APPENDIX

TABLE OF APPENDICES

Appendix A

State v. Ray

Court of Appeals of Utah

July 29, 2022, Filed

No. 20121040-CA

Reporter
2022 UT App 95 *; 516 P.3d 329 **; 2022 Utah App. LEXIS 97 ***; 2022 WL 3008921

STATE OF UTAH, Appellee, v. ERIC MATTHEW RAY, Appellant.

Prior History: **[***1]** Fourth District Court, Provo Department. The Honorable Lynn W. Davis. No. 101401511.

State v. Ray, 2022 UT App 39, 509 P.3d 791, 2022 Utah App. LEXIS 41, 2022 WL 964517 (Mar. 31, 2022)

Counsel: Douglas J. Thompson, Attorney for Appellant.

Sean D. Reyes and Karen A. Klucznik, Attorneys for Appellee.

Judges: JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES DAVID N. MORTENSEN and JILL M. POHLMAN concurred.

Opinion by: GREGORY K. ORME

Opinion

[331]** Amended Opinion*

ORME, Judge:

[*P1] On remand from our Supreme Court, Eric Matthew Ray again challenges his conviction of forcible sexual abuse, arguing that Utah Code section 76-5-406(2)(k) is unconstitutionally vague on its face and that the trial court erred in denying him access to a portion of his victim's medical records. We affirm.

[332]** BACKGROUND[1]

[*P2] In late 2008, Ray, then a married twenty-seven-year-old law student in Illinois, sent a text message to a wrong number. R.M., then a fourteen-year-old girl living in Utah, was the recipient of the misdirected text. R.M. informed Ray of his mistake and of her age, but the two began communicating daily through text, social media, and telephone conversations. They initially discussed topics such as politics, religion, school, and Ray's marital problems, but their conversations eventually took a romantic turn. R.M. testified that their "conversations got a little bit more intimate," **[***2]** and they began discussing sex, love, and marriage. These discussions included talk of marriage in a temple of their shared religion and of R.M. attending art school in Illinois.

[*P3] In March 2010, Ray flew to Utah during his spring break to visit R.M., who by that time was fifteen years old. Over the course of Ray's four-day visit, with the exception of the third day, during which R.M. was grounded, Ray and R.M. would go to Ray's hotel room and engage in progressively serious sexual activity.

[*P4] On the first day of his visit, Ray picked R.M.

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* This amended opinion replaces the opinion issued March 31, 2022, *State v. Ray*, 2022 UT App 39, 509 P.3d 791. Footnotes 8 and 19 have been amended to discuss the law in effect at the relevant time.

[1] "When reviewing a jury verdict, we examine the evidence and all reasonable inferences in a light most favorable to the verdict, reciting the facts accordingly. We present conflicting evidence only when necessary to understand issues raised on appeal." *State v. Ray*, 2020 UT 12, n.2, 469 P.3d 871 (quotation simplified).

up from school in his rental car and took her to his hotel. There, Ray gave R.M. her "first kiss and then there was a lot of kissing and making out going on" for the next several hours. R.M. testified at trial that while lying in bed together, Ray touched her "bra and underwear areas" over her clothing. R.M. acknowledged that this contradicted her testimony at an earlier preliminary hearing, during which she stated that they had just kissed and that nothing else had happened on that first day. When they had finished, Ray dropped R.M. off at a corner near her house.

[*P5] On the second day, R.M.'s two friends accompanied R.M. to the hotel. While the friends **[***3]** went swimming at the hotel's pool, Ray and R.M. disrobed to their underwear and began "kissing on the bed" for about an hour. R.M. testified at trial that Ray again touched her "bra and [her] underwear areas" and that he also touched her buttocks and "momentarily" reached under her bra. This trial testimony also contradicted her testimony at the preliminary hearing that Ray never touched under her bra or her buttocks. R.M. testified at trial that she also touched Ray's "private parts" over his underwear, and when her friends returned to the room, the four played a game of "Sexy Truth or Dare," during which Ray showed them a picture he had taken of two sex toys.

[*P6] On the third day, because R.M. was grounded due to poor grades, Ray met her in her high school parking lot, and they worked on her homework for about an hour in the rental car. R.M. testified at trial that "nothing happened" that day other than homework.

[*P7] On the fourth day—their last day together—Ray decorated the hotel room with flowers and candles. R.M. took a shower and, per Ray's earlier request via text, shaved her pubic area. R.M. testified at trial that she exited the bathroom naked to find Ray also naked. They began kissing **[***4]** and eventually moved to the bed, where Ray touched the "outside" of R.M.'s vagina with his fingers for "[a] few minutes."[2] Afterward, they watched a movie from the *Twilight* franchise while in bed and later went out to eat. This contradicted R.M.'s testimony at the preliminary hearing that after she showered and shaved, she "[g]ot dressed and went back into his room," where they watched the movie together and then began engaging in sexual activity.

[*P8] They left the hotel room to get something to eat, and when they returned to the hotel room, the two discussed the possibility of sexual intercourse. R.M. told Ray that she "wasn't ready for that," and he said "he was okay to wait."[3] While still at the hotel, Ray **[**333]** gave R.M. a candle, a tee shirt he had worn, and a vibrator to remember him by. In return, R.M. gave Ray a tee shirt she had worn.

[*P9] When Ray returned to Illinois, the two continued to communicate via text message for just under a week until R.M. was hospitalized with meningitis. During her ten-day hospital stay, R.M. spent some time in the ICU and was given numerous medications. R.M. stated that she was "on and off conscious" during her stay, while her mother (Mother) testified that **[***5]** R.M. "was awake and asleep, awake and asleep," but that she was never "unconscious."

[*P10] R.M. notified Ray of her condition when she was admitted to the hospital, but she was unable to communicate with him thereafter. After unsuccessfully trying to get ahold of R.M., Ray called Mother posing as Edward Matthews, a fictional classmate of R.M.'s, and asked about her condition. Thereafter, Ray continued to contact R.M.'s parents and the hospital at least once a day inquiring after her condition and offering his own theories as to the type of infection R.M. had. At one point, he informed R.M.'s parents via email that R.M. had a vaginal infection, which Mother considered "a red flag."

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[2] R.M. testified at the preliminary hearing that Ray digitally penetrated her vagina.

[3] R.M. also testified at trial that, prior to this conversation, Ray had performed oral sex on her and that she reciprocated, but the jury did not return a unanimous verdict on two counts of forcible sodomy that correlated with this testimony.

Concerned, Mother looked through R.M.'s social media page and found a picture containing two tags: Ray and Edward Matthews. Mother also discovered many pictures of Ray on R.M.'s cellphone. When Ray later called R.M.'s phone, her parents told him "to leave her alone."

[*P11] R.M.'s parents contacted a neighbor in law enforcement, who in turn asked a detective (Detective) to look into the matter. On March 24, 2010, Detective interviewed R.M. at the hospital, whom he described at trial as being "in a sedated state" and "slow **[***6]** to respond." Detective also stated that R.M.'s responses quickly became "slurred," "groggy," and "incoherent." In his report, Detective wrote, "I was informed that [R.M.] had been given a dose of pain medication that made it difficult for her to speak clearly, but that she could understand what I was asking of her, and that she could answer the questions I would ask."

[*P12] Although the interview lasted only about ten minutes due to R.M.'s condition, R.M. managed to confirm to Detective that Ray and Edward Matthews were the same person and to explain how they first began exchanging text messages. She told Detective that they began expressing romantic feelings toward each other and that Ray visited her in Utah earlier that month. She said that on the first day of Ray's visit, she met Ray in her high school parking lot and that "they remained there for several hours" in Ray's car. She said that they "kissed on the lips multiple times, and talked about various topics." This was at odds with R.M.'s later trial testimony that they went back to Ray's hotel room and that, in addition to kissing, Ray touched her "bra and [her] underwear areas" over her clothing.

[*P13] R.M. then told Detective that she **[***7]** did not see Ray again until the third day. This account differed from R.M.'s later trial testimony that she and two friends went back to Ray's hotel on the second day, and that while the friends were at the pool, Ray again touched her "bra and underwear areas" and "momentarily" reached under her bra. R.M. told Detective that on the third day, they again spent time in Ray's rental car in the high school parking lot "talking and kissing" for "three to four hours." But this time, she said that Ray also put his hands down her pants and attempted to "finger" her. Ray removed his hand after she told him to because she had a yeast infection and the rubbing was causing her pain.[4] R.M. also told Detective that she had sent Ray approximately 100 nude images of herself.[5]

[*P14] At the time, R.M. did not disclose to Detective any of the additional details regarding **[**334]** her interactions with Ray that were later presented at trial. When Ray's counsel asked why not, R.M. responded that she "was in the hospital" and "was very sick."

[*P15] Even after being discharged from the hospital, R.M. was still "extremely ill," "found it very difficult to sit" or to "communicate for long periods of time," and became nauseated "every **[***8]** time she moved." Based on these extenuating circumstances, and based on R.M.'s adverse reaction to Detective whenever he brought up the investigation, Detective arranged for R.M.'s adult sister (Sister) to interview her at home. During that interview, R.M. disclosed additional details that she had not disclosed in her interview at the hospital, which Sister recorded in written form.[6]

[*P16] Approximately one month after the hospital interview, Detective, posing as R.M., began communicating with Ray over social media with the aim of getting "more information as to whether there had been any criminal activity." At one point,

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[4] R.M.'s trial testimony that "nothing happened" in the car on that day other than homework contradicted these statements. At trial, Ray's counsel elicited testimony from R.M. that she initially told Detective that Ray had attempted to "finger" her in the car that day.

[5] At trial, R.M. denied sending nude photographs of herself to Ray, and Ray's counsel elicited testimony from R.M. that an examination of her phone did not reveal any nude photographs.

[6] The trial testimony is vague as to what R.M. disclosed to Sister. But Sister's written record of the interview reveals that R.M. told Sister that she visited Ray's hotel room multiple times, Ray played "Sexy Truth or Dare" with her and her two friends, he gave her a sex toy, they touched each other's genitals over their underwear, he touched her breast over her bra, they performed oral sex on each other, and he tried to "finger" her.

Detective asked whether Ray had told his wife about "going down my pants." Ray responded: "no I have not violated any laws so ther ewould be noting to tell."[7] At another point, Detective asked "what if I was pregnant or soemthing?" to which Ray replied, "we didnt have sex and im sure if you were pregnant, i would have found out." Detective responded, "yeah but you touched me there what if sperm was on your hand," which Ray did not deny, but instead replied, "your parents would have found a way to get me arrested." Later on in the conversation, Ray stated: "we wanted to [have **[***9]** sex] when we were kissing," "but you wanted to . . . stay a virgin and i didnt want to hurt you in any way and we didnt have sex." Ray later described giving R.M. her first kiss and how they then "got into bed and kissed for the rest of the day."

[*P17] Eventually, Ray and "R.M." arranged for Ray to make a second visit to Utah. When Ray arrived, he was arrested. Detective subsequently interviewed Ray, during which Ray confirmed that his relationship with R.M. began as a result of him sending a text message to a wrong number. Ray further related how they began discussing religion, politics, and personal matters and how they eventually began developing feelings for each other. He also confirmed that he used the pseudonym Edward Matthews.

[*P18] The State charged Ray with one count each of forcible sexual abuse and object rape, and two counts of forcible sodomy. To prove lack of consent, the State relied on Utah Code section 76-5-406(2)(k) (the enticement provision), which provides that forcible sexual abuse and other sexual offenses are without consent if "the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and entices or coerces the victim to submit **[***10]** or participate, under circumstances not amounting to . . . force or threat." *See* Utah Code. Ann. § 76-5-406(2)(k) (LexisNexis Supp. 2021).[8]

[*P19] At a preliminary hearing, R.M. testified that she did not feel well when Detective interviewed her at the hospital and that her memory at the time was affected "just a little bit." She also stated that she "remembered better" when she spoke with Sister a few weeks later. And Detective testified that the interview did not last long because R.M. was "[i]ntoxicated" and "not very articulate"—that it was as if "her tongue wasn't working" and that "[i]t gradually got worse and worse."

[*P20] Following the preliminary hearing, Ray served a supplemental discovery request on the State for R.M.'s medical records, "including **[**335]** a list of medications and dosage of those medications she was taking during her stay in the hospital as well as after her release." Ray stated that the information was "critical to the defense . . . because [R.M.] gave statements to the police as well as to other people (i.e. her sister) while under the influence of potentially mind and memory-altering drugs."

[*P21] Approximately one month later, Mother submitted a medical record disclosure form authorizing the hospital to release **[***11]** R.M.'s "medications & doses" and "diagnosis" to Detective for the purpose of the "criminal investigation where [R.M.] was the victim." She did not check boxes on the form allowing for the release of, among other things, "Discharge Summary," "Consultation(s)," and "Progress notes." Mother also acknowledged on the form that she understood that the hospital "cannot guarantee that the Recipient will not redisclose [R.M.'s] health information to a third party."

[*P22] The State received 22 pages of R.M.'s medical records. The State disclosed 11 of those pages, consisting of a "Medications Given Report," to Ray. The hospital apparently released the remaining pages in error. The State filed a motion

[7] Throughout this opinion, we quote the various text messages verbatim, including typos, adding bracketed material only when necessary for clarity.

[8] Because the applicable provisions of the Utah Code in effect at the relevant time do not materially differ from those currently in effect, except where otherwise noted, we cite the current version of the code for convenience.

under rules 14(b) and 16 of the Utah Rules of Criminal Procedure, requesting that the trial court conduct an in camera review[9] of the remaining pages for relevance and that it "determine what records, if any, the State must disclose to the defense." Ray did not object to this requested procedure.

[*P23] At a hearing following the court's review of the records, the court stated that it had determined that "there wasn't anything in connection with the medical report that would be relevant relative to the . . . case." When asked whether it had looked for "things **[***12]** that affected [R.M.'s] memory," the court replied that it "was looking for all of that." The court later issued a written order stating, "After careful review of the submitted medical records, the court finds no relevancy of these records to this case" and that "in providing defense counsel with copies of the 'Medications Given Report,'" the State "has complied strictly and thoroughly with the defendant's discovery request."

[*P24] Prior to trial, Ray filed two motions to dismiss. One motion argued that the enticement provision was unconstitutionally vague because the term "entice" was not sufficiently defined to give Ray notice that his conduct constituted enticement. The other motion argued that "the State failed to present sufficient evidence at the preliminary hearing . . . to establish probable cause." Specifically, he contended that "[t]he State's evidence presented at the preliminary hearing failed to establish probable cause [that he] enticed or coerced R.M. to engage in any sexual conduct without her consent."

[*P25] The trial court denied both motions. It concluded that the enticement provision was not unconstitutionally vague "[b]ecause the words used to describe a proscribed conduct **[***13]** are both commonly used and clearly defined" by caselaw.

[*P26] Turning next to Ray's sufficiency-of-the-evidence argument, the court found evidence that Ray "use[d] religious principles to foster a sexual relationship" with R.M. by promising her that "he would 'take her to the temple, marry her.'" The court continued that "[i]n the mind of an impressionable young girl, it's probable that this promise would create a veneer of wholesomeness and goodness on a relationship which is manifestly abhorrent." And "[b]y manipulating [R.M.'s] religious beliefs, [Ray] likely was able to get [her] to act sexually in ways she might not otherwise act." The court also found evidence that Ray "spent 18 months plus cultivating the relationship" and "groomed [R.M.] by saturating himself into her life" with "texting, instant messaging, [and] speaking by video." There was also evidence that Ray "used teen pop culture to manipulate" R.M. by donning the pseudonym Edward Matthews "as a reference to the popular *Twilight* series, [implicating] the series's theme of forbidden love and desire and danger, etc." Based on this, the court concluded that the State presented sufficient **[**336]** evidence to establish probable cause **[***14]** that Ray enticed R.M.

[*P27] The case then proceeded to trial, following which the jury convicted Ray on the forcible sexual abuse charge but acquitted him on the object rape charge and could not reach a unanimous verdict on either forcible sodomy charge. Ray appealed his conviction to this court, raising several issues. While the appeal was then pending, this court granted Ray's motion for a rule 23B remand, during which an expert witness for the defense reviewed all 22 pages of R.M.'s medical records. *See generally* Utah R. App. P. 23B.

[*P28] In our prior opinion in this case, *State v. Ray (Ray I)*, 2017 UT App 78, 397 P.3d 817, *rev'd*, 2020 UT 12, 469 P.3d 871, we held that Ray's trial counsel provided constitutionally ineffective assistance for failing to request a jury instruction defining the term "indecent liberties" under Utah Code section 76-5-404(1). *See* 2017 UT App 78, ¶¶ 17-23, 397 P.3d 817. We vacated Ray's conviction and remanded for a new trial on that basis. *See id.* ¶ 28. With the exception of Ray's argument that we should simply reverse his

[9] "With origins in Latin, where 'camera' means 'chamber,' in camera review or inspection refers to a trial judge's private consideration of evidence." *State v. Betony*, 2021 UT App 15, ¶ 17 n.4, 482 P.3d 852 (quotation simplified).

conviction because R.M.'s testimony was inherently improbable, which argument we rejected, *see id.* ¶ 27, we did not have occasion to address the remaining arguments Ray raised on appeal in view of our decision to vacate his conviction and remand for a new trial.

[*P29] Our Supreme Court granted certiorari and issued *State v. Ray* (*Ray II*), 2020 UT 12, 469 P.3d 871, in which it concluded **[***15]** that Ray's trial counsel had not performed deficiently in not requesting an instruction on "indecent liberties." *See id.* ¶¶ 25, 45. In so doing, the Court clarified, among other things, that the standard for the deficient performance prong of the ineffective assistance of counsel inquiry "is not whether counsel's course of conduct was strategic, but whether it fell below an objective standard of reasonableness." *Id.* ¶ 33. The Court then reversed our decision in *Ray I*, reinstated Ray's conviction, and remanded for us "to address Ray's remaining claims." *Id.* ¶ 46.

[*P30] Following remand to this court, Ray filed a stipulated motion to allow replacement briefs on the ground that "[n]early five years ha[ve] passed since Ray's opening brief was filed, that includes five years of new cases potentially relevant to, persuasive toward, or even binding upon the remaining briefed issues." We granted this motion and later, upon Ray's request, clarified that based on our Supreme Court's mandate "to address Ray's remaining claims," *id.*, the replacement briefs were to be limited to "the claims that were initially raised by Ray on appeal but that were not addressed by this court in its prior opinion."

ISSUES AND STANDARDS OF REVIEW

[*P31] Ray first **[***16]** argues that the trial court incorrectly ruled that the enticement provision was not unconstitutionally vague.[10] "Whether a statute is unconstitutionally . . . vague is a question of law reviewed for correctness." *State v. Jones*, 2020 UT App 31, ¶ 27, 462 P.3d 372 (quotation simplified). The party challenging a statute "as unconstitutional bear[s] the burden of demonstrating its unconstitutionality." *State v. Jones*, 2018 UT App 110, ¶ 9, 427 P.3d 538 (quotation simplified). Furthermore, "[a] statute is presumed constitutional, and we resolve any reasonable doubts in favor of constitutionality." *State v. Mattinson*, 2007 UT 7, ¶ 6, 152 P.3d 300.

[*P32] Next, Ray argues that the trial court erred in denying him access to the remaining eleven pages of R.M.'s medical **[**337]** records. "We review a trial court's denial of a discovery motion for abuse of discretion."[11] *State v. Santonio*, 2011 UT App 385, ¶ 12, 265 P.3d 822. Additionally, "we will reverse only if a reasonable likelihood exists that absent the error, the result would have been more favorable to the defendant." *State v. Leech*, 2020 UT App 116, ¶ 31, 473 P.3d 218 (quotation simplified). *See* Utah R. Crim. P. 30(a).

ANALYSIS

I. Vagueness Challenge

[*P33] The enticement provision states that various sexual offenses, including forcible sexual abuse, are without consent if "the victim is 14 years of age or older, but younger than 18 years of age, and the actor is more than three years older than the victim and *entices* or coerces **[***17]** the victim to submit or participate, under circumstances not amounting to . . . force or threat." Utah Code Ann. § 76-5-406(2)(k)

[10] Ray raises two additional constitutional challenges to the enticement provision. First, he argues that the enticement provision is unconstitutional as applied to him because it criminalized his fundamental rights under the Due Process Clause and violated the First Amendment. In his view, "R.M. could legally consent to sexual conduct" and could marry "if voluntarily and with premarital counseling." In that context, he asserts that "[i]ntimate relationships involved in creating a family are a fundamental element of personal liberty" and that "adults have First Amendment rights to sexual expression," both of which the enticement provision unconstitutionally criminalized in his case. Second, Ray argues that the enticement provision is unconstitutionally overbroad. On remand, we are limited by our Supreme Court's mandate "to address Ray's remaining claims." *Ray II*, 2020 UT 12, ¶ 46, 469 P.3d 871. Because Ray did not raise these issues in his original brief, we have no occasion to address them here.

[11] The State asserts that this issue is not preserved. Because we resolve the merits of the claim in the State's favor, we need not address this preservation argument. *See State v. Kitches*, 2021 UT App 24, ¶ 28, 484 P.3d 415 ("If the merits of a claim can easily be resolved in favor of the party asserting that the claim was not preserved, we readily may opt to do so without addressing preservation.") (quotation simplified).

(LexisNexis Supp. 2021) (emphasis added). The purpose of the enticement provision, "in combination with the statutory section defining the crime, is to prevent mature adults from preying on younger and inexperienced persons." *State v. Gibson*, 908 P.2d 352, 356 (Utah Ct. App. 1995) (quotation simplified). It "protect[s] young persons from sexual exploitation by older, more experienced persons until they reach the legal age of consent and can more maturely comprehend and appreciate the consequences of their sexual acts." *State v. Scieszka*, 897 P.2d 1224, 1227 (Utah Ct. App. 1995) (quotation simplified). Ray argues that the enticement provision is unconstitutionally vague on its face.[12]

[*P34] "A statute may be unconstitutional either on its face or as applied to the facts of a given case." *State v. Herrera*, 1999 UT 64, ¶ 4 n.2, 993 P.2d 854. A facial challenge is the most difficult of the two "because it requires the challenger to establish that no set of circumstances exists under which the statute would be valid."[13] *Id.* (quotation simplified). *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). Furthermore, facial vagueness challenges to a statute are appropriate only if First Amendment rights or other constitutionally protected conduct are implicated.[14] **[**338]** *See State v. Green*, 2004 UT 76, ¶ 44, 99 P.3d 820 (stating that "'[vagueness] challenges to statutes **[***18]** which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand'") (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). *See also United States v. Gaudreau*, 860 F.2d 357, 360 (10th Cir. 1988) (stating that an appellant may raise a facial vagueness challenge only (1) "when it threatens to chill constitutionally protected conduct, especially conduct protected by the First Amendment"; or (2) "in some instances . . . on pre-enforcement review") (footnote omitted).

[*P35] Here, the State argued at trial that Ray enticed R.M. by "play[ing] right into" the tendency of teenage girls to "fall[] in love with fantasy" and "playing into [R.M.'s] young, . . . 15-year-old mind" through, among other things, the cultivation of an 18-month relationship, the "constant barrage of IMs

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[12] Ray also, at least nominally, raises an as-applied vagueness challenge to the enticement provision, which requires him to establish "that the statute was applied to him . . . in an unconstitutional manner." *State v. Herrera*, 1999 UT 64, ¶ 4 n.2, 993 P.2d 854. Although Ray raised an as-applied argument in his original brief to this court, he argues in his replacement brief, under the as-applied heading, that the enticement provision is overbroad and subject to strict scrutiny because it infringes on his First Amendment rights to freedom of speech and association and on his fundamental rights to marriage and procreation. As previously discussed, *see supra* note 10, because Ray did not raise these other constitutional issues in his original brief, we have no occasion to address them on remand.

[13] Ray argues that because "[t]his is a First Amendment case, some valid applications cannot save [the enticement provision] as [his] speech was not clearly proscribed." Although Ray correctly states that an exception to this general rule arises in the First Amendment context, it does so in the form of an overbreadth challenge. *See United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010) ("[A] Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression."); *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) ("There are two main ways to succeed on a facial challenge in the First Amendment context. A plaintiff may demonstrate either that no set of circumstances exists under which the law would be valid, i.e., that the law is unconstitutional in all of its applications, or that the law is overbroad because a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep.") (quotation simplified). The exception therefore does not apply to Ray's vagueness challenge.

[14] Additionally, "when a party raises both facial and as-applied vagueness challenges, '[a] court should . . . examine the complainant's conduct before analyzing other hypothetical applications of the law.'" *State v. Pence*, 2018 UT App 198, ¶ 19, 437 P.3d 475 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). This is because "a defendant 'who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *State v. Jones*, 2018 UT App 110, ¶ 16, 427 P.3d 538 (quoting *Village of Hoffman*, 455 U.S. at 495). And because "a Fifth Amendment vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression," this "rule makes no exception for conduct in the form of speech." *Holder*, 561 U.S. at 20. Thus, "[u]nder this rule, a 'court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.'" *Lehi City v. Rickabaugh*, 2021 UT App 36, ¶ 40, 487 P.3d 453 (quoting *Village of Hoffman*, 455 U.S. at 495).

Here, because we address only Ray's facial challenge to the enticement provision, we do so without first addressing Ray's conduct.

and texting," discussing politics and religion, "[t]alking about . . . infatuation," making long term plans, and discussing temple marriage. Because this conduct implicates the First Amendment right to free speech and of association, we may proceed to address Ray's facial vagueness challenge.[15]

[*P36] "Vagueness questions are essentially procedural due process issues, i.e., whether the statute adequately notices the proscribed conduct." *State v. MacGuire*, 2004 UT 4, ¶ 14, 84 P.3d 1171 (quotation simplified). *See State v. Davie*, 2011 UT App 380, ¶ 14, 264 P.3d 770 ("[T]he vagueness doctrine is rooted in **[***19]** the Due Process Clauses of the Fifth and Fourteenth Amendments."). "A statute is impermissibly vague if it either (a) 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (b) 'authorizes or even encourages arbitrary and discriminatory enforcement.'" *State v. Ansari*, 2004 UT App 326, ¶ 42, 100 P.3d 231 (quoting *Hill v. Colorado*, 530 U.S. 703, 732-33, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)). A statute is not unconstitutionally vague so long as it "is sufficiently explicit to inform the ordinary reader what conduct is prohibited." *MacGuire*, 2004 UT 4, ¶ 14, 84 P.3d 1171 (quotation simplified). *Cf. id.* ¶ 32 ("[B]ecause the meaning of the term is readily ascertainable, its inclusion does not encourage or facilitate arbitrary and discriminatory enforcement.").

[*P37] "The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and other pertinent law[.]" *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). *See United States v. Williams*, 553 U.S. 285, 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008) (stating that terms found to be void for vagueness lack "statutory definitions, narrowing context, or settled legal meanings"). Additionally, the constitutionality of a law may not be called into doubt simply on the basis that it "call[s] for the application of a qualitative standard." *Johnson v. United States*, 576 U.S. 591, 603-04, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). But "the failure of persistent **[**339]** efforts to establish a standard can provide evidence of vagueness." *Id.* at 598 (quotation simplified). In the case before **[***20]** us, based on the plain language of the enticement provision and relevant caselaw, we hold that the enticement provision is not unconstitutionally vague on its face.

[*P38] Although our Legislature did not define the term "entice" as used in the enticement provision, it is a word that is both "commonly used and clearly defined." *State v. Gallegos*, 2009 UT 42, ¶ 16, 220 P.3d 136 (discussing "entice" and other terms in the context of Utah Code section 76-4-401), *abrogated on other grounds by Miller v. Utah Dep't of Transp.*, 2012 UT 54, 285 P.3d 1208. *See United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007) (stating, in the context of 18 U.S.C. § 2422(b), that certain words, including "entice," "though not defined in the statute, are words of common usage that have plain and ordinary meanings"); *United States v. Dhingra*, 371 F.3d 557, 562 (9th Cir. 2004) (same). "In fact, '[t]he likelihood that anyone would not understand'" such a common term "'seems quite remote.'" *Gallegos*, 2009 UT 42, ¶ 16, 220 P.3d 136 (alteration in original) (quoting *Hill*, 530 U.S. at 732). And a defendant "cannot simply inject doubt as to the meaning of words where no doubt would be felt by the normal reader." *Id.* (quotation simplified).

[*P39] Utah courts have previously relied on dictionary definitions to define "entice" when addressing the enticement provision. In *State v. Gibson*, 908 P.2d 352 (Utah Ct. App. 1995), this court noted that "Black's Law Dictionary defines 'entice' as 'to wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax or seduce'" and "'[t]o lure, **[***21]** induce, tempt, incite, or persuade a person to do a thing.'" *Id.* at 356 (quoting *Entice*,

[15] Our Supreme Court has held that "soliciting, seducing, luring, or enticing a known minor to actually engage in unlawful sexual activity . . . is not afforded First Amendment protections." *State v. Gallegos*, 2009 UT 42, ¶ 19, 220 P.3d 136 (quotation simplified), *abrogated on other grounds by Miller v. Utah Dep't of Transp.*, 2012 UT 54, 285 P.3d 1208. Nevertheless, the First Amendment is still implicated here because we must determine whether the enticement provision gave sufficient notice of what constitutes prohibited conduct or speech.

Black's Law Dictionary 531 (6th ed. 1990)). *See State v. Scieszka*, 897 P.2d 1224, 1226 (Utah Ct. App. 1995) (referencing Black's Law Dictionary and Webster's New 20th Century Dictionary definitions of "entice"). And in *State v. Billingsley*, 2013 UT 17, 311 P.3d 995, our Supreme Court similarly noted that "*Black's Law Dictionary* defines 'entice' as '[t]o lure or induce; esp., to wrongfully solicit (a person) to do something,'" *id.* ¶ 13 (quoting *Entice*, Black's Law Dictionary 611 (9th ed. 2009)), and that "*Webster's Third New International Dictionary* defines it as 'to draw on by arousing hope or desire,'" *id.* (quoting *Entice*, Webster's Third New Int'l Dictionary 757 (1961)).

[*P40] Based on the dictionary definitions, this court has held that under the enticement provision, "the 'enticement' of a teenager by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires which would not otherwise have occurred." *Gibson*, 908 P.2d at 356. *See id.* at 356 n.3 (noting that "[o]ther courts have defined 'entice' similarly"). And later, our Supreme Court clarified that the "inquiry under the statute should focus on the defendant's conduct, not the victim's sexual experience." *Billingsley*, 2013 UT 17, ¶ 13, 311 P.3d 995. Utah courts have further observed that the determination **[***22]** of whether a defendant's conduct amounts to enticement is based on "the totality of the facts and circumstances." *Gibson*, 908 P.2d at 356. *Accord Scieszka*, 897 P.2d at 1227. And borrowing from caselaw on the "similar issue" of "indecent liberties," Utah courts have suggested that relevant factors in such an inquiry may include

> (1) the nature of the victim's participation (whether the defendant required the victim's active participation), (2) the duration of the defendant's acts, (3) the defendant's willingness to terminate his conduct at the victim's request, (4) the relationship between the victim and the defendant, and (5) the age of the victim.

Scieszka, 897 P.2d at 1227 (quotation simplified). *Accord Gibson*, 908 P.2d at 356.

[*P41] Additionally, in *Gallegos*, our Supreme Court rejected a vagueness challenge to another statute's use of "entice." *See* 2009 UT 42, ¶¶ 21-22, 220 P.3d 136. The statute in question provided that "a person is guilty of enticing a minor over the internet if he or she 'knowingly uses a computer to solicit, seduce, lure, or *entice* . . . a minor or a person the defendant believes to be a minor to engage in sexual activity which is a violation of state law.'" *Id.* ¶ 16 (quoting Utah Code Ann. § 76-4-401 (LexisNexis 2008)) (emphasis added). The Court held that the statute in question was not unconstitutionally **[**340]** vague because "the words used **[***23]** to describe the proscribed conduct"—including "entice"—"are both commonly used and clearly defined," and because "the likelihood that anyone would not understand any of these common words seems quite remote." *Id.* (quotation simplified). We conclude that the same applies to our Legislature's use of "entice" in the enticement provision context. Additionally, "because the meaning of the term is readily ascertainable, its inclusion does not encourage or facilitate arbitrary and discriminatory enforcement." *State v. MacGuire*, 2004 UT 4, ¶ 32, 84 P.3d 1171.

[*P42] Ray contends that *Gallegos* is distinguishable because our Supreme Court also noted that "any concern about lack of notice is ameliorated by the fact that [Utah Code section 76-4-401] contains a scienter requirement, i.e., that the person must 'knowingly' solicit a minor," 2009 UT 42, ¶ 16 n.1, 220 P.3d 136 (quotation simplified), and because the statute at issue in that case "prohibits an individual from 'solicit[ing], seduc[ing], lur[ing], or entic[ing]' a known minor to actually *engage* in unlawful sexual activity," *id.* ¶ 19 (quoting Utah Code Ann. § 76-4-401(2)(b)(ii)) (emphasis in original). Ray asserts that unlike Utah Code section 76-4-401, the enticement provision (1) contains no such scienter requirement and (2) does not "require[] enticement to engage in illegal sex." We disagree that these observations render **[***24]** *Gallegos* inapplicable.

[*P43] First, the Utah Criminal Code provides that "when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability"—as is the case with both Utah Code section 76-5-404's definition of forcible sexual

abuse and with the enticement provision—"intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code Ann. § 76-2-102 (LexisNexis 2018). *See State v. Barela*, 2015 UT 22, ¶ 26, 349 P.3d 676 (requiring mens rea for the non-consent element of a sex crime). Accordingly, by virtue of Utah Code section 76-2-102, the enticement provision has a scienter provision.

[*P44] And in any event, although the United States Supreme Court has stated that "a scienter requirement may mitigate a law's vagueness," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), it "has never suggested that the absence of a mens rea requirement, by itself, renders a statute unconstitutional," *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 973 (9th Cir. 2003). *See Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Karlin v. Foust*, 188 F.3d 446, 463 (7th Cir. 1999). And in *Gallegos*, our Supreme Court did not hold that the statute in that case would be unconstitutionally vague but for its scienter requirement. *See* 2009 UT 42, ¶¶ 16-22, 220 P.3d 136. Instead, in addressing the first prong of the vagueness test—that the statute "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," *id.* ¶ 15 (quotation simplified)—the Court focused its analysis on **[***25]** the plain meaning of the words of the statute and rejected the appellant's argument on that basis, *see id.* ¶¶ 16-17. The Court merely added in a footnote that "moreover, any concern about lack of notice is ameliorated by the fact that the [statute] contains a scienter requirement." *Id.* ¶ 16 n.1 (quotation simplified).

[*P45] Second, turning to Ray's assertions that *Gallegos* is distinguishable from the present case on the ground that the enticement provision does not require "enticement to engage in illegal sex," Ray does not elaborate on this argument other than to reiterate that "underlying crimes are absent" in the enticement provision. This argument misses the point. Utah Code section 76-5-406 lists several unlawful sexual offenses that are committed when there is lack of consent—including the offense of forcible sexual abuse of which Ray was convicted. *See* Utah Code Ann. § 76-5-406(2) (LexisNexis Supp. 2021); *id.* § 76-5-404(1) (defining forcible sexual abuse). The section then provides several circumstances, including the one contained in the enticement provision, under which the victim is not considered to have given consent. *See id.* § 76-5-406(2). Thus, if a defendant engages in sexual activity with a victim without the victim's consent, it is clear that the non-consensual sexual activity constitutes **[***26]** **[**341]** "illegal sex," the specific charge of which, depending on the facts of the case, is listed in section 76-5-401(2) and defined in greater detail elsewhere in the Utah Criminal Code. *See generally id.* §§ 76-5-401 to - 416 (2017 & Supp. 2021).

[*P46] Lastly, Ray asserts that the enticement provision is unconstitutionally vague because each time it "is before the court, a new test is invented," thereby rendering enticement "undefinable." *See Johnson v. United States*, 576 U.S. 591, 598, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) ("The failure of persistent efforts to establish a standard can provide evidence of vagueness.") (quotation simplified). He first points to our Supreme Court's holding in *State v. Billingsley*, 2013 UT 17, 311 P.3d 995, that an enticement inquiry should focus on the defendant's conduct and not the victim's sexual experience, *see id.* ¶¶ 14-15, and a seemingly contradictory footnote in the concurring opinion stating that "sexual innocence, while certainly relevant, is not essential to the question of enticement," *id.* ¶ 27 n.2 (Lee, J., concurring in part). He also points to *State v. Gibson*, 908 P.2d 352 (Utah Ct. App. 1995), in which this court discussed the dictionary definitions of "entice," *see id.* at 356; cited the definitions of "entice" employed by Wisconsin and South Dakota courts in a similar context,[16] *see id.* at 356 n.3; and discussed and applied five factors relevant in the "totality of the facts and circumstances" inquiry, *see* ***[***27]*** *id.* at

[16] This court in *Gibson* cited the definitions from other jurisdictions in the context of noting that "[o]ther courts have defined 'entice' similarly." 908 P.2d at 356 n.3.

356-57. Ray asserts that these references "all use 'entice' differently." Lastly, Ray references the concurring opinion in *Gibson*, which stated that in *Scieszka* "we seemed to assume that 'entice,' as used in the statute, required a pattern of ongoing, systematic, purposeful conduct with at least an implicit offer of some kind of reward," but "we have, in essence, equated the word entice, as used in the statute, to include any situation in which the adult participant takes the lead in bringing about the sexual encounter complained of." *Id.* at 357 (Orme, J., concurring).

[*P47] We disagree with Ray's characterization of the relevant caselaw. Although the enticement inquiry has certainly developed over time, our caselaw falls short of "repeated attempts and repeated failures to craft a principled and objective standard," which the United State Supreme Court indicated may evidence a statute's vagueness. *Johnson*, 576 U.S. at 598. In *Johnson*, the Supreme Court invalidated the residual clause of the Armed Career Criminal Act of 1984 as unconstitutionally vague. *Id.* at 606. As evidence of vagueness, the Court noted that each time it addressed the residual clause, it "found it necessary to resort to a different ad hoc test to guide [its] inquiry." *Id.* at 598. The Court also pointed to the "pervasive disagreement" **[***28]** among the lower federal courts "about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider" when determining "whether the residual clause covers this or that crime." *Id.* at 601.

[*P48] Unlike with the provision at issue in *Johnson*, although adjustments and clarifications have been made to Utah's enticement inquiry over time, the standard has never been overturned and replaced. Indeed, the qualitative nature of the inquiry prevents it from being entirely resistant to adjustment with each new set of facts. In pointing to the relevant factors Utah courts have considered in determining whether a defendant engaged in enticement, Ray seems to argue that the enticement provision is unconstitutionally vague based on the qualitative nature of the totality of circumstances inquiry. But this, on its own, is insufficient to render a statute vague. *See id.* at 603-04. To the contrary, "the law is full of instances where a man's fate depends on his estimating rightly some matter of degree." *Id.* at 604 (quotation simplified).

[*P49] For the foregoing reasons, we hold that the enticement statute is not unconstitutionally vague on its face.

II. Sealed Medical Records

[*P50] Ray argues that the trial court erred **[***29]** in denying him access to the remaining eleven pages of R.M.'s medical **[**342]** records. Among other things, he argues that the court should have ordered the disclosure of the sealed records under rule 16(a) of the Utah Rules of Criminal Procedure, that the court misapplied rule 14 of the Utah Rules of Criminal Procedure, and that Mother waived any privilege in the records when she signed the medical record disclosure form.[17] But even assuming, without

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[17] Ray also argues that by withholding the remaining medical records, the State violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), "to disclose material, exculpatory evidence to the defense in criminal cases." *State v. Bisner*, 2001 UT 99, ¶ 32, 37 P.3d 1073 (quotation simplified). *See Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). The State argues that because Ray did not raise this issue in his original brief, it falls outside our Supreme Court's mandate on remand. Ray counters that "although the *Brady* argument is a new argument, and is supported by cases not previously cited, it is not a distinct claim." But because we conclude that any error in withholding the eleven additional pages was harmless, we need not resolve this question.

More specifically, because Ray's *Brady* argument is unpreserved, he asks us to review it for plain error. This requires him to "establish that (i) an error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful." *State v. Johnson*, 2017 UT 76, ¶ 20, 416 P.3d 443 (quotation simplified). Under the third prong, for an error to be harmful, it "must be shown to have been of such a magnitude that there is a reasonable likelihood of a more favorable outcome for the defendant." *Id.* ¶ 21 (quotation simplified). In other words, there must be "a reasonable probability that, but for the alleged error, the outcome in the case would have been different." *Id.* (quotation simplified). This standard mirrors the harmless error doctrine, under which "we will reverse only if a reasonable likelihood exists that absent the error, the result would have been more favorable to the defendant." *State v. Leech*, 2020 UT App 116, ¶ 31, 473 P.3d 218 (quotation simplified). *See* Utah R. Crim. P. 30(a). Because we conclude that any error in denying Ray's

deciding, that the court erred in denying Ray access to the remaining eleven pages, such error is harmless and does not warrant reversal.

[*P51] "Not every trial error requires reversal." *State v. Leech*, 2020 UT App 116, ¶ 42, 473 P.3d 218 (quotation simplified). Under the harmless error doctrine, "an error is harmless and does not require reversal if it is sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings." *State v. Reece*, 2015 UT 45, ¶ 33, 349 P.3d 712 (quotation simplified). *See* Utah R. Crim. P. 30(a) ("Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded."). In other words, "the likelihood of a different outcome absent the error must be sufficiently high to undermine confidence in the verdict." *Reece*, 2015 UT 45, ¶ 33, 349 P.3d 712 (quotation simplified). Here, we are not convinced that, had Ray been given access to the 11 additional pages **[***30]** of R.M.'s medical records, there is a reasonable likelihood he would have obtained a more favorable result at trial.

[*P52] Ray asserts that "[t]his case rests entirely upon R.M.'s credibility, and in turn, the State's excuses for her inability to tell the same story twice." At trial, Ray's strategy "was to show that R.M. was not telling the truth by showing inconsistencies in her various interviews, her preliminary hearing testimony, and her trial testimony." Accordingly, Ray contends that the sealed pages were "crucial to . . . attacking R.M.'s credibility" and were "favorable to show that R.M. and [Detective] were willing to lie or seriously exaggerate under oath." Specifically, R.M. stated at trial that she was "on and off conscious" during her hospital stay. And Detective at trial described R.M. as being "in a sedated state" and "slow to respond" during the hospital interview. Detective also stated that the interview did not last long because R.M.'s responses quickly became "slurred," "groggy," and "incoherent."

[*P53] To counter these descriptions, Ray points to sections of the sealed records[18] and **[**343]** asserts that they "prove R.M. was not incapable of communicating, was not unconscious or comatose, **[***31]** was not intoxicated, and was not suffering from memory loss" at the time Detective interviewed her at the hospital. Based on this, Ray contends that, had he been given access to the records, "he would have prevented R.M. and [Detective] from covering up her inconsistencies with patently false statements." Specifically, Ray's expert witness testified at the rule 23B hearing that "[n]othing in the sealed records indicates that R.M. had a fever while hospitalized or that she had trouble communicating during her stay, that she was ever comatose, or that she had any problems with her memory," and that "[i]f R.M. had become comatose or unable to communicate during her stay, [the expert witness] would have expected that information to be included in the sealed records." The expert witness also pointed to an instance in the medical records that described R.M. as responsive to an exam despite being "quite sedated" from certain medications and another instance that indicated that she was "alert and oriented" during a different exam. And the expert noted R.M.'s discharge summary that stated "R.M.'s 'behavior was at times inconsistent and suggestive of exaggerated symptoms.'"

[*P54] But the expert also acknowledged **[***32]** that the sealed records do "not represent the entire hospital record," "which would also include daily progress notes from the physician and a large volume of data generated by nurses, laboratory results, and CT scans." The records are silent as to R.M.'s condition at the time Detective interviewed her on March 24. Indeed, our review of the sealed records indicates that the interview took place squarely in the middle of an eight-day period in which the records do not specifically reference R.M.'s condition. And the medical records containing the "Medications

motion to disclose the additional medical records was harmless, it follows that the *Brady* claim will likewise not pass muster under plain error review.

[18] Because the medical records in question remain sealed, we rely on the expert witness's testimony at the rule 23B hearing, which is not sealed, for our discussion of the records. We have reviewed the sealed records and have determined that they are consistent with that testimony.

Given Report," to which Ray was given access prior to trial, indicate that within a 24-hour period of the interview, R.M. was given several medications that the expert witness acknowledged can have a sedative effect and can cause "dizziness," "drowsiness," or "confusion." Two of the medications given to R.M. at that time were the same medications that caused her to be "quite sedated" for an earlier medical exam. This is consistent with Detective's report, in which he indicated, "I was informed that [R.M.] had been given a dose of pain medication that made it difficult for her to speak clearly, but that she could understand what **[***33]** I was asking of her, and that she could answer the questions I would ask."

[*P55] Next, although the expert witness pointed to a note in R.M.'s discharge summary that "R.M.'s 'behavior was, at times, inconsistent and suggestive of exaggerated symptoms,'" he conceded that the sealed records do not indicate that R.M. "had trouble communicating during her stay, that she was ever comatose, or that she had any problems with her memory." Thus, this statement does not support the proposition that R.M. had pervasive exaggerated memory or communication problems. Furthermore, the aforementioned note in the records indicating that R.M. became "quite sedated"—although still responsive—from certain medications was made the day R.M. was admitted to the hospital, which was before her parents discovered her relationship with Ray. R.M. therefore would not have had any relevant reason to exaggerate her reaction to those medications at that time. And to the extent the sealed medical records contradict R.M.'s trial testimony that she was "on and off conscious" during her hospital stay, the jury had already heard Mother testify that R.M. "was awake and asleep, awake and asleep," but never "unconscious" during **[***34]** that time.

[*P56] And even assuming that the inconsistencies between R.M.'s initial interview and her trial testimony were completely excused by her medical condition, there were also several significant inconsistencies between R.M.'s preliminary hearing testimony and her trial testimony, for which R.M. offered no explanation other than to state that she was "less afraid" at the time of trial. For example,

- At the preliminary hearing, R.M. said that she and Ray had just kissed on the first day, but at trial she said that Ray had also touched her "bra and [her] underwear areas" over her clothing.
- At the preliminary hearing, R.M. stated that Ray never reached under her **[**344]** bra, but at trial she said that he "momentarily" reached under her bra on the second day.
- At the preliminary hearing, R.M. said that Ray did not touch her buttocks on the second day, but at trial she said that he had.
- At the preliminary hearing, R.M. said that after she had showered and shaved on the fourth day, she "[g]ot dressed and went back into [Ray's] room," where they watched a movie together in bed. But at trial, she said that they were undressed, began kissing, and eventually moved to the bed, where Ray touched the **[***35]** "outside" of her vagina with his fingers for "[a] few minutes."
- At the preliminary hearing, R.M. stated that Ray inserted his fingers into her vagina, but at trial she stated that he touched the "outside" of her vagina with his fingers.
- At the preliminary hearing, R.M. repeatedly denied performing oral sex on Ray, but at trial she stated that she did.

All these substantial, unexplained inconsistencies—many of which Ray highlighted at trial—produced strong impeachment evidence on their own. We are not persuaded that it is reasonably likely that the additional incremental impeachment evidence arguably to be gleaned from the remaining medical records would have made a difference.

[*P57] Finally, Ray's own admissions corroborated much of R.M.'s account regarding their relationship and her testimony regarding touching that amounted to forcible sexual abuse.[19] Among other things, in his

[19] Utah Code section 76-5-404 provides that

> [a]n individual commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, forcible sodomy, or attempted rape or forcible

police interview and in the messages Ray exchanged with Detective posing as R.M., Ray corroborated R.M.'s account about how their relationship began and progressed; that he gave R.M. her first kiss; that they played "Sexy Truth or Dare" with two of R.M.'s friends; and that on the last day, Ray decorated the hotel **[***36]** room with candles and flowers. More notably, when "R.M." asked whether Ray had told his wife about "going **[**345]** down [R.M.'s] pants," Ray did not deny the assertion. Instead, he texted, "no I have not violated any laws so there would be noting to tell." And at another point, when "R.M." asked if she could be pregnant because "you touched me there what if sperm was on your hand" Ray again did not deny touching R.M. "there," instead replying that if she was pregnant, R.M.'s "parents would have found a way to get [him] arrested."

[*P58] In sum, we are not convinced **[***37]** that it is reasonably likely that Ray would have obtained a more favorable outcome at trial if he had obtained access to the remaining medical records. For this reason, even if there was error on the trial court's part, such error was harmless and does not warrant reversal.

CONCLUSION

[*P59] The enticement provision is not unconstitutionally vague on its face, and any error in withholding R.M.'s remaining medical records was harmless. Accordingly, Ray's conviction is affirmed.

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> sodomy, the actor touches the anus, buttocks, pubic area, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, with intent to cause substantial emotional or bodily pain to any individual or with the intent to arouse or gratify the sexual desire of any individual, without the consent of the other, regardless of the sex of any participant.

Utah Code Ann. § 76-5-404(1) (LexisNexis Supp. 2021). "Accordingly, the forcible sexual abuse statute establishes two variants of the offense." *Ray II*, 2020 UT 12, ¶ 26, 469 P.3d 871. "The first variant relates to the touching of specific areas of another's body (touching variant)" and "the second variant is more general and establishes that otherwise taking indecent liberties with another constitutes forcible sexual abuse (indecent liberties variant)." *Id.* (quotation simplified).

Although the text of this statute as currently in effect is substantially similar to the version in effect in March 2010, *compare* Utah Code Ann. § 76-5-404(1) (Supp. 2021), *with id.* (2008), there is one significant difference: in the version in effect in 2010, over-the-clothes touching did not satisfy the touching variant of forcible sexual abuse. Specifically, Utah Code section 76-5-407 listed three sexual offenses for which "any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense." *See id.* § 76-5-407(3) (2008). Those offenses are sodomy on a child, sexual abuse of a child, and aggravated sexual abuse of a child. *See id.* § 76-5-407(3)(a)-(b). Because section 76-5-407 excluded forcible sexual abuse from this list, this court held that over-the-clothes touching did not satisfy the touching variant. *See State v. Jacobs*, 2006 UT App 356, ¶¶ 6-9, 144 P.3d 226. However, this court held that "even when the specified body parts are touched through clothing, the perpetrator may still be punished under the indecent liberties [variant] of the statute when, considering all the surrounding circumstances, the conduct is comparable to the touching that is specifically prohibited." *Id.* ¶ 9. Based on this, R.M.'s trial testimony provided sufficient evidence of forcible sexual abuse, of both the touching and indecent liberties variants. And as discussed above, we are not convinced that, had Ray been given access to the 11 additional pages of R.M.'s medical records, there is a reasonable likelihood he would have obtained a more favorable result at trial.

In 2019, our Legislature amended section 76-5-407 to add forcible sexual abuse to the list of offenses where touching over the clothing is enough, *see* Utah Code Ann. § 76-5-407(3)(e) (Supp. 2019), and has since moved the over-the-clothing provision to section 76-5-404 itself, *see* 2022 Utah Laws Ch. 181 § 87 (codified at Utah Code section 76-5-404(2)(b)).

Appendix B

The Order of the Court is stated below:
Dated: December 02, 2022 02:46:51 PM /s/ John A. Pearce Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

----ooOoo----

State of Utah, Respondent, v. Eric Matthew Ray, Petitioner.	ORDER Supreme Court No. 20220861-SC Court of Appeals No. 20121040-CA Trial Court No. 101401511

----ooOoo----

This matter is before the Court upon a Petition for Writ of Certiorari, filed on September 28, 2022.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari is denied.

End of Order - Signature at the Top of the First Page

Appendix C

State v. Ray

Court of Appeals of Utah

May 4, 2017, Filed

No. 20121040-CA

Reporter
2017 UT App 78 *; 397 P.3d 817 **; 2017 Utah App. LEXIS 74 ***; 838 Utah Adv. Rep. 10; 2017 WL 1788369

STATE OF UTAH, Appellee, v. ERIC MATTHEW RAY, Appellant.

Subsequent History: Writ of certiorari granted State v. Ray, 406 P.3d 250, 2017 Utah LEXIS 173, 2017 WL 5179067 (Utah, Sept. 7, 2017)

Reversed by, Remanded by State v. Ray, 2020 UT 12, 2020 Utah LEXIS 29, 2020 WL 1180487 (Mar. 9, 2020)

Prior History: **[***1]** Fourth District Court, Provo Department. The Honorable Lynn W. Davis. No. 101401511.

Counsel: Margaret P. Lindsay and Douglas J. Thompson, Attorneys for Appellant.

Sean D. Reyes and Karen A. Klucznik, Attorneys for Appellee.

Judges: JUDGE GREGORY K. ORME authored this Opinion, in which JUDGES STEPHEN L. ROTH and JILL M. POHLMAN concurred.

Opinion by: GREGORY K. ORME

Opinion

[818]** ORME, Judge:

[*P1] Eric Matthew Ray, then twenty-eight years old, engaged in a wholly inappropriate relationship with a fifteen-year-old girl (Victim). Growing out of that relationship, Ray was charged with several sexual offenses and, after a jury trial, was found guilty of forcible sexual abuse, a second degree felony. *See* Utah Code Ann. § 76-5-404(2)(a) (LexisNexis 2012). He was acquitted of a charge of object rape, and the jury could not reach a verdict on two counts of forcible sodomy. Because trial counsel provided Ray ineffective assistance by failing to request a jury instruction explicating the legal meaning of a key phrase within the elements instruction for the crime of which he was convicted, we reverse and remand for a new trial.

BACKGROUND

[*P2] This case began innocently enough when Ray, then a law student in Illinois, inadvertently sent a text message to a wrong number. Victim, with **[***2]** whom he was not then acquainted, was the recipient of that text. Following this initial contact, Ray and Victim began an ill-advised relationship through continued (and frequent) text messages. **[**819]** Their relationship progressed, and eventually both parties affirmed their love for each other and their ultimate desire to wed. Ray decided to visit Utah to meet Victim during his spring break.

[*P3] The pair met in front of Victim's school, and Ray drove her to his hotel, where they spent a considerable amount of time together over the next several days. On the first day, Ray kissed Victim, "and then there was a lot of kissing and making out going on." According to Victim, the "making out" involved intense kissing, with Ray touching her breasts and pubic area over her clothing. This went on for several hours.

[*P4] The following day, the activities grew more sexual in nature. In particular, Ray and Victim again kissed on the bed, but this time they wore only their underwear. According to Victim, Ray "momentarily"

touched under her bra and the front and back of her "private area" over her underwear. Victim testified that she touched Ray's "private area" over his underwear and gave him a "hand-job."

[*P5] Two **[***3]** days later, Ray again took Victim to his hotel room, which he had decorated with flower petals and some thirty candles. Among other activities, Victim showered in Ray's hotel bathroom, shaved her pubic area (per Ray's earlier request via text message), and then exited the bathroom, naked, to find Ray, also naked. They kissed, standing together nude, before moving to Ray's bed where they continued kissing in the nude. Although they never engaged in vaginal intercourse, Victim testified that Ray touched the *outside* of her vagina. This testimony was contrary to what the prosecution told the jury to expect in its opening statement, namely that Victim would testify that Ray digitally (and painfully) penetrated her vagina.[1] Afterward, they watched a movie together while still naked.

[*P6] After going out for lunch at a nearby fast-food restaurant, they returned, undressed again, and kissed some more. According to Victim, Ray asked her if she wanted to have intercourse with him, but Victim said she "wasn't ready." Victim also testified that Ray then discussed with her how far he thought they could go "without getting in trouble with the law." That day, the last day of their tryst, Ray gave Victim **[***4]** "a candle, a tee shirt, and a vibrator" to remember him by, and Victim gave Ray a shirt.

[*P7] Shortly after Ray returned to Illinois, Victim became severely ill with meningitis and was hospitalized. During her hospitalization, Victim's parents discovered her apparent involvement with a much older man, but they initially believed the relationship was limited to communication via the internet. After making this discovery, Victim's parents sent a message to Ray telling him to "leave [Victim] alone." They also contacted a family friend, who was a police detective, about the matter.

[*P8] The detective visited the hospital and interviewed Victim. Victim, though "groggy" and heavily sedated, told the detective about her and Ray kissing and his having attempted to touch her vagina, but she did not then claim that any other sexual contact occurred. The detective continued his investigation, taking Victim's phone and assuming her identity in text-message and Facebook conversations with Ray. During the course of these conversations, Ray confided in "Victim" that he had deleted many of the photos Victim had sent him because he was afraid "the police were coming after [him]," even though he was sure his **[***5]** conduct had "not violated any laws."

[*P9] When "Victim" asked Ray via text message why he was so afraid of her "telling on [him]," Ray texted back that "it would cause unnecessary complications in my life."[2] "Victim" wondered whether she might be pregnant, but Ray affirmed, "[W]e didnt have sex." After "Victim" responded, "yeah but you touched me there what if sperm was on your hand," Ray only replied, "your parents would have found a way to get me arrested." Ray did note, however, that "we wanted to [have sex] when we were kissing," "but you **[**820]** wanted to . . . stay a virgin and I didnt want to hurt you."

[*P10] In an effort to lure Ray into making a more incriminating statement, the detective, still posing as Victim, feigned forgetfulness about the time they spent together. Ray confirmed key details of Victim's account, such as kissing her, the candles and rose petals in the hotel room, watching the movie together, kissing in bed "for the rest of the day," and visiting the fast-food restaurant with Victim. But he steadfastly refused to admit any conduct establishing the crimes for which he was later charged.

[*P11] Eventually, "Victim" succeeded in persuading Ray to return to Utah. Before Ray left Illinois, **[***6]** he corroborated yet another detail: he asked "Victim" whether she still possessed the vibrator he had given her. Ray was arrested upon his

[1] The prosecutor's misstatement appears not to have been calculated, but rather a function of unexpected turns in Victim's testimony.

[2] One such complication, no doubt, was that Ray was married at the time.

arrival in Utah. Although it is true, as Ray states in his brief, that he "did not confess to or acknowledge[] any of the charged offenses" during his interrogation by police, he did confirm that the pair started their relationship through text messages, and he professed his deep feelings for Victim "numerous times and vigorously, vehemently." He was charged with two counts of forcible sodomy,[3] one count of object rape, and one count of forcible sexual abuse. The case proceeded to trial.

[*P12] During trial, Ray's counsel exposed a number of inconsistencies in Victim's story, including significant variation among the versions of her story as told to the detective during her initial interview, as discussed with her father and sister, during her preliminary hearing testimony, and as given in the course of her trial testimony. For example, Victim failed to testify that Ray digitally penetrated her vagina, which, as noted above, the State said she would do during its opening statement. Defense counsel also pointed out that Victim had denied on other occasions **[***7]** that Ray's penis entered her mouth, including during the preliminary hearing[4] and in a discussion with her sister, before she testified during her direct examination at trial that it did enter her mouth.

[*P13] At trial, the detective recounted his conversation with Victim while she was hospitalized, described his trickery of Ray, and laid the foundation for the introduction of Ray's text messages to Victim's phone while the detective was pretending to be Victim. Victim's mother and Ray's (by then) ex-wife also testified against him. Ray did not take the stand.

[*P14] Despite Ray's counsel's otherwise vigorous and effective defense, he neglected to ask for a jury instruction defining "indecent liberties" as that phrase is used in the forcible sexual abuse statute. *See* Utah Code Ann. § 76-5-404(1) (LexisNexis 2012). After deliberation, the jury returned a verdict of not guilty on the charge of object rape and guilty as to forcible sexual abuse. It could not reach a verdict on the two forcible sodomy charges. The trial court sentenced Ray to one-to-fifteen years in prison on the sexual abuse charge. Ray appeals.

ISSUE AND STANDARD OF REVIEW

[*P15] Ray alleges that, by failing to request a jury instruction defining the term "indecent **[***8]** liberties," his trial counsel provided him ineffective assistance. Ray raises this claim for the first time on appeal. Although, ordinarily, "to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue," *State v.* ***[**821]*** *Soules*, 2012 UT App 238, ¶ 9, 286 P.3d 25 (citation and internal quotation marks omitted), "[i]neffective assistance . . . is an exception to the preservation rule," *State v. Johnson*, 2015 UT App 312, ¶ 15, 365 P.3d 730, because it is unrealistic to expect that trial counsel would bring his own ineffectiveness to the attention of the trial court. When such claims are raised for the first time on appeal, we treat them as presenting "a matter of law." *State v. Maestas*, 1999 UT 32, ¶ 20, 984 P.2d 376. "To win reversal on ineffective-assistance grounds, a defendant must prove both that counsel's performance was objectively deficient and that it resulted in prejudice." *Johnson*, 2015 UT App 312, ¶ 15, 365 P.3d 730.

ANALYSIS

I. Trial Counsel's Performance Was Objectively Deficient.

[3] Although Victim denied at various times that she and Ray had oral sex, at one point during the preliminary hearing Victim alleged that she performed oral sex on Ray, and he on her, and that he ejaculated into her mouth. But a few minutes later, she denied that his penis actually entered her mouth. At trial, her testimony was that his mouth touched her vagina and that she touched his "private area" with her mouth for "[m]aybe 10 minutes." Of course, her prior inconsistency was consistently emphasized by defense counsel.

[4] Victim's testimony during the preliminary hearing was somewhat contradictory; during examination by the prosecutor, she testified that Ray ejaculated in her mouth, but during cross-examination she testified, in response to defense counsel's question, "Was his penis ever inside your mouth?," "No. It might have touched [it.]" The magistrate likely concluded, in deciding to bind Ray over for trial on the sodomy charges, that one version of Victim's admittedly confusing account of events would support the charges, although clearly the jury would have credibility issues to sort out.

[*P16] To begin, we state two basic points that guide our analysis. First, it has long been recognized that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" is unconstitutional. *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926). The only **[***9]** thing capable of saving vague phrases—phrases such as "indecent liberties"—from constitutional infirmity is a clear and consistent meaning that has been engrafted onto the statute via judicial decisions. *See State v. Lewis*, 2014 UT App 241, ¶ 11, 337 P.3d 1053. And second, "[t]he general rule for jury instructions is that an accurate instruction upon the basic elements of an offense is essential. Failure to so instruct constitutes reversible error." *State v. Bird*, 2015 UT 7, ¶ 14, 345 P.3d 1141 (citation and internal quotation marks omitted).

[*P17] The Utah Code states that

> [a] person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another . . . .

Utah Code Ann. § 76-5-404(1) (LexisNexis 2012) (emphasis added). We have previously made clear that the emphasized phrase is so vague as to be unconstitutional when it is not accompanied with further instruction as to its precise legal definition, which is considerably narrower than what it might be taken to mean in common parlance. *See Lewis*, 2014 UT App 241, ¶¶ 11-13, 15, 337 P.3d 1053. Although the average juror is presumed capable of interpreting **[***10]** terms with universally accepted definitions, *see State v. Day*, 572 P.2d 703, 705 (Utah 1977), to go further and "say that men unlearned in the science of the law are competent at all times . . . to determine the technical legal bearing and proper construction of an act . . . is something this Court cannot concede," *People v. Green*, 1 Utah 11, 15 (1876). Thus, we explained in *Lewis* that "indecent liberties" is a phrase that passes constitutional muster only if it is taken to refer to conduct on par with the specific, enumerated acts mentioned in the statute. *See* 2014 UT App 241, ¶ 15, 337 P.3d 1053.

> Without this important narrowing of the term, a juror might reasonably assume that this catch-all phrase covered actions that are less serious than the specifically prohibited conduct—including actions that are merely socially or morally reprehensible or that strike us, subjectively, as being indecent in the sense of being totally inappropriate.

Id.

[*P18] And so we arrive at ineffective assistance. "To prove that counsel's performance was deficient, a claimant 'must show that counsel's representation fell below an objective standard of reasonableness'" as "evaluated 'under prevailing professional norms.'" *Landry v. State*, 2016 UT App 164, ¶ 25, 380 P.3d 25 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Although we "'indulge a strong presumption'" of "'reasonable professional assistance,'" if the **[***11]** claimant demonstrates "there is no way that counsel's actions 'might be considered sound trial strategy'" then the presumption is overcome. **[**822]** *Id.* (quoting *Strickland*, 466 U.S. at 689).

[*P19] Neglecting to provide an instruction as to the meaning of "indecent liberties" amounted to a failure to instruct the jury as to all the essential elements of the offense, because without this knowledge the jury would not know what sort of conduct constituted "indecent liberties" in the legal sense. *See Lewis*, 2014 UT App 241, ¶ 15, 337 P.3d 1053. The definition of "indecent liberties"—"activities of the same magnitude of gravity as [those] specifically described in the statute," i.e., "touching the vagina, anus, buttocks, or breasts"—is as much an element of the offense of forcible sexual abuse as the enumerated acts. *Id.* ¶ 11 (citation and internal quotation marks omitted). And just as failure to instruct the jury as to the elements of the charged offense would constitute reversible error, *see Bird*,

2015 UT 7, ¶ 14, 345 P.3d 1141, in the context of the case before us, the failure to request an instruction explaining the element of "indecent liberties" constitutes objectively unreasonable assistance by counsel, *see Lewis*, 2014 UT App 241, ¶¶ 10-13, 337 P.3d 1053.

[*P20] As we see it, defense counsel had two basic options consistent with his duty to render effective **[***12]** assistance. Either he could have requested an instruction defining "indecent liberties," *see, e.g.*, Model Utah Jury Instructions 2d CR1601 (Advisory Comm. on Criminal Jury Instructions 2014), http://www.utcourts.gov/resources/muji/ [https://perma.cc/D2H S-UDZ9], or he could have requested that the problematic phrase be excised from the elements instruction,[5] *see Lewis*, 2014 UT App 241, ¶ 9 n.7. But under the circumstances, "[t]here was no conceivable tactical benefit to [Ray] for trial counsel to allow a jury instruction that described the offense in a manner that is inconsistent with the narrow way in which Utah courts have interpreted the applicable statute," *see id.* ¶ 13, leaving the jury to employ its own common sense view of what "indecent liberties" are, a view that likely encompasses a much wider range of conduct than is contemplated in the legal sense.

II. Trial Counsel's Deficient Performance Prejudiced Ray.

[*P21] "Performance is deficient when it falls below an objective standard of reasonableness. . . . A defendant suffers prejudice when, absent the deficiencies of counsel's performance, there is a reasonable likelihood that the defendant would have received a more favorable result at trial." *State v. Hards*, 2015 UT App 42, ¶ 18, 345 P.3d 769.

[*P22] In this case, several circumstances compel a **[***13]** conclusion of prejudice. First, the jury acquitted Ray as to a count of object rape and was unable to reach a verdict as to two forcible sodomy counts, while convicting him only on the forcible sexual abuse count. This means the jury credited Victim's trial testimony that Ray never digitally penetrated her vagina, and it means that one or more jurors did not believe Victim's testimony that Ray performed oral sex on her and she on him. Although the sexual abuse conviction could mean that the jury believed Victim's testimony that Ray put his hand down her pants, touching the outside of her vagina, and up her bra, touching her breast, it is just as likely, especially given Victim's credibility issues, that the jury rejected this testimony, too, but concluded that a twenty-eight-year-old married man passionately kissing a fifteen-year-old while both were naked is "socially or morally reprehensible or . . . [otherwise] totally inappropriate"—conclusions with which one cannot reasonably **[**823]** argue—and thus constituted the taking of "indecent liberties." *See State v. Lewis*, 2014 UT App 241, ¶ 15, 337 P.3d 1053.

[*P23] Second, Victim's credibility issues only increase the possibility that the jury convicted Ray based on moral condemnation and social disapprobation **[***14]** rather than the narrow terms of the law. *Mills v. Maryland*, 486 U.S. 367, 377, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) (stating that "[u]nless we can rule out the substantial possibility that the jury may have rested its verdict on [an] 'improper' ground, we must remand"). Because we cannot know how the jury decided given the evidence before it and the obvious skepticism with which it apparently viewed Victim's testimony in general, and because it may well have based its decision on improper grounds, "the general effect of [this] uncertain verdict is fatal to it." *See Brannigan v. People*, 3 Utah 488, 24 P. 767, 771 (Utah 1869). "No verdict so defective . . . in substance can be corrected or

[5] The latter course might have been the most logical one in this case, as the State did not argue that Ray was guilty of forcible sexual abuse because he took indecent liberties with Victim. The State overtly relied exclusively on the particular acts enumerated in the statute, specifically contending that he had touched Victim's breast and/or vagina. Although the solution to this problem is easy enough on a case-by-case basis, albeit often at the price of a reversal and retrial, we believe the Legislature would be well-advised to revisit Utah Code sections 76-5-404(1) and 76-5-404.1(2) and fix this problem. It could do so by excising the vague phrase from the statutes, by including in the appropriate statute the definition of the phrase that has been judicially embraced, or by spelling out the specific other acts the Legislature determines should also constitute forcible sexual abuse. *See* Utah Code Ann. § 76-5-404(1) (LexisNexis 2012); *id.* § 76-5-401.1(2) (Supp. 2016).

changed by presumptions against [Ray]." *See id.* The sum total of these circumstances "mak[es] it much more likely that [the jury] would have reached a different conclusion but for trial counsel's ineffectiveness," and we must, therefore, reverse and remand for a new trial.[6] *See Landry v. State*, 2016 UT App 164, ¶ 43, 380 P.3d 25.

III. Victim's Testimony Was Not "Inherently Improbable."

[*P24] In view of our reversal, we consider a separate issue Ray presents. Ray argues that Victim's lack of credibility—due largely to what he characterizes as her constantly changing account—amounts to "inherent improbability" as defined in *State v. Robbins*, 2009 UT 23, 210 P.3d 288, entitling him to a reversal of his conviction without the State having the opportunity **[***15]** to retry him. We disagree and take this opportunity to explain our understanding of the *Robbins* doctrine.

[*P25] *Robbins* was something of a unique case, combining distinctly incredible testimony with what the Supreme Court termed "patently false statements." *Id.* ¶ 22. "Inherent improbability" is a distinction reserved for such comparatively rare instances; it does not apply more generally to cases involving a victim's incredibility—not even significant incredibility. For example, an "inherent improbability" might be found if the testimony offered "flies in the face of uncontroverted physical facts" or well-known physical phenomena. *See Haarstrich v. Oregon Short Line R. Co.*, 70 Utah 552, 262 P. 100, 104 (Utah 1927) (noting that testimony in contradiction of physical facts "is not substantial evidence"). *Cf. Blomberg v. Trupukka*, 210 Minn. 523, 299 N.W. 11, 13 (Minn. 1941) ("The operation of the law of gravity is a matter of such common knowledge that all persons of ordinary intelligence and judgment, even if they are illiterate, are required to take notice of it."). Another such instance is patent falsehood, the variant of improbability at issue in *Robbins*, where the victim referred to a possible eavesdropper located in a closet that she claimed to be within a room that did not, in fact, have a closet and also "made up a story about **[***16]** a hearing problem." *See* 2009 UT 23, ¶ 23, 210 P.3d 288. In all other instances we can envision, however, we defer to the jury to sort out fact from fiction, because "the jury serves as the exclusive judge of . . . the credibility of witnesses." *State v. Johnson*, 2015 UT App 312, ¶ 10, 365 P.3d 730 (citation and internal quotation marks omitted). This deference is appropriate in the fairly common situation of a victim whose story changes over time or who never seems to tell her story the same way twice, as in this case. Such inconsistency clearly creates a credibility question for the jury to resolve, but it does not trigger the applicability of the "inherent improbability" doctrine.

[*P26] As we recently noted, "In judging whether testimony is inherently improbable, a witness's inconsistency is not dispositive." *State v. Crippen*, 2016 UT App 152, ¶ 13, 380 P.3d 18. Indeed, this distinction between *Robbins*-esque circumstances and more routine witness inconsistency is hardly new. As early as 1955 the Utah Supreme Court explained that

> **[**824]** [w]hile it is true that if a witness willfully testifies falsely as to any material matter the jury is at liberty to disbelieve the whole of his testimony if they so desire, it does not necessarily follow that they are obliged to do so. . . .
>
> > It is the duty of this court to leave the question of credibility **[***17]** of witnesses to the jury or fact trier . . . . As has often been said, the jury is in a favored position to form impressions as to the trust to be reposed in witnesses. They have the advantage of fairly close personal contact; the opportunity to observe appearance and general demeanor; and the chance to feel the impact of personalities. All of which they may consider in connection with the reactions, manner of expression, and apparent frankness and candor or want of it in reacting to and answering questions on

[6] Because we reverse Ray's conviction and remand for a new trial on the strength of his ineffective-assistance/jury-instruction claim, we do not reach the balance of the issues Ray raises on appeal, with the exception of the question answered in section III.

> both direct and cross-examination in determining whether, and to what extent, witnesses are to be believed. . . .
>
> *It is not a prerequisite to credibility that a witness be entirely accurate with respect to every detail of his testimony*. If it were so, human frailties are such that it would be seldom that a witness who testified to any extent could be believed. . . . An examination of the record here does not show that facts testified to would be impossible in the light of known physical facts, or so contradictory or uncertain as to justify a conclusion that . . . the witnesses were entirely 'unworthy of belief' . . . .

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115, 1117 (Utah 1955) (emphasis added). *Accord State v. Prater*, 2017 UT 13, ¶ 38, 392 P.3d 398 (explaining that in *Robbins*, it **[***18]** "was the inconsistencies in the child's testimony *plus* the patently false statements the child made *plus* the lack of any corroboration that allowed this court to conclude that insufficient evidence supported Robbins's conviction") (emphasis in original).

[*P27] Although the jury apparently disbelieved Victim as to many aspects of her testimony—it could not reach a verdict on two of the four charges against Ray and acquitted him of a third—it likely believed other aspects of her testimony. The jury's finding of Ray's guilt as to the remaining charge at least suggests this possibility, *see Gittens*, 284 P.2d at 1117 ("The jury may evaluate the testimony of witnesses and accept those parts which they deem credible, even though there be some inconsistencies."), although the likelihood that the misapplication of "indecent liberties" explains its single guilty verdict admittedly makes that proposition questionable. Again, issues of credibility, as opposed to inherent improbability, are for the jury to decide, not this court. *See id.*; *State v. Johnson*, 2015 UT App 312, ¶ 10, 365 P.3d 730. Accordingly, we reject Ray's argument that we should simply vacate his sexual abuse conviction on the ground of inherent improbability.

CONCLUSION

[*P28] For the reasons explained above, we reverse **[***19]** Ray's conviction for forcible sexual abuse and remand for a new trial or such other proceedings as may now be appropriate.

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Appendix D

State v. Ray

Supreme Court of Utah

April 11, 2018, Heard; March 9, 2020, Filed

No. 20170524

Reporter
2020 UT 12 *; 469 P.3d 871 **; 2020 Utah LEXIS 29 ***

STATE OF UTAH, Petitioner, v. ERIC MATTHEW RAY, Respondent.

Subsequent History: Rehearing denied by State v. Ray, 2020 Utah LEXIS 159 (Utah, July 13, 2020)

On remand at, Judgment entered by State v. Ray, 2022 UT App 39, 2022 Utah App. LEXIS 41, 2022 WL 964517 (Mar. 31, 2022)

Prior History: [*1]** On Certiorari to the Utah Court of Appeals. Fourth District, Provo. The Honorable Lynn W. Davis. No. 101401511.

State v. Ray, 2017 UT App 78, 397 P.3d 817, 2017 Utah App. LEXIS 74, 2017 WL 1788369 (May 4, 2017)

Counsel: Attorneys:[1]Sean D. Reyes, Att'y Gen., Karen A. Klucznik, Asst. Solic. Gen., Salt Lake City, for petitioner.

Douglas J. Thompson, Provo, for respondent.

Judges: JUSTICE PETERSEN authored the opinion of the Court in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PEARCE joined.

Opinion by: PETERSEN

Opinion

[872]** JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

[*P1] Eric Matthew Ray was convicted of forcible sexual abuse of R.M., who was fifteen years old at the time. He appealed the conviction, and the court of appeals concluded Ray's trial counsel provided ineffective assistance because he did not object to the jury instruction for forcible sexual abuse. The instruction included an option to convict Ray if he took "indecent liberties" with R.M., but it did not define that phrase. The court of appeals concluded counsel was ineffective because he did not object to the jury instruction and ask the district court to either omit the phrase "indecent liberties" or define it. The question before us is whether the court of appeals erred in this determination.

[*P2] Under the circumstances here, **[***2]** we conclude defense counsel's performance was not deficient. Accordingly, we reverse and reinstate Ray's conviction.

BACKGROUND[2]

[*P3] Ray, a twenty-eight-year-old man who was attending law school in Illinois, accidentally texted R.M., a fourteen-year-old girl living in Utah.

[1] Amicus curiae attorneys are:

Jennifer Springer, Jensie L. Anderson, Salt Lake City, for the Rocky Mountain Innocence Center.

[2] "When reviewing a jury verdict, we examine the evidence and all reasonable inferences in a light most favorable to the verdict, reciting the facts accordingly. We present conflicting evidence only when necessary to understand issues raised on appeal." *State v. Heaps*, 2000 UT 5, ¶ 2, 999 P.2d 565 (citation omitted).

Although Ray had texted the wrong number, the two continued communicating via text messages, social media, and eventually telephone. Over time, R.M. started to have romantic feelings for Ray. He reciprocated. They discussed sex, love, and marriage. And eventually, Ray flew to Utah over his spring break to meet R.M. in person. At the time of Ray's visit, R.M. was fifteen years old.

[*P4] **[**873]** On the first day of Ray's visit, he picked up R.M. from school and took her to his hotel room. They spent hours kissing on his bed, and he touched her "bra" and "underwear areas." Finally, he dropped her off on a corner near her home. Over the next three days, Ray continued to pick up R.M., take her to his hotel room, and engage in progressively serious sexual activity—except for one day when R.M. was grounded and only did homework in Ray's rental car for about an hour.

[*P5] Although R.M. kept her interaction with Ray a secret from her family, her **[***3]** parents eventually learned of it. Less than a week after Ray left Utah, R.M. became extremely ill and was hospitalized for ten days. When Ray learned R.M. was sick, he repeatedly contacted the hospital and R.M.'s parents about her. He claimed to be a school friend named "Edward Matthews."

[*P6] When "Edward Matthews" mentioned knowing about an infection in R.M.'s vaginal area, R.M.'s mother considered this a "red flag." Looking for more information, R.M.'s mother found an Edward Matthews on a list of R.M.'s Facebook friends. She then found a picture that was tagged with both Ray's name and the name Edward Matthews. R.M.'s phone also contained photos of Ray.

[*P7] R.M.'s family contacted a neighbor who in turn contacted a detective, informing the detective that the family was seeking help in uncovering the connection between R.M. and Ray. The detective went to the hospital and spoke with R.M.'s parents. He then spoke with R.M., but for only about ten minutes because she "was in a sedated state," was "slow to respond," and her answers "started getting" incoherent. R.M. disclosed some information about Ray and her contact with him.

[*P8] The detective also posed as R.M. on Facebook and engaged in a conversation **[***4]** with Ray, attempting to elicit more information about Ray's contact with R.M.

[*P9] Ultimately, the State charged Ray with one count of object rape, two counts of forcible sodomy, and one count of forcible sexual abuse. In the district court proceedings, R.M. testified at a preliminary hearing and at trial.

[*P10] During Ray's trial, R.M. testified about what took place when Ray visited Utah. On the first day, a Wednesday, Ray met R.M. at her school and took her to his hotel room. There, Ray gave R.M. her first kiss. For hours the two talked, kissed, and lay on the bed together. Ray also touched R.M.'s "bra" and "underwear areas." He dropped her off at a corner near her house over five hours later.

[*P11] On Thursday, Ray again met R.M. at her school. This time, they were joined by R.M.'s friend and the friend's boyfriend. As her friends swam in the hotel pool, Ray and R.M. went to Ray's room, disrobed to their underwear, lay on the bed, and kissed for about an hour. Ray touched R.M.'s breasts, both over and under her bra. He also touched R.M.'s buttocks and her vagina over her underwear. R.M. touched Ray's "private parts" over his underwear, but she refused his request for a "hand job."

[*P12] The two then **[***5]** got dressed and played a game Ray had brought—"Sexy Truth or Dare"—with R.M.'s friend and her boyfriend. Ray also showed them photos of sex toys. He drove them home, again dropping R.M. off at the corner near her house.

[*P13] On Friday, Ray again met R.M. at her school. But she was grounded that day, so she just did homework for a short while in Ray's car.

[*P14] Early Saturday morning, Ray texted R.M. about getting together. They arranged for him to pick her up as she walked toward her school, and he again

took her to his hotel room. Ray had decorated his room with flower petals and candles. They started "making out." After kissing awhile, R.M. took a shower and shaved her pubic area with Ray's razor. In an earlier conversation, Ray had asked her to do this. She returned to the room naked. Ray was also naked. As they kissed on the bed, Ray touched outside R.M.'s vagina with his fingers. Still naked, the two watched the movie "New Moon" from the Twilight Series. Ray mentioned "a few times" how far they "could go without getting in trouble with the law."

[*P15] R.M. testified that Ray then performed oral sex on her, and she reciprocated. **[**874]** [3] She also testified that Ray asked her if she wanted to have sexual **[***6]** intercourse, but when she said she "wasn't ready," he said "he was okay to wait." Ray then gave R.M. "a candle, a tee shirt, and a vibrator." She testified that Ray told her to "think of him" when she used it.

[*P16] The State admitted into evidence Ray's electronic conversations with the detective posing as R.M. Ray's statements corroborated portions of R.M.'s testimony. Ray referenced: that the two had "kissed" and "made out"; getting "into bed and kiss[ing] for the rest of the day"; playing "truth or dare"; and "the buzzy toy."

[*P17] Ray's defense was that he had not engaged in any sexual activity with R.M. In the alternative, he argued that if the jury did believe R.M.'s testimony, any sexual activity was consensual. Ray developed his defense through cross-examination of the State's witnesses, including R.M. Defense counsel cross-examined R.M. about variances in the statements she made to the detective, to family members, during her testimony at the preliminary hearing, and during her testimony at trial.[4]

[*P18] With regard to the forcible sexual abuse count, the district court instructed the jury that in order to find Ray guilty, the jury must find that each of the following essential elements of **[***7]** the crime were proven beyond a reasonable doubt:

> 1. That the defendant, Eric Ray;
> . . .
> 4. Did intentionally, knowingly, or recklessly;
>
> 5. Touched [sic] the anus, buttocks, or any part of the genitals of another, or touched [sic] the breasts of a female person 14 years of age or older, *or otherwise took indecent liberties with the actor or another*[;]
> 6. With the intent to arouse or gratify the sexual desires of any person[;]
> 7. Without the consent of the other, regardless of the sex of any participant.

(Emphasis added.) To establish that R.M. did not consent, the State had to prove that she was "14 years of age or older, but younger than 18 years of age"; Ray was "more than three years older than [R.M.]"; and Ray "entice[d] or coerce[d] [her] to submit or participate." *See* UTAH CODE § 76-5-406(11) (2010).[5]

[*P19] The district court did not provide a definition of "indecent liberties." And defense counsel did not object to this instruction.

[*P20] The jury found Ray guilty of forcible sexual abuse, but acquitted Ray of object rape and could not reach a verdict on the two counts of forcible sodomy.

---

[3] The jury could not reach a unanimous verdict on the two forcible sodomy counts, which were based on R.M.'s testimony that she and Ray had engaged in oral sex with one another. We include this testimony not as an established fact, but to describe the events at trial.

[4] For example, counsel elicited that at trial, R.M. testified that her feelings about Ray changed as early as September 2009, but on prior occasions R.M. testified and shared with others that her feelings changed in November or December 2009 or January 2010. At the preliminary hearing, R.M. testified that before March 2010, Ray had "not really" brought up sexual intercourse, which counsel characterized as "the exact opposite" of what she testified to at trial. At the preliminary hearing, R.M. testified that she and Ray "made out" on the first day of his visit and that he did not attempt to do anything other than kiss her that day. But at trial, R.M. testified that on the first day Ray touched her on her bra and underwear. And finally at trial, R.M. testified that after showering and shaving on Saturday, she exited the shower without getting dressed and lay on the hotel bed. But at the preliminary hearing, R.M. testified that she showered, shaved, and then got dressed and went back into the room.

[5] Because the statute has since been amended, we cite to the version of the statute then in effect.

Ray appealed.

[*P21] In the court of appeals, Ray made a number of arguments, including that his trial counsel was ineffective for failing **[***8]** to object to the jury instruction for forcible sexual abuse. The court of appeals agreed, and it reversed Ray's convictions and remanded for a new trial.

[*P22] We granted the State's petition for certiorari. We exercise jurisdiction under Utah Code section 78A-3-102(3)(a).

STANDARD OF REVIEW

[*P23] "On certiorari, this court reviews the decision of the court of appeals for **[**875]** correctness, giving no deference to its conclusions of law." *State v. Baker*, 2010 UT 18, ¶ 7, 229 P.3d 650. "When we are presented with a claim of ineffective assistance of counsel, we 'review a lower court's purely factual findings for clear error, but [we] review the application of the law to the facts for correctness.'" *Ross v. State*, 2019 UT 48, ¶ 65, 448 P.3d 1203 (alteration in original) (citation omitted).

ANALYSIS

[*P24] The only question before us is whether the court of appeals wrongly concluded that Ray's counsel provided ineffective assistance at trial. The Sixth Amendment to the United States Constitution guarantees criminal defendants the effective assistance of counsel, and we evaluate claims of ineffective assistance under the standard articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See State v. Sessions*, 2014 UT 44, ¶ 17, 342 P.3d 738. To prevail on this claim, Ray must demonstrate that (1) his counsel's performance was deficient in that it "fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced **[***9]** the defense." *Strickland*, 466 U.S. at 687-88.

[*P25] Ray argues his counsel performed deficiently when he did not object to the undefined term "indecent liberties" in the forcible sexual abuse jury instruction. A person is guilty of forcible sexual abuse "if the victim is 14 years of age or older" and the actor touches the anus, buttocks, or any part of

> the genitals of another, or touches the breast of a female, or *otherwise takes indecent liberties with another* . . . with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other.

UTAH CODE § 76-5-404(1) (2010) (emphasis added).

[*P26] Accordingly, the forcible sexual abuse statute establishes two variants of the offense. The first variant relates to the touching of specific areas of another's body (touching variant). The second variant is more general and establishes that "otherwise tak[ing] indecent liberties with another" constitutes forcible sexual abuse (indecent liberties variant).

[*P27] However, at the time of the offense here, the statute did not define the term "indecent liberties."[6] We have interpreted the statute's use of the disjunctive "or" in combination with the term "otherwise" **[***10]** to mean that the indecent liberties variant "proscribe[s] the type of conduct of equal gravity to that interdicted in the first part" of the statute. *In re J.L.S.*, 610 P.2d 1294, 1295 (Utah 1980); *see also State v. Maestas*, 2012 UT 46, ¶ 273 n.371, 299 P.3d 892 (noting that we have "applied the doctrine of ejusdem generis" in interpreting this phrase). And we have cautioned that the term "indecent liberties" "cannot derive the requisite specificity of meaning required constitutionally" unless it is considered to refer "to conduct of the same magnitude of gravity as that specifically described in the statute." *In re J.L.S*, 610 P.2d at 1296; *see also State v. Lewis*, 2014 UT App 241, ¶¶ 11-13, 337

[6] Until 2019, the statute did not define "indecent liberties." But it now does. *See* UTAH CODE § 76-5-416. The legislature has also clarified that "any touching, even if accomplished through clothing, is sufficient to constitute the relevant element" of forcible sexual abuse. *Id.* § 76-5-407(3).

P.3d 1053. Only then is "the potential infirmity for vagueness . . . rectified." *In re J.L.S*, 610 P.2d at 1296.

[*P28] With regard to the first prong of *Strickland*, the court of appeals concluded that in light of the precedent discussed above, counsel's acceptance of the jury instruction here amounted to deficient performance. The court of appeals explained,

> Neglecting to provide an instruction as to the meaning of "indecent liberties" amounted to a failure to instruct the jury as to all the essential elements of the offense . . . [a]nd just as failure to instruct the jury as to the elements of the charged offense would constitute reversible error, in the context of the case before us, the failure to request **[***11]** an instruction explaining the element of "indecent liberties" constitutes **[**876]** objectively unreasonable assistance by counsel.

State v. Ray, 2017 UT App 78, ¶ 19, 397 P.3d 817 (citations omitted).

[*P29] The court of appeals reasoned that "defense counsel had two basic options consistent with his duty to render effective assistance. Either he could have requested an instruction defining 'indecent liberties,' or he could have requested that the problematic phrase be excised from the elements instruction." *Id.* ¶ 20 (citation omitted). The court of appeals concluded that "[t]here was no conceivable tactical benefit to [Ray]" in taking neither of these actions, and therefore trial counsel performed deficiently. *Id.* ¶¶ 19-20 (alterations in original).

[*P30] The State argues that the court of appeals' analysis was incorrect. We agree.

[*P31] First, not objecting to an error does not automatically render counsel's performance deficient. We agree with the court of appeals that a district court instructing a jury on forcible sexual abuse should define indecent liberties. *See In re J.L.S.*, 610 P.2d at 1296 (cautioning that indecent liberties "cannot derive the requisite specificity of meaning required constitutionally" unless it is considered to refer "to conduct of the same magnitude of gravity **[***12]** as that specifically described in the statute"). But it does not automatically follow that counsel's acquiescence to an instruction that did not do so was unreasonable *per se*. The United States Supreme Court has rejected the notion that certain actions by counsel are *per se* deficient "as inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (quoting *Strickland*, 466 U.S. at 688). "[T]he reasonableness of counsel's challenged conduct" must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

[*P32] Thus, it is not correct to equate counsel's submission to an error with deficient performance. Defense counsel did not have a Sixth Amendment obligation to correct every error that might have occurred at trial, regardless of whether it affected the defendant. Counsel could pick his battles. We must view a decision to not object in context and determine whether correcting the error was sufficiently important under the circumstances that failure to do so was objectively unreasonable—i.e., a battle that competent counsel would have fought.

[*P33] Second, the ultimate question is not whether counsel's course **[***13]** of conduct was strategic, but whether it fell below an objective standard of reasonableness. In assessing counsel's performance, the court of appeals determined that counsel's assent to the jury instruction yielded "no conceivable tactical benefit to [Ray]." *Ray*, 2017 UT App 78, ¶ 20, 397 P.3d 817 (alteration in original). The court of appeals reasoned that if the defendant demonstrates "there is no way that counsel's actions might be considered sound trial strategy, then the presumption [of reasonable assistance] is overcome." *Id.* ¶ 18 (citation omitted) (internal quotation marks omitted).

[*P34] But *Strickland* demands reasonable assistance, not strategic assistance. *See Flores-Ortega*, 528 U.S. at 481 ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."). It is correct that the United

States Supreme Court has directed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689. But "these presumptions are simply tools that assist [courts] in analyzing *Strickland*'s deficient **[***14]** performance prong." *Bullock v. Carver*, 297 F.3d 1036, 1046 (10th Cir. 2002). If it appears counsel's actions could have been intended to further a reasonable strategy, a defendant has necessarily failed to show unreasonable **[**877]** performance.[7] *See Strickland*, 466 U.S. at 688. But the converse is not true. "[E]ven if an omission is inadvertent" and not due to a purposeful strategy, "relief is not automatic." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

> [W]hether a counsel's actions can be considered strategic plays an important role in our analysis of *Strickland's* deficient performance prong. As a general matter, we presume that an attorney performed in an objectively reasonable manner because his conduct *might* be considered part of a sound strategy. Moreover, where it is shown that a challenged action was, in fact, an adequately informed strategic choice, we heighten our presumption of objective reasonableness and presume that the attorney's decision is nearly unchallengeable. The inapplicability of these presumptions (because, for example, the attorney was ignorant of highly relevant law) does not, however, automatically mean that an attorney's performance was constitutionally inadequate. Instead, we still ask whether, in light of all the circumstances, the attorney performed in an objectively reasonable manner. **[***15]**

Bullock, 297 F.3d at 1051.

[*P35] Language in some of our appellate case law has muddied this point. *See, e.g., State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162 ("To satisfy the first part of the test, defendant must overcome the strong presumption that [his] trial counsel rendered adequate assistance, by persuading the court that there was *no conceivable tactical basis* for counsel's actions." (alteration in original) (citation omitted) (internal quotation marks omitted)); *Lewis*, 2014 UT App 241, ¶ 13, 337 P.3d 1053 (finding counsel deficient where there "was no conceivable tactical benefit" to his omission); *State v. Doutre*, 2014 UT App 192, ¶ 24, 335 P.3d 366 ("If clearly inadmiss[i]ble evidence has no conceivable benefit to a defendant, the failure to object to it on nonfrivolous grounds cannot ordinarily be considered a reasonable trial strategy.").

[*P36] We take the opportunity to clarify and realign our case law on this point with United States Supreme Court precedent. To be clear, it was not error for the court of appeals to assess whether counsel may have had a sound strategic reason for not objecting to the jury instruction. Indeed, the United States Supreme Court has directed that defendants must overcome such a presumption. *See Strickland*, 466 U.S. at 689. But when the court of appeals concluded there was no strategic reason for counsel to not object to **[***16]** the instruction, the deficiency analysis was not at an end. A reviewing court must always base its deficiency determination on the ultimate question of whether counsel's act or omission fell below an objective standard of reasonableness. Here, that means we must ask whether defining indecent liberties was sufficiently important under the circumstances that counsel's failure to argue for a clarifying jury instruction fell below an objective standard of reasonableness. *See id.*

[*P37] Under the circumstances here, we disagree with the court of appeals' conclusion that counsel's acquiescence to the jury instruction could not have been sound strategy. Importantly, neither side put the

[7] We note the concern of *amicus curiae* that "virtually any act or omission of trial counsel could be construed as part of a hypothetical 'strategy' (rather than an error that is objectively unreasonable)." But when inquiring whether counsel may have had a sound trial strategy, it must fall "within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Vallejo*, 2019 UT 38, ¶¶ 41-70, 449 P.3d 39. An objectively unreasonable strategy will not suffice.

precise meaning of "indecent liberties" at issue. The State focused on the specific touching variant of forcible sexual abuse, not "indecent liberties."[8]

[*P38] And the definition of "indecent liberties" was not pertinent to Ray's defense. **[**878]** Ray's primary defense was that he had not engaged in sexual activity with R.M. at all. Counsel pursued this strategy by cross-examining R.M. and highlighting inconsistencies in her various statements. He devoted most of his closing argument to challenging R.M.'s credibility as a witness, **[***17]** telling the jury to "think about all the lies that she's told." In the alternative, he argued that if the jury did believe her, there had been no enticement or coercion because the entire relationship was consensual. Importantly, Ray did not parse the evidence of sexual conduct to argue that it did not rise to the level of forcible sexual abuse.

[*P39] Within that context, counsel could have made a "reasonable professional judgment," *Strickland*, 466 U.S. at 690, not to draw the State's attention to the indecent liberties variant. While the State did not focus its attention on indecent liberties, it could have. The statute gave the State the option of proving either variant of forcible sexual abuse.

[*P40] And counsel could have reasonably concluded there was credible evidence before the jury that, while it did not fit within the specific touching variant, could have constituted indecent liberties. For example, R.M. testified that in addition to Ray touching her, she and Ray spent hours "making out" in a hotel room, watched a movie together while they were naked, and that she had touched the front of his "private parts."

[*P41] And Ray's own statements corroborated much of this. In his electronic communications with the detective **[***18]** posing as R.M., Ray referenced: that the two had "kissed" and "made out"; getting "into bed and kiss[ing] for the rest of the day"; playing "truth or dare"; and "the buzzy toy."

[*P42] In light of this evidence, which came partly from Ray himself, counsel could have reasonably concluded that clarifying indecent liberties would not help clear Ray and could instead broaden the State's arguments against him. While counsel's focus was that the inconsistencies in R.M.'s statements showed she could not be believed at all, counsel could have reasonably judged that even if the jury did not fully accept this argument, the inconsistencies he highlighted would more effectively undermine the State's proof on charges involving specific acts rather than more general "indecent liberties."

[*P43] We conclude counsel could have reasonably preferred the State to remain focused on the specific touching variant of forcible sexual abuse, and chosen not to draw the State's attention to the indecent liberties variant by objecting to the related jury instruction.[9] Accordingly, Ray has failed to overcome the "strong presumption" that his counsel exercised reasonable professional judgment.

[*P44] We clarify, however, that even if **[***19]** we were unable to conceive of a possible sound strategy behind counsel's conduct, it would not have ended our analysis. We would have proceeded to determine whether correcting the erroneous jury instruction was sufficiently important that counsel's inaction was objectively unreasonable. In light of the fact that neither side had put the meaning of indecent liberties at issue, and that it was not germane to the defense, we likely would have arrived at the same conclusion.

[8] The State focused on evidence related to the touching variant: i.e., that Ray had touched R.M.'s breasts over and under her bra, her buttocks, and her vagina. The State briefly mentioned indecent liberties only one time in its closing argument, connecting it to R.M.'s testimony that she had "touched [Ray's] private part in the front."

[9] The court of appeals assumed counsel could have successfully asked for "indecent liberties" to be either clarified or excised. But the indecent liberties alternative is statutorily established, and there was trial evidence in support of it. (For example, in its closing the State referenced R.M.'s testimony that she had "touched [Ray's] private part in the front," which is not specifically listed in the touching variant of forcible sexual abuse but would likely be deemed equally serious by a factfinder.) Accordingly, we are not certain that if defense counsel had objected to the term as overly vague, the court would have given counsel the option of deleting it, because a definition would have addressed counsel's concern.

[*P45] Because we conclude counsel's performance was not deficient, we do not address the prejudice prong of *Strickland*.

CONCLUSION

[*P46] We conclude that Ray's counsel did not provide ineffective assistance. Accordingly, we reverse and reinstate Ray's conviction. We remand to the court of appeals to address Ray's remaining claims.

Appendix E

INSTRUCTION NO. 5E

In order for you to find the defendant guilty of the offense of **FORCIBLE SEXUAL ABUSE**, as charged in Count 4 of the Information, you must find that each of the following essential elements of the crime charged in the Information have been established beyond a reasonable doubt:

1. That the defendant, Eric Ray;
2. On or between March 10, 2010 and March 13, 2010;
3. In Utah;
4. Did intentionally, knowingly, or recklessly;
5. Touched the anus, buttocks, or any part of the genitals of another, or touched the breasts of a female person 14 years of age or older, or otherwise took indecent liberties with the actor or another,
6. With the intent to arouse or gratify the sexual desires of any person,
7. Without the consent of the other, regardless of the sex of any participant.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the essential elements of the crime charged, then you must find the defendant not guilty. But if the State has proved to your satisfaction beyond a reasonable doubt all of the essential elements of the offense as set forth above, then you must find the defendant guilty of the offense charged in the Information.

INSTRUCTION NO. 5F

An act of 1) forcible sodomy, 2) object rape, and 3) forcible sexual abuse is without consent of the alleged victim where:

a) The alleged victim is 14 years of age or older, but younger than 18 years of age,

b) The defendant is more than three years older than the alleged victim, and

c) The defendant entices or coerces the alleged victim to submit or participate.

Appendix F

INSTRUCTION NO. 23

In determining whether enticement exists in this case, you must decide by considering the totality of the facts and surrounding circumstances. Factors that can be relied upon to assist in that determination include, but are not limited to the following:

1. The nature of Ms. [redacted] participation (whether Mr. Ray required her active participation);
2. The duration of Mr. Ray's acts;
3. Mr. Ray's willingness to terminate his conduct at Ms. [redacted] request;
4. The relationship between Ms. [redacted] and Mr. Ray; and
5. Ms. [redacted] age.

Enticement must be proven beyond a reasonable doubt.

Appendix G

FOURTH DISTRICT COURT, PROVO COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 101401511 FS
Plaintiff,	:	
v	:	
ERIC MATTHEW RAY,	:	
Defendant.	:	With Keyword Index

ORAL ARGUMENT FEBRUARY 22, 2012

BEFORE

THE HONORABLE LYNN W. DAVIS

CAROLYN ERICKSON, CSR
CERTIFIED COURT TRANSCRIBER
1775 Ellen Way
Sandy, Utah 84092
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APPEARANCES

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Utah County Attorney

For the Defendant: EDWARD K. BRASS
Attorney at Law

* * *

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cases.

In Seisca there was a religious connection between the two of them and he was constantly telling this young woman that this was something that God wanted her to engage in and he would sort of attempt to do things with her and then she would say no and he would withdraw. There was more of that that went on, again with this pressure from God telling her that this was what needed to be done and ultimately she capitulated and she consented but only after there was that buildup.

Same thing happens in Gibson. In that case it involves a woman whose moved from a rural county to a more urban county, I think it was Weber, and she's 14 years old and she befriends another 14-year old and the 14-year old begins to introduce her to her father and her father importunes her with gifts. This is all prior to the sexual relationship, doesn't object when she refers to them as boyfriend/girlfriend, is comfortable with some sort of sleeping arrangement that was arranged by the daughter where all three of them were sleeping together at the same time. And all this takes place over what they describe in the appellate decision a considerable period of time of togetherness before there is consensual sexual activity that become non-consensual by application of the Subsection 11. Same thing with Seisca.

We don't have that in this case. What we have as you just recited - and this is the evidence that was presented at the preliminary examination - that there was a long period of time where these people exchanged text messages, Facebook, telephone calls, you know, video conferencing, all sorts of things like that for a period of 18 months in which the young lady says that sex was never discussed, never, never came up at all. There wasn't any, Hey, you know, maybe we should get together and do this some day. There was no interchange or exchange of inappropriate photos. There was just simply nothing sexual about their relationship at all and the young lady testified at the preliminary examination in this case that she began to develop emotional feelings for him. And I believe there was evidence presented at the preliminary examination, the same could be said for Mr. Ray, that they began to become involved before they'd even met each other in sort of a romantic relationship where they had genuine feelings of caring for one another.

When they get here - and again this is in dispute, I mean, I'll say that for the record but I what the burden is at a preliminary hearing as well as anybody and I know that the evidence has be viewed in the light most favorable to the State and the State did present evidence that there was sexual activity that occurred to them, or that occurred

between the two of them in a hotel here in Provo during a weekend in March after they'd had this 18-month conversation that was going on between the two of them which she testified was done entirely consensually and she said, in fact, she said if I didn't want to do something, he didn't do it. And then subsequent to that there's an exchange of some token gift. This is after the fact, a tee shirt. They each exchanged tee shirts with one another and he goes back to Iowa and she goes back - or Illinois - and she goes back to Springville. That's not what happened in Seisca, that's not what happened in Gibson. The standards that you're required to employ and I mean, the reason I wanted you to consider both these motions at the same time is it's sort of tough to talk about enticement when our other argument is, you know, what is enticement. But okay, let's talk about it for a moment.

THE COURT: Well, we can do that and I can share with you as it relates to sort of the second component as it relates to your motions and my understanding -

MR. BRASS: Sure -

THE COURT: - as it relates to that.

MR. BRASS: We don't need to get there quite yet but if you apply these factors that the Court suggests should be applied in both Gibson and Seisca, the factors are, number one, the nature of the victim's participation and then in

parentheses, (whether the defendant required the victim's active participation). You know, I don't know, I mean honestly as I stand here I don't know what that mean. I'm sure a wiser mind in the robe might be able to impart some sort of meaning to that but the nature of her participation and whether he required her act or participation, I mean, obviously in a consensual sexual relationship there's going to be active participation by both parties. Whether he required it or not must be the focus and her testimony was, at the preliminary hearing was that she did this of her own free will and that there wasn't any - I'm extrapolating some from the testimony since she said it was consensual, there wasn't any requirement. You know requirement sounds sort of like a watered down version of force of some sort, you know, that somehow there was some sort of compulsion or coercion going on. You know, it wasn't something that he required or suggested, at least that wasn't the testimony that was presented.

Number two is the duration of the defendant's acts. Again, unlike these other people, you know, who suggested that first of all that it was God that was saying they should have sexual relations to this religious young woman and another one whose clearly praying on a friendship that the young lady has with his daughter and the fact that she's the new kid in town and she doesn't have anybody else and she

looks up to him and he's taking advantage of that. These people had 18 months of almost daily contact with one another by one medium or another in which sex was never mentioned at all and it only occurred here in Provo when they finally got together. So the duration of his acts in the overall context of the relationship is extremely short. It's not like Gibson; it's not like Seisca.

The defendant's willingness to terminate his conduct at the victim's request. Well, she testified at the prelim that he would do that. She said, you know, we're not going that. It didn't happen. The relationship between the victim and the defendant, you know what that is. I don't need to belabor that and you know what her age was. So you apply all those factors and it's my argument that enticement is missing.

You know, for the crimes that have been charged here, for them to be crimes, the ones that are charged, there has to be this lack of consent that's supplied by that Subsection 11. Not all sexual relationships between a person whose more than three years older than an individual who is between the age of 14, excuse me, over 13 and under 18, they're not blanket prohibited. They're only prohibited if there is this element, this aspect of enticement. So, maybe this is something that society in general might not -

THE COURT: Can you clarify for me as it relates to

that relationship, long distance, which occurred as you say nearly daily, sometimes for hours per day -

MR. BRASS: Certainly.

THE COURT: - and he was either in law school or graduating from law school in another state. He's somewhere between, depending on the length of time involved, he's somewhere between ages 25 and 28; is that about right?

MR. BRASS: I think that's about right.

THE COURT: Is that about fair?

MR. BRASS: I think that's about right.

THE COURT: And she is between like 14, 15, 16, is that -

MR. BRASS: Fourteen, 15.

THE COURT: Fourteen, 15 for the two years. Is there anything in that correspondence as it relates to texting and telephoning and Facebooking, etc. where he advises her that he is, in fact, married and has children or anything else that way?

MR. BRASS: You know, I can't say that I'm that familiar with the record, the overall context of the case itself to be able to answer that question but that wasn't presented at the preliminary hearing and so when we're talking about the evidence that was presented at the preliminary hearing, I don't want to get into things that might or might not come out at trial, let me tell you what I

think about that as I think the evidence would show at trial, that she absolutely knew that he was married, that they discussed his wife and that she knew that he was in law school. There's no question about that. But -

THE COURT: Yeah, I know that.

MR. BRASS: - in fairness, in fairness, I don't think that was an issue that was presented at the preliminary hearing. So...

THE COURT: There was an issue, the issue as it relates to the age differential.

MR. BRASS: There was an issue there absolutely. We put that into our memo, again, because I realize the evidence has to be viewed in a light most favorable to the State, all inferences are drawn at the prelim in favor of the State. I get that. I know that one of the things that she said was that apparently that she didn't know how old he was. That seems a little far fetched but again given what you're charged to do at a preliminary examination, you know, that is one of the things that was out there.

So, but be that as it may again, one thing that isn't disputed and that it was very clear from the record is that she said that sex, anything physical that would be related to a sexual activity that might be prohibited by law, was never discussed, never, never came up, never exchanged inappropriate photos, nothing like that.

THE COURT: Well, but it's very interesting because the facts are is that he arrived here. Of course he did not go to her home, didn't pick her up, didn't visit with her parents or engage in anything in connection with that. He picks her up at school, correct?

MR. BRASS: That is correct on one occasion at least, yes.

THE COURT: Yes.

MR. BRASS: But again, I don't know that that adds anything to your determination about whether or not, you know, whether or not you involve someone's parents or not, I don't know if that adds anything to the determination about whether or not there's enticement.

THE COURT: Well, yeah, but in terms of enticement or anticipation, etc., he, ahhh, my recollection - and it's been some time since we've had the preliminary hearing - is that he rented a room in the Marriott just across the street here -

MR. BRASS: That's correct.

THE COURT: - and made arrangements as it relates to that and with a reasonable anticipation as it relates to a sexual relationship with this girl, period.

MR. BRASS: Well, the reasonable anticipation, you know, I don't know - you know, I'm hard pressed to think where the Court might be inferring that from, in all candor.

I mean, just by virtue of the fact that he traveled -

THE COURT: Well, he comes in from out of state, from law school, wherever he is and comes directly here, picks her up at school. I don't think they go out to dinner, as I recall or they don't go to a movie or they don't engage in anything other than going from - my recollection - nearly directly from school to the motel, the hotel.

MR. BRASS: Again, this might be because of the passage of time and what your recollection is. There is some of what you said there that is accurate but there was more than one trip to the hotel.

THE COURT: Right.

MR. BRASS: If I've got it right I think the very first one, in fact, I think there were a couple of friends that the State intends to call as witnesses to confirm Mr. Ray's presence in the hotel room that came along which really, you know, doesn't really sound like, you know, here's my two friends from high school that are going to come over to the hotel room with us. That really doesn't sound like somebody who set out to come across country with the sole purpose of engaging in a sexual relationship. But even if that was what was in his head, let me give you that for the purpose of argument only, just for the moment and again, that's not enticement. I mean, it's not enticement. If that's one of his motives for coming here - because again,

the legislature hasn't prohibited that. They've haven't. They prohibited that there be lack of consent by virtue of operation of law when you're between 14 and 17 and there's enticement or coercion. They haven't absolutely prohibited that there be sexual activity between people who of greater age than that or they could have just done so. They could have just made the age of consent 17, period, and we'd be done with it and draw a bright line.

So again, even if he came across country with that in his mind - and I would argue that there's isn't sufficient evidence to draw that conclusion based on the 18 months of conversations up until then where the ugly word never raised its head, that at that point there still isn't any enticement going on. I mean, she's willingly participating in this relationship, she told you so, I mean she told you so from the witness stand. So enticement is something different. I mean, you know in Seisca the court throws around definitions from other jurisdictions and this sort of plays into the constitutional problem I suppose we're going to discuss in a minute but, you know, it talks about Black's Law Dictionary defining that as improper psychological manipulation to - improper they put in italics so that you're aware that it's something special - psychological manipulation includes the will of another, enticement of a teenager by an adult when he uses psychological manipulation to instill improper sexual

desires which would not have otherwise occurred. You know, I don't know how you do that. As you said, we have hours and hours of conversations for 18 months on end and you never even talked about the subject. You know, I don't know what sort of, you know, mastermind you'd have to be to accomplish that end without ever even discussing it one time. That's not like what happened with these other two guys whose convictions were affirmed on appeal. You know, they set out with a specific goal in mind and used psychological manipulation to break the person down at the same time that they're testing -

THE COURT: Well, you don't think he had a goal as it relates to a sexual relationship with the alleged victim here? I mean, if he did not, why does he purchase sex toys and condoms?

MR. BRASS: For that?

THE COURT: Yeah.

MR. BRASS: I mean, that's certainly a possibility that there would be a sexual relationship engaged in but only one that was within the confines of this law and one that didn't involve the buildup of enticement or coercion, you know, the only one that was permissible under Utah law because again, it wasn't banned. It's not banned. That relationship is not forbidden by law, only if there is enticement and again, if they wanted to say strict liability,

they could have said strict - you know, that goes to the -

THE COURT: It's not an issue as it relates to strict liability but look at it. There's discussion as it relates to marriage. There's some discussion as it relates to, quote, unquote, 'temple marriage' in terms of the culture and a variety of other things that way. Doesn't that rise to the level as it relates to enticement in connection with a relationship?

MR. BRASS: I'd have to see the overall context of those discussions in order to be able to effectively answer that question. I'd say, you know, it would depend on how those discussions were used. But again, you keep in mind that her own testimony was that this was something that over time to her became a romantic relationship, not anything sexual or inappropriate sexually at all, that it became romantic and so these two people who happen to share, you know, a common religion and common religious beliefs, it would occur to me that as their romantic relationship developed that those might be the kind of things that they discussed that had nothing to do with having sex at all. You know, I mean, it's just they talked about many things. Now if he said, if he did like Seisca did and he said, you know, God wants us to do this, I wouldn't be standing here talking to you like this now. I mean, we wouldn't be having this discussion because I would think that it would be more clear.

We might be having the constitutional discussion about what in the heck enticement really means but, you know, it would be more clear -

THE COURT: Okay.

MR. BRASS: - if there was something used - you know, other Courts like South Dakota is quoted in Seisca and talks about entice meaning lure or traps, snare, inveigle, decoy, tempt to delude, persuade against ones will or better judgment, drawn into a situation by rouse or wiles. You know, you would have to take the position - and I don't think the law requires you to do that - that all this stuff that went on between them for the 18 months up until the weekend that he came here was just garbage, it wasn't true, that it was all the big buildup, up to that relationship and that young lady testified that she sure doesn't believe that that's the case. She sure thought that those communications were genuine and that he genuinely cared for her. So that's, you know, that's what I've got to say about the enticement aspect.

THE COURT: Okay, can we shift gears as it relates to - I'll tell you what my understanding is as it relates to sort of the arguments in connection with the constitutionality of the provision. Defendant argues that 76-5-406(11) is void for vagueness. A statute is void for being unconstitutionally vague if it does not give an

ordinary person a reasonable understanding that his contemplated conduct is prescribed. In Collinder vs. Lawson which is a US case and United States vs. National Dairy Products, in determining the constitutionality of the statute, it must be examined in the light of the conduct in which the defendant is charged. The reviewing court must not look - must not look only at the statute on its face but examine the statute as though it read precisely as the highest court of the state has interpreted. Defendant argues that there's no way he could foresee that his conduct was criminal. The statute which only criminalizes enticed sexual behavior implies that a person between 14 and 18 can engage in consensual sexual conduct, yet the statute gives no guidance on how the younger person can consent and what behavior by the older person is prohibited.

The Utah cases that have analyzed the statute made the question more confusing. Zeisca - or I don't know how you pronounce that - Seisca states, "Enticement is based on the totality of the circumstances and enumerates several factors for courts to consider. These factors focus on the victim's behavior; thus, an ordinary person does not know what determines enticement, whether it's the actor's behavior or the characteristics of the victim." Utah Courts have not reviewed this statute on vagueness grounds but a recent case from the Indiana Supreme Court can shed light on the issue.

In Brown vs. State, the court struck the terms fraud and enticement from its original - from it's criminal and confinement statute on the grounds that it was too broad to support a conviction. That court ruled that enticement included any number of socially acceptable behaviors.

Similarly, 406(11) is too broad. Indeed, in Gibson, Judge Orme read the statute as criminalizing a person for merely instigating sexual contact with a minor unlike other statutes containing an enticement provision, this statute does not contain a Scienterd (phonetically) requirement. Thus, a person a can run afoul of the enticement statute without any actual intent to entice. Lastly, the statute is so vague it does not distinguish whether enticement is a subjective or an objective standard. It's not clear if the actor must avoid behavior that would entice an ordinary person or the specific victim. This ambiguity creates uneven enforcement because without guidance judges will apply different standards.

The State responds that, quote "in order to establish that the complained provisions are impermissibly vague, a defendant must demonstrate either (1) that the statutes do not provide the kind of notice that enables ordinary people to understand what conduct is prohibited; or (2) that the statutes encourage arbitrary and discriminatory enforcement. Furthermore, a statute that is clear as applied

to a particular complainant cannot be considered impermissibly vague in all of its applications and thus will necessarily survive a facial vagueness challenge. Although Utah Courts have not considered this particular statute, in State vs. Gallegos, Utah's internet enticement statute was similarly challenged for vagueness. That statute made it a crime to, quote, "knowingly use a computer to solicit, seduce, lure or entice a minor or a person the defendant believes to be a minor to engage in any sexual activity which is a violation of state law." In its ruling upholding the statute, the Utah Supreme Court ruled that the words used to describe the prescribed conduct are both commonly used and clearly defined. To avoid arbitrary and discriminatory enforcement, the legislature must establish minimal guidelines that govern law enforcement.

In McGuire, state vs. McGuire, the defendant argued that the statute did not provide sufficient guidelines forcing prosecutors to make decisions based on speculation, their own thoughts and beliefs. That court ruled that because the term, disputed term, quote, "has a straight forward definition," a prosecutor is not left to speculate as to the statute's meaning. Enticement has a straightforward definition to guide prosecutors in enforcing the statute. Thus, the statute does not risk arbitrary enforcement and is constitutionally permissible.

Those are the arguments as I understand it from the respective sides in connection with both the defense and the State of Utah.

MR. BRASS: Again, I concede that's an accurate summary of the arguments, no question about it. So let's talk first about - let me respond. I told you when we met previously that I might want some time to respond to Gallegos. I don't think I need that. I think that if you take the time to read the opinion you'll see why Gallegos doesn't really help the State one or the other in resolving this, this question about whether this is unconstitutionally vague.

With Gallegos, let me read from the opinion, was about was that he argued that the statute does not provide notice because a person of ordinary intelligence cannot know whether the offense is complete when the person actually meets the minor, takes any step to meet the minor or whether the chat alone is sufficient. So his argument for vagueness wasn't, had nothing to do with enticement, zero, okay? What it had to do with is when have I completed this offense? You know, is it because I did the chat and then I pushed send? Is it because I took some steps like going down and getting in my car to drive to some park somewhere to meet the imaginary 13-year old? Or is it actually going to the park to meet the imaginary 13-year old? Is that when it's

complete? So that was the argument about what made it vague and the Supreme Court said, no, there isn't really anything vague about it at all, it's complete when you send it, when you push send, when you've written out whatever you've said, then you send it to the imaginary 13-year old, you're guilty of the offense, that's it. But, they also elaborate on what the offense is and it's interesting I think, it's instructive of you read the opinion, it'll show you what's different about this case, Gallegos versus our case where we're talking about enticement. In Gallegos they said, okay, we're going to save this statute by saying that it's not just that you solicit someone over the internet to commit a crime, you have to do so with the specific intent to commit a sex crime that's prohibited by Utah law. It's not just the chat, it's not just punishing speech, you, defendant have to also have the specific intent in engaging in that chat, to cause someone else to violate the very serious crime under Utah law. That's different. I mean, there is a mental state in that case, in Gallegos and that's specific intent to get somebody to violate a crime.

Now, the distinction that exists in our situation, and we gave you some examples. I don't know if you have them in your summary or not but you know, again, what is enticement? You know, that's an issue that we're having here. Is it enticement for someone whose more than four

years old older than the 16-year old, for a 20-year old to say to a 16-year old, Gee, you look nice today, nice dress? Or I've got a couple of tickets here to the Lakers game tonight, they're going to be in town playing the Jazz, is that enticement, you know, to go on a date with someone? Is that sufficient? You know, and that's the problem. It doesn't tell you what sort of conduct after the fact might be viewed by a court or an appellate court or jury or a prosecutor or a police agency as, quote, "enticement". You know, and I think it's also instructive if you look at the rest of the consent statute, if you look at all of 76-5-406 to see what else is prohibited, and it's this. An act of sodomy, for example, is without the consent of the victim under any of the following circumstances, not just (11) but I'm going to go through them.

The victim expresses lack of consent through words or conduct. Okay, she says no. We don't have that here and that's clear from the record in this case. The actor overcomes the victim through the actual application of physical force or violence. Okay, that's obvious. I mean, that's obvious to any human being. You know, you don't force people by application of physical force to do things they don't want to do. That's something our society frowns on.

He's able to overcome the victim through concealment or the element of surprise. The actor coerces

the victim to submit by threatening to retaliate in the immediate future against the victim or any other person. "I'm going to kill you, I'm going to kill your cat, I'm going to kill your brother if you don't do this." That's pretty obvious too. No one in their right mind can say that they didn't know what that prohibited.

The victim has not consented and the actor knows the victim is unconscious, unaware the act is occurring or physically unable to resist. That's a person whose been drugged or maybe intoxicated or impaired by alcohol. Again, that's pretty obvious.

The actor knows as a result of a mental disease or defect the victim is at the time of the act incapable of either appraising the nature of the act or resisting it. I mean, that's again also obvious, very obvious that you don't take advantage of people who are mentally disabled and incapable of making decisions for themselves.

The victim submits or participates because the victim erroneously believes the actor is the victim's spouse. I mean, that's to prevent people from fooling other people and tricking them in some way.

The actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance. That would be almost the same thing as 5, except in this case you can't get somebody drunk

or you can't have them take drugs and overcome their will that way.

Then we have an absolute prohibition for someone whose younger than 14 age, years of age. And then we have someone younger than 18 and we have all the positions of special trust, parents, mental health counselor, religious counselor, etc., etc., legal guardian, adoptive parents. Again, the societal judgment, pretty clear that if you're a parent or you are an adoptive parent or a stepparent or your somebody's religious counselor or mental health professional that you should not be engaging in sexual relations with someone under 18. Nothing vague about that at all.

And then we get to this, the victim is 14 years of age or older but not older than 17 and the actor is more than three years older than the victim, and entices her or coerces the victim to submit or participate under circumstances not amounting to the force required in these other subsections. So, entices or coerces them to do what? I mean, there is no intent there. There isn't anything spelled out. All these other things require that the actor know the victim is unconscious, the actor knows as a result of a mental disease of defect, they can't do - the actor knows the victim submits or participates because the victim erroneously believes the actor is the spouse. He intentionally impairs the power of the victim to participate. He intentionally threatens

someone. He intentionally force someone to participate in this. In this case we don't have, in this subsection we don't have any sort of mental state at all. How is it that we're to prohibit this? Is it that they intentionally coerced someone or excuse me, entice, you know, the person who like Seisca set out on this course, you know, to fool this girl, that it was God speaking to her that made this okay, you know? Or is it something as simply as criminal negligence or recklessness, you know, that maybe somebody whose 'x' years of age - who knows what age that would be - and said to someone, a 20-year old, okay, let's do that again who says to someone, Gee, you know, you're 16, you look nice in your prom dress tonight, is that enticement? I mean, it might be, it might be. Certainly if the person acted with the intent but that's not spelled out in the statute, that that could be intent to think that, Well, if I tell she looks nice in her dress that maybe something will happen between us later on, you know, then that's a problem, okay. But there isn't any mental state that the statute supplies. It just isn't there and so you're left to speculate about what conduct will constitute enticement and that's exactly the sort of thing that Collander vs. Lawson and every vagueness case says, you can't require someone to speculate about what's prohibited by a penal law, you can't because that's a violation of due process.

THE COURT: Okay.

MR. BRASS: So, there you go. I think that's it.

THE COURT: Thank you.

MR. BRASS: Thank you.

THE COURT: Mr. Johnson.

MR. JOHNSON: Judge, I'll try to get us out of here before one.

With respect to the first motion, and just to clarify why the Court or why the State referred to the defendant's argument or characterized it that the Court was not acting as a rubber stamp, it's on Page 4 of the defendant's motion it quotes case law in two different spots talking about that the Court not act as a rubber stamp and then proceeds with its argument so I was just trying to point out that the State thinks that the Court made an intelligent decision and reasoned and didn't just say well, the State says it's so and so and on we go.

Looking at, you know, Seisca and Gibson, you know, that's great, those cases certainly stand for enticement. They certainly don't say if it doesn't make this standard of these two cases then you're out. I mean, those are - if they had found that that was not enticement and that was more than we had here then I think there's an argument. And so I think they all stand for are the factors that are listed, the five factors which as the Court well knows are not to be just

checked off, you know, two against three or one against four or five against zero, that it's a balancing test that the Court must do. You know, this case is a little bizarre with some of these facts, Judge. I mean, number one, the nature of the victim's participation like Mr. Brass said, you know, we know that he had, after performing oral sex on her, he said will you perform oral sex on me, she says no, but then within a few minutes he gets permission to ejaculate in her mouth. How does that happen? I think the victim's participation was involved somehow there and I think the jury can look into that.

The duration of the defendant's acts, number two. This was not a situation where, you know, Mr. Ray tells the victim that she looks great in her homecoming dress on one occasion and all of a sudden she jumps on him and on they go with this relationship. This was, as he said, a prolonged thing for a year and a half of grooming. So I think the duration would speak more to this case and contrary to his example of what really is enticement.

Number three, his willingness to terminate the conduct. I don't think there's any argument there that the defendant was willing to terminate the conduct with respect again to everything except for this oral sex situation where he's like, Yeah, I'm cool, we won't do that and then all of a sudden he's ejaculating in her mouth.

Number four, the relationship between the victim and the defendant. You know, this is kind of an interesting situation. You know, they weren't neighbors or anything, this was kind of an accidental texting that led to this relationship. I guess all we know is that, as the Court has pointed out, he was - the State's view of things and I think the Court can infer is he was grooming and praying on her art skills, her art talents when he suggested, you know, you can come out to school in Iowa where I live, there's a great art school here. And furthermore, I'm going to leave my wife and we're going to get married in the temple. Well, apparently in their relationship to that point he knew that that would be something that would appeal to her, that that would entice her to be willing to go along with this, you know, I guess more so than saying, Hey, let's just go run away to a justice of a the peace and get married there. But saying he's going to leave his wife and to to the temple, I think was a factor that the Court should consider in this enticement.

Number five, the age of the victim. You know, the defendant is about twice her age, Judge. I mean, 14 to 15 years of age, he's 27 or 28 at this time. I think that's a factor that should be balanced more heavily than the other five frank - than the other four frankly. When you're looking at someone here, you know, the prelim, it talks about how the defendant somehow thought that the victim was

politically mature or politically savvy and that he just really loved these intellectual conversations he was having with this 14-year old in Utah. I find that very odd and very suspect that his real goal here is to carry on a sexual relationship with a 14-year old. Why do you - you come to Springville, go to her high school, she's getting ready to go to her seminary hour and he said, no, let's go out back, meet me out back and where do they go? They go right to the motel where they make out and kiss that day, take her back, drop her off away from her house so she, you know, he doesn't have to meet the parents and get her in more trouble. Then subsequent day they go back, again getting picked up at school with the two friends. They take the friends to the motel. After the friends go swimming they reconvene in the motel room where he plays, he suggests that they play this sexy truth or dare game where he ends up pulling out a picture of a bunch of sex toy vibrators and showing that around for some good fun that day. And the fact that that was, you know, within the second visit -

THE COURT: Why wouldn't that solely on its own constitute enticement?

MR. JOHNSON: I don't think that solely on its own would. I think at that point, I think, there's a totality of what's going on here. I think when you're looking at, in the grooming process, as he praying upon her, she makes a comment

where - just showing the totality of this - the day after the friends are there, so the third day, that Saturday when he brings her back and the rose pedals are there on the way to the bathtub and the bed and he says go take a shower and shave. Shave? What's that all about? And she says, Well, it's something that we had talked about before that he wanted me to shave my vagina when we got together. Well, that kind of goes against the whole "well, we never talked about sex." That seems like something out of right field if you're comparing George Bush and Barack Obama's politics and then talk about something like that. I think that that speaks to a bigger thing that there was enticement and grooming as part of this and then to then lead to showing the sex toys. So it's a progressive thing. The first day they're kissing, the next day he's showing sex toys, the third day "Go shower, shave, let's watch Twilight, New Moon on the bed and we're going to spend the whole day together and then I'm going to perform oral sex on you and this is going to proceed like that.

And so I think looking at the totality of that clearly, that was his intent. He had condoms there. It's not something that comes in the room with the Gideon Bible. He would have had to bring those, Judge. So I mean, I think that all of that together show that all inferences taken to looking at the State, that this was coercion, enticement,

that the Court could find that by a probable cause determination and like I said, I mean, ultimately I think that the Court should not take this case from the fact, the ultimate fact finder, the jury. These are great arguments that Mr. Brass makes that the jury has to make that call, what is enticement? So, with that I'll transition to the second argument.

THE COURT: Yes, sir.

Mr. JOHNSON: Actually, one last thing on the last one, just to clarify and be clear, and I know Mr. Brass is just taking issue with this particular statute but for the record under 76-5-401 even if this was "consensual activity" this would still be a third degree felony because there was more than four years of age difference and so the fact that we're arguing there was not consent raises it from a third to a first. So this whole - just to the extent of clearing the air, that we're not trying to say, well, if there wasn't - if this was consensual then everything is fine and we can, they can go to the hotel right now and all is well. It's still a felony. So, it's not acceptable legal behavior in anyone's view.

With respect to the unconstitutionality statute and Gallegos, you know, while I think that Mr. Brass is accurate with his representation of the record of how they got to Gallegos and what the purposes were and what the actual

challenges were, arguments from the defense in that case. I think the language still is good. There's nothing there that says, Well, because if you're looking at it from a different prospective, all of a sudden the enticement language does not have an ordinary definition that is commonly known or understood. I think that the language there is very instructive and helpful that this Court can adopt and while it's looking at different statutes, the fact is we're arguing over enticement and it's something at that point that they took issue with, the didn't just say, Well, that's not before us and we're not going to talk about it. They did talk about it and they gave us some good language there and I think that that's something that we can turn over to the jury and they can weigh and balance those factors and say, Well, what is enticement? And is this enough? Is this, you know, he gave gifts later, not earlier. Is that a factor? Sure. He wasn't her religious leader; is that a factor? Sure. But did he bring up that they were going to get married in the temple and that she should shave herself before they have sex? Well, yeah, that's probably another factor they can consider and they can balance and weigh that and decide beyond a reasonable doubt did he entice her? Was this without consent?

And so on balance, Judge, the State would ask that the Court not disturb the bindover, not dismiss for that

reason and that the Court would deny the other motion to dismiss as the statute is not unconstitutionally vague.

THE COURT: All right. Mr. Brass, anything further, sir?

MR. BRASS: I can be pretty brief I think.

THE COURT: Proceed.

MR. BRASS: Just with respect to the notion that it's the jury that's going to decide whether or not there's enticement, they're entitled to decide that as a matter of fact but certainly you're going to have to define that for them first in the form of a jury instruction. So they don't just get to exercise independent judgments about what is or isn't enticement. They have to have some guidance from you first. So I see that more as a legal question than a fact question.

THE COURT: It's both. Yeah.

MR. BRASS: It might be. We might argue that on a different day when we're talking about jury instructions.

THE COURT: No, in terms of a jury instruction, it's going to be purely legal, but then they're going to have to make a determination as it relates to the facts and whether or not there was enticement.

MR. BRASS: I agree with that. And then the notion that, you know, that this "leaving my wife." I mean, I guess that indicates that she was aware he was married because

there's some discussion about leaving her, and getting married later on, that that constitutes enticement in some way. First of all, there wasn't any evidence that was presented at the preliminary examination from her that said, Hey, that was something I considered in whether or not I was going to engage in this conduct with him. So that's lacking. It's a nice argument but there's no evidence to support that. She didn't say, you know, "the reason I did what I did that day was because he told me that," that simply didn't happen. Nor is there any indication other than again a great argument from the prosecutor that that was his intention, that somehow that by saying that, whenever that was said, at some point in time, and we don't know when, that in March of 2010 that when he made those statements that he knew in March of 2010 that would some way break her down so that she would engage in something she wouldn't otherwise engage in.

Then lastly, the business about the sex toys which has been argued about by the State, you know, I don't know. I mean I don't know how that can be seen necessarily automatically as a matter of law as some form of enticement. I mean, it might have been something that this young lady or some other young lady or any young lady might think was repugnant or revolting in some way, you know, that might not have been any form of enticement whatsoever. It might have been something that actually put an end to this relationship

right then and there. So, I don't think that adds anything to the discussion.

THE COURT: How do you, how do you address the issue that your client is law trained?

MR. BRASS: How do I address that?

THE COURT: Yeah. I mean, he's not an individual who is, you know, he's literate?

MR. BRASS: No question.

THE COURT: College trained and he's law trained.

MR. BRASS: Sure.

THE COURT: Did he look at the Utah statutes and say, you know, if I sort of work it this way - I challenge the constitutionality of that particular statute and I think that I can engage in this activity with a 15-year old because, you know, I've studied the law, I've studied the Utah law, I've studied the cases and I'm going to challenge the constitutionality.

MR. BRASS: Well, I think I can answer some of that, Your Honor.

THE COURT: But I mean, he's literate.

MR. BRASS: Of course he's literate, he's -

THE COURT: And he's a law student -

MR. BRASS: Let me answer that, yeah. I mean, you know, pretty much everybody who appears in front of you was a law student at one time or another and I'm just going to take

a wild guess here I think there might be a wild variation in the intellects of the people who appear before you.

THE COURT: Absolutely.

MR. BRASS: So I'm not even going to exclude myself from that computation. So, you know, that's a tough question but let me answer it. The tough question you're asking is (a) the simple answer is there's no evidence to suggest that that happened.

THE COURT: I know that.

MR. BRASS: (B) The -

THE COURT: But there is evidence that he's literate.

MR. BRASS: No question, and (b) you know, my partner Ms. Cordova, drafted these, she wrote them herself, I don't have an issue about that. He didn't have anything to do with it and C, I suppose in all seriousness and all kidding aside, whether a person is William Shakespeare or some person who has a drinking problem, who sleeps at night in Pioneer Park, the beauty of our law is that it's written in a way to apply to everyone equally and if the person who is living homeless in Pioneer Park or the law student in Illinois is being punished under a vague law, it doesn't matter how smart you are. It's the law that's the problem.

THE COURT: Okay.

MR. BRASS: Okay.

THE COURT: Understood. Let me take just a moment and I'll review my notes and I'll make a decision.

MR. BRASS: There is one more matter we should take before you make your decision and we can wait, I mean, we're here, I don't think these people are getting out of here, Your Honor, but there is the matter of, I've made a verbal motion this morning to continue the trial in this case based on a critical illness that a very close relative of mine is suffering from that took a turn for the worse last Friday after we were here the previous Wednesday. I understand the State - and I greatly appreciate this - is not opposing that motion. I thought we should probably put that on the record.

THE COURT: Yeah. I was going to do that when I got back. We had a short discussion in chambers relative to that. The State of Utah certainly did not object to that and was sort of tenderly appreciative of you bringing it to the attention of the Court and had agreed that the trial scheduled for next week could be stricken and rescheduled in light of that family need. That's the intent of the Court even though, you know, you've indicated there have been plane tickets and hotels and everything else as it relates to the family involved, but in light of the mutual attention to that emergency in your family, I'm going to grant the motion.

MR. BRASS: Thank you.

THE COURT: I'll take a moment back in chambers.

I'll come back out and then announce the decision.
(Ruling previously transcribed and attached for convenience)
(12:14:31)

THE COURT: You may be seated. Let's go back on the record.

Counsel, let me make some observations now as it relates to the arguments that have been presented today rather than defer and wait for a long opinion to come out in connection with this. Here are my thoughts as it relates to the arguments. The defendant has presented two questions; first, is the statute constitutional; second, did the State provide sufficient proof to the court to provide probable cause. In the estimation of this Court, the answer to both questions is yes. When reviewing the constitutionality of a statute pursuant to law, we presume that the statute is constitutional. The challenger bears the burden of demonstrating the unconstitutionality of the statute. The case law is further clear that unconstitutionality of a statute must be shown beyond a reasonable doubt, State vs. Johnson, 224 P Third 720 which relies upon State vs. Shepherd which is a 1999 Court of Appeals case. The reviewing court must not look only at the statute on its face but examine any language of that Court, "The statute is though it read precisely as the highest court of the state has interpreted it." It's in Collander at Page 357. "Thus, the court should

consider the statute in light of the interpretation given it by the two appellate court cases which interpret the statute." In both cases that courts had no difficulty in defining the term entice. Both courts rely upon the dictionary definition.

If we look at Gibson at Page 356 and Cieska at Page 1226, the statute must be interpreted, "In its entirety and in accordance with the purpose which was sought to be accomplished." Both courts state the statute is aimed at prohibit mature adults from preying on younger and inexperienced persons. In other words, the enticement of a teenager by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires which would not otherwise have occurred.

Now, the statute here does not provide adequate notice to the defendants about what conduct is prescribed. A person may not entice. The statute here does provide adequate notice to defendants about what conduct is prescribed. A person may not, "entice" or specifically, a person may not "wrongfully solicit, persuade, procure, allure, attract, draw by blandishment, coax or seduce, lure, induce, tempt, incite or persuade a minor between the ages of 14 and 18 to engage in illicit sexual activities. And adult may not use psychological manipulation to instill improper sexual desires which would not otherwise have occurred."

Because the words used to describe a prescribed conduct are both commonly used and clearly defined, the statute is constitutional.

The state presented at the preliminary hearing sufficient evidence to find probable cause in the estimation of this Court. The Court found probable cause on that occasion. The issue is not properly before the Court because defendant has already argued its position. The Court ruled. Nevertheless, out of an abundance of caution, the Court has, in fact, reconsidered the issue and looked at it once again in new light.

The cases defendant cites on enticement do present some guidance on the issue. The purpose of the statute is to prevent "mature adults from preying on younger, inexperienced persons." Read in this light, the specific intent of Subsection 11 is to create a legal definition of consent for teenagers which is different from the more lenient consent required between adults. The enticement of a teenager by an adult occurs when the adult uses psychological manipulation to instill improper sexual desires which would not otherwise have occurred. Whether the defendant enticed the victim is based upon the totality of the circumstances, that's the Ceensca or Cieska. Both Gibson and Cieska were cases where a man at least 10 years older than the victim engaged in sexual activities with a 14 or 15-year old girl. In both cases, the

defendants strike up a relationship which eventuates into sexual activity. In Cieska the defendant used religion to help manipulate the victim, holding himself as "a man of God". In the present case, defendant was not a religious leader but did use religious principles to foster a sexual relationship. He promised the victim he would "take her to the temple, marry her" so and by virtue of that, there is some, the establishment of some religious principles in so doing. And by so doing, he was drawing on the victim's religious background, it's major emphasis for a "temple marriage" in order to legitimize and strengthen the relationship. In the mind of an impressionable young girl, it's probable that this promise would create a veneer of wholesomeness and goodness on a relationship which is manifestedly abhorrent. By manipulating the victim's religious beliefs, defendant likely was able to get to act sexually in ways she might not otherwise act.

Now, in addition to that, we have a - we have - in Gibson, we have a relationship that last, you know, one to two months. Here we have a relationship that's approximately 18 months and it's hard for the Court to concede, after hearing the preliminary hearing, that this law student who is 10 to 12 years older than the victim is engaged in a, exclusively in some type of political exchange. He's drawing upon a 14-year old as it relates to the discussion of

politics? With the age differential here does he really look at sort astute political opinions from a young teenager in high school while he's in law school? Aren't there other around him that he could in fact engage in? Who knows? But that argument that it's sort of - this is a generic constitutional protected political exchange between these parties is belied by virtue of the fact that, at least at the preliminary hearing she testifies as it relates to some previous discussion relative to some sexual discussions and that relates to the shaving of the vagina area, that's not political in the estimation of this Court in any form or fashion, nor is it in any form or fashion protected discussion by virtue of application of the First Amendment or by virtue of a charge that, or a claim that the subject statute is unconstitutional.

Now, as I mentioned in Gibson, the defendant spent one to two months grooming his victim, gave her gifts, allowed the girl to call him her boyfriend. Here he spent 18 months plus cultivating the relationship. He groomed the victim by saturating himself into her life. The testimony is that they spent hours a day texting, instant messaging, speaking by video. The victim's life outside of school was dominated by a relationship with the defendant, he used teen pop culture to manipulate her. There was a - he donned the name Edward or nickname as a reference to the popular

Twilight series, constricting the series theme of forbidden love and desire and danger, etc. He played all of that out. It's hard to say that he was romantically involved with her and an admission that theirs was an 18-month romance and that there was nothing, nothing sexual as it relates to that romance. He gave her gifts when they met, some of them of intimate sexual nature. You know, unlike Gibson, this defendant did not merely allow the girl to call him her boyfriend, he convinced the young girl that they would marry, spent hundreds of hours developing a romantic relationship with the victim, convinced her that they were in love, made plans and promises, came to her school, took her to a hotel, engaged in sexual activities. Considering the totality of the circumstances, the state has presented evidence there was probable cause the defendant enticed the victim and the Court finds the statute relied upon by the state of Utah is in fact presumed, the constitutionality of it is presumed.

The only other thing is that the state of Utah has submitted a brief today that I haven't had a lot of time to examine but does state in one section that the Utah Supreme Court explicitly states, "if a statute is sufficiently explicit to inform the ordinary reader what conduct is prohibited, it is not unconstitutionally vague." And the Court should first look at the plain language of the provision, we need not look beyond the plain language unless

we find some ambiguity. The plan language of a statute is to be read as a whole and it's provisions interpreted in harmony with other provisions in the same statute, with other statutes under the same and related chapters.

So I'll deny the Motion to Dismiss based upon that. I find that the language in the Utah statute is not so broad that any act might be considered to be enticement and the statute does not encourage arbitrary or discriminatory enforcement. So having denied the motion then to dismiss as it relates to the bindover and then in addition finding that the statute is not unconstitutional, then counsel, we can either reschedule this, based upon some of your family needs for the purpose of rescheduling the trial or we can do that today, either way.

MR. JOHNSON: Your Honor, the State would prefer bumping it out four to five weeks for a scheduling conference because of the large amount of planning that goes into plane flights and hotel. I want to give Mr. Brass and his family time to see where the course goes.

MR. BRASS: Thank you, that's fine.

THE COURT: Okay.

(End of previous transcript of ruling)

THE COURT: If we looked at maybe five weeks we would be looking at March the 28th at 8:30 a.m.

MR. BRASS: Your Honor, could we either go one week

before that or one week after [inaudible]?

THE COURT: We can look at six weeks on April the 4th at 8:30.

MR. JOHNSON: April the 4th works for the State?

MR. BRASS: Would that be at 8:30? That's fine.

THE COURT: It would be. Thank you very much.

MR. BRASS: Thank you, Your Honor.

(Whereupon the hearing was concluded)

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Appendix H

FOURTH DISTRICT COURT, PROVO COURT

UTAH COUNTY, STATE OF UTAH

STATE OF UTAH,	:	Case No. 101401511 FS
Plaintiff,	:	Volume III of IV
v	:	
ERIC MATTHEW RAY,	:	
Defendant.	:	With Keyword Index

JURY TRIAL SEPTEMBER 24, 25, 27 & 28, 2012

BEFORE

THE HONORABLE LYNN W. DAVIS

CAROLYN ERICKSON, CSR
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APPEARANCES

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* * *

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14 years of age or older. There's no dispute that [redacted] was 15 years old at the time and so engaged in a sexual act. Sexual act is number six, involving the genitals of one person in the mouth of another person regardless of sex of the participant.

So 5B and 5C are the same language, exact same thing except one is Count 1 and one is Count 2. You can sort them out however you want but essentially they're talking about the oral sex that there was oral sex performed on [redacted] by Eric Ray and then she performed oral sex on Eric Ray. So each one of those counts, one would go for one if acts on him, the other is the act on her, however you decide to sort that out is up to you but the since the elements are the same, you heard her testimony that on the Saturday after watching New Moon and getting lunch and stuff that they went back to the hotel and disrobed and she admitted, told you that Mr. Ray gave her oral sex with his mouth on her vagina and then after that, that she performed oral sex with his penis in her mouth until he ejaculated. So, those are the facts you heard from the witness stand to establish Counts 1 and 2.

Going to No. 7, without the consent of the other and obviously this is the biggest - well, all this happened but it happened with her consent and (inaudible), she's not saying, no, I didn't tell him no about that at that time.

Initially she said she had some hesitancy and I'm not saying that he held her down and forced himself on her that way, ultimately when it comes to without consent, turn with me to 5F please.

So again, I told you in opening statements that the statute and the law says (inaudible). This is how. So under (a) that [redacted] was 14 years of age or older or younger than 16. So again, she's 15 so that one is met; (b) the defendant is more than three years older than her, he's 28, more than three years (inaudible). And then (c) the defendant entices or coerces the alleged victim, [redacted] to submit or participate. So (c) is really where (inaudible) boils down to that when you look at the totality of the relationship (inaudible) not just what happened on Wednesday, Thursday, Friday, Saturday but the whole year and a half leading up to it and all the facts that you have describing gifts, conversations, the thousands of correspondence, IMs, texts, phone calls to decide that Mr. Ray did, in fact, entice or coerce her, a 15-year old girl, half his age, to submit to this sexual activity. And so it says at the top that this is (inaudible) forcible sodomy (inaudible) sex abuse.

Turn to object rape now, please, and 5D. In 5D we're talking about Count 3 what we're here to decide. So again numbers 1 through 4, same as 1 and 2. Going to count 5; cause of penetration, however slight, of the genital

opening of another person (inaudible) and object such a (inaudible) device. So in this case, she testified that on Saturday that the vibrator that you have in the exhibits here, that he used that on her (inaudible) vagina. That would be caused penetration of her and she was over 14, she was 15. So that act (inaudible) penetrating her with that is sufficient for the court of object rape.

No. 6, that he's doing this - in my argument it's not the first one (inaudible) but that he did this to arouse or gratify his sexual desire (inaudible) this was done for the purpose of turning him on as part of their sexual relationship (inaudible).

Again, number seven, without the consent of the other, going back to 5F, how she was coerced and enticed to participate in this conduct when he gave her the vibrator and said here use this.

Bringing us to the last one 5B, (inaudible) Count 4, forcible sexual abuse but when we're breaking down each one of these sexual acts. (1) through (4) again are not in dispute. (5) Touching anis, buttocks, part of the genitals of another or touch the breasts of a female (inaudible) older, otherwise took indecent liberties with the actor or another and (6) with the intent to arouse or gratify the sexual desires.

Okay, so once again this happened on several days

(inaudible) Wednesday they were making out. Well, what's making out? They were kissing (inaudible) going on with private parts. Thursday with Shane and her boyfriend went swimming, making out on the bed, disrobed and she talks about (inaudible) vagina, over her underwear, talked about touching her breasts (inaudible) over her bra and under her bra, skin to skin (inaudible) butt, so that qualifies as well. Then Saturday, (inaudible) oral sex and making out and vibrators, he's touching her while this is going as well, so (inaudible) happened at least once. There's evidence this has happened three or four times with different parts of her body. And so that's the elements that you can match up to those laws that were given you. Again, this was to arouse his sexual desire and the other part of (inaudible) indecent liberties is another, that he had her touch his penis. She said after that she finally said that she touched his private part in the front. So, again, number seven, (inaudible). So again she was forced and enticed to do this entire relationship. (Inaudible).

So that's the summary of how you can get to each one of these four counts beyond a reasonable doubt and after Mr. Brass I'll have a chance to address you all (inaudible).

MR. BRASS: As you can tell, Mr. Johnson and I spend entirely too much time around each other.

May it please the Court, Your Honor, Detective

come here from Texas with her mom, dropping whatever she's doing back there and to come and describe not just some sexual activity but her first sexual activity with a man whose on trial that she was once in love with. And we expect her to stand up for herself, you know, straight back and spit it out and not look down, not look embarrassed. Reasonable doubt is doubt. I mean, is there doubt that this happened? There's always doubt but is it reasonable? We have to look. If there's reasonable doubt that means that she's lying, she's making this up. What motive does she have to make this up? Is that what came across in her testimony, her looking down? I mean, even with me, did it look like I was coaching her, that she was reading some script? This is something that she is testifying reluctantly about something that was very troubling to her, something that she didn't want to talk about. That came across and that shows her credibility, ladies and gentlemen.

I mean is it any surprise that she would struggle with that under the circumstances, us much less as adults, like Mr. Brass said, it's difficult for us to talk about the subject much less someone of her age. Even though she did not affirmatively stop oral sex and the vibrator gifts and penetration and all that, the touching, because she didn't leave that hotel room when that was going down, that doesn't matter under the law because of the age difference, because

of her young age. The law says no (inaudible), ladies and gentlemen. That's why we're here. She was coerced. She was enticed. Looking at the full picture, not just the three days, you will be convinced beyond a reasonable doubt that the defendant is guilty of forcible sodomy, two counts of oral sex; object rape for the vibrator use in the hotel and forcible sexual abuse for all the sexual touching of her breasts and vagina. Thank you for your time.

THE COURT: Thank you, counsel.

Let's have the clerk of the court then swear the law court bailiff please. Raise your right hand.

(Whereupon the bailiff was sworn)

THE COURT: Ladies and gentlemen, now is the time that you have to deliberate. We will provide you with the exhibits that have been received in the court during the jury trial and about the first thing that we will do in light of the hour is order lunch for you and now is the time for deliberation together and to speak with each other as it relates to this case. Thank you very much.

(Whereupon the jury left the courtroom)

THE COURT: Counsel, if you will supply the clerk of the court with your contact numbers so that she can reach you at such time as a verdict has been reached.

MR. JOHNSON: Thank you, Your Honor.

THE COURT: Thank you very much and we can leave