No. 20220272-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff / Petitioner,

v.

BREVAN BRINGHURST BAUGH,
Defendant / Respondent.

Brief of Respondent

On Writ of Certiorari to the Utah Court of Appeals

Mr. Baugh is not incarcerated.

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ORAL ARUGMENT REQUESTED

List of Parties

All parties to this appeal, with their appellate counsel, are as follows:

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State of Utah
Represented by Utah Attorney General Sean Reyes and Assistant Solicitor General William Hains

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Introduction

The court of appeals held that Mr. Baugh's trial counsel provided ineffective assistance by failing to ensure the jury was properly instructed that it must unanimously agree which of multiple allegations of aggravated sexual abuse with a child constituted a charged crime in order to convict.

On certiorari, the State argues that the court of appeals erred in so holding. But the State does not dispute that the law governing unanimity in effect at the time of Mr. Baugh's trial required the jury to unanimously agree on a particular charge to convict. Instead, it contends that the law regarding unanimity *instructions* was unclear at the time of Mr. Baugh's trial.

But unlike plain error, a claim of ineffective assistance does not require a defendant to show clearly established law. Given what the State concedes the principle of unanimity requires in a case like Mr. Baugh's, the court of appeals correctly determined trial counsel acted unreasonably when he failed to ensure the jury was properly instructed on the principles of unanimity applicable to Mr. Baugh's case. Under the circumstances of this case, there is a reasonable likelihood of a different result if counsel had ensured the jury was properly instructed regarding unanimity.

The court of appeals applied the proper legal standards and correctly held that Mr. Baugh received ineffective assistance of counsel. The State has not shown that the court of appeals erred. This Court should therefore affirm.

Issue Presented

Issue: Was Mr. Baugh's counsel ineffective when he failed to ensure the jury was properly instructed regarding its unanimity obligation?

Standard of Review: "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Roberts*, 2019 UT App 9, ¶ 10, 438 P.3d 885. "[O]n writ of certiorari [this Court] review[s] the opinion of the court of appeals for correctness." *Becker v. Sunset City*, 2013 UT 51, ¶ 9, 309 P.3d 223, 226

Preservation: Claims of ineffective assistance of counsel are an exception to the general preservat

Statement of the Case

1. Sasha accuses Mr. Baugh

In 2012, Mr. Baugh lived with First Wife and his four children, including his daughter, Sasha,[1] at the family home in Nibley. (R.479, 678.) Sasha was nine or ten years old at the time. (R.488–89.) While at the Nibley house, Sasha saw pornography that Mr. Baugh had left up on a screen and interrupted him while he was masturbating. (R.697.)

Mr. Baugh lived at the Nibley house with his family until April 2014, when he separated from First Wife and moved into a one-bedroom apartment called the Falls. (R.489–90.)[2] His four children, including Sasha (who was 12 years old at the time), would visit him occasionally at the Falls apartment. (R.490.) During this time, Mr. Baugh took an antidepressant and used marijuana to cope with his marriage troubles and First Wife's psychiatric problems. (R.696.) At some point, Mr. Baugh apologized to Sasha for her seeing the pornography. (R.697–98, 865.)

First Wife attempted suicide, and she and Mr. Baugh divorced. (R.680.) In 2015, Mr. Baugh married Second Wife. (R.652.)

For the next few years, First Wife consistently denied Mr. Baugh access to the children, but at the beginning of 2018, Mr. Baugh received more parent-time.

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[1] The pseudonym used by the Utah Court of Appeals.

[2] Mr. Baugh told Detective, "[W]e were in the Nibley house from 2012 to 2015" and that he was in the Falls apartment starting in April 2014. (R.892, 894).

(R.657, 682.) During this time, Mr. Baugh felt that he had a good relationship with Sasha. (R.682.)

In the summer of 2018, nearly 16-year-old Sasha spent extended parent time with Mr. Baugh. (R.658–59.) During that parent time, Mr. Baugh told Sasha "about wanting her to dress modestly" because of his religious beliefs. (R.683–84.) That conversation made Sasha uncomfortable, and she became distant and combative. (R.684.)

A few weeks later, Sasha told First Wife that Mr. Baugh and had made her feel uncomfortable, but she did not go into specifics. (R.484.) Sasha then saw a therapist, and she alleged to the therapist that Mr. Baugh had her touch his genitals several years prior, both in the Nibley house and at the Falls apartment. (R.484–86, 504.) The therapist called the police. (R.486.)

2. Sasha calls Mr. Baugh

After the therapist reported Sasha's allegations, Detective investigated. (R.504.) During that investigation, Detective asked Sasha to call Mr. Baugh to see if he would admit to her allegations. (R.493, 505–06.) Detective recorded that call. (State Ex. 1.)

Sasha started the phone call by accusing Mr. Baugh of having her give him hand jobs when she was younger, but Mr. Baugh denied that she ever touched him. (R.863–64.) She asked him about the apology that he gave to her at the Falls apartment. (R.865.) He said that he apologized to her because she had seen his

pornography twice. (*Id.*) He told her, "My concern here is that you're putting that together with something . . . about me that didn't happen." (*Id.*)

When she pressed him to admit that he had her touch him, he said, "Well, what I certainly can't do is deny that and say that you're absolutely wrong, because you get to feel however—you, you get to remember it however you remember it. And I can't deny that." (R.866.) He then reiterated that she was exposed to pornography twice at the Nibley house, and one of those images was a hand job. (*Id.*)

When she described the details of her allegations, Mr. Baugh said, "[Sasha], that's terrible. And I am very sorry for that . . . I have no recollection about it. I am terribly sorry." (R.867.) And when she pressed him again about whether he remembered, he said he was "messed up" when he was living at the Falls apartment because of the divorce, so he was smoking a lot of cigarettes and pot so that he would not be present. (R.868–69.) When she insisted again that it happened, he responded, "I'm not denying it. . . . And if you say I did it, then—then I'm sure it did." (R.869.) He then apologized for everything that she "got exposed to." (R.870.)

Sasha continued accusing him of having her touch him in the Nibley house and at the Falls apartment, and Mr. Baugh responded that he did not remember ever making Sasha do something like that in the Nibley house. (R.870–71.) He also said that although he did remember the two of them laying on a bed in the Falls apartment, and that he was out of it at the time because he was taking

medicine to make himself numb. (R.871.) He said, "I guess what I'm saying is, if you say it happened, it happened, hmm, and I'm not going to deny it." (R.872.) He further explained, "I would never physically take your hand and put it down my pants. If I did that at the [Falls], I can, hm, I totally accept that and say, oh, that's awful . . . And I've got—and I've got to own that, even if I did it while on a whole bunch of medications or high on pot or whatever and don't remember it, but I've got to own it." (R.874.)

Mr. Baugh ended the call by again reiterating that he would never have his child touch him. (R.875.)

3. Detective interviews Mr. Baugh and the State charges him

After Sasha made the call, Detective interviewed Mr. Baugh. (R.511–13; State Ex. 2.) During the interview, Mr. Baugh said that Sasha said he had her touch him, but he had no recollection of that. (R.887.) He told Detective that Sasha had been inadvertently exposed to pornography while living in the Nibley house, and one of the images was of a hand job. (R.890, 892–93.) He said that he apologized to Sasha for exposing her to pornography. (R.896.)

Mr. Baugh told Detective that Sasha told him that she had touched him inappropriately in the Falls apartment: "[M]y conversation with [Sasha] this morning was, [Sasha], I'm not going to deny it because it takes a lot for you to come . . . forward and say that. . . . I was messed up when I was separated from your mom, and I can't—I can't tell you that, yes, but if I did, I'm sorry. That—

there was—there would be no—no way that I would ever want to make you feel like junk." (R.895.)

He told Detective he did not think that Sasha was a liar. (R.898.) But when Detective asked Mr. Baugh if he had Sasha touch him inappropriately, Mr. Baugh consistently denied it. He said there were "zero" times when that happened and that Sasha was "getting things mixed up." (R.899, 900.)

Mr. Baugh explained to Detective that Sasha had seen him masturbate when she was younger. (R.900.) And when Detective told Mr. Baugh that he knew that Mr. Baugh had forced Sasha to give him hand jobs, Mr. Baugh responded, "I've never made my daughter make me ejaculate. . . . I'm not going to have my daughter ever, ever do something where she is going to feel dirty." (R.903, 905.) When Detective asked him to tell the truth, Mr. Baugh said, "I reject and I cannot ever accept that I would actually have [Sasha] hold my penis while I ejaculate. End of story." (R.906.)

Then Detective asked Mr. Baugh about the time in the Falls apartment when Mr. Baugh admitted that he was using drugs. Mr. Baugh responded, "It's very possible . . . that she could be up against me, and it's very possible that I was out of it. . . [I]t's very possible, and that's why I said I'm not going to deny it." (R.912.)

The interview ended with the following exchange:

> DETECTIVE: Have you had your daughter giving you hand jobs for years?

> MR. BAUGH: For years. Okay. No.
>
> DETECTIVE: And when was the last time?
>
> MR. BAUGH: It would be at Riverwoods here is what you're telling me. I'm telling you it's the Nibley House.

(R.917.)

Based on this interview and Sasha's allegations, the State charged Mr. Baugh with two counts of aggravated sexual abuse of a child. (R.1–2.) The only difference between the charges was that Count 1 noted a date range in 2012 while Count 2 noted a date range in 2014. (*Id.*)

4. The State presents Sasha's and Detective's testimony at trial

At trial, the State presented its case through two witnesses: Sasha and Detective. (R.476, 500.)

Sasha: Sasha testified that when she was 9 or 10 years old, she lived in the Nibley house, and she claimed that Mr. Baugh had her put her hand on his penis and rub it until he ejaculated. (R.479, 487, 489.) She alleged this happened twice at the Nibley house—once in Mr. Baugh's bedroom and once when Mr. Baugh was tucking her into bed. (R.487–88.)

Sasha testified that when Mr. Baugh moved to the one-bedroom Falls apartment, she would visit Mr. Baugh during their parent-time when he would see all four children at the same time. (R.489–90.) She testified that in that apartment, she and Mr. Baugh were both laying on his bed, and he had her put her hand on his penis and rub it until he ejaculated. (R.481.) She testified that

sometime while Mr. Baugh lived at the Falls apartment, Mr. Baugh told her that he had repented and that God wanted her to forgive him. (R.483.)

She testified that she did not disclose what happened until several years later, in 2018, when Mr. Baugh made a comment about her clothes, and "all those memories [came] back." (R.484, 491–92.) Sasha admitted that since she made her allegations, she had not had parent-time with Mr. Baugh. (R.490–91.) She admitted that before she made her allegations, Mr. Baugh disapproved of the amount of time she was spending with a friend. (R.492.)

Detective: Detective testified about interviewing Sasha and having her call Mr. Baugh. (R.505.) Then Detective played the audio of Sasha's call and the audio of Mr. Baugh's police interview. (R.510, 513, 862–917.)

5. Mr. Baugh presents his case at trial

Mr. Baugh presented four witnesses at trial: Second Wife, Second Wife's father, his mother, and himself. (R.648, 665, 671, 676.)

Second Wife: Second Wife testified that Mr. Baugh and Sasha had a close relationship and that she did not see anything strange between them. (R.653.) She also noted that the two butted heads a lot. (R.653.) She testified that a few days before Sasha made her allegations, Sasha visited them for parent-time and was "very stand off-ish." (R.660.)

Second Wife's Father and Mr. Baugh's Mother: Second Wife's father and Mr. Baugh's mother both testified that they never observed anything unusual in Sasha's relationship with Mr. Baugh. (R.668, 673.)

Mr. Baugh: Finally, Mr. Baugh testified. He denied that Sasha ever touched his genitals. (R.685, 689.) He explained that when Sasha called him, he wanted to "meet her where she's at and accept her. Let her know that I support what she's going through." (R.686.) He testified, "I didn't do what she's accusing me of. But she's entitled to feel however she wants to feel, even if she is getting things mixed up." (*Id.*) He testified that when he said during the call that he could not deny what Sasha said, he did that so that Sasha could "feel validated" and "deal with whatever issues she's going through." (R.695.)

He testified that in his interview with Detective, he felt that Detective had already made up his mind, so he stood up for himself to the best of his ability. (R.688.) He explained that in his last line in the interview—where he said, "[I]t would be at Riverwoods here, is what you're telling me. I'm telling you it's the Nibley House"—he was referring to when Sasha had been exposed to pornography in the Nibley house. (R.694–95.)

He also testified that, although he was taking antidepressants and marijuana while he was living at the Falls apartment to cope with First Wife's psychiatric problems and his marriage troubles, those drugs did not cause him to forget doing something sexual to Sasha. (R.697.)

6. The court instructs the jury and the parties make closing arguments

After the close of evidence, the court instructed the jury. It informed the jury that they should only reach a unanimous agreement if they could do so

"honestly and in good conscience." (R.260.) The instruction also informed the jury to not "give up your honestly held views about the evidence simply to agree on a verdict." (*Id.*)

The court also gave the jury the elements for Count 1 and Count 2. (R.263–64.) Those instructions were identical with the exception of Count 1 listing "on or about 01/01/2012–12/31/2012," and Count 2 listing "01/01/2014–12/31/2014." (*Id.*) The court did not give the jury a specific unanimity instruction, but the instructions did say: "Because this is a criminal case, every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" (R.260.) And it further encouraged jurors to approach their deliberations in such a way so that they could "reach a unanimous agreement on a verdict." (*Id.*)

In closing, the State told the jury that Sasha had testified to "three different instances" where Mr. Baugh had her touch him, and he informed the jury that the "two counts" for which Mr. Baugh was charged "can be fulfilled with—with any two of those experiences, any two of those incidents that she described, those can be the elements of both of these counts." (R.775–76.)

7. The jury is deadlocked and then issues a split verdict

The court gave the case to the jury for deliberations at 3:21 pm. (R.234, 282.) Shortly after 10:00 pm, the jury "sent a verbal message to the Court through the bailiff." (R.324.) The jury told the court "that they were at an impasse." (R.797.) The Court responded verbally through the bailiff outside the presence of counsel. (R.324, 283.) "The message [the court] returned to them

verbally through the bailiff was that they needed to go back and keep trying." (R.797.) At 10:40 pm, the court informed counsel that the jury said they were at an impasse earlier, and that the court had told the jury to continue deliberating. (R.234, 283, 797–98.)

The jury returned its verdict at 11:43 pm. (R.234.) It issued a split verdict, acquitting Mr. Baugh of Count 1 and convicting him of Count 2. (R.243, 264.)

8. The court of appeals reverses Mr. Baugh's conviction

Mr. Baugh appealed his conviction. Among other things, Mr. Baugh argued defense counsel provided ineffective assistance for failing to ensure the jury received proper instruction regarding unanimity. *State v. Baugh*, 2022 UT App 3, ¶ 1, 504 P.3d 171. The court of appeals reversed on this issue and did not dispose of the other issues raised by Mr. Baugh in his opening brief and accompanying rule 23B motion.[3] *Id.*

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[3] In his opening brief to court of appeals, Mr. Baugh also argued that the court plainly erred by having the bailiff tell the jury to continue deliberating, without consulting with or informing counsel or making a contemporaneous record of what the bailiff said to the jury.

Mr. Baugh filed a related rule 23B motion arguing that his counsel provided ineffective assistance by failing to investigate what the bailiff told the jury. When an appellate counsel's investigator conducted interviews, a juror reported that the bailiff "actually told [the jury] it couldn't be an impasse and we needed to make a decision" and that "the judge instructed us to make a decision." The coercive instruction conveyed by the bailiff would have warranted a new trial, had trial counsel not provided ineffective assistance by failing to investigate.

In addition to the issues related to the supplemental jury instruction delivered off-the-record through the bailiff, Mr. Baugh also raised on appeal that Detective gave inadmissible and prejudicial testimony and that the court should reverse under the cumulative error doctrine.

The court of appeals explained that juries must "reach unanimity as to each count of each distinct crime charged," and must further "agree on a specific criminal act for each charge in order to convict." *Id.* ¶ 14 (quotations simplified). The court noted that Mr. Baugh "faced multiple charges for aggravated sexual abuse of a child, but the jury heard testimony of more instances of alleged abuse than the State charged." *Id.* ¶ 16. And because "nothing in this case conclusively linked the allegations to the counts listed in the instructions," the court concluded that it "cannot know which one of the three instances of alleged abuse (one of two in the family house or the one in the apartment) was the one for which the jury convicted him." *Id.* ¶ 17. Because of that uncertainty, and because "defense counsel bears a duty to assist the defendant in reaping the benefits of a jury trial and to hold the State to its full and complete burden of proof," the court concluded that counsel was deficient in failing to ensure the jury was properly instructed regarding its unanimity obligation. *Id.* ¶ 19 (quotation simplified).

With regard to prejudice, the court explained that "[t]he fact that the jury heard nothing specific about when each act occurred creates a reasonable probability that the jurors did not agree on which act of alleged abuse supported each count." *Id.* ¶ 21. Because "[i]t is therefore entirely possible that some (but not all) of the jurors convicted on count two based on the belief that the alleged abuse occurred at the family house, while some other (but not all) jurors

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The court of appeals did not resolve any of these issues and instead reversed on the unanimity issue.

convicted based on the belief that the abuse occurred at the apartment," the court concluded Mr. Baugh was prejudiced by counsel's deficiency. *Id.*

The court of appeals accordingly vacated Mr. Baugh's conviction and remanded for further proceedings. *Id.* ¶ 27.

9. This Court grants the State's petition for a writ of certiorari

The State petitioned this Court's review of the court of appeals' decision. Over Mr. Baugh's opposition, the Court granted the State's petition as to the following issues:

> 1. Whether the Court of Appeals erred in concluding Petitioner's counsel was ineffective in failing to ensure the jury was instructed that all of its members were required to agree on a particular alleged incident of sexual contact to justify any conviction for a count of aggravated sexual abuse of a child.
>
> 2. Whether the Court of Appeals erred in concluding Petitioner was prejudiced by any deficient performance relating to a failure to ensure the jury was properly instructed.

(Order of the Utah Supreme Court, issued July 11, 2022.)

Summary of the Argument

The court of appeals correctly concluded that Mr. Baugh's counsel was deficient in failing to ensure the jury was properly instructed regarding its unanimity obligation. And it was also correct in concluding that Mr. Baugh was prejudiced by that deficiency.

The jury unanimity instructions were inadequate. They did not inform the jury that it needed to unanimously agree on the underlying act supporting its conviction, if any. Counsel unreasonably failed to ensure that the jury was properly instructed. This constituted deficient performance.

Mr. Baugh was prejudiced by his counsel's deficient performance. Had counsel ensured the jury was properly instructed, there is a reasonable likelihood the outcome of the trial would have been different—in particular, there's a reasonable likelihood there would have been a mistrial or acquittal on Count 2, just as the jury acquitted Mr. Baugh on Count 1. Because there is a reasonable likelihood of a different result absent, Mr. Baugh was prejudiced.

The State has not shown that the court of appeals erred. This Court should therefore affirm the opinion of the court of appeals.[4]

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[4] If this Court does not affirm, it should reverse with instructions for the court of appeals to consider the other issues raised by Mr. Baugh in his appeal and accompanying rule 23B motion, which were not resolved by the court of appeals due to its reversal on the ground currently under review by this Court.

Argument

1. Mr. Baugh's trial counsel provided ineffective assistance by failing to ensure the jury was properly instructed on unanimity

Mr. Baugh argued on appeal that his trial counsel provided ineffective assistance by failing to ensure that the jury was properly instructed on the law of unanimity. *Baugh*, 2022 UT App 3, ¶ 11. Specifically, counsel did not "ensure the jury was instructed that [it] must unanimously agree on which of the three alleged instances [of abuse] constituted the criminal act for each charge on which [it] convicted [him]." *Id.* ¶ 13 (alterations in original).

Before this Court, the State agrees that the Unanimous Verdict Clause required that Mr. Baugh's jury unanimously agree which of the three allegations constituted the charged crime in order to convict on a particular count. (State's Br. at 16, 18.) It concedes that "the requirement that the jury agree on the specific criminal act underlying each conviction would have been clear at the time of Baugh's trial." (State's Br. at 18.) And the State does not challenge the court of appeals' interpretation of the Unanimous Verdict Clause or this Court's precedent interpreting the clause. (State's Br. at 16, 18.)

Instead, the State argues that counsel's failure to ensure that the jury was instructed that it must "agree on the specific criminal act underlying each conviction" was not ineffective assistance because "the law on unanimity *instructions* was anything but clear" at the time of Mr. Baugh's trial. (State's Br. at 18.) The State also argues that the court of appeals erred in its prejudice

analysis. (*Id.* at 38.) But the State has not shown that the court of appeals erred in holding that Mr. Baugh's counsel provided ineffective assistance.

Instead, the court of appeals applied the correct legal standards and reached the correct result: (1) it correctly determined that Mr. Baugh's counsel unreasonably failed to ensure the jury was properly instructed; and (2) it correctly determined that this failure prejudiced Mr. Baugh. The court therefore correctly held that Mr. Baugh received ineffective assistance of counsel, and this Court should affirm its ruling.

1.1 Mr. Baugh's counsel performed deficiently

Text Mr. Baugh's trial counsel's failure to ensure that the jury was properly instructed on unanimity was objectively unreasonable under the circumstances and therefore deficient. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Nonetheless, the State argues that the court of appeals erred in holding Mr. Baugh's counsel was deficient. (State Br. at 18–33.) Although it concedes the law regarding unanimity was clear at Mr. Baugh's trial, it claims that "the law on unanimity *instructions* was anything but clear." (*Id.* at 18.) It reasons that "[c]ompetent counsel could have" looked at the state of the law and "moved on." (*Id.* at 18, 28.) The State also asks this Court to overturn *Alires*. (*Id.* at 19–22.)

But the State's arguments do not show that the court of appeals erred in determining that Mr. Baugh's counsel performed deficiently. To the contrary, (1) the court of appeals correctly apprehended the law regarding unanimity applicable to Mr. Baugh's case, (2) the court of appeals applied the correct legal

standards and correctly held that Mr. Baugh's counsel performed deficiently, and (3) the State has not shown that *Alires* misapprehended the law regarding unanimity or that it should be overturned.

1.1.1 The court of appeals correctly apprehended the law on unanimity to Mr. Baugh's case

The court of appeals correctly appended the law regarding unanimity to Mr. Baugh's case. The Unanimous Verdict Clause requires that where there are multiple criminal acts alleged and crimes charged, that the jury must unanimously agree on which allegation constitutes a charged crime in order to convict on that count. *Baugh*, 2022 UT App 3, ¶¶ 13, 19. The State agrees that this is what the Unanimous Verdict Clause requires. (State's Br. at 16, 18.) But Mr. Baugh's jury was not told this. *Baugh*, 2022 UT App 3, ¶¶ 13, 19. As a result, Mr. Baugh's jury was not properly instructed on the law applicable to his case. *Id.* ¶ 19.

In reaching its holding that Mr. Baugh's counsel provided ineffective assistance, the court of appeals held that "[t]he jury [had]to be unanimous as to the specific acts supporting each count of conviction" and "without a sufficient link to the actions in the instructions themselves, an instruction requiring as much as critical to ensuring unanimity." *Id.* ¶ 19 (second alteration in original) (quotation marks omitted). The court of appeals was correct.

The Unanimous Verdict Clause of the Utah Constitution requires a unanimous verdict. Utah Const. art. I, § 10 ("In criminal cases the verdict shall be unanimous"). This clause embodies the common law principle that "the truth of

every accusation . . . had to be confirmed by the unanimous suffrage" of all jurors in order for the jury to convict. *State v. Hummel*, 2017 UT 19, ¶¶ 43–44, 393 P.3d 314 (quotation marks omitted). It requires both "unanimity as to each count of each distinct crime charged" and that "a jury must be unanimous on all elements of a criminal charge for [a] conviction to stand." *Id.* ¶¶ 26, 29

This Court has held that "[j]ury unanimity means unanimity as to a specific crime." *Id.* ¶ 28; *see also State v. Saunders*, 992 P.2d 951, 966–67 (Utah 1999) (plurality). In other words, "[t]he jury must unanimously agree on one or more of the specified unlawful acts and they may not combine their conclusions on different specified acts so as to converge on an ultimate verdict of guilty." *State v. Roedl*, 155 P.2d 741, 747 (Utah 1945).

Thus, "a verdict would not be valid if some jurors found a defendant guilty of robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found him guilty of the elements of the crime of robbery." *Hummel*, 2017 UT 19, ¶ 28 (quotation marks omitted). Likewise, as relevant to the charges faced by Mr. Baugh, "jurors must be unanimous as to the particular act or acts that form the basis for a sexual abuse conviction." *State v. Alires*, 2019 UT App 206, ¶ 19, 455 P.3d 636.[5]

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[5] Many other jurisdictions have interpreted unanimity in the same manner. *See, e.g.*, *Thomas v. People*, 803 P.2d 144, 154 n.21 (Colo. 1990) ("What is essential is that the jury be in agreement that the defendant committed a particular act or series of acts."); *State v. Arceo*, 928 P.2d 843, 874–75 (Haw.

The State does not argue that the court of appeals erred in interpreting the unanimity requirement, nor does it ask this Court to overturn its precedent interpretating unanimity. (State's Br. at 16, 18.) Instead, the State agrees that "[i]f the prosecution charges one count but presents evidence of two separate acts that could each independently satisfy the actus reus element of the charged crime,

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1996) (holding a defendant's right to a unanimous jury verdict is violated "unless one or both of the following occurs: (1) at or before the close of its case-in-chief, the prosecution is required to elect the specific act upon which it is relying to establish the 'conduct' element of the charged offense; or (2) the trial court gives the jury a specific unanimity instruction."); *State v. Santos-Vega*, 321 P.3d 1, 17 (Kan. 2014) ("The State agrees it presented a multiple acts case and did not inform the jury which act to rely on for each charge. Because of that, the State concedes the district court erred by not instructing the jury to unanimously agree on the specific act underlying each conviction."); *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008) ("[I]n a case involving multiple counts of the same offense, a trial court is obliged to include some sort of identifying characteristic in each instruction that will require the jury to determine whether it is satisfied from the evidence the existence of facts providing that each of the separately charged offenses occurred."); *Johnson v. State*, 271 A.3d 1192, 1195 (Md. 2022) (holding "a defendant's right to a unanimous jury verdict is violated when the State presents evidence of multiple incidents at trial to prove a single charged count[] in absence of an election between the incidents or a special jury instruction"); *People v. Cook*, 521 N.W.2d 275, 282 (Mich. 1994) (allowing general unanimity instructions except where "the alternative acts are materially distinct" or "there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt"); *State v. Stempf*, 627 N.W. 352, 354–55 (Minn. Ct. App. 2001) ("Where jury instructions allow for possible significant disagreement among jurors as to what acts the defendant committed, the instructions violate the defendant's right to a unanimous verdict."); *State v. Carlton*, 527 S.W.3d 865, 868 (Miss. Ct. App. 2017) ("Because the verdict directors, as given, did not ensure jury unanimity as to the criminal conduct supporting [the defendant's] convictions, his right to a unanimous jury verdict was violated."); *State v. Brown*, 762 S.W.2d 135, 137 (Tenn. 1988) (holding that the prosecution was required to elect the specific offense upon which the guilty verdict was based); *see also United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977) (requiring a specific unanimity instruction when evidence of multiple acts by a defendant are placed before a jury to support a single charged offense).

then the jury would have to unanimously agree which of the two criminal acts were proven beyond a reasonable doubt, or that both were." (*Id.* at 16.) And it concedes that "the requirement that the jury agree on the specific criminal act underlying each conviction would have been clear at the time of Baugh's trial." (*Id.* at 18.)

But in Mr. Baugh's case, the jury was not told it must unanimously agree on the specific allegation underlying a charge to convict. Although Sasha alleged three instances of sexual abuse, Mr. Baugh was charged with only two counts, and the jury instructions did not inform the jury it must agree *which* of Sasha's three allegations constituted a charged crime in order to convict on that count.

Instead, the jury was only generally instructed through a MUJI instruction[6] to "try to reach a unanimous agreement" and "[b]ecause this is a criminal case, every single juror must agree with the verdict before the defendant can be found 'guilty' or 'not guilty.'" (R260; *see also* R261 ("The foreperson will fill in the appropriate blank to reflect the jury's unanimous decision.").)

The Utah Court of Appeals has correctly determined that this general instruction "insufficient" to ensure that the jury is adequately instructed concerning what unanimity requires in a case with multiple allegations and counts. *Alires*, 2019 UT App 206, ¶ 23 n.5. It informs the jury it must unanimously agree on the verdict (guilty or not guilty) but does not inform the

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[6] *See* Model Utah Jury Instructions, Second Edition, CR216, *available at* https://www.utcourts.gov/resources/muji/.

jury that it must unanimously agree on the specific allegation that constitutes a charged crime in order to convict on that count.

But without such an instruction, "the instructions taken as a whole" did not "fairly instruct the jury on the law applicable to the case." *State v. Dominguez*, 2019 UT App 116, ¶ 20, 447 P.3d 1224. The other instructions did not tie each count to a specific allegation from Sasha.[7] (R.263–64.) Nor did the States urge the jury to convict on each count based on one particular allegation from Sasha. To the contrary, the State told the jury that "the 'two counts can be fulfilled with . . . any two of those experiences' that Sasha described and that 'any two of those incidents . . . can be the elements of both of these counts.'" *Baugh*, 2022 UT App 3, ¶ 25.

In light of the law regarding unanimity and the circumstances of Mr. Baugh's case, the court of appeals correctly held that "[t]he jury [had] to be unanimous as to the specific acts supporting each count of conviction" and "without a sufficient link to the actions in the instructions themselves, an instruction requiring as much as critical to ensuring unanimity." *Id.* ¶ 19 (second alteration in original) (quotation marks omitted).

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[7] The only difference between the counts was that Count 1 noted a time frame of 2012, while Count 2 noted a timeframe of 2014. (R.263–64.) But the prosecutor effectively "rejected any theory that the acts that had been testified to were specially linked to particular counts based on the timing and location of the underlying criminal act" when it argued that the jury could convict on any two allegations made by Sasha. *Baugh*, 2022 UT App 3, ¶ 25. And the jury could have viewed at least two of Sasha's allegations as having occurred in 2014 (the timeframe noted for Count 2, on which the jury convicted). *Id.* ¶¶ 21–22.

1.1.2 The court of appeals applied the correct standards and correctly held that counsel performed deficiently

The court of appeals applied the correct legal standards governing deficient performance and reached the correct conclusion that Mr. Baugh's counsel performed deficiently under the circumstances of this case. *Baugh*, 2022 UT App 3, ¶ 19. Although the State argues that the court of appeals erred because "the law on unanimity *instructions* was anything but clear," the State's claim is both beside the point and inaccurate. Counsel had an obligation to ensure the jury was correctly instructed on the law applicable to Mr. Baugh's case; it is not necessary for there to be an appellate decision dictating a specific instruction or manner of instruction for counsel's conduct to be deficient.

The court of appeals correctly applied the law governing deficient performance: In assessing whether trial counsel's performance was deficient, "[t]he proper measure . . . [is] reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). And under prevailing norms, defense counsel should "request[] or object[] to jury instructions" and "ensure that constitutional and other legal rights of their clients are protected." AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS: DEFENSE FUNCTION, STDS. 4-1.2(b), 4-1.5.[8]

[8] These standards can be found at https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/.

"Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688. As a result, "trial counsel bears a duty to assist the defendant in reaping the benefits of a jury trial and to hold the State to its full and complete burden of proof." *State v. Mendoza*, 2021 UT App 79, ¶ 17, 496P.3d 275. And "no objectively competent attorney would have failed to request a clarifying instruction in order to avoid . . . allowing the State to carry a burden any lighter than what our law requires." *Id.* ¶ 17. Thus, Utah courts have often found deficient performance where counsel failed to object to erroneous jury instructions or ensure the jury was properly instructed. *See, e.g., State v. Grunwald*, 2018 UT App 46, ¶ 24, 424 P.3d 990, *rev. on other grounds* 2020 UT 40; *State v. Liti*, 2015 UT App 186, ¶ 20, 355 P.3d 1078; *State v. Ekstrom*, 2013 UT App 271, ¶ 27, 316 P.3d 435.

The court of appeals applied the correct law governing deficient performance and considered whether "defense counsel's assistance fell below an objective level of reasonableness when he did not ensure that the jury was instructed that [it] must unanimously agree on which of the three alleged instances [of abuse] constituted the criminal act for each charge on which [it] convicted [him]." *Baugh*, 2022 UT App 3, ¶¶ 13–14 (alterations in original) (quotation marks omitted).

Under this standard, the court of appeals "conclude[ed] that under the circumstances of this case, it constituted deficient performance for counsel to fail to request that the jury receive proper unanimity instruction through either

specific unanimity instructions for each count or a special verdict form requiring the jury to specify which alleged act was linked with each conviction." *Id.* ¶ 13. Specifically, the court reasoned that "[w]here neither the charges nor the elements instructions link each count to a particular act, instructing the jury that it must agree as to which criminal acts occurred is critical to ensuring unanimity on each element of each crime." *Id.* ¶ 19 (quotation marks omitted).

But "counsel neglected to request that the jury was otherwise properly instructed." *Id.* ¶ 18. "By failing to require juror unanimity as to each underlying act, the instructions—coupled with the prosecutor's closing argument—effectively lowered the State's burden of proof." *Id.* ¶ 19 (quotation marks omitted). As a result, counsel did not fulfill his "duty to assist the defendant in reaping the benefits of a jury trial and to hold the State to its full and complete burden of proof," and "such a failure constitutes deficient performance" under the circumstances of this case. *Id.* ¶¶ 13, 19 (quotation marks omitted).

Given the circumstances of Mr. Baugh's case—the multiple allegations and multiple counts, the lack of any instructions tying each count to a particular allegation, the State's argument that the jury could convict on any two counts, and the contested evidence concerning each of Sasha's allegations—it was objectively unreasonable for trial counsel to not ensure the jury was properly instructed on what the law of unanimity required for a jury to convict. The court of appeals applied the proper legal standard to assess deficient performance and reached the correct result.

The State's claim that "the law on unanimity *instructions* was anything but clear" is beside the point and inaccurate: The State argues that the court of appeals erred in holding that counsel performed deficiently because it claims "the law on unanimity *instructions* was anything but clear before" the trial. (State's Br. at 18 (emphasis added)*; see generally* State Br. at 1–4, 18–33.) But the State is wrong for two reasons.

First, the State's argument is beside the point. Even if "the law on unanimity instructions" is unclear as the State claims (State's Br. at 18), it does not follow that the court of appeals must have erred in holding that counsel performed deficiently. This is because, unlike with plain error, a defendant is not required to show the law is clearly established to demonstrate his counsel performed unreasonably. *State v. Silva*, 2019 UT 36, ¶ 20, 456 P.3d 718.

Indeed, in *Silva*, this Court explicitly "repudiate[d] the language in our case law limiting our review of an attorney's performance to the law in effect at the time of trial" and rejected the notion that "we may assess the reasonableness of defense counsel's performance only in light of the law in effect at the time of trial." *Id.* Instead, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* (quotation marks omitted).

Thus, even if "the law on unanimity instructions" is unclear or was unclear at the time of Mr. Baugh's trial (State's Br. at 18), this does not mean the court of appeals erred in determining that Mr. Baugh's counsel performed deficiently.

Instead, the question is whether counsel acted reasonably under the circumstances. As the court of appeals correctly held, counsel's failure to ensure the jury was instructed on the law of unanimity applicable to Mr. Baugh's multiple-allegation case was objectively unreasonable. *Baugh*, 2022 UT App 3, ¶¶ 15–19.

Second, the State's claim that "the law on unanimity instructions was anything but clear" is also inaccurate. (State's Br. at 18.) Even if there was not a specific appellate decision dictating a multiple-allegation unanimity instruction or declaring the precise manner in which a jury must be instructed regarding unanimity in a multiple-allegation case, the law in effect at trial still required the jury to be correctly instructed on the law, and it also required that the jury agree on the specific criminal act underlying each conviction.

It was well established at the time of Mr. Baugh's trial that jury instructions must "fairly instruct the jury on the law applicable to the case." *See, e.g., State v. Maestas*, 2012 UT 46, ¶ 148, 299 P.3d 892 (quotation simplified). They must not "incorrectly or misleadingly state the law." *State v. Larsen*, 828 P.2d 487, 495 (Utah Ct. App. 1992). And it was "clear at the time of [Mr.] Baugh's trial," as the State concedes, that the law requires that "the jury agree on the specific criminal act underlying each conviction." (State's Br. at 18.)

In sum, the State's argument does not show the court of appeals erred. The law of unanimity applicable to Mr. Baugh's case was established at the time of his trial. And an attorney can perform deficiently with regards to jury instructions

even when an appellate court has not yet issued an opinion on the exact manner or form of the instruction. Given the law of unanimity applicable to Mr. Baugh's case, counsel's failure to ensure the jury was properly instructed was unreasonable and therefore deficient.

1.1.3 The State has not shown that *Alires* should be overturned

The State asks this Court to overrule the *State v. Alires*, 2019 UT App. (State's Br. at 19–33.) The State claims *Alires* was wrongly decided because it "misread *Saunders* as a majority opinion," read *Saunders* incorrectly, and did not "account for the many fractured and conflicting opinions this Court has issued on the question of unanimity instructions." (*Id.* at 19–22.)

But *Alires* did not materially misread *Saunders*. The State's arguments fail to account for this Court's holding in *Hummel*, in which a majority of the court accepted and reiterated key points from *Saunders*. Indeed, the State has not shown that *Alires* misapprehended the law on unanimity. This Court's precedent supports both the *Alires* decision and this case.

First, the State's emphasis on the plurality aspect of *Saunders* is misplaced because Justice Durham "concur[red] in Justice Stewart's opinion," 1999 UT 59, ¶ 67, and the dissenting justice—Justice Zimmerman—dissented on plain-error grounds, not on jury unanimity grounds. *Id.* ¶¶ 77–79 (Zimmerman, J., concurring and dissenting). That is, Justice Zimmerman thought the "proper rules" regarding jury unanimity were not "obvious" at that time. He did not contend that the "proper rules" regarding jury unanimity were different than

what Justice Stewart articulated. *Id.* ¶ 78 (Zimmerman, J., concurring and dissenting). Concluding that jury unanimity rules were not "obvious" at the time, *id.*, is not the same as concluding "the law on jury unanimity [is] unsettled." (State Br. at 19–20.) Moreover, even if "the proper rules" were not "obvious" pre-*Saunders*, 1999 UT 59, ¶ 78 (Zimmerman, J., concurring and dissenting), they certainly were post-*Saunders*.

Second, the State reads *Saunders* too narrowly and overlooks this Court's subsequent decision in *Hummel*. Although the State views the principles set forth in *Saunders* as limited to single-act cases where "the State present[s] evidence of several alleged instances of abuse" and no "general unanimity instruction" is given (State Br. at 20), the fact that *Saunders* involved only a single criminal act does not mean that the unanimity principles set forth in *Saunders* and other cases only apply in single-act cases.

To the contrary, in *Hummel*, a majority of this Court held that "[w]here separate crimes are charged, . . . a verdict may be insufficient if it fails to disclose the jury's unanimity on all elements of each crime." 2017 UT 19, ¶ 54. It also explained that "[j]ury unanimity means unanimity as to a specific crime." *Id.* ¶ 28 (quoting *Saunders*, 1999 UT 59, ¶ 60). Because of this, "a verdict would not be valid if some jurors found a defendant guilty of robbery committed on December 25, 1990, in Salt Lake City, but other jurors found him guilty of a robbery committed January 15, 1991, in Denver, Colorado, even though all jurors found

him guilty of the elements of the crime of robbery." *Id.* (quoting *Saunders*, 1999 UT 59, ¶ 60).

Thus, even if *Saunders* was a plurality or the law regarding unanimity was not clear after this Court's decision in *Saunders*, a majority of this Court held in 2017—before the trial in *Alires* and before Mr. Baugh's trial—that "[j]ury unanimity means unanimity as to a specific crime" and explained what this requirement means in multiple-allegation cases. 2017 UT 19, ¶ 28.

The State claims *Saunders*—and hence, *Alires*—also did not account for the "many fractured and conflicting opinions this Court has issued on the question of unanimity instructions" (State Br. 22.) But in this Court's subsequent *Hummel* opinion, a majority of this Court adopted key principles set forth by the plurality in *Saunders*. *E.g.*, *Hummel* 2017 UT 19, ¶¶ 28, 54. Given this Court's majority decision in *Hummel*, embracing the key principles of *Saunders* relied on by the *Alires* court, the State has not shown that *Alires* was wrongly decided. *Id.*

Although the court of appeals looked to *Alires* in Mr. Baugh's case, *Alires* cited *Hummel* and applies the unanimity principles set forth in *Hummel*. *See Alires*, 2019 UT App 206, ¶¶ 18, 20–21. And the State has not asked this Court to overturn *Hummel*. Thus, even if *Alires* had never been decided, this Court's own precedent demonstrates that Mr. Baugh's counsel performed deficiently. *See also Roedl*, 155 P.2d at 747 ("[T]he jury must unanimously agree on one or more of the specified unlawful acts and they may not combine their conclusions on different specified acts so as to converge on an ultimate verdict of guilty.").

Indeed, as previously noted, the State concedes that unanimity requires that the jury must "agree on the specific criminal act underlying each conviction." (State's Br. at 18.)

In sum, the State has not shown that *Alires* misapprehended the law regarding unanimity or that *Alires* should be overturned. Moreover, given that the State has not asked this Court to overturn its own precedent in *Hummel*, even if *Alires* had never been decided, the court of appeals would have correctly ruled under *Hummel* that counsel unreasonably failed to ensure the jury was instructed on unanimity.

1.2 The court of appeals correctly held that Mr. Baugh was harmed

Mr. Baugh was prejudiced by his counsel's deficient performance because there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The State disagrees, claiming that the court of appeals misapplied the law governing prejudice and failed to consider other cases in which appellate courts did not find prejudice. (State's Br. at 34–53.)

But as set forth below, the State is wrong because (1) the court of appeals applied the correct legal standards and reached the correct result and (2) the cases relied on by cited by the State are materially distinguishable.

1.2.1 The court of appeals applied the correct legal standard and reached the correct result

The court of appeals applied the correct legal standards and reached the correct result. *Baugh*, 2022 UT App 3, ¶¶ 20–26. Nonetheless, the State claims the court of appeals erred in is prejudice analysis because it claims that "[t]he court of appeals did not engage in the counterfactual analysis *Strickland* requires, instead improperly analyzing only the possible effect of any error on this jury." (State Br. at 38.) The State claims that the court effectively "shift[ed] the burden to the State to disprove prejudice" because it asked "whether counsel's challenged performance affected the verdict." (*Id.*)

The State's contentions are without merit and mischaracterize the court of appeals' analysis. The court of appeals applied the proper standards and reached the correct result.

Under *Strickland*, a defendant is prejudiced when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* But a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693.

In assessing whether a defendant has shown prejudice, courts "must consider the totality of the evidence before the judge or jury." *Id.* at 695. In light of the complete evidentiary picture, courts consider whether "the decision

reached would reasonably likely have been different absent the errors." *Id.* at 696. In other words, "to evaluate prejudice, [courts] assess counterfactuals scenarios—that is, what would have happened but for the ineffective assistance." *Ross v. State*, 2019 UT 48, ¶ 76, 448 P.3d 1203.

Importantly, "[t]he ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. "[T]he court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

This Court has noted that to assess *Strickland* prejudice in cases of deficient performance involving erroneous jury instructions, courts should consider whether "the error in the jury instructions create[d] the possibility that the jury convicted the defendant based on factual findings that would not have led to conviction had the instructions been correct," and then determine whether there is "a reasonable probability that at least one juror based its verdict on those factual findings." *Grunwald*, 2020 UT 40, ¶ 22, 478 P.3d 1.[9]

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[9] The State asks this Court to "disavow" *Grunwald* because it "reformulat[es]" *Strickland*. (*See* State Br. at 47.) But the State's reading of *Grunwald* is incorrect and in any event, the court of appeals did not rely on *Grunwald* in holding that Mr. Baugh was prejudiced.

There is some amount of "guesswork" involved in every "counterfactual hypothetical exercise." *State v. Hintze*, 2022 UT App 117, ¶ 50, 520 P.3d 1. And that "guesswork" is magnified when reviewing a jury-instructional error since reviewing courts are not privy to jury deliberations. It is magnified more still

Here, the court of appeals applied these principles in assessing whether Mr. Baugh had been prejudiced by his counsel's performance. Just as *Strickland* requires, the court "consider[ed] the totality of the evidence" in assessing whether there is "a reasonable probability that but for defense counsel's deficient performance, the proceeding's outcome would have differed." *Baugh*, 2022 UT App 3, ¶¶ 21, 26. And the court concluded its "confidence in the outcome ha[d] been undermined." *Id.* ¶ 26.

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when the outcome being reviewed is a split verdict on identical counts. In recognition of these jury-instruction quirks, this Court elaborated on how *Strickland*'s prejudice prong works when considering errors in jury instructions in *State v. Garcia*, 2017 UT 53, 424 P.3d 171, and *State v. Grunwald*, 2020 UT 40, 478 P.3d 1. This Court explained that, in order to carry out *Strickland*'s counterfactual analysis under these circumstances, courts must determine whether "the error in the jury instructions create[d] the possibility that the jury convicted the defendant based on factual findings that would not have led to conviction had the instructions been correct" and then determine whether there is "a reasonable probability that at least one juror based its verdict on those factual findings." *Grunwald*, 2020 UT 40, ¶ 22. Contrary to the State's assertions, this test helps courts fulfill *Strickland*'s counterfactual prejudice mandate—it does not compete with it. (*See* State Br. at 46–49.) Thus, *Grunwald* does not "reformulat[e]" *Strickland*, and so a "disavow[ing]" of it is inappropriate. (*See* State Br. at 47.)

In any event, the court of appeals did not rely on *Grunwald*, so the State's arguments about *Grunwald* are irrelevant. The court of appeals applied the *Strickland* prejudice standard. (Opinion ¶ 20) It considered whether there is "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," such that [its] confidence in the proceeding's outcome should be undermined." (*Id.* (quotation marks omitted.) That is precisely what *Strickland* requires. 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.")

In reaching this conclusion, the court of appeals considered whether "the ambiguity in the jury instructions, the dearth of consistent evidence, and the State's invitation for the jury to apply any act to any charge" supported a showing of prejudice. *Id.* ¶ 20. In concluding that Mr. Baugh had been prejudiced, the court recounted and analyzed the record concerning the evidence at trial, the State's arguments to the jury on appeal, the jury's deliberations, and the resulting split verdict. *Id.* ¶¶ 21–25. It also took into account that the jury instructions "distinguished the counts, not by location but based on the date of the alleged abuse—2012 for count one and 2014 for count two." *Id.* ¶ 21. It considered Sasha's testimony, which alleged two instances of abuse in the Nibley home and one in the Falls apartment, but which did not address when each instance occurred. *Id.* It explained that "the jury heard no evidence about when the alleged abuse occurred." *Id.* And it also considered the evidence that Mr. Baugh lived at both the Nibley home and the Falls apartment in 2014, which was the timeframe noted in the jury instruction for Count 2. *Id.*; *see* R.264.

The court of appeals also considered Mr. Baugh's purported admission to police, his explanation for his statements to police, and the State's argument to the jury about the significance of Mr. Baugh's statements. *Baugh*, 2022 UT App 3, ¶¶ 22–23 (noting that the State's "theory of this admission's origin and significance has changed" on appeal, and pointing out that "the very fact that the State can espouse multiple theories regarding the existence of an admission

demonstrates the potential variability in the way the jury could have viewed the evidence").

The court of appeals further took into account that the State's closing argument, wherein it invited "the jury to take any allegation and apply it to any count." *Id.* ¶ 25. In doing so, the court explained that the State "rejected any theory that the acts that had been testified to were specially linked to particular counts," and it emphasized that this error "loomed large in the absence of any specific unanimity instruction." *Id.*

And finally, the court of appeals reasoned that the record "suggest[ed] that the jury might have struggled with the evidence." *Id.; see Strickland*, 466 U.S. at 669 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."). The court pointed out that "the jury deliberated over a case with relatively simple facts for nearly seven hours before announcing that it had arrived at an impasse" a few minutes after 10 pm. *Baugh*, 2022 UT App 3, ¶ 25. It was not until "the [district] court instructed the jury to keep trying" that "the jury returned with a split verdict" at at 11:43 pm. *Id.* ¶¶ 10, 25.

Having thus considered all the circumstances of this case, the court's conclusion was sound. Indeed, it was predicated on "the possibility that the jury convicted the defendant based on factual findings that would not have led to conviction had the instructions been correct," *Grunwald*, 2020 UT 40 ¶ 22, because the circumstances of the case combined with the instructional deficit

made it "entirely possible that some (but not all) of the jurors convicted on count two based on" one belief "while some other (but not all) jurors convicted based on" another belief. *Baugh*, 2022 UT App 3, ¶ 21.

The court of appeals did not place the burden on the State to disprove prejudice. Rather, it considered whether Mr. Baugh had met his burden of showing prejudice given "the totality of the evidence." *Id.* ¶ 20. And the combined effect of "the ambiguity in the jury instructions, the dearth of consistent evidence, and the State's invitation for the jury to apply any act to any charge" led it to conclude that there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotation marks omitted).

Instead, the court of appeals accordingly correctly applied and held under the *Strickland* prejudice standard that there was a "reasonable probability that but for defense counsel's deficient performance, the proceeding's outcome would have differed," and as a result, its "confidence in the outcome ha[d] been undermined." *Id.* ¶ 26. Because there is a reasonable likelihood of a different result absent trial counsel's deficient performance, this Court should affirm.

1.2.2 The cases cited by the State are distinguishable

The State contends that the court of appeals' decision "overlooked" this Court's decision in *Evans*, 2001 UT 22, 20 P.3d 888, and the court of appeals' decision in *State v. Kitzmiller*, 2021 UT App 87, 493 P.3d 1159. (State Br. at 35–37.) The State contends that because prejudice was not found under the

circumstances in those cases, the court of appeals was foreclosed from finding prejudice in Mr. Baugh's case. (*Id.*) These cases, however, are materially distinguishable from Mr. Baugh's case. And "[b]ecause this case is not like those cases, those holdings do not help [the Court] here." *Randolph v. State*, 2022 UT 34, ¶ 29 n.8, 515 P.3d 444.

***Evans*.** The State first asserts that, "[h]ad the court of appeals properly followed *Evans*, it would" have seen that "there is risk of only slight confusion when a general unanimity instruction is given." (State's Br. at 54.) But *Evans*'s circumstances are entirely unique from Mr. Baugh's, and that case is accordingly not helpful here.

In *Evans*, a driver argued that the jury instructions violated his right to a unanimous verdict "because the jury instructions concerning attempted aggravated murder set forth alternative theories on which the jury could convict" the driver, "but the instructions did not explain that the jury must be unanimous as to the theory relied upon for the conviction." 2001 UT 22, ¶¶ 15–16. Reviewing for plain error, this Court "accept[ed] the notion that failure to instruct the jury as to unanimity was an obvious error at the time of" the driver's trial, but it was nonetheless "not convinced that the instructions" rose "to the level" of a more-problematic "non-unanimity instruction." *Id.* Without any specific analysis, this Court summarily concluded that it was "unconvinced that the slight confusion that may have arisen from the wording of the instructions used here presents a reasonable likelihood of a more favorable result for defendant." *Id.*

Based on its reading of *Evans*, the State claims that a jury's "misunderstanding" about its unanimity requirement "becomes reasonably likely only when someone incorrectly tells the jury" that it "can reach a unanimous agreement by disagreeing about the criminal act that satisfied the elements of the offense." (State Br. at 36.) The State further claims that because the prosecutor in Mr. Baugh's case "did not make a non-unanimity argument," as a matter of law only "slight confusion" could have arisen "from the lack of a specific unanimity instruction" in Mr. Baugh's trial. (*Id.* at 37.)

But the State's arguments are without merit for three reasons: (i) the State overreads *Evans;* (ii) the State overlooks the material differences between *Evans* and this case; and (iii) the State misapprehends the significance of the prosecutor's closing argument.

First, the State overreads *Evans*. Contrary to the State's reading, this Court did *not* hold in *Evans* that a jury instruction can only be prejudicial as a matter of law if it tells the jury it "can reach a unanimous agreement by disagreeing about the criminal act that satisfied the elements of the offense." (State Br. at 36.) Although the Court recognized that instructing the jury in this way does result in prejudice, the Court did not hold that this is the only instruction that can be prejudicial. *Evans*, 2001 UT 22, ¶ 17.

And while this Court found that the particular instruction at issue in *Evans* was not prejudicial, the problem with the *Evans* instruction is different from the problem in the instructions here. In *Evans*, the defendants' concern was that the

jury was not instructed that it must unanimously agree between alternative aggravating elements to convict on a single charged crime. 2001 UT 22, ¶ 15. But in Mr. Baugh's case, the problem is that he was charged with two crimes and the State put on evidence that he committed three. Thus, while the *Evans* defendant complained of the jury needing to be unanimous as to the method or means through which he committed the crime, Mr. Baugh here argues the jury needed to agree on *which* crime he committed in the first place. (*Compare Evans*, 2001 UT 22, ¶ 15 n.1 *with Baugh*, 2022 UT App 3, ¶¶ 20–21.) *Evans* does not make any ruling concerning the potential harm of jury instructions that fail to inform the jury it must unanimously agree which of multiple allegations constitutes a charged crime before it can convict.

Second, the State argue overlooks that the evidentiary picture at issue in *Evans* was significantly different from Mr. Baugh's case. Indeed, in *Evans*, the State charged the driver with three counts of attempted aggravated murder based on the driver firing shots at three undercover police officers who had attempted to pull him over while he drove a car. 2001 UT 22, ¶ 8. The driver testified at trial, describing "the initial stop, shooting, and subsequent chase" as well as his later attempt to shoot at the third officer with what he learned to be an "empty" gun. *Id.* ¶¶ 12–13. His passengers and other motorists likewise testified the driver was in possession of a gun, and that the cars pulling over the driver were unmarked

police vehicles. *Id.* ¶¶ 9–10. After hearing this evidence, the jury convicted the driver of two of the attempted aggravated murder charges.[10] *Id.* ¶ 1.

Thus, the driver's own testimony confirmed the State's charges against him. *Id.* ¶¶ 12–13, 17. That is, in testifying that he "reach[ed] for the rifle, cock[ed] it, and sh[ot]" at the two officers after seeing "a stranger walking towards him with a gun in his belt," *id.* ¶ 12, the driver proved his own guilt. Thus, there was little likelihood in *Evans* that a different unanimity instruction would have changed the result.

But that is not the case here. Indeed, Mr. Baugh *contested* all the State's evidence against him. (*See, e.g.*, R.685–689.) He consistently denied that Sasha ever touched his genitals. (R.685, 689.) He explained that when Sasha called him, he wanted to "meet her where she's at and accept her. Let her know that I support what she's going through." (R.686.) He testified that when he said during the call that he could not deny what Sasha said, he did that so Sasha could "feel validated" and "deal with whatever issues she's going through." (R.695.) And while he acknowledged that he accidently exposed Sasha to pornography (R.694–95) and that she also walked in on him masturbating (R.697), Mr. Baugh unequivocally testified that he "didn't do what she's accusing [him] of." (R.686.)

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[10] This is likely because the driver actually fired gunshots at only two of the officers and only attempted to fire what turned out to be an empty gun at the third officer. *See Evans*, 2001 UT 22, ¶¶ 4–7.

Thus, the evidentiary picture in Mr. Baugh's case is materially different from that in *Evans*. That the instructional error was not prejudicial in *Evans* accordingly does not mean the instructional error was harmless here.

And third, though the State claims the prosecutor's closing arguments in Mr. Baugh's case would not have confused the jury regarding its unanimity obligation, the State misapprehends the significance of the prosecutor's closing argument. (State Br. at 31.) The court of appeals has recognized that closing arguments can ameliorate the prejudice caused by insufficient unanimity instructions. *See State v. Mottaghian*, 2022 UT App 8, ¶ 58, 504 P.3d 773 ("This problem could have been alleviated, however, if the State had identified for the jury—in closing argument, for instance—which act supported each charge.") (quotation simplified). If the prosecutor's closing arguments tie particular allegations to specific counts, such an argument can mitigate the prejudice from instructions that fail to inform the jury it must unanimously agree which allegation constitutes a charged crime in order to convict on that charge. *See id.*

But here, rather than identifying a particular allegation from Sasha to each of the counts on which Mr. Baugh was charged, the prosecutor compounded the prejudice of the inadequate jury instructions during his closing argument by "reject[ing] any theory that the acts that had been testified to were specially linked to particular counts based on the timing and location of the underlying criminal act." *Baugh*, 2022 UT App 3, ¶ 25. Specifically, the prosecutor told the jury that the "two counts" against Mr. Baugh "can be fulfilled with—with any two

of those [three] experiences" Sasha described and that "any two of those incidents . . . can be the elements of both these counts." (R.777.)

Informing the jury that it could "pick or choose" among Sasha's three allegations to convict Mr. Baugh is an incorrect statement of law. *See State v. Gollaher*, 2020 UT App 131, ¶ 34, 474 P.3d 1018. As a result, the prosecutor's argument did not mitigate the prejudice from the inadequate instructions. *See State v. Garcia-Lorenzo*, 2022 UT App 101, ¶¶ 52–53, 517 P.3d 424 (concluding the prosecutor's closing argument "fell short of sufficiently and clearly instructing the jury regarding which act corresponded with the sodomy count" and so did not resolve the jury unanimity problem), *cert. granted*, October 21, 2022 (No. 20220802); *cf. State v. Paule*, 2021 UT App 120, ¶ 48, 502 P.3d 1217 (holding that prosecutors "obviate[d] any jury unanimity problem" when they "clearly identified for the jury which factual circumstance formed the basis for [the] obstruction of justice charge"), *cert. granted*, July 11, 2022 (No. 20220039).

And while the State argues that *"[a]s long as the jury was unanimous as to which act or acts they selected*, they could use 'any two of those incidents' to satisfy the two counts" (State's Br. at 31 (emphasis added)), neither the prosecutor nor the jury instructions ever *told the jury* it must be "unanimous as to which act or acts they selected." Thus, the prosecutor's argument in this case did not cure the prejudice from the inadequate jury instructions. *See Garcia-Lorenzo*, 2022 UT App 101, ¶ 52 (concluding the prosecutor's closing statement

"resolved nothing for the jury" because it "made reference to both asserted [criminal] acts").

In sum, *Evans* does not demonstrate Mr. Baugh was not prejudiced. *Evans* dealt with a different unanimity problem and reached a holding regarding prejudice based on circumstances which do not exist here.

Kitzmiller. *State v. Kitzmiller*, 2021 UT App 87, 493 P.3d 1159, is also distinguishable from Mr. Baugh's case.

There, a boyfriend "was convicted on two counts of child abuse in connection with the death of his girlfriend's newborn baby." *Id.* ¶ 1. "Counts II, III, and IV were all child abuse charges based on the same statutory section, but the Information—which was once read verbatim to the jury and then later referred to in the preliminary jury instructions—specified which injuries [the boyfriend] allegedly caused that corresponded with each count." *Id.* ¶ 22. "[D]uring closing argument, the prosecutor also clarified which injuries supported which counts of child abuse." *Id.* On appeal, the court of appeals concluded no prejudice occurred from any deficiency in the jury instructions because "the prosecutor mentioned the three separate child abuse counts, tied each to specific injuries, and explained them in order" during his closing argument. *Id.*

This is not like Mr. Baugh's case. Indeed, here the information, the jury instructions, nor the prosecutor's closing tied particular allegations from Sasha to each specific charge. (*See* R.1–2, 263–64, 777.) Instead, the counts differed only

in that Count 1 (on which the jury acquitted) noted a timeframe of 2012 while Count 2 (on which the jury convicted) noted a timeframe of 2014. (R.263–64.) But as the court of appeals correctly noted, the timeframe did not meaningfully distinguish the counts because Mr. Baugh "lived at both the family house and the apartment in 2014," so at least two of Sasha's allegations could have fit that timeframe. *Baugh*, 2022 UT App 3, ¶ 21.

Moreover, as described above, the prosecutor's closing arguments in Mr. Baugh's case did not tie particular allegations from Sasha to the specific charged counts. (R.777.) Instead, the prosecutor "rejected any theory that the acts that had been testified to were specially linked to particular counts based on the timing and location of the underlying criminal act," *Baugh*, 2022 UT App 3, ¶ 25, when he informed the jury that the "two counts" against Mr. Baugh "can be fulfilled with—with any two of th[e] [three] experiences" Sasha described and that "any two of those incidents . . . can be the elements of both these counts." (R.777.) This exacerbated the jury unanimity problem in Mr. Baugh's case.

In sum, *Evans* and *Kitzmiller* are materially distinguishable and neither case shows that the court of appeals erred in holding that Mr. Baugh was prejudiced by counsel's deficiency here. *Randolph*, 2022 UT 34, ¶ 29 n.8. The court of appeals correctly found that there is a reasonable likelihood of a different result absent trial counsel's deficient performance, and this Court should affirm its decision accordingly.

Conclusion

The State has not shown the court of appeals erred in holding that Mr. Baugh's trial counsel provided ineffective assistance when he failed to ensure the jury was properly instructed on the principles of unanimity applicable to Mr. Baugh's case. Because Mr. Baugh received ineffective assistance, this Court should affirm.

If this Court does not affirm, then it should reverse and remand this case to the court of appeals with instructions for that court to resolve the outstanding issues Mr. Baugh raised before it, including his rule 23B motion.

DATED this 16th day of August, 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 12,092 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 16th day of August, 2023.

_____/s/ Emily Adams_____

Certificate of Service

This is to certify that on August 16, 2023, I emailed and therefore served the foregoing on the following:

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