norton should be sentenced under the highest tier because "there was never any evidence that this was an attempted forcible sex abuse or an attempted rape. It was all evidence that it was an actual rape and actual forcible sex abuse."

¶21 Although the court determined that defense counsel's argument had some merit, the court ultimately agreed with the State, taking a "common sense approach" and determining that although the instructions included the offenses of attempted rape and attempted forcible sexual abuse, "[t]he evidence presented is that there was an actual act of sexual intercourse" and "an actual . . . insertion [in her vagina] by his hand." Accordingly, the court ruled that it was proper to sentence him at the highest tier because the "evidence as presented" related to actual, not attempted, conduct and "there was never an argument made that this was an attempted rape or attempted forcible sexual abuse."

Sentencing: The Interests of Justice Analysis

¶22 Once the court determined that it was proper to sentence Norton at the highest tier for the aggravated sexual assault convictions, defense counsel then requested that the court impose terms of six-years-to-life on those counts and to run the sentences concurrently.[2] In requesting the lesser sentence,

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2. In addition to providing three sentencing tiers, the aggravated sexual assault statute provides that a court may impose less than the presumptive sentence if the court "finds that a lesser term than the term described" as presumptive "is in the interests of justice and states the reasons for this finding on the record." *Id.*
(continued...)

defense counsel identified several facts which, in his opinion, merited a lesser sentence. Norton also made a statement, expressing his regret at having violated the protective order and for having hurt Wife and his family and stating a desire to move forward personally and professionally to "rebuild [his] life." In response, the State requested that the court impose the presumptive sentences of fifteen years to life on both of the aggravated sexual assault counts and that the sentences run consecutively. The State contended that a lesser sentence on those counts made "no sense," particularly where Norton had not accepted responsibility for what he had done and the crimes were "terrible." The court also had the benefit of the Presentence Investigation Report (the PSI) prepared by Adult Probation & Parole, which recommended imprisonment according to the statutory terms and indicated that "there are not enough mitigating circumstances to override the serious nature of the current offense."

¶23 The court sentenced Norton to the presumptive fifteen years to life on each of the aggravated sexual assault counts. It recognized that Norton had "a good past in many, many ways" but that "one of the real difficulties" in the case was Norton's "inability and unwillingness to follow the truth," stating that the court and the jury did not believe the events happened "at all the way [Norton said] they happened." The court also stated that Norton's conduct "went[] way, way, way over the line" and was of a kind "that simply cannot be accepted in our society," and that while it recognized a fifteen years to life sentence would be lengthy, especially given Norton's age, the extreme and harmful

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(...continued)
§ 76-5-405(3)(a). For offenses falling under the highest tier of sentencing—fifteen years to life—the court may find it is in the interests of justice to impose a lesser prison sentence of either "10 years and which may be for life," or "six years and which may be for life." *Id.*

nature of Norton's conduct merited the presumptive sentence. Nonetheless, the court stated that Norton was "entitled to some mercy" in that it did not believe that the sentences ought to be consecutive. Accordingly, on the aggravated sexual assault counts, the court sentenced him to two terms of fifteen years to life, with the sentences to run concurrently.

¶24 Norton timely appealed from the court's judgment, sentence, and commitment.

ISSUES AND STANDARDS OF REVIEW

¶25 Norton first argues that the court erred by giving instructions of aggravated sexual assault and its lesser included offenses that did not properly inform the jury of the mens rea that applies to the nonconsent element. "Generally, whether a jury instruction correctly states the law presents a question of law which we review for correctness," and we "will affirm when the instructions taken as a whole fairly instruct the jury on the law applicable to the case." *State v. Moore*, 2015 UT App 112, ¶ 4, 349 P.3d 797 (quotation simplified).

¶26 Norton next argues that the court erred by refusing to give requested lesser included offense instructions on the aggravated sexual assault, aggravated kidnapping, and aggravated burglary counts. "A trial court's refusal to grant a lesser included offense instruction is a question of law, which we review for correctness." *State v. Reece*, 2015 UT 45, ¶ 16, 349 P.3d 712 (quotation simplified).

¶27 Finally, Norton asserts two claims of error concerning his sentence. First, he argues that the court violated his right to due process and his right to trial by jury when it sentenced him under the highest sentencing tier on the aggravated sexual assault counts for which he was convicted. "[C]onstitutional questions present questions of law that we review for correctness without deference to the lower court's ruling." *State*

v. Candedo, 2010 UT 32, ¶ 7, 232 P.3d 1008. Second, Norton argues that the court abused its discretion when it imposed two terms of fifteen years to life on the two aggravated sexual assault convictions "without conducting the statutorily mandated interests-of-justice analysis." We review a trial court's sentencing decision for an abuse of discretion. *See LeBeau v. State*, 2014 UT 39, ¶ 16, 337 P.3d 254 ("An appellate court will . . . only set aside a sentence if the sentence represents an abuse of discretion, if the district court fails to consider all legally relevant factors, or if the sentence imposed is clearly excessive." (quotation simplified)).

ANALYSIS

I. Jury Instructions

¶28 Norton first argues that the instructions on the aggravated sexual assault charges and the associated lesser included offenses of rape and forcible sexual abuse misstated the law. Norton asserts that under *State v. Barela*, 2015 UT 22, 349 P.3d 676, the instructions "failed to instruct the jury that it could not convict unless it found that Norton acted with the requisite mens rea as to [Wife's] nonconsent" and that, had the jury been properly instructed, there is a reasonable probability that it would have acquitted him of those charges.

¶29 "A mens rea element is an essential element of an offense," and as a general rule, failure to accurately instruct on it is error. *See State v. Bird*, 2015 UT 7, ¶ 14, 345 P.3d 1141 (quotation simplified). The crime of rape requires that a defendant has the "requisite mens rea as to the victim's nonconsent."[3] *Barela*, 2015 UT 22, ¶ 26.

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3. The State does not contest that this principle also applies to other sexual offenses requiring proof of a victim's nonconsent. Given the State's position and our conclusion that Norton was

(continued...)

¶30 Norton concedes that this issue is unpreserved and requests that we review it under the doctrines of manifest injustice, plain error, or ineffective assistance of counsel. To establish ineffective assistance of counsel, Norton must show both that his trial counsel's performance was objectively deficient and that counsel's deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To establish manifest injustice[4] and plain error, Norton must demonstrate the existence of an "obvious, prejudicial error." *State v. Bell*, 2016 UT App 157, ¶ 8, 380 P.3d 11. The prejudice standards for ineffective assistance and plain error are the same. *State v. McNeil*, 2016 UT 3, ¶ 29, 365 P.3d 699. Norton must demonstrate that, but for the errors, "there is a reasonable probability that . . . the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *See Strickland*, 466 U.S. at 694. And because Norton must meet all the elements of each test to prevail, we may dispose of both claims on prejudice alone without analyzing the other elements. *See Archuleta v. Galetka*, 2011 UT 73, ¶ 41, 267 P.3d 232.

¶31 The court instructed the jury that it could not find Norton guilty unless the State proved "a mental state as to each of the . . . counts charged." The court also instructed the jury as to

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(...continued)
not prejudiced by the instructions, "we assume without deciding that the principle applies more broadly" to all of the sexual offenses at issue here. *See State v. Reigelsperger*, 2017 UT App 101, ¶ 73 n.8, 400 P.3d 1127.

4. Manifest injustice is generally synonymous with the plain error standard. *See State v. Pullman*, 2013 UT App 168, ¶ 5, 306 P.3d 827. Norton has not argued in this case that it is not. Therefore, we review his challenges under the same standard.

the meaning of applicable mental states.[5] As to the aggravated sexual assault charges, the court instructed that the jury could find Norton guilty of aggravated sexual assault if it found beyond a reasonable doubt that

> 1. On or about the date charged in the Information [Norton] raped or attempted to rape or committed forcible sexual abuse or attempted forcible sexual abuse against [Wife]; and
>
> 2. That in the course of that rape or attempted rape or forcible sexual abuse or attempted forcible sexual abuse [Norton]
>
> > (a) used or threatened [Wife] with the use of a dangerous weapon; or
> >
> > (b) compelled, or attempted to compel, [Wife] to submit to rape or forcible sexual abuse by threat of kidnaping, death, or serious bodily injury to be inflicted imminently; and
>
> 3. That [Norton] did such acts knowingly or intentionally.

¶32 The court then provided separate instructions for rape and forcible sexual abuse. As to rape, it instructed that the jury

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5. The court instructed that "intentionally" meant "[a] person acts . . . [with a] conscious objective . . . to cause a certain result or to engage in certain conduct," and it instructed that a person acts "knowingly" when the person "is aware of the nature of his conduct," "is aware of the particular circumstances surrounding his conduct," or "is aware that his conduct is reasonably certain to cause the result." *See generally* Utah Code Ann. § 76-2-103 (LexisNexis 2012).

could convict Norton if it found beyond a reasonable doubt that, "[Norton] had sexual intercourse with [Wife]"; that "such conduct was without the consent of [Wife]"; and that "said conduct was done intentionally or knowingly." For forcible sexual abuse, it instructed that the jury could convict Norton if it found beyond a reasonable doubt that

> 1. On or about the date charged [Norton] touched the anus, buttocks, breasts, or any part of the genitals of [Wife]; and
>
> 2. That such conduct was done with the intent to either
>
> > (a) cause substantial emotional or bodily pain to [Wife], or
> >
> > (b) arouse or gratify the sexual desires of any person; and without the consent of [Wife]; and
>
> 3. That said conduct was done intentionally or knowingly.

¶33 Assuming, without deciding, that these instructions were erroneous under *Barela* and that counsel performed deficiently by not objecting to them, we conclude that Norton has not demonstrated that he suffered prejudice.

¶34 "A reviewing court attempting to determine whether the omission of an element from a jury instruction is harmless error 'asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *State v. Ochoa*, 2014 UT App 296, ¶ 5, 341 P.3d 942 (quoting *Neder v. United States*, 527 U.S. 1, 19 (1999)). For example, in *State v. Barela*, the defendant, who was convicted of rape, argued that the jury instruction improperly omitted the mens rea as to the issue of nonconsent. 2015 UT 22, ¶¶ 20, 26, 349 P.3d 676. After agreeing with the defendant that the jury instruction was

incorrect, *id.* ¶ 26, our supreme court proceeded to determine whether the omission was harmful, *id.* ¶¶ 28–32. The supreme court analyzed the issue by reviewing the record evidence and asking whether a reasonable jury could have found, based on the "totality of the evidence in the record," that the defendant did not have the required mental state as to the victim's nonconsent. *See id.* The court determined that there was such a basis. The defendant had contended during trial that the sexual conduct had been consensual and initiated by the victim, *id.* ¶¶ 10, 29, while the victim claimed that the defendant had abruptly instigated and perpetrated the intercourse without her consent, *id.* ¶¶ 6–7, 29. Nonetheless, the victim's account contained some ambiguity surrounding the issue of her consent—she recounted that she "froze" during the intercourse, "neither actively participating in sex nor speaking any words," and otherwise expressed no other reaction. *Id.* ¶ 29 (quotation simplified). The supreme court determined that, had the jury been properly instructed, this evidence could have supported a reasonable determination that the defendant had mistaken the victim's reaction for consent. *Id.* ¶ 28. On that basis, the court reversed. *Id.* ¶ 32.

¶35 Here, the jury convicted Norton of two counts of aggravated sexual assault based upon vaginal intercourse and the sexual touching that occurred afterward in the bathroom. During trial, the parties presented the jury with two vastly differing versions of the events as to the element of consent. *See supra* ¶¶ 5–15. Wife testified that Norton forced her to submit to the sexual contact that occurred by threatening her with a gun when she refused to comply. Norton, on the other hand, testified that the intercourse was entirely consensual—that Wife, in fact, had initiated it—and, by his account, that the sexual touching in the bathroom did not occur at all.

¶36 While we cannot know precisely how the jury processed the two accounts, what we do know from the jury's decision is that it concluded that Norton sexually assaulted Wife at

gunpoint after breaking into her parents' house and kidnapping her, and despite her repeated expressions of nonconsent. *See Barela*, 2015 UT 22, ¶ 30 (using the jury's verdict to explain what elements the jury must have found). Norton must therefore demonstrate that, had the trial court properly instructed the jury, there is a reasonable likelihood that the verdict would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). To meet this burden, he must at least show that there is some rational basis in the evidence from which the jury could have concluded that, despite Wife's nonconsent and Norton's threats in the face of her protests, Norton nevertheless did not have the instructed mental state—intentional or knowing—as to her nonconsent. *See Barela*, 2015 UT 22, ¶¶ 26, 28–32; *Ochoa*, 2014 UT App 296, ¶¶ 6–7.

¶37 There is no such rational basis in the evidence. Norton provided no evidence to suggest that, despite threatening Wife under aggravating circumstances to force her compliance, he might have been mistaken about Wife's consent as to either instance of sexual assault; his testimony was that one incident was consensual, that the other did not occur, and that he did not use a gun or threaten Wife. Likewise, Wife provided no evidence from which a jury could reasonably find that Norton was mistaken as to her nonconsent. She testified that when she verbally expressed her nonconsent, he threatened her with a gun and thereafter ordered and physically forced her to comply with his demands, including the sexual touching that occurred in the bathroom.

¶38 Norton points to Wife's testimony that during intercourse she squeezed his penis, arguing it as a "scenario in which [he] may have mistakenly believed she consented," and one sufficient to provide the jury a rational basis from which to determine he did not have the requisite mental state. But as we recently observed in *State v. Reigelsperger*, 2017 UT App 101, 400 P.3d 1127, any actions on the part of the victim of alleged "cooperation cannot be viewed in a vacuum" but must instead

be viewed within the larger context in which they occur. *Id.* ¶ 85; *see Barela*, 2015 UT 22, ¶ 39 (explaining that "[t]o determine whether a victim has truly consented, the factfinder must pay close attention to the verbal and nonverbal cues given by the victim and to a wide range of other elements of context"). Indeed, "[w]hen refusals, rejections, or resistance are met with disregard, hostility, and commands to submit, any limited cooperation that immediately follows cannot be said, without more, to constitute consent." *Reigelsperger*, 2017 UT App 101, ¶ 85.

¶39 Even if squeezing Norton's penis could have somehow in isolation been interpreted by Norton as indicative of Wife's willing participation, the action occurred within the larger context of Norton breaking into his parents-in-law's house in the middle of the night, kidnapping Wife, threatening her, informing her that they were going to have intercourse after she asked him if he was going to rape her, and disregarding her repeated verbal refusals. *See id.* Furthermore, Wife also testified that after she squeezed his penis, Norton "grabbed both of [her] hands and just put them over [her] head in one of his hands," and even defense counsel during trial characterized Wife's action as one of protest, not participation.

¶40 Thus, there is no rational basis in the evidence to support a jury finding that Norton could have been mistaken about Wife's nonconsent. *See State v. Barela*, 2015 UT 22, ¶¶ 29–32, 349 P.3d 676. Accordingly, even if the instructions regarding the mens rea applicable to the element of nonconsent were erroneous, Norton has not demonstrated that he was harmed by the mistake. His claims of ineffective assistance of counsel, manifest injustice, and plain error on the basis of the mens rea instructions therefore fail. *See Archuleta v. Galetka*, 2011 UT 73, ¶ 41, 267 P.3d 232.

II. Lesser Included Offense Instructions

¶41 Norton next argues that the trial court erred when it refused to instruct on his requested lesser included offenses. Specifically, he argues that the court erred when it refused to instruct the jury on (A) sexual battery as the lesser included offense of aggravated sexual assault, (B) unlawful detention as the lesser included offense of aggravated kidnapping, and (C) aggravated assault and assault as the lesser included offenses of aggravated burglary.

¶42 "A defendant's request for a lesser included offense instruction is evaluated under the evidence-based standard" found in Utah Code section 76-1-402. *See State v. Campbell*, 2013 UT App 23, ¶ 5, 295 P.3d 722 (quotation simplified). We apply a two-part test to determine whether a trial court must give a requested instruction. First, we determine under section 76-1-402(3) whether the lesser offense is included in the greater offense. Most often, this will require analyzing whether "some of their statutory elements overlap" and whether "the evidence at the trial of the greater offense includes proof of some or all of those overlapping elements." *State v. Baker*, 671 P.2d 152, 158–59 (Utah 1983); *see also* Utah Code Ann. § 76-1-402(3)(a) (LexisNexis 2012); *State v. Powell*, 2007 UT 9, ¶¶ 24–25, 154 P.3d 788 (explaining that a defendant's entitlement to a lesser included offense instruction "depend[s] on whether there exists some overlap in the statutory elements of allegedly included offenses and whether the same facts tend to prove elements of more than one statutory offense" (quotation simplified)).

¶43 Second, we determine under section 76-1-402(4) whether the evidence provides "a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Utah Code Ann. § 76-1-402(4). In so doing, we must determine whether there is "a sufficient quantum of evidence presented to justify sending the question to the jury," *Baker*, 671 P.2d at 159, and we view the evidence "in the light

most favorable to the defendant requesting the instruction," *Powell*, 2007 UT 9, ¶ 27. Both parts of the test must be met "before the trial court must instruct the jury" regarding the lesser included offense. *Baker*, 671 P.2d at 159.

¶44 We address each requested lesser included offense instruction below.

A. Sexual Battery

¶45 Norton requested lesser included offense instructions on rape, forcible sexual abuse, and sexual battery for Counts 3 and 4—the aggravated sexual assault charges. The court instructed only rape as the lesser included offense for Count 3, and it instructed only forcible sexual abuse as the lesser included offense for Count 4. The court declined to instruct the jury on sexual battery for either count.

¶46 Norton contends that the failure to instruct on sexual battery for both counts was error because there is overlap in the elements of aggravated sexual assault[6] and sexual battery,[7] and

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6. For aggravated sexual assaults based on the underlying offenses of rape and forcible sexual abuse, "[a] person commits aggravated sexual assault if: (a) in the course of a rape . . . or forcible sexual abuse, the actor: (i) uses, or threatens the victim with the use of, a dangerous weapon" or "(ii) compels, or attempts to compel, the victim to submit to rape . . . or forcible sexual abuse[] by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person." Utah Code Ann. § 76-5-405(1)(a) (LexisNexis 2012).

7. A person commits sexual battery "if the person, under circumstances not amounting to," among other offenses, a rape or forcible sexual abuse or attempted rape or attempted forcible sexual abuse, "intentionally touches, whether or not through clothing, the anus, buttocks, or any part of the genitals of another

(continued...)

there is a rational basis in the evidence from which the jury could have acquitted him of aggravated sexual assault on both counts and instead convicted him of sexual battery. He essentially contends that there was a sufficient quantum of evidence developed at trial to create questions about his mental state as to Counts 3 and 4.

¶47 We disagree. Without deciding whether sexual battery is an included offense of aggravated sexual assault, we conclude that there was no rational basis in the evidence to acquit Norton of aggravated sexual assault and convict him instead of sexual battery. As we concluded above, *supra* ¶¶ 37–40, contrary to Norton's assertions, neither party presented evidence at trial to create a dispute about his mental state as to either the sexual intercourse or the sexual touching that occurred in the bathroom. *See State v. Oldroyd*, 685 P.2d 551, 555–56 (Utah 1984) (explaining that a defendant is entitled to a lesser included offense instruction where the evidence offered in the case places an element in dispute such that, based on that dispute, the jury could find a defendant guilty of a lesser offense and not of the greater); *State v. Baker*, 671 P.2d 152, 157 (Utah 1983) ("Thus, *where proof of an element of the crime is in dispute,* the availability of the 'third option' . . . gives the defendant the benefit of the reasonable doubt standard." (emphasis added)); *see also Keeble v. United States*, 412 U.S. 205, 213 (1973) (suggesting that where "the nature of petitioner's intent was very much in dispute at trial," the jury could have rationally convicted the petitioner of a requested lesser included offense with a lower intent "if that option had been presented"). Indeed, Norton's primary defense

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person, or the breast of a female person, and the actor's conduct is under circumstances the actor knows or should know will likely cause affront or alarm to the person touched." Utah Code Ann. § 76-9-702.1(1) (LexisNexis 2012). Sexual battery is "a class A misdemeanor." *Id.* § 76-9-702.1(3).

at trial was that Wife lied about the instances of sexual abuse to gain primary custody of their children. Norton made no assertion that, for example, despite Wife's alleged initiation of sexual intercourse, circumstances arose such that he might have been mistaken about Wife's consent or that he knew or should have known the continued sexual contact would cause affront or alarm to Wife. Nor did he make any statement or suggest any circumstances that might have created some ambiguity about his intent as to the sexual touching in the bathroom; by his account, Wife fabricated that touch.[8]

¶48 Therefore, the evidence about Norton's mental state on either count was not ambiguous, subject to any alternative interpretation, or quantifiably sufficient to entitle him to lesser included instructions on sexual battery. *See Baker*, 671 P.2d at 159 (explaining that a lesser included offense instruction must be given when "there is a sufficient quantum of evidence to raise a jury question regarding a lesser offense" or "the evidence is ambiguous and therefore susceptible to alternative interpretations, and one alternative would permit acquittal of the

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8. On appeal, Norton also challenges the trial court's refusal to instruct on sexual battery for Count 4 by questioning the sufficiency of the evidence to establish his intent. He argues that "there was little if any evidence that Norton touched [Wife's] vagina" with the required intent, where Wife's testimony was that Norton inserted his fingers in her vagina for the purpose of "wip[ing] away his DNA." But Norton conceded a sufficiency of the evidence argument below; indeed, at the close of the State's case, defense counsel stated that he recognized that "there's sufficient evidence with regard to each of the elements in this case" and thereby declined to "make a motion for a judgment as a matter of law." And, apart from his sufficiency argument, Norton has not shown that, based on the evidence at trial, he was entitled to a lesser included offense instruction for sexual battery on this count.

greater offense and conviction of the lesser"). As a result, the jury would have had to impermissibly speculate about Norton's mental state to acquit him of aggravated sexual assault and convict of sexual battery on both counts. *See State v. Reece*, 2015 UT 45, ¶ 30, 349 P.3d 712 (explaining that "a defendant's request for a lesser included offense instruction cannot be based on sheer speculation" (quotation simplified)); *State v. Garcia-Vargas*, 2012 UT App 270, ¶¶ 17–18 & n.5, 287 P.3d 474 (indicating that, to create a dispute about mental state sufficient to entitle the defendant to lesser included offense instructions, there must be actual evidence presented to the jury to suggest a dispute about mental state); *see also Baker*, 671 P.2d at 157.

¶49 Accordingly, we conclude that the trial court did not err in declining to instruct the jury on sexual battery as to Counts 3 and 4.

B. Unlawful Detention

¶50 Next, Norton argues that the court erred when it refused to instruct the jury on unlawful detention[9] as a lesser included offense of aggravated kidnapping. He contends that such an instruction was warranted because the statutory elements of aggravated kidnapping and unlawful detention overlap[10] and

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9. A person commits the crime of unlawful detention when that person "intentionally or knowingly, without authority of law, and against the will of the victim, detains or restrains the victim under circumstances not constituting a violation of: (a) kidnapping, . . . or (c) aggravated kidnapping." Utah Code Ann. § 76-5-304(1) (LexisNexis 2012).

10. Norton argues that unlawful detention qualifies as a lesser included offense of aggravated kidnapping because it is statutorily defined as such. However, even if unlawful detention *could* qualify as an included offense under statute, as we discuss (continued...)

because there was a basis in the evidence to justify the instruction. Specifically, Norton refers to his testimony where he described restraining Wife's hands at the Fort Douglas office building. According to Norton, after he and Wife engaged in consensual sexual intercourse, they argued over custody and the argument "became physical." He testified that Wife hit him, he backhanded her, and then, for about "a minute," he grabbed Wife's hands to stop her from hitting him again. He contends that if the jury believed this testimony, it would have been rational for it to find that he "merely detained or restrained" Wife and to convict him of unlawful detention instead of aggravated kidnapping or kidnapping.

¶51 Norton's argument is misplaced. To determine that a defendant was entitled to a lesser included offense instruction, we must determine, among other things, that the "*same facts* tend to prove elements of more than one statutory offense." *State v. Powell*, 2007 UT 9, ¶¶ 24–25, 154 P.3d 788 (emphasis added) (quotation simplified); *see also* Utah Code Ann. § 76-1-402(3)(a) (LexisNexis 2012) (identifying a lesser included offense as one "established by proof of the same or less than all the facts required to establish the commission of the offense charged"). But Norton has not demonstrated that the "same facts" relied on by the State to establish the offense of aggravated kidnapping also tend to prove the elements of unlawful detention. Instead, Norton wrongly claims entitlement to a lesser included offense instruction by pointing to evidence that is distinct from the evidence developed at trial to establish the greater offense.

(...continued)
below, an included offense cannot be based upon different facts than the greater offense. And here, the facts the State proffered to establish aggravated kidnapping and the facts Norton proffers on appeal to establish unlawful detention are not the same.

¶52 To prove the charge of aggravated kidnapping, the State presented evidence that Norton duct-taped Wife's head and mouth, took her from her parents' house, and, while threatening her with a gun, drove her to the Fort Douglas office building where he sexually assaulted her. Norton does not contend that these facts—or a subset of these facts—justifies an unlawful detention instruction. Instead, Norton describes an entirely separate event at the Fort Douglas office building where he allegedly restrained Wife by holding her hands for about "a minute." But the State did not rely on this event to prove the greater offense of aggravated kidnapping, nor did the State charge Norton for this act.

¶53 Thus, Norton cannot demonstrate that the lesser offense of unlawful detention is established by proof of the same or less than all the facts required to prove the offense for which he was charged. *See Powell*, 2007 UT 9, ¶¶ 24–25 & n.21. If anything, the event Norton describes could more appropriately labeled a possible separate offense, not a lesser included offense that would warrant a lesser included offense instruction. *Cf. State v. Branch*, 743 P.2d 1187, 1191 (Utah 1987) (explaining that an offense is not lesser included if it is a separate offense "committed within the same criminal episode" that is based on "proof [of] different evidence"); *State v. Garrido*, 2013 UT App 245, ¶ 31, 314 P.3d 1014 (stating that "[e]ven if there is overlap in the statutory elements, if the convictions rely on materially different acts, then one crime will not be a lesser included offense of another" (quotation simplified)); *State v. Smith*, 2003 UT App 179, ¶ 16, 72 P.3d 692 (concluding that one offense was not the lesser included of another where the State relied on "materially different acts" to prove two separate offenses); *State v. Mane*, 783 P.2d 61, 63, 65–66 (Utah Ct. App. 1989) (concluding separate acts that were part of a single criminal episode were separate offenses requiring proof of different evidence and therefore did not stand in the relationship of greater and lesser offenses). Accordingly, the court did not err in declining to give the requested unlawful detention instruction.

C. Aggravated Assault and Assault

¶54 Finally, Norton argues that the court erred by not instructing the jury on aggravated assault and assault[11] as lesser included offenses of aggravated burglary.[12] He contends that elements of aggravated assault and assault overlap with those of aggravated burglary and that there was a rational basis in the evidence to support giving those instructions. Specifically, he contends that it would have been rational for the jury to acquit him of aggravated burglary but convict him of aggravated assault or assault on the basis of his entry of the Fort Douglas office building. He alleges that the jury could have determined

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11. At the time of Norton's conduct, the aggravated assault statute provided that an aggravated assault occurs "if the person commits assault . . . and uses: (a) a dangerous weapon . . . ; or (b) other means or force likely to produce death or serious bodily injury." Utah Code Ann. § 76-5-103(1) (LexisNexis 2012).

Similarly, at the time of Norton's conduct, an assault was "(a) an attempt, with unlawful force or violence, to do bodily injury to another; (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another." *Id.* § 76-5-102(1).

12. Aggravated burglary occurs when a person "in attempting, committing, or fleeing from a burglary . . . (a) causes bodily injury to any person who is not a participant in the crime; (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or (c) possesses or attempts to use any explosive or dangerous weapon." *Id.* § 76-6-203(1) (2012). Burglary occurs when an actor "enters or remains unlawfully in a building or any portion of a building with intent to commit," among other things, a felony or "an assault on any person." *Id.* § 76-6-202(1).

that backhanding Wife during the mutual argument over custody he contends occurred in that building constituted aggravated assault or assault. Further, he claims that the jury could have acquitted him of aggravated burglary by finding that he "did not enter [the building] unlawfully." Either way, Norton claims, if the jury believed that he backhanded Wife in the Fort Douglas office building with the requisite intent, aggravated assault or assault would have been the "appropriate verdict."

¶55 Like we concluded about Norton's unlawful detention argument, we conclude that aggravated assault and assault are not lesser included offenses of aggravated burglary under the facts of this case. The evidence developed by the State to establish the greater offense of aggravated burglary and the evidence Norton relies upon to claim entitlement to lesser included offense instructions are materially different. *See Powell*, 2007 UT 9, ¶¶ 24–25. The State's entire case related to the aggravated burglary charge centered only on Norton's entry of his parents-in-law's house at the beginning of the night. The State made no allegation and presented no facts or evidence at trial that Norton's entry of the *Fort Douglas office building* was unlawful or formed the basis of the aggravated burglary charge; indeed, the State specifically argued that Norton "entered or remained unlawfully in the building—the building being the house."

¶56 Norton cannot prove entitlement to lesser included offense instructions by pointing to facts and evidence that are factually distinct from and center upon entirely different alleged incidents than those offered to establish the greater offense. *See id.*; *cf. Garrido*, 2013 UT App 245, ¶ 31; *Smith*, 2003 UT App 179, ¶ 16. Because the facts and evidence developed to establish the greater offense of aggravated burglary were different from the facts and evidence relied upon by Norton to claim entitlement to the lesser included offense instructions of aggravated assault and assault, those lesser offenses were not included within the

greater offenses. *Powell*, 2007 UT 9, ¶¶ 24–25. Accordingly, the court did not err in declining to give the requested instructions.[13]

III. Sentencing

¶57 Finally, Norton argues that his sentence was erroneous for two reasons. First, he argues that sentencing him for the

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13. In a footnote, Norton also contends that his counsel was ineffective for "failing to request criminal trespass as an additional lesser-included offense of aggravated burglary" because the jury could have believed his testimony that he did not break into his parents-in-law's house at the beginning of the night, but that he was guilty of criminal trespass because he was "not justified in breaking into [Wife's parents'] house after [Wife] locked herself out or that he remained at the house unlawfully after he and [Wife] resumed arguing and [Wife] ordered him to leave."

For similar reasons that we concluded Norton was not entitled to the requested aggravated assault and assault instructions, we conclude that based on *Strickland v. Washington*, 466 U.S. 668 (1984), his counsel was not ineffective for failing to request that the jury be instructed on criminal trespass as a lesser included offense of aggravated burglary. Here, the evidence Norton relies upon is different—in time and in substance—from the evidence developed to establish the greater offense. The State's entire case for aggravated burglary was based on events that occurred when Norton retrieved Wife from her parents' house at the beginning of the night. Accordingly, criminal trespass was not an included offense of aggravated burglary under the circumstances of this case, and Norton's counsel was therefore not ineffective for failing to request criminal trespass as a lesser included instruction. *See State v. Calvert*, 2017 UT App 212, ¶ 22, 407 P.3d 1098 (explaining that "counsel's failure to make a motion that would be futile if raised does not constitute deficient performance").

aggravated sexual assault convictions under the highest sentencing tier violated his rights to due process and a jury trial. Second, he argues that the court abused its discretion in imposing two fifteen-years-to-life terms for the aggravated sexual assault convictions because the court did not conduct the "statutorily mandated interests-of-justice analysis." We address each argument below.

A. Sentencing Tier

¶58 The jury convicted Norton of two counts of aggravated sexual assault based upon Wife's testimony describing nonconsensual intercourse and Norton inserting his fingers into her vagina. During sentencing, Norton contended that, because there was no special verdict form and the instructions allowed the jury to convict him if it found that he had committed attempted rather than completed acts of rape or forcible sexual abuse, the court should sentence him as though the jury had found him guilty of committing the lowest culpable underlying offense in the aggravated sexual assault statute—attempted forcible sexual abuse. The court disagreed and instead sentenced Norton on those counts each to the presumptive fifteen years to life sentences for completed acts of rape and forcible sexual abuse—the highest tier of sentencing available under the statute. *See* Utah Code Ann. § 76-5-405(2) (LexisNexis 2012). In doing so, the court determined that sentencing in that way achieved "fundamental fairness" with no "denial of any due process or right" because there was no evidence in the record to support a conclusion that Norton's actions constituted mere attempts.

¶59 On appeal, Norton contends this was error. He frames his challenges under his constitutional rights to a jury trial and due process.[14] As we understand it, his argument is that, because

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14. Norton references both the United States and the Utah Constitutions in making this claim. However, Norton "has not (continued...)

there was no special verdict form and the trial court instructed the jury that it could convict him for attempts as well as completed acts, sentencing him under the highest tier violated his "rights to due process and to a jury trial because it increased [his] minimum mandatory sentence without a jury verdict on each of the elements required to increase the sentence." He contends that attempted forcible sexual abuse was the only "version of the offense for which the record showed that the jury found [him] guilty of each element of the offense beyond a reasonable doubt."[15] In essence, then, Norton seems to argue that, in choosing to sentence him under the highest tier, the court impermissibly increased the penalty he would have received had he been sentenced according to the facts that he claims were reflected in the jury's verdict. In this way, the sentence violated his rights to due process and a jury trial because the court based its sentence on facts that the jury did not find beyond a reasonable doubt.

(...continued)
adequately set forth any separate legal analysis" under the due process or the right to jury trial provisions of the Utah Constitution. *See State v. Marshall*, 2003 UT App 381, ¶ 8 n.2, 81 P.3d 775 (quotation simplified). Accordingly, we do not separately analyze Norton's state constitutional claims. *See id.*

15. The State argues that Norton has not preserved his argument for appeal. We disagree. Norton argues on appeal that the court erred when it declined to sentence him according to the lowest tier of the aggravated sexual assault sentencing hierarchy for Counts 3 and 4 because doing so violated his rights to due process and a jury trial. He made these same arguments to the court below, and the court ultimately determined that, given the evidence, there was no denial of due process or fundamental fairness by sentencing Norton for committing the underlying offenses of rape and forcible sexual abuse.

¶60 Norton is correct that he is entitled to a jury trial on all of the elements of the crimes for which he is charged and that he cannot be convicted for the charged crimes unless there is "proof beyond a reasonable doubt of every fact necessary to constitute" them. *See State v. Palmer*, 2009 UT 55, ¶ 11 & n.17, 220 P.3d 1198 (quotation simplified); *State v. Reyes*, 2005 UT 33, ¶ 11, 116 P.3d 305; *see also Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000) (explaining that the rights to a jury trial and to due process, "[t]aken together, . . . indisputably entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt" (quotation simplified)). Norton is also correct that these rights are implicated in sentencing cases "whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury verdict or admitted by the defendant." *Palmer*, 2009 UT 55, ¶ 12 (quotation simplified). For example, a sentencing court may not make additional factual findings that ultimately "expose[] the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 483 & n.10 (quotation simplified); *see also id.* at 490.

¶61 Here, although Norton argues that the jury's verdict reflected convictions beyond a reasonable doubt of two counts of only attempted[16] forcible sexual abuse and that the court erred in not sentencing him accordingly, we conclude that the court did not err in sentencing him under the highest tier of the

16. An attempt occurs if a person "engages in conduct constituting a substantial step toward commission of the crime" and "intends to commit the crime; or . . . when causing a particular result is an element of the crime, he acts with an awareness that his conduct is reasonably certain to cause that result." Utah Code Ann. § 76-4-101 (LexisNexis 2012).

aggravated sexual assault statute.[17] We must assume that the jury convicted Norton of the act or acts for which the evidence was sufficient. *See State v. Isom*, 2015 UT App 160, ¶ 27, 354 P.3d 791 (stating that a jury must "decide the case on the evidence" presented about the charged crime (quotation simplified)); *see also United States v. Self*, 2 F.3d 1071, 1093 (10th Cir. 1993) (stating that, in determining whether reversal is necessary when a general verdict is returned where more than one theory is advanced, "factual insufficiency" of one of the theories advanced will not require reversal "as we will presume that the jury rejected the factually inadequate theory and convicted on an alternative ground for which the evidence was sufficient");

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17. In making his argument, Norton relies heavily on decisions such as *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *State v. Lopes*, 1999 UT 24, 980 P.2d 191, in which the respective courts determined that due process and the right to a jury trial are violated when a sentencing court finds facts distinct from those of the convicted crime that increase the allowable penalty for that crime but have not been proven by the State beyond a reasonable doubt or submitted to a jury. *See Apprendi*, 530 U.S. at 476–90; *Lopes*, 1999 UT 24, ¶¶ 13–17, 22. However, other than citing those cases, Norton does not explain how or why that jurisprudence applies in the circumstances of his case, particularly where the trial court submitted the elements and the evidence proffered to support conviction for completed acts of rape and forcible sexual abuse to the jury for determination. And, as we discuss below, he does not identify the record evidence that supports his contention that the jury's verdict could reflect only convictions of attempted forcible sexual abuse for those counts. In any event, we ultimately conclude that the sentencing court did not err when it sentenced Norton under the highest tier of the aggravated sexual assault sentencing hierarchy. But in doing so, we express no opinion on whether the *Apprendi* and the *Lopes* lines of cases apply to the circumstances present here.

cf. State v. Fedorowicz, 2002 UT 67, ¶ 40, 52 P.3d 1194 (noting that, in reviewing an evidentiary challenge to a verdict, we "assume that the jury believed the evidence that supports the verdict"); *Madsen v. Brown*, 701 P.2d 1086, 1092 (Utah 1985) (explaining that a jury's verdict must have "foundation in the evidence" and may not be "based on evidence so fragmentary that no reasonable minds could have so concluded"). And we cannot discern from our review of the record any factual basis—and Norton does not identify such a factual basis—to support a conclusion that the jury could have determined that the sexual acts underlying Counts 3 and 4 constituted only attempted forcible sexual abuse. *See United States v. Barnes*, 158 F.3d 662, 667–68 (2d Cir. 1998) (noting that the evidence of conspiracy to possess marijuana was legally insufficient and that it was "inconceivable that the jury could have convicted" on that basis, but assuming that "the jury convicted the defendant of conspiring to possess at least one of those controlled substances as to which the evidence was sufficient"); *cf. State v. Peterson*, 881 P.2d 965, 968–70 & n.3 (Utah Ct. App. 1994) (concluding that the defendant was not entitled to lesser included offense instructions for, among other things, attempted aggravated burglary, burglary, and criminal trespass, where the trial court determined that "there was no credible testimony" contradicting the fact that the defendant actually entered the residence at issue in the case, and noting that "[i]f entry occurred, the attempt offenses would logically be excluded" as appropriate lesser included offenses).

¶62 For the conviction pertaining to Count 3, the sexual intercourse count, there is no evidence in the record to support a conclusion that the jury's guilty verdict reflected a finding beyond a reasonable doubt of an underlying aggravated sexual assault offense other than rape. The trial court instructed the jury that this count pertained to the "allegation of sexual intercourse," and it was undisputed at trial that the sexual intercourse occurred. Both Norton and Wife unequivocally testified that it did; thus, at trial, the only question for the jury was whether the intercourse amounted to rape or consensual

intercourse, not whether Norton attempted but failed to engage in intercourse with Wife.

¶63 Other evidence presented during trial also demonstrated that this count pertained to a completed act of sexual intercourse as opposed to an act of attempted sexual touching or an attempted taking of "indecent liberties." *See* Utah Code Ann. § 76-5-404(1) (LexisNexis 2012) (providing that forcible sexual abuse involves touching "the anus, buttocks, or any part of the genitals of another, or touch[ing] the breast of a female, or otherwise tak[ing] indecent liberties with another" in circumstances *"not amounting to rape . . . or attempted rape"* (emphasis added)); *id.* § 76-5-402(1) (providing that "[a] person commits rape when the actor has sexual intercourse with another person without the victim's consent"). For example, both parties stipulated that the vaginal swabs performed on Wife after the incident tested positively for semen and that Norton's DNA was found in that semen. And Norton has not pointed to any evidence that potentially created any ambiguity as to the factual question of whether the sexual assault was an attempted forcible sexual abuse as opposed to a completed rape. *Cf. State v. Barela*, 2015 UT 22, ¶¶ 28–32, 349 P.3d 676 (explaining that reversal on the basis of erroneous jury instructions was appropriate where the evidence in the record created some ambiguity as to whether the defendant might have been mistaken about the victim's nonconsent); *Peterson*, 881 P.2d at 968–70 & n.3. As a result, under the circumstances of this case, "we refuse to indulge the assumption" that the jury's verdict could have been based on a finding of an underlying aggravated sexual assault offense other than a completed rape. *See Barnes*, 158 F.3d at 668. Thus, the sentencing court did not err in concluding that the jury's verdict on this count reflected a finding of guilt that Norton completed the act of rape and in sentencing him accordingly.

¶64 Likewise, for Count 4, the allegation pertaining to Norton's penetration of Wife's vagina with his fingers, there is

no evidence in the record to suggest that the jury's guilty verdict reflected conviction of an attempted rather than a completed forcible sexual abuse. The dispute at trial centered on whether the incident occurred at all, not whether the touching was completed rather than attempted. Wife testified that it did occur—she claimed that Norton inserted his fingers when he ordered her to shower and rinse herself off after raping her. Norton denied it by testifying that Wife voluntarily showered after the sexual intercourse and that his participation was limited to turning on the faucet and handing her paper towels with which to dry off. And other than his denial, there was no evidence creating ambiguity about the factual question of whether Norton merely attempted, as opposed to completed, the alleged abuse. *Cf. Barela*, 2015 UT 22, ¶¶ 28–32; *Peterson*, 881 P.2d at 968–70 & n.3.

¶65 As a result, there was no room in the narratives for the jury to have concluded the truth lay somewhere between the two accounts. *Cf. Barela*, 2015 UT 22, ¶¶ 28–32 (reversing based on an erroneous jury instruction where there was evidence in the record that could have permitted the jury to conclude that "the truth fell somewhere in between the two accounts" provided by the defendant and the victim during trial). Thus, even though the jury was free to believe or disbelieve either Wife's or Norton's account, neither narrative gave the jury a basis from which to conclude that the sexual abuse on this count was only an attempt. *See Madsen*, 701 P.2d at 1092 (explaining that a jury's verdict must have its "foundation in the evidence"). In these circumstances, we can conclude only that, by convicting instead of acquitting Norton on this count, the jury's verdict reflected a finding of guilt beyond a reasonable doubt on the basis of a completed act of forcible sexual abuse.[18] *See Isom*, 2015 UT App 160, ¶ 27.

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18. Norton also suggests that the lack of a special verdict form somehow played into the deprivation of his rights. Our supreme (continued...)

¶66 For these reasons, we conclude that the sentencing court did not err when it determined that the facts reflected in the jury's verdict amounted to convictions for a completed rape and completed forcible sexual abuse and thereafter sentenced him under the highest tier of the aggravated sexual assault sentencing hierarchy.

B. Interests of Justice

¶67 Norton contends that the trial court abused its discretion by declining to reduce in the interests of justice the presumptive fifteen years to life sentences for the two counts of aggravated sexual assault, as permitted by Utah Code section 76-5-405. Norton argues that the court exceeded its discretion by not conducting the required interests of justice analysis set out by our supreme court in *LeBeau v. State*, 2014 UT 39, 337 P.3d 254. He asks that we remand the case for a new sentencing hearing, "with an order that the court conduct a complete interests-of-justice analysis."

(...continued)
court has recently reiterated that a special verdict form, while permitted, is not required. *State v. Hummel*, 2017 UT 19, ¶ 50, 393 P.3d 314. But even if we assume a special verdict form should have been employed in this case, for the same reasons explained above, we cannot conclude that Norton was harmed by its absence. Because there was no basis in the evidence for the jury to have determined as a factual matter that Norton committed only attempted forcible sexual abuse on Counts 3 and 4, employing a special verdict form could not have provided Norton the relief he now seeks—being sentenced as though he committed only attempted forcible sexual abuse. *See State v. Isom*, 2015 UT App 160, ¶ 27, 354 P.3d 791 (stating that the jury's duty is to "decide the case on the evidence" through a "disinterested, impartial and fair assessment of the testimony that has been presented" (quotation simplified)).

¶68 Generally, "a trial court's sentencing decision will not be overturned unless it exceeds statutory or constitutional limits, the judge failed to consider all the legally relevant factors, or the actions of the judge were so inherently unfair as to constitute abuse of discretion." *State v. Jaramillo*, 2016 UT App 70, ¶ 32, 372 P.3d 34 (quotation simplified). In reviewing the sentence imposed, we will "presume that the sentencing court made all the necessary considerations," *State v. Alvarez*, 2017 UT App 145, ¶ 4, 402 P.3d 191 (quotation simplified), unless the appellant successfully demonstrates the presence of circumstances to overcome that presumption, *State v. Helms*, 2002 UT 12, ¶ 11, 40 P.3d 626 (noting that situations in which this presumption should not apply "are normally limited to [those] where (1) an ambiguity of facts makes the assumption unreasonable, (2) a statute explicitly provides that written findings must be made, or (3) a prior case states that findings on an issue must be made"). "Absent these circumstances, we will not assume that the trial court's silence, by itself, presupposes that the court did not consider the proper factors as required by law. To do so would trample on the deference this court usually gives to the sentencing decisions of a trial court." *Id.*

¶69 Utah Code section 76-5-405 provides that the presumptive prison sentence for a person convicted for aggravated sexual assault on the basis of a completed act is fifteen years to life. *See* Utah Code Ann. § 76-5-405(2)(a)(i) (LexisNexis 2012). However, a sentencing court may reduce the presumptive prison term to either ten years to life or six years to life if it determines that a "lesser term . . . is in the interests of justice." *See id.* § 76-5-405(3)(a). In *LeBeau*, our supreme court held that the sentencing court must conduct an interests of justice analysis for offenses that permit a reduction on that basis before imposing the presumptive sentence for convictions of certain offenses, like aggravated sexual assault. 2014 UT 39, ¶¶ 21, 24; *see also id.* ¶ 29 (observing that the legislature added the interests of justice analysis in 2007 "as part of a sweeping revision of the penalties associated with sexual offenses and kidnapping," including the

offense of aggravated sexual assault, and that in each offense, the legislature "instructed sentencing courts to consider whether the interests of justice warranted a lesser sentence" than the presumptive sentence). The interests of justice analysis requires a sentencing court to consider the proportionality of the sentence to the offense and the defendant's rehabilitative potential. *Id.* ¶ 37.

¶70 First, the court must consider "the proportionality of the defendant's sentence in relation to the severity of his offense." *Id.* ¶¶ 36–37. In this regard, the court must consider the "gravity of the offense and the harshness of the penalty." *Id.* ¶ 42 (quotation simplified). The supreme court has identified the Utah Sentencing Commission's list of aggravating and mitigating circumstances as "a good starting point," while instructing that courts should also "consider all relevant facts raised by the parties about the defendant's crime in relation to the harshness of the penalty," such as the nature and magnitude of the crime, the "culpability of the offender," and the offender's motivation. *Id.* ¶¶ 42–46. Proportionality also requires the court to "compare the sentence being imposed to the sentences imposed for other crimes in Utah" so as to avoid arbitrary sentencing disparities. *Id.* ¶¶ 41, 47; *see also State v. Martin*, 2017 UT 63, ¶ 61 (stating that the "ultimate question at this stage . . . should be whether the overall sentence that the court plans to impose will be unusually high or low compared with the typical sentences for approximately similar offenses"). *But see Martin*, 2017 UT 63, ¶¶ 64–66 (explaining that, because this "is a daunting task," it is not one "that we can require our district courts to perform without prompting or guidance from counsel").

¶71 The court must also "appropriately weigh a defendant's potential for rehabilitation," which includes considering "all of the factors relevant to a defendant's rehabilitative potential" and taking into consideration the Board of Pardons and Parole's (the Board) role in our indeterminate sentencing scheme to monitor a defendant's behavior and accordingly adjust the maximum

sentence. *LeBeau*, 2014 UT 39, ¶¶ 37, 52, 54. Some factors that have bearing on a defendant's rehabilitation potential are the defendant's age, "the extent to which a defendant's crime was tied to alcohol or drug addiction," "the defendant's prospects for treatment," "[t]he extent to which a defendant's criminal history evidences continual violence," and the Sentencing Commission's guidelines as related to the defendant's "capacity for rehabilitation." *Id.* ¶ 54.

¶72 Norton asserts that the court failed to consider both the proportionality of his sentence and his potential for rehabilitation. With the above principles in mind, we address each below.

1. Proportionality

¶73 Norton argues that although the court considered the severity of his conduct, it did not consider whether the presumptive sentence was a proportional penalty for both convictions of aggravated sexual assault. He contends that the court did not conduct the proportionality analysis required by *LeBeau* and instead merely "assumed that [his] conduct merited a 15-years-to-life sentence and imposed sentence based on its assessment of whether [he] was entitled to 'mercy.'" He also contends that, under the circumstances of this case, his aggravated sexual assault convictions are comparatively less serious than other crimes, such as murder, which also carry presumptive prison sentences of fifteen years to life.

¶74 We conclude that Norton's contentions do not have merit. To begin with, Norton is correct that the court did not expressly explain its sentencing decision in terms of the proportionality rubric set out in *LeBeau*. But although Norton asked the court to reduce his sentence in the interests of justice, "he did not invoke the proportionality rubric in making his argument" for a reduced sentence. *See State v. Alvarez*, 2017 UT App 145, ¶ 5, 402 P.3d 191. Instead, Norton referred to subsection (3)(a) but then proceeded to provide the court only with considerations relating

to his past and his rehabilitative potential that he claimed justified a departure from the presumptive sentence. At no time did Norton invoke the proportionality rubric set out in *LeBeau* or object to the court's analysis for failing to explain the sentence it imposed in those terms. As a result, Norton cannot "now be heard to argue that the sentencing court was remiss in not articulating its views on proportionality." *See id.* ¶¶ 4–5 & n.4.

¶75 Moreover, there is no evidence to support Norton's contention that the court imposed its sentence by merely assuming that his conduct merited the presumptive sentence, without taking into account the relevant proportionality considerations presented by the parties. Rather, it is apparent from the sentencing transcript that the court, based upon the information provided to it, did consider whether the presumptive sentence was a proportional penalty to Norton's crimes. *See LeBeau v. State*, 2014 UT 39, ¶¶ 42, 46, 337 P.3d 254 (explaining that "courts should consider all relevant facts *raised by the parties* about the defendant's crime in relation to the harshness of the penalty," and reiterating that, even under an interests of justice analysis, "sentencing remains a highly fact-dependent endeavor" for which there is no "exhaustive list of factors" (emphasis added)).

¶76 First, the court indicated it had reviewed the PSI and the attached letters, which included extensive information regarding the aggravating and mitigating circumstances in the case as well as information regarding the violent nature of the aggravated sexual assaults, Norton's culpability in perpetrating them, and an ultimate recommendation for the statutory prison sentence on each count. The court also heard from both parties regarding their recommended sentence and the reasons for the recommendations. We presume that the court duly considered all such information in rendering its sentencing decision. *State v. Helms*, 2002 UT 12, ¶ 11, 40 P.3d 626; *accord State v. Moa*, 2012 UT 28, ¶ 35, 282 P.3d 985.

¶77 Further, the court explained its decision to impose the presumptive sentence by highlighting the various factors it recognized to be in play and explaining why it believed Norton's requested reduction was inappropriate in light of the circumstances. The court stated that, in its view, the case was "not a probation case." The court noted that Norton had had a "good past in many, many ways," with "very little that's negative," and that it recognized that "a marriage break up is complicated and difficult." It also recognized that the convictions resulted from "a concrete discrete event that took hours and not days." Yet the court explained that it accepted the jury's verdict, which demonstrated the jury's rejection of Norton's narrative of the events, and expressed its belief that the events did not happen at all the way Norton contended. In this regard, the court observed that Norton's conduct was "way, way, way over the line" and not of a kind that "our society can tolerate." The court explained that Norton was "entitled to some mercy, but not what [his] lawyer is asking and not what [Norton was] asking." It concluded that in the balance, given the severity of Norton's conduct and the "great" harm he inflicted, "a 15 to life term covers it."

¶78 Norton has not demonstrated this analysis was improper in light of the information presented to the court for sentencing. *See LeBeau*, 2014 UT 39, ¶ 42 (explaining that a court must consider all information related to proportionality that is "raised by the parties"). And to the extent that Norton disagrees with the court's weighing of the various factors presented to it regarding proportionality, Norton cannot demonstrate an abuse of discretion merely by disagreeing with the court's analysis or arguing on appeal that the court ought to have weighed certain factors more heavily.[19] *Alvarez*, 2017 UT App 145, ¶ 5.

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19. Norton also asserts that the presumptive sentence was inappropriate because "the jury rejected [Wife's] testimony that Norton used a gun," the sexual assaults "did not rise to the level (continued...)

¶79 Norton also contends that the court failed to compare his sentence with sentences imposed for other similar crimes. But Norton did not provide the court with comparative information regarding whether the presumptive sentence would "be unusually high or low compared with the typical sentences for approximately similar offenses." *State v. Martin*, 2017 UT 63, ¶ 61. Norton contended during the sentencing hearing that the "Court has seen some very serious and egregious offenses," and that "this case does not rise to the level of the kinds of egregious cases where we have individuals who suffered significant loss of life or impairment." Other than this imprecise assertion, he did not request that the court compare the presumptive sentence to

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(...continued)
of murder or aggravated sexual abuse of a child," and they did not "result in serious bodily injury." Contrary to Norton's assertions, the jury's verdict of aggravated sexual assault demonstrates that, at least as to the sexual assaults, the jury found that Norton perpetrated them under aggravating circumstances, and Norton has not challenged the sufficiency of the evidence regarding the aggravating factor for either aggravated sexual assault conviction on appeal. In light of the presence of an aggravating factor, we also reject Norton's contention that the court could not impose the presumptive sentence absent evidence of serious bodily injury. As the supreme court observed in *LeBeau v. State*, 2014 UT 39, 337 P.3d 254, in establishing the sentencing scheme for sexual offenses, the legislature "signaled its judgment that sexual crimes, which intrude on the fundamental bodily integrity of the victim like no others short of murder, are serious enough to warrant a sentence of [life without parole]" and that sexual crimes "represent an especially heinous form of bodily insult." *Id.* ¶¶ 49–50. Certainly, it is not beyond the pale for a sentencing court to conclude that in certain cases a sexual assault perpetrated under aggravating circumstances merits imposition of the presumptive fifteen years to life sentence.

other sentences imposed for similar crimes or provide the court with any actual comparisons of typical sentences for similar offenses to assist the court. In these circumstances, we will not fault the court for failing to conduct a sua sponte review of the Utah Code to "identify similar offenses" and then "compare their sentencing schemes to the sentence" it intended to impose on Norton. *See id.* ¶ 66 (explaining that this is "not a task that we can require our district courts to perform without prompting or guidance from counsel"). Nor will we shoulder the burden on appeal of "scouring the criminal code" in an effort to determine other sentencing schemes the court "ought to have considered in assessing the propriety of the sentence it imposed." *See id.* ¶ 65.[20]

2. Rehabilitation

¶80 Norton also argues that the sentencing court failed to consider his potential rehabilitation in imposing the presumptive prison terms. In particular, he claims that the sentencing court failed to consider all the relevant factors and the Board's role in determining his maximum sentence. He also contends that the court wrongly rejected much of the mitigating evidence.

¶81 We disagree. Norton has not rebutted the presumption that the court duly considered all of the information the parties presented with bearing on his rehabilitative potential. *See State v. Jaramillo*, 2016 UT App 70, ¶¶ 41–42, 372 P.3d 34 (presuming that a court considers the factors presented to it regarding a defendant's potential for rehabilitation). As discussed above, the

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20. Norton also contends that the court inappropriately applied principles of deterrence to reach its sentencing decision. Norton did not object on this basis below or suggest to the court that, when conducting an interest of justice analysis, applying principles of deterrence is inappropriate. As a result, we consider this argument waived and do not address it further. *See State v. Johnson*, 2017 UT 76, ¶ 16 n.4.

court "had the benefit of [the PSI] containing information about [Norton's] criminal and personal history." *See id.* ¶ 42. During sentencing, the court was also provided further information regarding Norton's potential for rehabilitation. Norton contended that his lack of criminal history, his desire to move forward productively in his life, his age, his acceptance that his relationship with Wife had ended, his amenability to supervision, and his desire to be released in "such a time that he could support his children," all justified a sentence reduction. He also cited letters submitted in support, which he contended showed that he had been a contributing community member before the incident. In contrast, the State contended that Norton's crimes had been "terrible" and violent, and it emphasized the fact that Norton had failed to take any responsibility for his actions and that he continued to maintain his "bogus" story. Wife's attorney addressed the court and expressed that, contrary to his contentions, Norton had shown himself to be unamenable to court supervision by blatantly defying the protective order that had been in place the night of the events. Wife also made a statement, reiterating her concern for her and her family's safety if Norton were ever released and stating that Norton blames her for his imprisonment and had lied under oath regarding the events.

¶82 Further, it is clear from the court's statements during sentencing that it considered the information the parties provided that had some bearing on Norton's rehabilitative potential. The court expressly acknowledged that Norton had a "good past," that he was well-liked by some people, that it would be "a long time in prison for someone [Norton's] age," and that Norton's crimes all occurred in one "concrete discrete event." *See LeBeau v. State*, 2014 UT 39, ¶ 54, 337 P.3d 254 (noting that a sentencing court should "consider all relevant factors when evaluating the defendant's rehabilitative potential," including a defendant's age and criminal history). But the court also expressed concern over Norton's failure to take responsibility for his actions. The court explained that "one of

the real difficulties here . . . is [Norton's] inability and unwillingness to follow the truth" related to the events. The court stated that it accepted the jury's verdict, and that in its opinion, the events did not happen "at all the way [Norton said] they happened." Likewise, the court expressed concern over the extreme nature of Norton's crimes.

¶83 To the extent that Norton argues that the court did not consider other relevant factors, such as the Board's role in our indeterminate sentencing scheme, Norton did not specifically raise the factors cited by *LeBeau* as relevant to rehabilitative potential, request the court to conduct a rehabilitative potential analysis, or raise the Board's role as a pertinent consideration. Indeed, the only mention of the Board throughout the sentencing hearing was made by the court, when it informed Norton that the Board would give him credit for the time he had already served and that it would handle collecting any restitution. As we explained above, we will not require a court to sua sponte consider factors on which Norton provided no information or did not raise for consideration. *See Martin*, 2017 UT 63, ¶¶ 64–66; *State v. Alvarez*, 2017 UT App 145, ¶¶ 4–5 & n.4, 402 P.3d 191.

¶84 Norton's other contentions on this point amount to disagreement with how the court weighed certain factors. Norton contends that the court failed to consider the mitigating evidence he offered and that the court ought to have weighed more heavily his age, his lack of criminal history, his employment skills, his desire to move forward with his life, the emotional devastation his divorce caused him, his acceptance of the divorce, and the fact that this amounted to one criminal episode with one victim.

¶85 But merely re-arguing certain factors on appeal and contending the court failed to appropriately weigh them is insufficient to demonstrate an abuse of discretion. *Alvarez*, 2017 UT App 145, ¶ 6. Moreover, the sentencing court is entitled to weigh some factors more heavily than others. *State v. Cline*, 2017

UT App 50, ¶ 7, 397 P.3d 652 (explaining that "not all aggravating and mitigating factors are equally important" because "one factor in mitigation or aggravation may weigh more than several factors on the opposite scale" (quotation simplified)). Here, the court was entitled to weigh the extreme and violent nature of the sexual assaults as well as Norton's failure to take responsibility for them more heavily than other factors offered in mitigation. *See State v. Martin*, 2017 UT 63, ¶¶ 70–71 (concluding that it was not an abuse of discretion for the sentencing court to impose a sentence reflective of the fact that the defendant failed "to take responsibility and express remorse" post-conviction for the crimes of which he was convicted, because this failure "cast serious doubt on [the defendant's] rehabilitative potential"); *LeBeau*, 2014 UT 39, ¶¶ 49–50 (suggesting that sexual crimes "intrude on the fundamental bodily integrity of the victim like no others short of murder" and that sexual crimes "represent an especially heinous form of bodily insult").

¶86 In sum, we conclude that the sentencing court did not exceed its discretion by not reducing Norton's sentence as requested in the interests of justice.

IV. Cumulative Error

¶87 Norton finally contends that we should reverse under the cumulative error doctrine. *See State v. White*, 2016 UT App 241, ¶ 14, 391 P.3d 311 (explaining that we will reverse under the cumulative error doctrine "only if the cumulative effect of multiple errors undermines our confidence that a fair trial was had" (quotation simplified)). But we have concluded that any potential error in the instructions related to the aggravated sexual assault counts was not harmful, that the court did not err in declining to give the requested lesser included offense instructions, and that the sentencing court did not err or abuse its discretion in imposing the presumptive fifteen-years-to-life sentence for both counts of aggravated sexual assault.

Accordingly, we decline to reverse on the basis of cumulative error.

CONCLUSION

¶88 For the foregoing reasons, we affirm Norton's convictions and the sentence imposed on him.

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of May, 2018, a true and correct copy of the attached OPINION was sent by standard or electronic mail to be delivered to:

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