No. 20220896-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff / Appellee,

v.

DUSTIN GILES ANDRUS,
Defendant / Appellant.

Appellant's Opening Brief

On appeal from the Second Judicial District Court, Davis County,
Honorable David Connors, District Court No. 211700097

Mr. Andrus is incarcerated.

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Introduction

After Laura[1] informed police of sexual activity between her and a man she met online, the police opted to circumvent the Utah statute that requires court orders to obtain electronic information and data and instead called in a favor to the FBI to issue a subpoena for that information. Several subpoenas later, the police identified Appellant Dustin Andrus and charged him with several crimes.

Dustin sought to suppress evidence obtained from the subpoenas. Although the district court was concerned about the police's conduct, it declined to suppress. The case went to trial, and Dustin was convicted.

Dustin then moved to arrest judgment on several charges because the State failed to produce evidence of every element, but the court denied that motion.

On appeal, this Court should reverse the order denying the motion to suppress. It should also arrest judgment on three charges. In the alternative, it should reverse for a new trial because the district court made an improper evidentiary ruling.

[1] A pseudonym.

Issues Presented

Issue 1: Did the district court err when it denied Dustin's motion to suppress?

Standard of review: In assessing a ruling on a motion to suppress, appellate courts review the factual findings for clear error and the legal conclusions for correctness. *State v. Roberts*, 2018 UT App 92, ¶ 7, 427 P.3d 416.

Preservation: This issue is preserved. (R.82–85, 293–304, 447–48.)

Issue 2: Should the district court have arrested judgment on the human trafficking conviction because there was no evidence that anything of value was given or received on the account of sexual acts?

Standard of review: Appellate courts "review a district court's grant or denial of a motion for directed verdict and to arrest judgment for correctness." *State v. Stricklan*, 2020 UT 65, ¶ 30, 477 P.3d 1251.

Preservation: This issue is preserved. (R.1197, 1206–11, 1819–21, 1937–38.)

Issue 3: Should the district court have arrested judgment on the sexual exploitation of a minor conviction because there was no evidence that Dustin produced child pornography?

Standard of review: Same as issue 2.

Preservation: This issue is preserved. (R.1211–14, 1821–22, 1937–38.)

Issue 4: Should the district court have arrested judgment on the distribution of a controlled substance count because the State did not produce evidence that the substance Laura took was marijuana?

Standard of review: Same as issue 2.

Preservation: This issue is preserved. (R.1559–60, 1562–63, 1569.)

Issue 5: Did the district court abuse its discretion when it did not exclude the Summit County evidence as improper under Utah R. Evid. 404(b)?

Standard of review: Appellate courts review evidentiary rulings for abuse of discretion, and a "district court abuses its discretion when it admits or excludes 'evidence under the wrong legal standard." *State v. Richins*, 2021 UT 50, ¶ 39, 496 P.3d 158 (cleaned up).

Preservation: This issue is preserved. (R.1897–98.)

Statement of the Case

1. The State uses a federal administrative subpoena process to identify Dustin

In September 2020, 16-year-old Laura informed police that she had been having a sexual relationship with a man named Timothy or Timmy from September 2019 to February 2020; their interactions occurred in Davis County, Utah. (R.8, 99, 120, 127, 180, 1005.) She told police that she communicated with Timmy over an app called TextNow and Snapchat, and she gave the police his usernames and phone numbers. (R.81, 102–03, 122, 372.)

In October 2020, Detective Vance with the Clearfield Police Department was assigned to investigate the case. (R.98, 110, 385.) Detective Vance asked Detective Carlson to identify Timmy from the Snapchat usernames and TextNow phone numbers. (R.372.) Detective Carlson, a fellow detective at the Clearfield Police Department, was also part of the FBI's Child Exploitation Task Force (CETF). (R.370–71.) Sometimes police officers operate as federal task force officers, and sometimes they operate as state officers. (R.414.)

Detective Carlson sent an email to his contact at the FBI—an administrative assistant—and "asked the FBI to send subpoenas to TextNow and Snapchat in order to identify" Timmy. (R.373, 375, 387, 404.) Detective Carlson told the administrative assistant: "We would like to receive the subpoena response sooner than later, and I know you can get results pretty quick. . . . If you're not able to do these subpoenas, then just let me know and we can go through the Davis County Attorney's Office. They are just slow." (Def. Exh. 1.)

The administrative assistant sent the subpoenas using the authority of a federal statute: 18 U.S.C. § 3486. (R.394, 413.)

Detective Carlson never screened this case with a federal prosecutor; Detective Carlson never saw a federal case number associated with this case, and he did not have a federal crime in mind when he asked the administrative assistant to send out the subpoenas. (R.396–97, 445.)

The administrative assistant sent out the TextNow subpoena in October 2020. (R.194.) TextNow responded with IP address for one of the phone numbers. (R.375.) The administrative assistant sent a subpoena to Comcast for subscriber information for that IP address. (R.375–76.) Comcast responded that the IP address was linked to the Andrus Family Carwash, a company in which Dustin was a part owner. (R.376, 442.)

The administrative assistant also sent out a subpoena for Snapchat, and Snapchat responded with an IP address. (R.376.) She sent a subpoena to Verizon for subscriber information for that IP address, and Verizon responded with several phone numbers. (R.377.) The administrative assistant sent another subpoena to Verizon asking for subscriber information for those phone numbers, and Verizon responded that the subscriber for one phone number was Dustin. (R.377.)

Using that information, officers discovered that Dustin had a house in Summit County (which he shared with a roommate), and they searched that

house. (R.378.) From Dustin's driver's license photo, Laura identified Dustin as Timmy. (R.82, 105, 120.)

Consequently, the State charged Dustin with human trafficking of a child, sexual exploitation of a minor, distribution of a controlled substance, four counts of unlawful sexual conduct with a 16- or 17-year-old, and two counts of enticement of a minor. (R.1–12, 458, 520–24.)[2]

2. The State denies Dustin's motion to suppress

Dustin moved to suppress all evidence derived from the State's use of the federal administrative subpoenas because those subpoenas were issued in violation of state and federal law and the Utah Constitution. (R.80–85, 291–304.)

After an evidentiary hearing, the district court denied Dustin's motion. (R.364–426, 441–50.) It reasoned that the federal statute—18 U.S.C. § 3486—authorized the use of a federal subpoena in "any investigation," meaning any state or federal investigation. (R.447.) However, the court was "troubled by the methodology deployed in the case" because "Detective Vance seems to have been able to circumvent the state statute by virtue of Detective Carlson's fortuitous dual-position with the CETF." (R.448.)

[2] The State originally charged Dustin with three additional crimes—rape, aggravated sexual extortion, and possession of a controlled substance—that allegedly occurred in Summit County and were not in the amended information. (R.1–12, 458, 491, 542, 1870–71.)

3. The court denies Dustin's motion to exclude evidence from Summit County

The crimes alleged in this case all purportedly occurred in Davis County. (R.520–24.) But prior to trial, the State moved to introduce evidence that in February 2020—at the end of the relationship between Laura and Dustin—Dustin allegedly drove Laura to his home *in Summit County* and provided alcohol and marijuana to her. (R.478.) The State claimed police searched Dustin's house in January 2021 and found Laura's underwear, alcohol, and a substance they believed was marijuana. (*Id.*)[3] Dustin opposed the State's motion. (R.495–96, 1879–80, 1884–86, 1891–95.)

The court allowed the evidence of the Summit County interaction and other evidence based on its reasoning that this was not other-acts evidence and was instead "really evidence that is part of the narrative of the relationship between these two individuals during the period of time. And I think the State is entitled to present that narrative." (R.1897–98.)

4. The State presents its evidence at trial

At trial, the State's main witness was Laura. The State also presented minor testimony from law enforcement officers.

[3] The court prohibited any party from admitting evidence about whether the Summit County interaction was consensual or not. (R.469, 1898.)

4.1 Laura testifies

Laura testified that in September 2019, she was 16 years old. (R.1096.) She talked online with a person whose username was "Timothy" about sexual things. (R.1098–100.) Laura testified he said he was 27. (R.1102.) Laura eventually pointed to Dustin in the courtroom and identified him as the person she had known as "Timothy." (R.1116.)

She testified that she first met Dustin[4] in person at a pizza place next to her dad's apartment. (R.1102.) She said she got into his car, he parked the car in the adjacent parking lot, and he "had me touch his groin." (R.1103, 1117.) She said that afterward, she "smoked marijuana" in the car. (R.1104.) She testified that Dustin never said anything about why he brought marijuana. (R.1104.) She did not testify that he gave her marijuana in exchange for sexual favors or because of the sexual activity. (*Id.*) She likewise did not testify to the amount or form of the marijuana, including whether Dustin did anything other than share a joint with her while they were in the car together. (*Id.*)

She testified that Dustin brought marijuana to at least one of their subsequent meetings,[5] but she did not recall him messaging her about bringing

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[4] Laura referred to "Timothy" rather than Dustin throughout her testimony, but given Laura's identification of Dustin as the person she had known as "Timothy," this recitation of the facts will refer to Dustin for simplicity.

[5] The State asked if Dustin "ever br[ought] you marijuana again," and she said, "Yes," but did not elaborate on whether he did so on more than one occasion. (R.1108.)

marijuana. (R.1108, 1112.) She likewise did not testify that Dustin brought marijuana in exchange for sexual favors or because of the sexual activity.[6]

She testified Dustin *offered* things to her—such as money, a car, or marijuana—but she did not testify that Dustin *gave* her these things he offered. (R.1109.) And she further clarified that when he made the offers, he did not ask for anything in return "at that very moment." (R.1109.) And while she did testify that on one occasion, he offered her "thousands of dollars" to continue "doing acts with him," she did not testify that he gave her any money. (R.1110.)

She testified that Dustin asked for nude pictures, and she sent him nude pictures. (R.1105.) She testified that she and Dustin exchanged videos of themselves masturbating. (R.1105–06, 1116.)

She testified that in his car in the parking lot of her dad's apartment, the two of them had "penetrated sex" and "oral sex." (R.1108.)

Laura also testified that she went to Dustin's house in Summit County once.[7] (R.1112.) She said she left a pair of underwear at his house, and she identified the underwear that the police found in Dustin's house as hers. (R.1112–13.) After the encounter in Dustin's house in February 2020, Laura stopped seeing Dustin. (R.962, 1114.)

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[6] She testified Dustin gave her "carts," or cartridges that she believed were filled with THC, but it appears that this occurred in Summit County, and Dustin is not charged with Summit County actions in this case. (R.1117.)

[7] There, she drank alcohol and had marijuana, and they had sex. (R.1112.) But again, Dustin was not charged for any crimes occurring in Summit County in this case. *See* footnote 2, above.

4.2 The State presents its remaining evidence

The State presented testimony from four law enforcement officers.

Detective Vance testified that while Laura was speaking to her in October 2020, Laura received several Snapchat messages from Dustin inviting Laura over to have sex and asking for her to send him pictures. (R.986; State's Exh. 1.)

Detective Vance testified about the process of identifying Dustin: finding a potential suspect only to have Laura not identify him in person, asking Detective Carlson to issue subpoenas to Snapchat and TextNow, and using the information obtained from those subpoenas to identify Dustin. (R.947–51.) She testified that when she tried to arrest Dustin, she saw a car registered to him (but she never saw Dustin) and the car fled. (R.953–56, 994.)

Detective Vance searched Dustin's phone and Laura's phone and found nothing of value. (R.997, 999.)

Detective Vance testified that although Laura said that several sexual acts occurred in Dustin's car, Laura's description of the car did not match any cars that belonged to Dustin. (R.1005–08.)

Detective Vance acknowledged that no testing was done on the substances found in Dustin's house. (R.723–24.) And she admitted that a "cart" can be used to inhale substances other than THC or to inhale marijuana that does not have THC in it. (R.722.) Detective Vance was aware that when Laura went to Dustin's home, she met Dustin's roommate, but Detective Vance never interviewed or investigated the roommate. (R.992–93.)

Detective Carlson testified about issuing the subpoenas on Snapchat and TextNow and how he ascertained Dustin's identity from the results of those subpoenas. (R.1063–72.) He also testified about how law enforcement searched Dustin's home in January 2021, nearly one year after the last sexual act with Laura, and found a pair of Laura's underwear, a substance that he believed was marijuana, and an alcohol flask. (R.1072–80.)[8]

A law enforcement agent testified about arresting Dustin at a gas station in Salt Lake City. (R.692.)

5. The jury convicts Dustin

After the close of the State's evidence, Dustin moved for a directed verdict on all counts. (R.701–06.) The court denied that motion. (R.711.)

Ultimately, the jury convicted Dustin on all counts: human trafficking of a child, sexual exploitation of a minor, distribution of a controlled substance, four counts of unlawful sexual conduct with a 16- or 17-year-old, and two counts of enticement of a minor. (R.598–607.)

6. The court denies Dustin's motion to arrest judgment

After the verdict, Dustin moved to arrest judgment on three counts—human trafficking, sexual exploitation, and unlawful sexual conduct with a 16- or 17-year-old by masturbating on camera). (R.1197.)[9] He argued that the State's

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[8] Another officer testified about actually finding these items. (R.687–88.)

[9] The court granted Dustin's request to reduce one count of unlawful sexual activity with a 16- or 17-year-old from a felony to a misdemeanor (R.1197, 1814, 1828.)

evidence did not meet the statutory definitions of those crimes. (R.1203–14, 1814–22.)

The court refused to arrest judgment on any of these grounds because viewing the evidence "in the light most favorable to the verdict" and "in light of the inferences that the jury could reasonably draw," it could not "determine that the verdict was so inconclusive or so inherently improbable that reasonable minds must have entertained reasonable doubt." (R.1937–38.)

Mr. Andrus now appeals.

Summary of the Argument

Dustin raises five issues on appeal.

First, the district court improperly denied the motion to suppress evidence obtained from the administrative subpoenas. The Utah Code expressly prohibited the detectives' actions, and their failure follow the Utah Code subjects all the evidence obtained from the federal administrative subpoenas to exclusion. Moreover, the detectives' actions violated the provisions of the Utah Constitution.

Second, the district court should have granted Dustin's motion to arrest judgment on the human trafficking conviction. The State failed to produce evidence on an essential element of that crime—commercial sexual activity—because it did not show that anything of value was given or received by any person on account of the sexual activity. This Court should dismiss the human trafficking conviction.

Third, the district court should have granted Dustin's motion to arrest judgment on the sexual exploitation of a minor conviction. The State did not put forth evidence that Dustin produced child pornography. Rather, all it presented was evidence that Dustin asked for nude pictures. Because there was no evidence that Dustin "produced" child pornography, this Court should dismiss the sexual exploitation of a minor conviction.

Fourth, the district court should have granted Dustin's motion for a directed verdict on the distribution of a controlled substance charge. The State produced no evidence that the substance distributed was actually marijuana; it

never tested any substance it found, and it did not ask Laura questions about how she felt or otherwise knew the substance was marijuana. This Court should dismiss the distribution conviction.

Fifth, the district court abused its discretion when concluded that the Summit County evidence was part of the narrative of the crime. However, the Summit County evidence and the Davis County crimes were not part of a single criminal episode and were not inextricably intertwined. Thus, the district court should have analyzed the Summit County evidence under rule 404(b), and had it done so, it would have concluded that it was inadmissible. This Court should reverse all of Dustin's convictions and remand for a new trial.

Argument

1. The district court improperly denied the motion to suppress

Dustin asked the district court to exclude "[a]ll evidence derived from investigative subpoenas that were obtained in violation of state and federal law," including the "the fruits of such subpoenas," under the U.S. Constitution, Utah Constitution, and Utah Code. (R.80, 85, 293–304.) But the district court denied this request because, it reasoned, Utah police officers could obtain evidence through federal subpoenas, although there were no federal charges or a federal investigation. (R.441, 445, 449–50.) This was error.

As set forth below, (1) regardless of whether the federal subpoenas were valid, the plain language of the Utah Code required the State's evidence to be excluded; (2) the evidence should also have been excluded because it was obtained in violation of the U.S. and Utah Constitution; and (3) Dustin was harmed by the district court's error in refusing to exclude the evidence.

1.1 The State's evidence should have been excluded under the Utah Code

Regardless of whether the federal subpoenas were valid or the search was constitutional, the State's evidence should have been excluded under the plain language of the Utah Code because it was obtained in violation of the relevant statutory provisions. Utah Code § 77-23c-105.

As set forth below, (i) evidence was obtained in violation of the relevant provisions of the Utah Code; (ii) the statute requires exclusion of the records, regardless of whether the federal subpoenas were valid; and (iii) the statute

incorporates the same Fourth Amendment exclusionary rule, which requires exclusion of evidence derived from the unlawfully obtained records.

1.1.1 The evidence was obtained in violation of the Utah Electronic Information or Data Privacy Act

Chapter 23C of the Utah Code is the Electronic Information or Data Privacy Act ("the Act"). Utah Code § 77-23c-102 (2020).[10] The Act places strict controls on when electronic information and data can be accessed by law enforcement agencies. It prohibits a law enforcement agency from obtaining, "without a search warrant issued by a court upon probable cause . . . electronic information or data[11] transmitted by the owner of the electronic information or data to a remote computing service provider." Utah Code § 77-23c-102(1). A law enforcement agency also may not obtain a "subscriber record"—which includes the subscriber's name, address, telephone number, and IP address[12]—unless the law enforcement agency follows the statutes under the Subpoena Powers for Aid

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[10] The first subpoenas were issued in October 2020, and the conduct occurred between 2019 and 2020. (R.194.) The Act was amended in 2019 and in 2021. Dustin will cite to the 2019 version.

[11] "'Electronic information or data' means information or data including a sign, signal, writing, image, sound, or intelligence of any nature transmitted or stored in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system." Utah Code § 77-23c-101.2 (3)(a).

[12] The statute prohibits the disclosure without a warrant of "other subscriber or customer number or identification, including a temporarily assigned network address." Utah Code § 77-23c-104(1)(f). This definition includes an IP address, which is a "numeric address of a computer on the internet." "IP address," *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/IP%20address.

of Criminal Investigation and Grants of Immunity. Utah Code § 77-23c-104(1)–(2).

And under the Subpoena Powers statute, a law enforcement agency can only obtain electronic and subscriber information by court order if the law enforcement agency (1) "articulate[s] specific facts showing reasonable grounds to believe that the records or other information sought . . . are relevant and material to an ongoing investigation," (2) "present[s] the request to a prosecutor for review and authorization to proceed," and (3) "submit[s] the request to a magistrate for a court order." Utah Code § 77-22-2.5(2). Companies can only produce subscriber information if it has that court order. Utah Code § 77-22-2.5(3)–(4).

Here, Detective Vance did not use the state subpoena process in the Act. (R.442–43.) She did not get a search warrant for electronic or subscriber information. Utah Code § 77-23c-102(1). Nor did she articulate specific facts showing reasonable grounds that the information was relevant and material; she did not present that request to a prosecutor for review and authorization; and she did not receive a court order allowing her to obtain those records. Utah Code § 77-22-2.5(2). Rather, she asked Detective Carlson to discover the identity of Timmy, and he asked an FBI administrative assistant to send out federal subpoenas. (R.373, 375, 387, 404.) He opted for the federal route because going through the "Davis County Attorney's Office"—the route specified by the Utah statutes—was "just slow." (Def. Exh. 1.) Thus, the detectives opted to not follow

the Utah statutes that govern obtaining electronic information and data.[13] In the district court's words, the detectives "circumvent[ed] the state statute." (R.448.)

If evidence is obtained in violation of the Act, that evidence is "subject to the rules governing exclusion *as if* the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14." Utah Code § 77-23c-105 (emphasis added). Thus, regardless of whether the federal subpoenas were valid or invalid, the State's evidence must be treated "as if" it was obtained unconstitutionally if it is obtained in violation of the Act.

To that end, Dustin argued that evidence obtained from the subpoenas should be suppressed because those subpoenas violated the Act. (R.296.) But the district court ignored this argument because it concluded the federal subpoenas were valid. (R.449.) [14]

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[13] The Act does allow law enforcement agencies to obtain electronic information "without a warrant" if they are acting "in accordance with a judicially recognized exception to warrant requirements." Utah Code § 77-23c-102(2)(b)(ii), -104(4)(b). Those exceptions include exigent circumstances, *Birchfield v. North Dakota*, 579 U.S. 438, 456 (2016), community caretaking, *State v. Smith*, 2022 UT 13, ¶ 14, 513 P.3d 629, and consent, *Fernandez v. California*, 571 U.S. 292, 298 (2014). The State did not establish any facts showing that these exceptions applied.

[14] Dustin addresses the validity of the federal administrative subpoenas in section 1.2.2, below.

To the extent the district court's reading could be read to imply it viewed the federal administrative subpoena statute as somehow preempting the Act, the district court was wrong. The federal administrative subpoena statute governs how evidence may be obtained in investigations of certain *federal* crimes, but the Act governs the obtaining and use of information in the investigation and

In so doing, the district court erred by ruling contrary to the plain language of the Act.

1.1.2 The Act required the evidence to be excluded

Because the State's evidence was obtained in violation of the Act, the evidence must be excluded even if the federal subpoenas are valid or the search was constitutional. Utah Code § 77-23c-105. In addition, the plain language of the Act incorporates the Fourth Amendment exclusionary rule, which requires exclusion not only of the records themselves, but of the evidence derived therefrom.

The Act required the evidence to be excluded, even if the federal subpoenas are valid: In interpreting statutes, this Court's "primary goal is to evince the true intent and purpose of the Legislature," which is "discern[ed] . . . by first looking to . . . the plain language of the statute itself." *State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276 (quotation marks omitted).

The Act directs all electronic data and subscriber records "that are obtained in violation of the provisions of this chapter shall be subject to the rules

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prosecution of *state* criminal cases. *Compare* 18 U.S.C. § 3486 *with* Utah Code § 77-23c-101.2(4).

"Federal law preempts state law where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively or to the extent that it actually conflicts with federal law." *Madsen v. Washington Mut. Bank fsb*, 2008 UT 69, ¶ 19, 199 P.3d 898 (cleaned up). But there is nothing in the plain language of the federal subpoena statute that indicates any intent to exclusively occupy the field of *state* criminal investigations or *state* subpoena processes. 18 U.S.C. § 3486. There is likewise nothing in the federal statute that conflicts with state law dictating the proper procedure for investigating and obtaining evidence for use in state criminal cases. *Id.*

governing exclusion as if the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14." Utah Code § 77-23c-105. Under the plain language of the Act, regardless of whether the evidence was obtained constitutionally, if it is obtained in violation of the Act, it must be excluded "as if" the evidence was obtained unconstitutionally. *Id.*

Even if the federal subpoenas were valid, because the use of federal subpoenas resulted in evidence "obtained in violation" of the Act, the evidence must be excluded by the Act. *Id.* The district court therefore erred in denying the motion to suppress because the federal subpoenas were valid—that reasoning does not make the evidence admissible under the Act. (R.445, 449.)

The Act incorporates the exclusionary rule of the Fourth Amendment: Because the Act incorporates the exclusionary rule of the Fourth Amendment, evidence derived from the unlawfully obtained records must likewise be excluded.

Courts "interpret statutes to give meaning to all parts, and avoid rendering portions of the statute superfluous." *In re A.G.*, 2022 UT App 126, ¶ 15, 522 P.3d 31. "The legislature is entitled to invoke specialized legal terms that carry an extra-ordinary meaning, and when it does so we credit the legal term of art." *State v. Canton*, 2013 UT 44, ¶ 28, 308 P.3d 517. And "when a word or phrase is transplanted from another legal source . . . it brings the old soil with it." *Id.* (quotation marks omitted).

Here, the Act incorporates the exclusionary rule developed in Fourth Amendment jurisprudence, because it explicitly references exclusion under the Fourth Amendment. Utah Code § 77-23c-105. Under the Fourth Amendment, "[t]he exclusionary rule prohibits the use at trial of evidence, both primary and derivative (the 'fruit of unlawful police conduct'), obtained in violation of an individual's constitutional and statutory rights." *State v. Topanotes*, 2003 UT 30, ¶ 13, 76 P.3d 1159.

Because the records obtained in violation of the Act must be excluded "as if the records were obtained in violation of the Fourth Amendment," Utah Code § 77-23c-105, the district court was required to "prohibit[] the use at trial of evidence, both primary and derivative (the 'fruit of unlawful police conduct')," *Topanotes*, 2003 UT 30, ¶ 13. Thus, the district court improperly focused on whether the federal subpoenas were valid under the federal statute. (R.445–49.) Because it was undisputed that the detectives did not follow the provisions of the Act, the district court should have suppressed the evidence obtained from the subpoenas—and all the evidence flowing from the subpoenas)—under the Act.

1.2 The evidence should have been excluded under the Utah Constitution

The district court also erred in denying the motion to suppress because the State obtained its evidence in violation of the Utah Constitution.

As set forth below, (1) Dustin had a reasonable expectation of privacy in the information sought by the subpoenas; (2) it was unreasonable for the state police to obtain this protected information for use in a state prosecution through the use

of federal subpoenas rather than the process mandated by the Utah Code; (3) the State's evidence should have been excluded under the Utah Constitution.

1.2.1 Dustin had a reasonable expectation of privacy,

Under Utah law, Dustin had a reasonable expectation of privacy in the records sought by the State.

The Utah Constitution protects "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." Utah Const. art. I, § 14. It "prohibits state actors from unreasonably intruding into areas where citizens have a legitimate expectation of privacy." *Schroeder v. Utah Attorney Gen.'s Office*, 2015 UT 77, ¶ 22, 358 P.3d 1075.

While it is true that the U.S. Supreme Court has held that individuals do not have a legitimate expectation of privacy in records shared with a third party, the Utah Supreme Court, in contrast, has explicitly recognized a legitimate expectation of privacy in records shared with a third party under the Utah Constitution. *Compare State v. Thompson,* 810 P.2d 415, 418 (Utah 1991) (recognizing right to privacy in bank statements under the Utah Constitution) *with United States v. Miller*, 425 U.S. 435, 442 (1976) (no right to privacy in bank statements under the Fourth Amendment). The Utah Supreme Court rejected the U.S. Supreme Court's reasoning that a person has no expectation of privacy in bank records and documents because they have been shared with a third party and instead has held that "article I, section 14 of the Utah Constitution" protects individuals "against unreasonable searches and seizures of their bank statements,

. . . and all papers which [they] supplied to the bank to facilitate the conduct of [their] financial affairs upon the reasonable assumption that the information would remain confidential." *Thompson*, 810 P.2d at 417–18. The Utah Supreme Court's holding in *Thompson* supports that individuals likewise have a legitimate expectation of privacy in electronic information shared with third-party providers "upon the reasonable assumption that the information would remain confidential" *Id.*

Similarly, this Court has held that defendants have a reasonable expectation of privacy in their medical records, even when those medical records are held by a third party and contain information disclosed to a third party. *State v. Yount*, 2008 UT App 102, ¶ 24, 182 P.3d 405.

The Supreme Court of New Jersey applied its own precedent in cases similar to *Thompson* and *Yount*, to hold that electronic data (IP addresses) disclosed to and held by internet services providers is protected under the New Jersey Constitution. *State v. Reid*, 945 A.2d 26, 32–33 (N.J. 2008). Pointing to its precedent holding that individuals had a legitimate privacy interest under the New Jersey Constitution in bank records and telephone records, it explained that "disclosure to a third-party provider, as an essential step to obtaining service altogether, does not upend the privacy interest at stake." *Id.* Thus, it reasoned that individuals had a legitimate privacy interest in IP addresses shared with internet service providers because "the nature of the technology requires individuals to obtain an IP address to access the Web" and "[u]sers make

disclosures to [internet service providers] for the limited goal of using that technology and not to promote the release of personal information to others." *Id.* at 33.

In Utah, not only does *Thompson* and *Yount* support that Dustin had a privacy interest in the subpoenaed information, but the Utah Electronic Information or Data Privacy Act, discussed at length above, guarantees Utah citizens privacy in their electronic and subscriber information by not allowing that information to be disclosed to law enforcement without a warrant or a court order. Utah Code § 77-23c-102(1), -104(c); Utah Code § 77-22-2.5(2). Because the Act strictly controls when law enforcement can obtain electronic and subscriber information and explicitly allows for the exclusion of that information if the act's provisions are not followed, Utah Code § 77-23c-105, Dustin had a legitimate expectation of privacy in his electronic information and data and his subscriber information under the Utah Constitution.[15]

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[15] In *State v. Roberts*, 2015 UT 24, 345 P.3d 1226, the Utah Supreme Court reasoned that there was no expectation of privacy in an IP address. But it explicitly did not consider the Electronic Information or Data Privacy Act, which was enacted *after* the events occurred in that case. 2015 UT 24, ¶¶ 30–33. Thus, *Roberts* has no bearing on the analysis here.

Also, in *State v. Oryall*, 2018 UT App 211, 437 P.3d 599, this Court rejected the defendant's argument that the GRAMA statutes created a reasonable expectation of privacy in her motor vehicle and driver records. This Court reasoned that "[t]hree separate statutory subsections appear to give law enforcement officers the right to access records such as vehicle registration and driver's license information," so GRAMA did not create a constitutional right of privacy in those records. 2018 UT App 211, ¶ 15. That is not the case here.

The Electronic Information or Data Privacy Act prohibits law enforcement from obtaining electronic and subscriber information unless they have a warrant

1.2.2 The search was unreasonable

Where an individual has a legitimate expectation of privacy, his rights under the Utah Constitution are violated where "the search and seizure by the State was 'unreasonable.'" *Thompson*, 810 P.2d at 418 (Utah 1991).

Although "[a] state intrusion is not unreasonable, . . . when the state acts under a *valid* warrant or subpoena." *Schroeder*, 2015 UT 77, ¶ 22 (emphasis added), where evidence is obtained "through subpoenas that were *illegal* due to the State's failure to" comply with the subpoena requirements, the search is unreasonable, and the evidence must be "suppressed." *Yount*, 2008 UT App 102, ¶ 24 (emphasis added).

To that end, in *Yount,* the Court suppressed the State's evidence where "Defendant's medical records were obtained through subpoenas that were illegal due to the State's failure to notify Defendant of their issuance," as required by Utah law, which "rendered the subpoenas invalid." *Id.* ¶¶ 11–16. In addition, although the State could have "receive[d] judicial authorization to issue subpoenas without notifying the target of the criminal investigation—the potential defendant—of the issuance" under the Subpoena Powers Act, "the State did not comply with the Subpoena Power Act's requirements." *Id.* ¶ 19 & n.2. Thus, the search was unreasonable, and "under Article I, Section 14 of the Utah

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or a court order or certain exceptions apply. Utah Code § 77-23c-102(1)–(2); Utah Code § 77-23c-104(2)–(4). Unlike GRAMA, the Electronic Information or Data Privacy Act does not allow law enforcement the right to access electronic information or data or subscription records.

Constitution, the evidence obtained through the State's illegal subpoenas to the Hospital must be suppressed." *Id.* ¶¶ 21, 24.

The same is true here. The State failed to comply with the requirements of Utah law for obtaining evidence in a Utah investigation, for use in a Utah criminal case. As discussed above, the Act requires law enforcement agencies to obtain a warrant or a court order before it can obtain electronic or subscriber information, but the detectives did neither here. Utah Code § 77-23c-102(1), -104(c); Utah Code § 77-22-2.5(2); R.442–43.

In addition, the State's evidence was likewise not obtained legally, or reasonably, through the federal administrative subpoena statute, 18 U.S.C. § 3486(a). As Dustin argued in the district court, "none of the substantive requirements of the statute were attempted, much less met." (R.294.)[16]

The federal administrative subpoena statute states: "In any investigation of . . . *a Federal offense* involving the sexual exploitation or abuse of children, the Attorney General . . . may issue in writing and cause to be served a subpoena requiring the production" of evidence. 18 U.S.C. § 3486(a) (emphasis added). The

[16] One of those requirements was that "the Attorney General . . . issue in writing and cause to be served a subpoena." 18 U.S.C. § 3486(a). The U.S. Attorney General's authority to issue subpoenas has been delegated to the FBI, but only to Special Agents in Charge, Assistant Special Agents in Charge, and Senior Supervisory Resident Agents. Department of Justice Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities part III(B)(4) (citing Attorney General Order No. 2421-2001, April 5, 2001). But the person who signed the TextNow subpoena was not in any of those roles; that person was a "Supervisory Special Agent." (R.194.)

plain language of the federal subpoena statute authorizes subpoenas only in "investigation[s] of . . . a *Federal Offense*," not for investigations of state offense.[17] *Id.* (emphasis added)

Nonetheless, the district court concluded the subpoenas were valid because "the phrase 'any investigation of' does not draw a distinction between a state investigation and a federal investigation." (R.447.) But the district court's reasoning ignores the language following the phrase it relied on, which only authorizes a subpoena "[i]n any investigation of . . . *a Federal offense* involving the sexual exploitation or abuse of children." 18 U.S.C. § 3486(a). The language "a Federal offense" (rather than any offense) does indeed distinguish between a federal and statute investigation. Thus, the district court erred as a matter of law in interpreting the federal subpoena statute. *Ellis v. Est. of Ellis*, 2007 UT 77, ¶ 6, 169 P.3d 441 (district court's statutory interpretation is reviewed for correctness).

Beyond this, the district court clearly erred to whatever extent it may have implicitly held that the subpoenas were issued in an investigation of a federal offense. (R.447 ("the investigation could have been for both state and federal offense simultaneously").) But the subpoenas were *not* filed in the investigation of a federal offense. The court found that "the lead investigator was Detective

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[17] When interpreting statutes, courts "first to the plain language of the statute." *Bagley v. Bagley*, 2016 UT 48, ¶ 10, 387 P.3d 1000 (cleaned up). Courts "presume that the legislature used each word advisedly" and that "the expression of one term should be interpreted as the exclusion of another, thereby presuming all omissions to be purposeful." *Id.* (cleaned up).

Vance, who is *not a [FBI] CETF agent*; at the time of Detective Carlson's testimony, *the case had not been sent to or screened by a federal prosecutor*; *no specific federal offenses were listed on the subpoenas* or the email that requested them; Detective Carlson was aware that he could seek a proper subpoena through the Davis County Attorney's Office; and *Detective Carlson was not working with or communicating with other CETF members or supervisors* during this investigation, except [the administrative assistant]." (R.446 (emphasis added).) It also found that at no point was this case ever screened by a federal prosecutor or given a federal case number. (R.446–47.) Thus, at the time the subpoenas were issued, there was no "investigation of . . . a Federal offense." 18 U.S.C. § 3486(a).

In sum, the detectives obtained their evidence through an unreasonable search. They did not comply with the Act, nor did they obtain the information through a valid federal subpoena.

1.2.3 The evidence should have been excluded under the Utah Constitution

Because the detectives obtained the electronic and subscriber information and the evidence derived from it in violation of the Utah Constitution, the evidence must be excluded. As counsel argued below, "[F]ailure to follow Utah law specifically allows for suppression of the fruits of such subpoenas." (R.80, 85, 303—304.) Trial counsel is correct.

The Utah Supreme Court has held that "exclusion of illegally obtained evidence is a necessary consequence of police violations of article I, section 14." *Thompson,* 810 P.2d at 419 (quotation marks omitted). Evidence "obtained *as a*

result of illegal subpoenas must therefore be suppressed." *Id.* (emphasis added); *see also State v. Rowan*, 2017 UT 88, ¶ 22, 416 P.3d 566 (Himonas, J., concurring).

Utah case law supports that Utah's exclusionary rule it is coextensive with the federal exclusionary rule, which "prohibits the use at trial of evidence, both primary and derivative (the "fruit of unlawful police conduct"), obtained in violation of an individual's constitutional and statutory rights." *Topanotes*, 2003 UT 30, ¶ 13 (citing *Nix v. Williams*, 467 U.S. 431, 442–43 (1984)).

In *State v. Larocco*, 494 P.2d 460, 471 (Utah 1990),[18] the Utah Supreme Court pointed to the U.S. Supreme Court decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which required exclusion in state criminal cases of evidence unconstitutionally obtained under the U.S. Constitution, then noted that "[a]fter *Mapp*, this court, in one justice's words, 'tacitly followed the federal lead' in adopting the exclusionary rule." And *Mapp*, *Larocco*, and *Thompson* were all decided long after the U.S. Supreme Court had held that "[t]he exclusionary prohibition extends as well to the indirect as the direct products of such [unconstitutional] invasions." *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

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[18] *Disagreed with on other grounds by State v. Anderson*, 910 P.2d 1229, 1235 (Utah 1996). In *State v. Anderson,* a plurality looked to federal case law decided after *Larocco* to reconfigure the scope of the federal automobile warrant exception. 910 P.2d 1229, 1235–36.

In this case, the State's evidence was obtained through the use of "illegal subpoenas." *Yount*, 2008 UT App 102, ¶ 24. Laura had communicated with a person online that she knew as "Timothy." (R.1098–100.) She did not know Dustin's name and was unable to identify him for police. (R.947–48.) Police learned Dustin's identity through the unlawful subpoenas, and used the information obtained from the subpoenas to arrest Dustin, secure his identification in court by Laura, learn his address and execute a search warrant on his home, and obtain items that the State introduced into evidence against Dustin at trial. (R.687–88, 947–51, 954–56, 1063–80.)

In addition, the facts demonstrate that application of the exclusionary rule is appropriate under the circumstances of the case. "[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." See *Herring v. United States*, 555 U.S. 135, 144 (2009). And the facts of this case demonstrate that such deterrence is appropriate here.

The district court was "troubled by the methodology deployed in the case" because "Detective Vance seems to have been able to circumvent the state statute by virtue of Detective Carlson's fortuitous dual-position with the CETF." (R.448.) The detectives were aware of the Utah statutes but opted to go try to information in the investigation of a Utah state crime through federal subpoenas, rather than by complying with Utah law, because the federal route because it was faster. (Def. Exh. 1.) Their conduct was deliberate—Detective Vance and Detective Carlson

each took affirmative action to attempt to obtain information to prosecute Dustin in Utah through federal subpoenas rather than by complying with Utah law. (Def. Exh. 1; R.442–43, 448.) And Detective Carlson indicated that having the FBI issue subpoenas for him was common, supporting that there is a "recurring or systemic" problem. (R.373–74.)

Thus, the district court should have suppressed the evidence under the Utah Constitution.

1.3 Dustin was harmed

Dustin was harmed by the district court's failure to grant his motion to suppress.

In assessing whether an error was harmful, courts consider whether a "reasonable likelihood exists that the error affected the outcome of the proceedings." *SIRQ, Inc. v. The Layton Companies, Inc.*, 2016 UT 30, ¶ 32, 379 P.3d 1237 (quotation marks omitted). This standard can be met if "the likelihood of a different outcome is sufficiently high to undermine [a court's] confidence in the verdict." *Id.* (quotation marks omitted). A court's "confidence in the outcome may be undermined at some point *substantially short*" of it being "more probable than not" that the jury would have reached a different result. *State v. Knight*, 734 P.2d 913, 920 (Utah 1987) (quotation omitted) (emphasis added).

Here, Dustin was harmed because there is a reasonable probability of a different outcome had the jury not heard about the information obtained from the subpoenas and the investigation done using that evidence.

The State's case was based on Laura's assertions. It admitted to that much in closing argument: "So the issue here is whether or not you believe [Laura's] testimony." (R.849.) The State had no physical evidence of acts that occurred in Davis County, no third-party witnesses, and no confession from Dustin. In fact, some of the evidence cut against Laura's testimony. Detective Vance admitted although Laura said that several sexual acts occurred in Dustin's car, Laura's description of the car did not match any cars that belonged to Dustin. (R.1005–08.) Detective Vance searched Dustin's phone and Laura's phone and found nothing of value. (R.997, 999.) Detective Vance testified that Laura actually identified two people in a photo lineup, one of whom was Dustin. (R.990.) Detective Vance also admitted to not investigating several key people, such as a roommate and several people who Laura talked to, nor did she ask for surveillance camara footage of where the interactions purportedly occurred between Laura and Dustin. (R.974–75, 992–93, 1000.)

Because the State's case was dependent on the jury believing Laura, it sandwiched her testimony between that of four law enforcement officers—Detective Vance, Detective Carlson, an officer who searched Dustin's home, and the officer who arrested Dustin—all of whom focused on acts taken to get the subpoenas and acts taken based on the information obtained from the subpoenas.

For example, Detective Vance testified about finding a potential suspect only to have Laura not identify him in person, asking Detective Carlson to issue

subpoenas to Snapchat and TextNow, and using the information obtained from those subpoenas to identify Dustin. (R.947–51.) Based on the information from the subpoenas, Detective Vance tried to arrest Dustin, testified about a car registered to Dustin fleeing from her car, asked the U.S. Marshals to track Dustin down, and searched Dustin's phone after he was arrested. (R.954–56.)

Detective Carlson testified about issuing the subpoenas on Snapchat and TextNow and how he ascertained Dustin's identity from the results of those subpoenas and the location of Dustin'. (R.1063–72.) He also testified about the search of Dustin's home and finding a pair of Laura's underwear, a substance that he believed was marijuana, and an alcohol flask. (R.1072–80.)

Another officer testified about actually finding these items. (R.687–88.)

A U.S. Marshal testified about arresting Dustin at a gas station in Salt Lake City that was near a motel. (R.692.) According to the marshal, Dustin had checked into the hotel under a name that was not his. (R.693.)

The State used this evidence to support Laura's testimony. During closing, the State encouraged the jury to convict Dustin because of the evidence discovered because of the subpoena. It told the jury that if it was concerned about whether Laura was telling the truth, it could look to the evidence found in Dustin's Summit County home—the home that was only found because of information obtained from the subpoenas. (R.817.) In his closing, Dustin argued that the police did not investigate the case properly, and the State responded: "When they located Dustin Andrus's information, there was simply no reason to

keep looking down all of these other holes." (R.847.) The State viewed the identification of Dustin through the subpoena process and the evidence obtained from that subpoena as dispositive.

Had the State been unable to elicit testimony about the subpoena process and the evidence obtained from the subpoenas (including Dustin's identity, the location and search of his home, and his arrest), the evidentiary picture before the jury would have changed dramatically. Of the four law enforcement officers, only one—Detective Vance—would have testified, and her testimony would have been limited. The jury would have never heard the State's assertion that the evidence found in the Summit County home indicated that Laura was telling the truth. The State's case would have been limited to Laura and her credibility before the jury.

Thus, this Court should reverse Dustin's convictions.

2. The district court should have arrested judgment on the human trafficking conviction (Count 1)

The district court erred when it did not arrest judgment on the human trafficking conviction (Count 1), because the State failed prove that anything of value was given or received (as opposed to merely offered) on account of a sexual act with a child.

District courts may arrest judgment "if the facts proved or admitted do not constitute a public offense." Utah R. Crim. P. 23. Courts will uphold a conviction "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Thus, appellate courts "will uphold a denial of the motion for directed verdict based on an insufficiency of the evidence claim, if, when viewed in the light most favorable to the State, some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt." *State v. Stricklan*, 2020 UT 65, ¶ 30, 477 P.3d 1251 (cleaned up). But jurors cannot make reach conclusions based on "surmise, conjecture, guess, or speculation, *Olsen v. Warwood*, 255 P.2d 725, 727 (Utah 1953), where there is "no underlying evidence to support the conclusion," *Salt Lake City v. Carrera*, 2015 UT 73, ¶ 12, 358 P.3d 1067.

The jury convicted Dustin of human trafficking under Utah Code § 76-5-308.5 (2019).[19] (R.520, 598.) Under that statute, a defendant "commits human trafficking of a child if the actor recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation." Utah Code § 76-5-308.5(2) (2019).[20] The statute defines sexual exploitation as "all forms of commercial sexual activity with a child, including sexually explicit performance, prostitution, participation in the production of pornography, performance in a strip club, and exotic dancing or display." Utah Code § 76-5-308.5(3)(b) (2019). And it defines "commercial sexual activity" as "any sexual act with a child, *on account of which anything of value is given to or received by* any person." Utah Code § 76-5-308.5(1) (2019) (emphasis added).

Below, Dustin argued that the State produced insufficient evidence to prove commercial sexual activity, and therefore sexual exploitation, because although Laura testified Dustin *offered* her things, there was no testimony that any of those things were ever "given to" or "received by" her, as the statute requires for conviction. (R.1197, 1206–11, 1819–21.) Because of the lack of evidence on the sexual exploitation element (which is defined as commercial sexual activity), Dustin argued that the court should arrest judgment. (*Id.*)

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[19] Dustin cites the 2019 statute because the conduct occurred between September 2019 and February 2020, and the statute was amended in May 2020.

[20] The statute also defines human trafficking as recruiting or harboring a child for forced labor, which is not an issue here. Utah Code § 76-5-308.5(2) (2019).

The district court denied this motion without engaging with Dustin's arguments: "I can't determine that the verdict was so inconclusive or so inherently improbable that reasonable minds must have entertained reasonable doubt. And from my perspective, in light of the inferences that the jury could reasonably draw from the facts that were presented to the jury during the trial, I don't believe that I'm in a position to grant the motion that has been brought by the defendant at this time." (R.1937–38.) The court was wrong.

The element of sexual exploitation is defined as commercial sexual activity, and the plain language defining commercial sexual activity requires both (i) something of value "is given" or "received" (not merely offered), and (ii) that the thing of value be given or received "on account of" the sexual act at issue. Utah Code § 76-5-308.5(1).[21]

The plain language of the statute requires that something of value be "*given* to or *received* by any person." Utah Code § 76-5-308.5(1) (emphasis added). A mere *offer* of something of value is not sufficient to establish commercial sexual activity; the plain language of the statute instead explicitly requires that the thing of value be "given" or "received." *Id.* Thus, the State must prove that something of value was "*given* to or *received* by any person" to satisfy

[21] "[A] statute should generally be construed according to its plain language." *Bryner v. Cardon Outreach, LLC*, 2018 UT 52, ¶ 9, 428 P.3d 1096 (quotation marks omitted). Thus, "[t]he first step of statutory interpretation is to look to the plain language, and where statutory language is plain and unambiguous, [Utah courts] will not look beyond the same." *Id.* (cleaned up).

the definition of commercial sexual activity and obtain a human trafficking conviction. *Id.* (emphasis added).

The plain language of the statute also requires a defined connection between the thing of value given or received and the sexual act at issue. A commercial sex act is statutorily defined as "any sexual act with a child, *on account of which* anything of value is given to or received by any person." Utah Code § 76-5-308.5(1) (emphasis added). The State must prove not only that something of value was given or received, but that the thing of value was given or received "on account of" the particular sexual act at issue. *Id.*

Unless the State proves both that (i) something "of value" was "given" or "received," and (ii) it was given or received "on account of" the particular sex act at issue, the State has failed to prove a commercial sexual activity. Utah Code § 76-5-308.5(1).

Here, the State did not prove commercial sexual activity under the plain language of the statute because it did not prove anything of value was "given" or "received" (as opposed to merely offered), that the thing given had value, or that the thing given or received was "on account of" the sex act at issue.

The State primarily elicited testimony from Laura that Dustin had *offered* things to her:

> LAURA: He had *offered* to give me a car, give me money, give me marijuana, and I think before, he has offered me to live with him.
>
> STATE: Okay. When he would offer those things to you, was he also asking for anything?

LAURA: Maybe not at that very moment.

STATE: Okay. When he would *offer* things to you, would he ever ask for anything in return for things that he gave you?

LAURA: Yes.

STATE: Can you tell me about that?

LAURA: He would ask for sexual acts.

STATE: Can you give me an example of a time that that happened?

LAURA: Well, when he *offered* -- when he wanted me to live with him, he would mention that we would be doing sexual acts a lot.
. . .
LAURA: When I had declined once, he had *offered* me some thousands of dollars for me to continuing doing acts with him.

STATE: Okay. Did that happen more than once?

LAURA: That was the only time that he *offered* me that much money.

STATE: Did he ever *offer* you other things other than money in exchange for -- to try to convince you to do sexual things when you didn't want to?

LAURA: Yes.

STATE: What kind of things would he *offer* you?

LAURA: Marijuana, the car, more money.

(R.1109–10 (emphases added).)

As to Laura's testimony about a car and money, although Laura testified that Dustin had *offered* her a car and money, she did not testify that Dustin *gave* her either of these things. (*Id.*) Laura's testimony that Dustin *offered* her a car

and money is not proof that something "of value [was] *given to* or *received by* any person," without any testimony that Dustin gave Laura any of these things or that she received them. Utah Code § 76-5-308.5(1); R.1109. Because Laura did not testify that Dustin gave her or she received a car or money, and the State put on no evidence to prove that occurred, Laura's testimony that Dustin *offered* her a car and money does not satisfy the statutory definition of a commercial sex act. Utah Code § 76-5-308.5(1).

As to Laura's testimony about marijuana, Laura testified that the first time she met Dustin in the parking lot, she touched his groin, and afterward, "[she] smoked marijuana" in the car.[22] (R.1104.) She also testified that she "use[d] . . . marijuana" with him at his house in Summit County.[23] (R.1111, 1117.) But even if Laura's testimony that she used marijuana with Dustin on these two occasions car could support that she received *something*, the State put on no evidence of "value"—it did not put on evidence of how much marijuana she received and what value it had, if anything. While ounces or pounds of marijuana may have value, a puff on another person's joint may not have value. And because "value" is an

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[22] Laura also testified that Dustin would give her cartridges filled with THC, but she linked this to conduct that occurred in Summit County, and that conduct was not charged in this case. (R.1117.)

[23] After Laura testified to smoking marijuana in Dustin's car, the State later asked Laura, "In those times that you would meet with [Dustin], did he ever bring you marijuana again?" She responded, "Yes." (R.1108.) It is unclear if this occasion where he brought marijuana again was the time in Summit County or another occasion. Laura did not testify to the details. But more importantly, she did not testify that he ever gave her marijuana in exchange for—"on account of"—any sexual act. (*Id.*)

element under the plain language of the statute, it must be proven by the State and cannot be assumed. Utah Code § 76-5-308.5(1).

In addition, Laura did not testify that Dustin let her use marijuana with him in exchange for sexual favors or on account of the sexual activity. To the contrary, in questioning Laura about her using marijuana with Dustin in his car, when the State asked her whether Dustin said "anything about that marijuana, what it was for," Laura responded: "No." (R.1104–05.) She likewise testified that he had not messaged in advance about bringing marijuana (as opposed to, for instance, testifying he promised to bring it in exchange for sexual acts). (R1108.)

Although Laura said "[h]e would ask for sexual acts" when the State asked if Dustin would "ever ask for anything in return," when the State asked Laura to expound on this, she did not say that Dustin asked for sex acts in exchange for marijuana. Instead, she responded, "[W]hen he wanted me to live with him, he would mention that we would be doing sexual acts a lot." (R.1109.) But although Dustin *offered* to have her live with him, she did not testify that she ever actually lived with Dustin.

Thus, the State did not prove the element of sexual exploitation, which is defined as commercial sexual activity, because Laura did not testify that she was given or received anything of value from Dustin "on account of" any sexual act. Utah Code § 76-5-308.5(1). Rather, she testified that she and Dustin engaged in sexual activity, he merely offered her things like money and a home, and she never testified that Dustin gave her drugs (or money or a home or anything else)

in exchange for the sexual activity. (R.1104–12.) Because the State failed to prove a material element of sexual exploitation, this Court should therefore reverse and dismiss Dustin's conviction for human trafficking (Count 1).[24]

[24] Those who *offer* payment or pay a child in exchange for any sexual activity can be liable for sexual solicitation. Utah Code § 76-10-1313. The jury was instructed on sexual solicitation as a lesser-included offense to human trafficking. (R.574–75.) But the jury found Dustin guilty of human trafficking, not sexual solicitation.

3. The district court should have arrested judgment on sexual exploitation of a minor (Count 2)

The district court erred when it did not arrest judgment on the sexual exploitation of a minor conviction (Count 2), because the State failed to produce evidence that Dustin directed Laura to create sexually explicit images of herself.

The jury convicted Dustin of sexual exploitation of a minor under Utah Code § 76-5b-201 (2019). (R.521, 599.) Under that statute, a person is guilty of sexual exploitation of a minor when the person "knowingly produces . . . child pornography." Utah Code § 76-5b-201(1)(a)(i) (2019). The jury was instructed that to find Dustin guilty, it had to find that Dustin did "[k]nowingly produce child pornography" and "[t]o wit: the defendant directed [Laura] to create sexually explicit images of herself." (R.576.)

In the district court, Dustin argued that the State failed to produce evidence that Laura created sexually explicit images of herself at Dustin's direction. (R.1211–14, 1821–22.) Indeed, the State produced no evidence that Laura created nude photographs of herself *after* Dustin asked for them rather than she sent him nude photographs that had been taken prior to his request. Without any evidence of the circumstances of their creation, including any evidence of the timing, the State failed to prove Dustin knowingly produced child pornography, and the court should have arrested judgment. (*Id.*)

The district court denied this motion, stating generally that the evidence was not "so inherently improbable that reasonable minds must have entertained

reasonable doubt." (R.1937–38.) The court did not engage with Dustin's arguments.

But the court was wrong.

The jury was instructed that it could find Dustin guilty of sexual exploitation if it found that he "knowingly produce[d] child pornography." (R.576.)[25] The statute defines "produce" as

> (a) the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography . . . ; or
>
> (b) the securing or hiring of persons to engage in the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography[.]

Utah Code § 76-5b-103(9) (2019). The instructions furthered directed the jury that it could only find Dustin guilty if it determined that "the defendant directed Laura to create sexually explicit images of herself." (R.576.)

At trial, Laura testified about sending nude photographs to Dustin:

STATE: Did he ever ask you for pictures of yourself?

LAURA: Yes.

STATE: What kind of pictures?

LAURA: Nude photos.

STATE: Did you send him nude photos?

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[25] Although a defendant can also be convicted of sexual exploitation of a minor for knowingly possessing child pornography, Utah Code § 76-5b-201 (2019), the court did not instruct the jury of the possession element. Rather, the court only instructed the jury that it could find Dustin guilty if it determined that Dustin had "knowingly produce[d] child pornography." (R.576.)

LAURA: Yes.

STATE: Did he ever tell you why he wanted those?

LAURA: Yes.

STATE: What did he say he wanted those pictures for?

LAURA: He wanted to ejaculate to them.

(R.1105.) In closing, the State argued that Dustin was guilty of sexual exploitation because he asked Laura to send him "sexy pics." (R.815–16.)

But although the State asked Laura about *sending* nude photographs to Dustin, it did not ask Laura about the *creation* of the nude photographs, including when they were created or the circumstances under which they were created. And Laura did not testify that she created nude photographs of herself at Dustin's direction. Indeed, she did not even testify that she created nude photographs of herself after Dustin's request, as opposed to haven previously taken them prior to his request. (R.1105.)

Moreover, the statute defines "produce" as requiring an active role in the creation of child pornography: "photographing, filming, taping, directing, creating, designing, or composing." Utah Code § 76-5b-103(9)(a) (2019). The State produced no evidence that Dustin did any of these.

The statute also defines "produce" as "securing or hiring of persons to engage in" the production of child pornography. Utah Code § 76-5b-103(9)(b) (2019). But there is no evidence that Dustin paid or "hir[ed]" Laura to engage in the production of child pornography. Moreover, because Laura did not testify

that she took nude photographs of herself *after* Dustin's request or at his direction, as opposed to having previously taken them, there is likewise no evidence that Dustin "secur[ed]" Laura to engage in the production of child pornography.

The only evidence the State produced was that Dustin asked for nude pictures and Laura sent them. Being the recipient of child pornography does not qualify as *producing* it under the statutory definition of production. Utah Code § 76-5b-103(9)(a).[26] The jury was instructed that it could find Dustin guilty if it

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[26] While Laura testified that Dustin asked her to masturbate for him during a live video chat (R.1106), the jury could not have relied on this evidence to convict of sexual exploitation in Count 2. For Count 2, the instructions informed the jury that it must find that "the defendant directed [Laura] to create sexually explicit *images* of herself." (R.576.) The instructions did not mention masturbation on camera. (*Id.*) In fact, the only time masturbation is mentioned is in connection with Count 7. (R.587.)

Furthermore, in the jury instructions for sexual exploitation (Count 2) defined "child pornography" in a way that differentiated between videos, live performances, and images and/or pictures. The jury was instructed that "child pornography" means "any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture." (R.576.) Thus, the jury instructions read as a whole instructed the jury to look at the pictures Laura sent, not at the video of Laura masturbating.

And the State did not ask the jury to convict on sexual exploitation (Count 2) because of the masturbation on camera. The State informed the jury that it could convict on sexual exploitation because Dustin requested that Laura send nude pictures: "That's what that sexual exploitation of a minor count is, and his intention of getting *those photos* is clear from those text messages as well." (R.815–16 (emphasis added).) In its argument against the motion for a directed verdict, the State again said it was seeking a conviction based on the photos, not the video. (R.1564–65.)

Because neither the instructions or the State's closing argument informed the jury that it could convict on sexual exploitation because of masturbation on

found that he "knowingly produce[d]" child pornography, but *sending* nude photos in response to a request—without any testimony that those photos were *created* in response to the request—does not satisfy the statutory definition of "produce." *See id.*

Because the State offered no evidence that Dustin filmed, directed, created, designed, or otherwise produced child pornography, the district court should have arrested judgment on the sexual exploitation conviction. Utah R. Crim. P. 23.

Consequently, this Court should reverse and dismiss Dustin's conviction for sexual exploitation of a minor (Count 2).

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camera, the State cannot use the masturbation as a justification to uphold the verdict.

4. The district court should have issued a directed verdict on the distribution of a controlled substance (Count 3)

The district court erred when it did not grant Dustin's request for a directed verdict on the distribution of a controlled substance charge (Count 3). Dustin moved for a directed verdict on all counts after the State presented its case. (R.1559–60.) He argued that Laura's "simple testimony" was insufficient to prove the charge. (R.1559.) He further argued that any evidence of a controlled substance was found in Dustin's house *in Summit County* (one year after Laura had been there) failed to prove he distributed a controlled substance to Laura *in Davis County*, as charged. (R.1563.)

The court denied Dustin's motion, reasoning that "giving the State the benefit of all inferences believes there is a rational basis for the jury to conclude that the defendant could be found guilty on each of the events of the charges brought by the State." (R.1569.) The court was wrong.

A court should grant a directed verdict motion when "the State presents no competent evidence from which a reasonable jury could find the elements of the relevant crime" beyond a reasonable doubt. *State v. Makaya*, 2020 UT App 152, ¶ 10, 476 P.3d 1025 (cleaned up); *Jackson*, 443 U.S. at 319.

The jury convicted Dustin of distribution of a controlled substance under Utah Code § 58-37-8(1)(a)(ii), for giving marijuana to Laura. (R.521, 600–01.)[27]

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[27] The statute defines marijuana as seeds, resin, derivatives from the seeds or resin, synthetic equivalents, or certain extracts. Utah Code § 58-37-2(1)(aa)(i).

The statute *excludes* from the definition of marijuana any compound or mixture that is developed from the "mature stalks, fiber, oil or cake," and any substance that has been approved by the Federal Drug Administration (such as CBD oil), among other things. Utah Code § 58-37-2(1)(aa)(ii).

In drug cases where neither the substance itself or an expert chemical analysis is introduced into evidence, courts have held that lay testimony and circumstantial evidence may be sufficient to establish the identity of the substance, if it establishes relevant details, such as:

- "evidence of the physical appearance of the substance involved in the transaction";
- "proof that the substance produced the expected effects when sampled by someone familiar with the illicit drug";
- "evidence that the substance was used in the same manner as the illicit drug";
- "testimony that a high price was paid in cash for the substance";
- "evidence that transactions involving the substance were carried on with secrecy or deviousness";
- "evidence that defendant called the substance by name or others did so in the defendant's presence."

Provo City Corp. v. Spotts, 861 P.2d 437, 442 (Utah Ct. App. 1993) (cleaned up).[28]

[28] These factors are not an exhaustive list but illustrative of the type of evidence required.

Importantly, the Court delineated the "*outer limit* of what we would affirm for a possession case" as when an officer described how a substance was used, the appearance of the substance, the smell of the substance, the defendant's physical appearance and behavior and how that was in conformity with out other people behaved while on a drug, and the defendant's lack of denial when the officer referred to the substance by name. *Id.* at 442–43 (emphasis added).

In contrast, the State produced insufficient evidence to prove a juvenile possessed a controlled substance when it failed to establish that the defendant "actually possessed marijuana ever," let alone on the date charged.[29] *In re C.P.B.*, 2012 UT App 174, ¶ 16, 282 P.3d 1023. The only evidence the State produced was "the drug dealer's uncorroborated written statement." *Id.* ¶ 6. That was not enough.

In this case, the evidence was likewise insufficient to prove the charge. Laura testified that she "believe[d] [she] smoked marijuana" with Dustin in his car the first time they met, but Laura did not testify to any of the pertinent details identified in *Spotts*—she did not testify to the "physical appearance of the substance," that it "produced the expected effects" of marijuana, that it was "used in the same manner" as marijuana,[30] that "a high price was paid in case," that the

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[29] The defendant was not "placed at the scene of the drug transaction, no evidence indicates when the transaction actually occurred, and no marijuana was found or even observed, let alone admitted into evidence, in relation to this charge." *In re C.P.B.*, 2012 UT App 174, ¶ 16, 282 P.3d 1023.

[30] Laura said only that she smoked the substance, but she gave no details about how she did so, such as the size, shape or appearance of what she smoked,

transactions involving the marijuana were "carried on with secrecy or deviousness," nor did she testify that Dustin "called the substance" marijuana when she used it with him. *Spotts*, 861 P.2d at 442.

To the contrary, Laura did not testify to the form of the substance, its odor, appearance or other attributes, nor did she testify to any effects on her from smoking the substance, such as how it made her feel. (R.1104, 1108–09, 1110, 1112, 1117.) In addition, she testified Dustin did not "say anything" about the substance they smoked in the car, and she did not recall him messaging in advance about bringing marijuana. (R.1104, 1108.)

While it is true that Laura testified that Dustin brought marijuana "again" after this first occasion (she did not testify that he did so more than one other time) and that he "offered" her marijuana, the State did not elicit testimony from Laura proving that he brought marijuana again or offered it to her in *Davis County*, where he was charged, rather than in *Summit County*. To the contrary, Laura gave no details or information at all about the circumstances under which Dustin subsequently brought or offered marijuana. And the only other time she testified to using marijuana was in *Summit County*, demonstrating that it cannot be assumed that any of these other incidents occurred in Davis County without testimony from Laura proving that to be the case.[31] (R.1112, 1117.)

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or whether it was an item prepared before she came or something she rolled or smoked it in a pipe or electronic cigarette, or so forth. (R.1104.)

[31] Because this case was charged and tried in Davis County, any acts in Summit County cannot be the basis for the conviction.

In any event, given Laura's lack of any detail about the substance when Dustin brought marijuana again or offered it to her, her testimony about these instances again fails to show any of the relevant details identified by *Spotts* or the like—appearance, effects, precise manner of use, high price, or secret transactions. 861 P.2d at 442.

Beyond her testimony, police produced no evidence that Dustin ever possessed marijuana or an illegal substance in Davis County (where he was charged) let alone that he had ever given an illegal substance to Laura in Davis County. Instead, police testified that they searched Dustin's home *in Summit County* one year after Laura's visit there. (R.1073.) But Dustin was not tried in this case for conduct in Summit County.[32] Furthermore, the State failed to prove Dustin possessed a controlled substance in Summit County. Police claimed to have found what they labeled "marijuana" in a baggie in Dustin's house. (R.1074, 1077.) But aside from labeling the substance as "marijuana," the officers testified to no details about the substance that enabled them to accurately identify it, such as its odor or other distinguishing characteristics. (*Id.*) And this substance was never tested, so there was no proof that it was marijuana. (R.723)

Police also found a bowl of unmarked glass vials, which Detective testified were electronic cigarette cartridges that could be used for *legal* substances such

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[32] Laura testified that she used marijuana at Dustin's Summit County house (R.1112) and that Dustin gave her "carts," which was a "cartridge filled with THC." (R.1112, 1117.) But these acts occurred in Summit County and therefore could not form the basis of the charges in this case.

as nicotine and CBD. (R.1074, 1076, 1080; State's Exh. 4.) The State failed to prove they contained illegal substances rather than legal substances; no officer testified to being able to identify an illegal substance in the cartridges, and the State did not test the cartridges. (R.723.)

Thus, the State did not even prove Dustin possessed marijuana or controlled substances in Summit County, and even if it had, such proof would be insufficient to prove that he distributed a controlled substance to Laura in *Davis County*, as charged.

In sum, the State's evidence was below the outer limits of what this Court considered sufficient in *Spotts*. Neither Laura's testimony, the testimony from law enforcement, nor any testing proved that Dustin possessed marijuana or an illegal substance, let alone that he had and gave an illegal substance to Laura in Davis County, as charged. Thus, the district court erred when it did not grant a directed verdict on the distribution of a controlled substance charge (Count 3).

5. The court should have excluded the Summit County evidence under rule 404(b)

The district court abused its discretion when it allowed the State to produce evidence of the Summit County evidence.

The crimes charged in this case occurred in Davis County. However, Laura alleged that at the end of her relationship with Dustin, he took her to his house in Summit County. (R.1112–13.) The State sought to admit evidence that Laura had sex with Dustin in his Summit County house, and he also gave her alcohol and marijuana. (R.478.) It also sought to admit evidence of the search of Dustin's house that occurred one year after the Summit County incident, where police found Laura's underwear, an alcohol flask, cartridges for an electronic cigarette, and a substance that the police believed was marijuana. (R.478.) The State sought to admit that evidence because it was "intrinsic" to the charged crimes in Davis County. (R.476.)

The court ruled that the Summit County evidence was not other-acts evidence that was governed by Utah Rules of Evidence 404(b). (R.1897–98.) Rather, it was "really evidence that is part of the narrative of the relationship between these two individuals during the period of time. And I think the State is entitled to present that narrative." (R.1898.)

As set forth below, (1) the district court abused its discretion when it determined that the Summit County evidence was part of the narrative of the relationship, and (2) Dustin was harmed.

5.1 The Summit County evidence was improper 404(b) evidence

The district court abused its discretion when it ruled that the Summit County evidence was admissible as "part of the narrative of the relationship between these two individuals during the period of time." (R.1898.) It rejected the argument that the Summit County evidence was other-acts evidence under rule 404(b) of the Utah Rules of Evidence. This ruling was an abuse of discretion.

Utah Rules of Evidence 404(b) prohibits the introduction of "[e]vidence of a crime, wrong, or other act" to prove someone's character. Utah R. Evid. 404(b)(1).

Rule 404(b) "applies only to evidence that is extrinsic to the crime charged." *See State v. Lucero*, 2014 UT 15, ¶ 14 n.7, 328 P.3d 841 (quotation simplified), *abrogated on other grounds by State v. Thornton*, 2017 UT 9, 391 P.3d 1016. "This is because rule 404(b) applies only to 'other' acts—if the evidence of prior acts is inextricably intertwined with the crime that is charged, or if both the charged crime and the prior act are considered part of a single criminal episode, then rule 404(b) would not apply." *Id.* (quotation marks omitted). "Rather, the act would be considered part of the case narrative and have important probative value that bears directly on the crime charged." *Id.*

The Summit County actions and the actions in this case were not part of a single criminal episode. Generally, acts are not part of a single criminal episode if they "occur at different times and under different circumstances from the offense charged." *State v. Burke*, 2011 UT App 168, ¶ 65,

256 P.3d 1102 (cleaned up). Here, Laura testified that Dustin met her in his car outside her apartment in Davis County, the two would engage in sexual activity and smoke marijuana, and the two would message each other. (R.1102, 1106, 1108.) She also testified the last time she saw Dustin was when they went to his Summit County house together. (R.1112–14.) She gave no timelines for any of these events, except she told law enforcement that her relationship with Dustin lasted six months and that the Summit County interaction was the last interaction. (R.962.) Thus, the evidence before the court was that the events in Davis County and Summit County occurred in different locations (different counties) and in different circumstances (they were separated by time and the way the sexual activity took place). Thus, they were not part of the same criminal episode.

The Davis County events were not inextricably intertwined with the events in Summit County. Generally, evidence "is inextricably intertwined with the evidence regarding the charged offense if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted." *United States v. Bush*, 944 F.3d 189, 196 (4th Cir. 2019) (quotation marks omitted). This is evidence that is "essential to the context of the crime." *United States v. Murry*, 31 F.4th 1274, 1290–91 (10th Cir. 2022) (quotation marks omitted).

For example, a defendant was charged with killing his father and burglarizing, robbing, and kidnapping a friend that same evening while he was

trying to cover up that murder. *State v. Main*, 2021 UT App 81, ¶ 9, 494 P.3d 1056. The district court bifurcated the murder trial from the other charges. *Id.* ¶ 10. But on the first day of trial, the defense's strategy was to cast the friend as the perpetrator of the murder because much of the murder evidence was found at the friend's house, and the State could not fully respond to that defense without bringing in evidence of the burglary, robbery, and kidnapping of the friend. *Id.* This Court reasoned that this evidence was not other-acts evidence under 404(b) but was "inextricably intertwined" with the murder evidence: "The evidence regarding the bifurcated charges was necessary to explain [the friend's] relationship to many pieces of inculpatory evidence. Thus, evidence regarding the bifurcated charges was necessary to rebut the defense's argument that [the friend's] connection to the inculpatory evidence indicated that he was the true perpetrator." *Id.* ¶ 21.

That is not the case here. The Summit County events were not needed to explain the Davis County events. Dustin never raised the Summit County events as any kind of defense to the events in Davis County. The events in the two counties were disconnected by time and location. The Summit County events did not happen in the middle of the Davis County events. *See United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996) (reasoning that statements about murder were intrinsic to a drug crime because the statements were made during the drug deal). Nor were the Summit County events necessary to explain or give context to the Davis County events.

This Court has expressed its "concerns with using other acts evidence to complete a story or explain the circumstances of an alleged criminal act" and noted that "an overly broad definition of inextricably intertwined might be problematic in such scenarios." *Main*, 2021 UT App 81, ¶ 23 n.9 (cleaned up). Thus, "[e]stablishing some minimal relevance to the State's narrative is insufficient to place other-act evidence beyond the reach of rule 404(b)." *State v. Hood*, 2018 UT App 236, ¶ 33, 438 P.3d 54.

That concern animates this case. Although the Summit County events marked the end of the relationship between Laura and Dustin, the ending of that relationship was not necessary to inform the jury of all the necessary facts for the Davis County events. To properly deliberate on the Davis County events, the jury needed to know what happened in Davis County. Nothing that happened in Summit County impacted what happened in Davis County, because the Davis County events occurred *before* the Summit County events. Thus, the Summit County events were irrelevant to the Davis County events.

Likewise, the search of Dustin's Summit County house was not inextricably intertwined with the Davis County events or relevant to those events. The search occurred one year after the Summit County interaction. The officers testified that they found marijuana in Dustin's house. (R.1072–80.) But no testing was done on that substance. (R.723–24.) And the officers provided no description of the substance to show that it was marijuana, opposed to their supposition that it was marijuana. (R.1072–80.) Moreover, Dustin had a roommate, but the officers

never investigated that roommate and whether any substances found belonged to that roommate. (R.992–93.) And although the police found electronic cigarette cartridges in the home, they did not test those, and they did not establish whether those cartridges belonged to Dustin or his roommate. (R.723–24, 992–93.)

Thus, the district court abused its discretion when it concluded that that Summit County evidence was not 404(b) evidence but rather "evidence that is part of the narrative of the relationship." (R.1898.)

Had the district court analyzed the evidence under rule 404(b), it would have excluded the evidence. Had the district court properly analyzed the Summit County evidence under the rule 404(b) framework, it would have excluded that evidence.

To admit other-acts evidence, the State must meet three requirements: the evidence "(1) must be offered for a genuine, noncharacter purpose, (2) must be relevant to that noncharacter purpose, and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice." *Hood*, 2018 UT App 236, ¶ 34 (quotation marks omitted).

Here, the State could not meet the first hurdle: the Summit County evidence was not offered for a genuine, noncharacter purpose. In its motion to admit the Summit County evidence, the State did not identify any non-character purpose for admitting that evidence. Rather, the State relied on the fact that the Summit County evidence was "intrinsic" to the Davis County events. (R.480–81.) Thus, the State—as the proponent of the evidence—did not carry its burden of

showing any genuine, noncharacter purpose for the Summit County evidence. Had the district court applied rule 404(b) to the Summit County evidence, it would have had to deny the State's request to admit that evidence because it did not meet the first requirement under rule 404(b).

In sum, the district court abused its discretion when it allowed the admission of the Summit County evidence, both the acts that occurred in Summit County and the evidence from the search of the Summit County house. The Summit County evidence was disconnected from the Davis County events by location and time and were not necessary for the State's narrative. Thus, the district court should have concluded that the Summit County evidence constituted other-acts evidence under rule 404(b), and the State did not carry its burden of showing that the Summit County evidence met the admissibility requirements under rule 404(b).

5.2 Dustin was harmed

Dustin was harmed by the admission of the Summit County evidence.

In deciding whether to reverse a conviction, appellate courts consider whether a "reasonable likelihood exists that the error affected the outcome of the proceedings." *SIRQ, Inc. v. The Layton Companies, Inc.*, 2016 UT 30, ¶ 32, 379 P.3d 1237 (quotation marks omitted). This standard can be met if "the likelihood of a different outcome is sufficiently high to undermine [a court's] confidence in the verdict." *Id.* (quotation marks omitted). A court's "confidence in the outcome may be undermined at some point *substantially short*" of it being "more probable

than not" that the jury would have reached a different result. *State v. Knight*, 734 P.2d 913, 920 (Utah 1987) (quotation omitted) (emphasis added).

As a consequence of the district court's ruling, the State asked Laura about her last interaction with Dustin: they went to the Summit County house, had sex, and she was provided alcohol and marijuana. (R.1112–13.) The State also presented evidence of the search of Dustin's Summit County house—which occurred about one year after her last interaction with him—and the discovery of Laura's underwear and the substances found in that house. (R.1072–80.) And at the end of trial, the district court instructed the jury that it heard evidence about "events and things" in "Summit County" and could "consider evidence from [Summit County] to support the charged offenses." (R.570.)

The State recognized that it had no physical evidence of the events that occurred in Davis County. Although the State had messages that Dustin sent to Laura, those messages were sent months after the events in Davis County occurred. (R.986.) It had no third-party witnesses to the events, no pictures, and no paper trail. The only evidence it had to support the Davis County charges was the testimony of Laura.

To support that testimony, the State brought in the Summit County evidence. For the drug distribution charge and for the trafficking charge (where the State relied on Laura's assertion that Dustin offered her drugs in exchange for sexual acts), the State relied in closing on the drugs that were purportedly found in the Summit County house. During closing argument, the State argued that the

search of the Summit County house revealed "vape carts" that were "similar to the vape carts the defendant gave her that contained THC. The defendant clearly had access to that. He had that in his possession. He still had that in his possession. That's circumstantial evidence of the fact that when [Laura] says he gave me vape carts before, it's the same ones he had in his possession at the point in time when his home was searched." (R.817.)

But this argument was problematic, because the State never tested the substances found in Dustin's house and never established that any of those substances were marijuana. (R.723–24.) And law enforcement was aware that Dustin had a roommate, and the State made no effort to establish that Dustin had constructive possession over the substances and cartridges found in the Summit County house. (*See* R.992–93.) Thus, the State supported Laura's say-so with physical evidence found from the Summit County house, although that evidence itself was problematic.

During closing argument, the State also bolstered Laura's testimony generally about the sexual acts by pointing to the evidence found in the Summit County house: it argued that if the jury had any questions about the truthfulness of Laura's testimony, "her underwear was found in the defendant's home a year later." (R.817.) Again, the State supported Laura's testimony—which was otherwise unsupported by any physical, forensic, or other third-party evidence—with the physical evidence found in the Summit County house one year later.

The State used the Summit County evidence to bolster Laura's otherwise unsupported testimony. Thus, Dustin was harmed by the admission of that evidence. According, this Court should reverse all of Dustin's charges and remand for a new trial.

Conclusion

For the foregoing reasons, this Court should vacate the convictions for human trafficking (Count 1), sexual exploitation of a minor (Count 2) and drug distribution (Count 3). It should also reverse the court's order denying the motion to suppress evidence from the federal administrative subpoenas and the admitting the Summit County evidence, which requires reversal of the all of Dustin's convictions.

DATED this 5th day of May, 2023.

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

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(a)(11) and 24 (g) because this brief contains 15,092 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21.

DATED this 5th day of May, 2023.

_____/s/ Emily Adams______

Certificate of Service

This is to certify that on May 5, 2023, I emailed and therefore served the foregoing on the following:

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Addendum A

Statutory provisions

Utah Statutes Annotated - 2020

West s Utah Code Annotated
Title 77. Utah Code of Criminal Procedure
Chapter 22. Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity

U.C.A. 1953 § 77-22-2.5

§ 77-22-2.5. Court orders for criminal investigations for records concerning an electronic communications system or service or remote computing service--Content--Fee for providing information

Effective: May 14, 2019
Currentness

(1) As used in this section:

(a)(i) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.

(ii) "Electronic communication" does not include:

(A) a wire or oral communication;

(B) a communication made through a tone-only paging device;

(C) a communication from a tracking device; or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

(b) "Electronic communications service" means a service which provides for users the ability to send or receive wire or electronic communications.

(c) "Electronic communications system" means a wire, radio, electromagnetic, photooptical, or photoelectronic facilities for the transmission of wire or electronic communications, and a computer facilities or related electronic equipment for the electronic storage of the communication.

(d) "Internet service provider" means the same as that term is defined in Section 76-10-1230.

(e) "Prosecutor" means the same as that term is defined in Section 77-22-4.5.

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(f) "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communications system.

(g) "Sexual offense against a minor" means:

(i) sexual exploitation of a minor or attempted sexual exploitation of a minor in violation of Section 76-5b-201;

(ii) a sexual offense or attempted sexual offense committed against a minor in violation of Title 76, Chapter 5, Part 4, Sexual Offenses;

(iii) dealing in or attempting to deal in material harmful to a minor in violation of Section 76-10-1206;

(iv) enticement of a minor or attempted enticement of a minor in violation of Section 76-4-401;

(v) human trafficking of a child in violation of Section 76-5-308.5; or

(vi) aggravated sexual extortion of a child in violation of Section 76-5b-204.

(2) When a law enforcement agency is investigating a sexual offense against a minor, an offense of stalking under Section 76-5-106.5, or an offense of child kidnapping under Section 76-5-301.1, and has reasonable suspicion that an electronic communications system or service or remote computing service has been used in the commission of a criminal offense, a law enforcement agent shall:

(a) articulate specific facts showing reasonable grounds to believe that the records or other information sought, as designated in Subsections (2)(c)(i) through (v), are relevant and material to an ongoing investigation;

(b) present the request to a prosecutor for review and authorization to proceed; and

(c) submit the request to a magistrate for a court order, consistent with 18 U.S.C. Sec. 2703 and 18 U.S.C. Sec. 2702, to the electronic communications system or service or remote computing service provider that owns or controls the Internet protocol address, websites, email address, or service to a specific telephone number, requiring the production of the following information, if available, upon providing in the court order the Internet protocol address, email address, telephone number, or other identifier, and the dates and times the address, telephone number, or other identifier is suspected of being used in the commission of the offense:

(i) names of subscribers, service customers, and users;

(ii) addresses of subscribers, service customers, and users;

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(iii) records of session times and durations;

(iv) length of service, including the start date and types of service utilized; and

(v) telephone or other instrument subscriber numbers or other subscriber identifiers, including a temporarily assigned network address.

(3) A court order issued under this section shall state that the electronic communications system or service or remote computing service provider shall produce a record under Subsections (2)(c)(i) through (v) that is reasonably relevant to the investigation of the suspected criminal activity or offense as described in the court order.

(4)(a) An electronic communications system or service or remote computing service provider that provides information in response to a court order issued under this section may charge a fee, not to exceed the actual cost, for providing the information.

(b) The law enforcement agency conducting the investigation shall pay the fee.

(5) The electronic communications system or service or remote computing service provider served with or responding to the court order may not disclose the court order to the account holder identified pursuant to the court order for a period of 90 days.

(6) If the electronic communications system or service or remote computing service provider served with the court order does not own or control the Internet protocol address, websites, or email address, or provide service for the telephone number that is the subject of the court order, the provider shall notify the investigating law enforcement agency that the provider does not have the information.

(7) There is no cause of action against a provider or wire or electronic communication service, or the provider or service's officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of the court order issued under this section or statutory authorization.

(8)(a) A court order issued under this section is subject to the provisions of Title 77, Chapter 23b, Access to Electronic Communications.

(b) Rights and remedies for providers and subscribers under Title 77, Chapter 23b, Access to Electronic Communications, apply to providers and subscribers subject to a court order issued under this section.

(9) A prosecutorial agency shall annually on or before February 15 report to the Commission on Criminal and Juvenile Justice:

(a) the number of requests for court orders authorized by the prosecutorial agency;

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