FILED
UTAH APPELLATE COURTS

SPE 1 2020

PUBLIC

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| STATE OF UTAH,<br><br>Plaintiff / Appellee,<br><br>vs.<br><br>DAVID CHADWICK,<br><br>Defendant / Appellant. | Case No: 20190818-CA |

# BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, FROM A CONVICTION ON ONE COUNT OF SEXUAL ABUSE OF A CHILD, A SECOND DEGREE FELONY,
BEFORE THE HONORABLE JUDGE JAMES TAYLOR

| | |
|---|---|
| SEAN REYES<br>Utah Attorney General<br>Appeals Division<br>160 East 300 South, Sixth Floor<br>P.O. Box 140854<br>Salt Lake City, UT 84114<br><br>Counsel for Appellee | DOUGLAS J. THOMPSON (12690)<br>Appeals Division<br>Utah County Public Defender Assoc.<br>51 South University Ave., Suite 206<br>Provo, UT 84601<br>Telephone: (801) 852-1070<br>dougt@utcpd.com<br><br>Counsel for Appellant |

ORAL ARGUMENT REQUESTED

Appellant is not currently incarcerated on this case

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

STATUTORY PROVISIONS AND RULES



CASES

PUBLIC

IN THE UTAH COURT OF APPEALS

| | |
|---|---|
| STATE OF UTAH,<br><br>Plaintiff / Appellee,<br><br>vs.<br><br>DAVID CHADWICK,<br><br>Defendant / Appellant. | BRIEF OF APPELLANT<br><br>Case No: 20190818-CA |

## INTRODUCTION

No statute or rule requires the Information to specifically describe the facts which support the individual charges therein

## STATEMENT OF THE ISSUES

1. Whether the trial court incorrectly instructed the jury on the requirement that the jury's verdicts be unanimous as to the specific act underlying each count. The issue was preserved by Chadwick's objection to the Court's instruction following the jury's request for information connecting a particular course of conduct with each count. R.435, R.486, R.1123-1125, R.1110-1111. Appellate courts review claims of error in the jury instructions for correctness. *State v. Lambdin*, 2017 UT 46, ¶11, 424 P.3d 117.

2. Whether the district court erred in its ruling on Chadwick's motion for access to the complaining witness's mental health records under Rule 14(b) of the Utah Rules of Criminal Procedure and Rule 506 of the Utah Rules of Evidence. This issue was preserved by Chadwick's motion, which was stipulated by the State.

R.115-123, R.537-538. "Whether a trial court errs in denying a motion for access to a victim's mental health records is a question of privileged." *State v. J.A.L.*, 2011 UT 27, ¶21, 262 P.3d 1. This Court reviews the district court's ruling on privilege for correctness. *State v. Cegers*, 2019 UT App 54, ¶20, 440 P.3d 924. *See also State v. Blake*, 2002 UT 113, ¶6, 63 P.3d 56.

## STATEMENT OF THE CASE

### A. Facts of the case[1]

• Preliminary hearing[2]

At the preliminary hearing the complaining witness, F.L.,[3] testified that when she lived in Eagle Mountain, in the late 90s, she met David Chadwick because he lived "kitty-corner" to the home where she was living with her friend. R.035. F.L. believes this was in 1999 when she was eight. R.035. Her friend took her to

[1] Courts on appeal are required to "review the record facts in a light most favorable to the jury's verdict and recite the facts accordingly." *State v. Holgate*, 2000 UT 74, ¶2, 10 P.3d 346. In this case, Chadwick was convicted in Count 1 but acquitted in Counts 2, 3, and 4. As will be explained in more detail below, because the jury was not instructed to connect each count with any specific alleged conduct, it is impossible on appeal to know which verdicts apply to which facts. Because of this ambiguity, and because Chadwick was found not guilty on 3 of the 4 identical counts, this Court should view and recite the evidence in the light most favorable to his innocence on each count. After all, Chadwick must be presumed innocent on at least three of these counts where he was acquitted, and it is impossible to know which facts the jurors found him guilty on.

[2] Testimony from the preliminary hearing is presented here because it was the only evidence before the district court when Chadwick moved to gain access to the complaining witness's mental health records.

[3] At the time of the alleged incidents, the complaining witness was known as T.S. Since that time she has changed her name to F.L. For the sake brevity and to avoid unnecessary confusion, anytime the record refers to the name T.S. Chadwick will use F.L.

Chadwick's house because he had a Nintendo 64 and video games. R.036. She and her friends, the Bond girls, also roller skated in Chadwick's basement. R.036. "It became a common thing to go over to his house. [F.L.] would go over there sometimes when [she] was sick." R.037.

One time when F.L. was sick and home from school and because her mother was working, she stayed at Chadwick's house. R.040. F.L. recalls that she sat in Chadwick's lap while they were watching a moving and "noticed that he'd become erect. So [she] went to move off and he told [her] it was okay to stay." R.038. F.L. claims Chadwick then asked her if she wanted to touch his penis, and she says she did. R.038. "It turned into a game where [F.L.] ended up kneeling on the ground in front of him" and "he had his hand underneath his pants, and moving it around so that I could catch it." R.039. F.L. testified that when she would catch Chadwick's penis, her hand was on the outside of his pants and he would move her hand down. R.039. F.L. described the penis as being partially erect, not hard or stiff, but "in between". R.054. F.L. claimed there was a knock at the door and the game ended. R.041. She claims Chadwick told her not to tell anyone about it. R.041.

F.L. does not remember whether this happened more than one time, but this is the only time she remembers. R.060-061. She believes it may have happened more than one time because she has PTSD. R.061. F.L. testified she was diagnosed with PTSD by a "psychiatrist and a therapist". R.061.

Later, in early 2000, F.L. and her family started living with Chadwick. R.041. There was an incident, when she was 9 or 10, where F.L. was sitting on Chadwick's

lap while they were watching TV and his penis became erect. R.042, R.055. F.L. could feel his penis under his pants. "He did end up pulling it out from his pants and rubbing it against the underwear" that F.L. was wearing, "toward [her] bottom more." R.043. F.L.'s mom then "opened the door and he stopped, but she didn't notice anything wrong because it wasn't uncommon for [F.L.] to be sitting on his lap." R.044.

On other instances F.L. claimed Chadwick would pass F.L. in the hallway and would grab her and tickle her sides and caress her breasts, moving his hand across the chest. R.044-045, R.056. F.L. says touching her breasts happened more than one time. R.046. Sometimes it would happen over her shirt and "[s]ometimes it slipped up the shirt because of the way he grabbed [her]." R.057. It stopped about the time F.L. turned eleven. R.046. Chadwick would also pin her to the ground and hold her down with his hips to tickle her ribs. R.045, R.059.

F.L. first reported the abuse to her sister when she was eleven. F.L. grades started to drop, and she began cutting herself, so her sister asked if anything had happened. R.062-063. F.L. told her sister exactly what she testified to and "possibly more", but she didn't know. R.063. [redacted]

• Private portions of the record[4]

[redacted]

[4] This portion of the fact section includes references, quotations, and citations to medical and mental health records obtained by the district court through subpoena's issued pursuant to Rule 14(b) of the Rules of Criminal Procedure. The portions of the record are now part of the record on appeal but are classified as "private" and do not have individual record page numbers. Instead, the therapy records are contained in manila envelopes, each with its own volume number. Citations to these private records will be made first to the envelope number, then to the page or date within the record, i.e. R.1015:2 or R.1018 (May 19, 2016).

[redacted]

[redacted]

[redacted]

[redacted]

• Trial testimony

Aaron Tischner is a former Utah County Sheriff's was referred to a report of a woman who has alleged she had been "inappropriately touch[ed]" by her landlord when she was "between the ages of nine to ten". R.755-757. Tischner contacted the complainant and interviewed her and then introduced her to the victim services coordinator. R.758. Then in May of 2016, Tischner and another officer met with David Chadwick at his home in Eagle Mountain. R.758. They interviewed him in

his home.

Tischner asked Chadwick if he knew F.L. R.764. Chadwick told the police he knew her and that she lived in his basement with her mother and siblings. R.764. When asked about his interactions with F.L., Chadwick told the police she was "a little standoffish with him." R.765. Chadwick confirmed that he did have a "game room or game/movie room" and that he watched movies and "just mainly played video games down there." R.765. When asked if he was ever asked to babysit F.L., Chadwick said it was usually her brother that watched her. R.765.

Chadwick confirmed that it was normal for kids to come watch movies and play games at his house. R.765. Tischner asked Chadwick if he had ever touched F.L. "on the breast, butt or vagina, and he stated that he had not." R.766. Tischner then asked if F.L. had touched him and Chadwick said that "if she was sitting on his lap that there would be contact" with her hand and his "penis area". R.766. "Chadwick stated that sometimes she would just move it away and sometimes she would hold it there, and she could hold it there for about 10, 15 seconds." R.768. "Sometimes [he] would move it away [himself] or [he] would just ignore it." R.768. Chadwick told them that he was not married and a virgin, "and because of that, any contact in that area he would get aroused and have an erection." R.768. Chadwick said that F.L. would regularly sit in his lap and if there was contact with his penis, he would become aroused, "but if she moved away and there wasn't any contact, then he would no longer be aroused." R.768-769. He "would either move her hand or ignore it." R.775.

The officers asked Chadwick about the "catch it game", something that had been described to them by F.L., and Chadwick said he did not recall it ever happening. R.770. When asked whether he ever pulled his penis out of his pants "and rubbed it against her butt", though he acknowledged that F.L. may "have felt it through her underwear", Chadwick "denied ever pulling it out." R.771, R.777. When asked about tickling F.L., Chadwick denied any tickling going on. R.771-772. Chadwick denied every touching F.L. in an inappropriate way. R.775.

F.L. lives in Lehi with her husband and three children. R.789. Before she changed her name to F.L., her name was T.S. R.790. Chadwick lived "kitty-corner to [F.L.'s] best friends," the Baums, who she lived with in 1999. R.790-791. While F.L., her mother, her sister, and her brother lived with the Baum family, there were four Baum girls and several cousins living there, too. R.791-792. The Baum's introduced F.L. to Chadwick as "a really cool person and an awesome playroom or like TV room with a Nintendo 64 and bunch of movies and an empty basement to roller skate in". R.792. Chadwick was in his 30's when they met, not married, with no children and lived alone. R.794-795.

F.L. says she would go to his house "[p]retty regularly" after that. R.795. She remembers his house pretty well, it was "in [her] memory." R.796. She also lived in the house. Her family "started staying there in 2000 upstairs off and on in his spare bedroom. Then he finished his basement and [they] moved downstairs, but [they] did go upstairs because it was the only kitchen". R.796.

F.L. reported "something extraordinary happened" once when Chadwick

was watching her because she was home sick, and her mother was working. R.808, R.813. F.L. was sitting on his lap on the couch in the living room and claims "[she] felt something hard on [her] butt and [she] went to move off and he said, 'No, it's okay, you can stay.'" R.808, R.822. F.L. says she felt something touching her "right buttocks" as she sat sideways on his lap. R.809. As she got older, F.L. realized the hard thing was his penis. R.808.

F.L. testified that Chadwick later asked her if she "wanted to play with it", or if she wanted to "play a game." R.808. Chadwick said, "Just try and catch it." R.809. F.L. got down on her knees in front of Chadwick. R.810. According to her testimony, Chadwick was holding his partially erect penis, and "he would move it under his pants." R.809-810. His penis was inside his sweatpants. R.811. F.L. grabbed his penis with her hand, through the pants, three or four times. R.811. On one instance when F.L. grabbed his penis, Chadwick "thrust his hips", he "moved his pelvic." R.811-812. The game stopped when there was a knock at the door. R.812. Chadwick jumped up and told F.L. to hide. R.812. Chadwick later told F.L. not to tell anyone because they would not understand. R.812.

F.L. described another incident where she was sitting in Chadwick's lap. R.814. It was dark and they were watching a movie in the TV room, sitting on the futon. R.815, R.821. F.L. was wearing on oversized tee shirt and underwear. R.816. She says she was chewing on or sucking on his shirt, "and he had taken his penis out of his pants and was rubbing it up against [her] underwear." R.814. F.L. claimed Chadwick was rubbing it along her buttocks and her vagina. R.814. She

did not see his penis but says she knew it was exposed because she could feel the skin on the skin of her leg. R.817. F.L. admits she told the officers there was never any skin-to-skin contact. R.831. It didn't last very long and ended when her mother opened the door. R.816. Even though Chadwick was doing this when F.L.'s mother opened the door, it "wasn't uncommon for [her] to be sitting on his lap, and [F.L.] had an oversized tee shirt, so there was nothing to be seen." R.816-817. When her mother came in F.L. "used it as an excuse to get up after a moment." R.817.

F.L. also said Chadwick would tickle her and slip his hand up her shirt in the living room. R.818, R.822. During that tickling his hands would touch her skin under her shirt, "[a]long the rib cage and slip" on to her breast and nipple area. R.818. F.L. does not remember how many times it occurred between the ages of 8 and 11. R.819. F.L. admitted that she told the officers the tickling occurred when she was 9 or 10 and that she did not have breasts at that point. R.831. F.L. said Chadwick would pin her to the ground and "grind his hips" while he tickled her. R.819.

F.L. says the tickling ended when she was about 11 when she changed her behavior, "started getting angry, telling him to stop." R.823-824. F.L. told her older sister "at least some of it when [she] was 11" and then "wrote it down when [she] was 12 while [she] was staying with her in Phoenix." R.825. F.L. told her sister "about the game" and "about that evening" but doesn't "remember what else [she] had told her…" R.826. The sister was saving it for F.L. "for if [she] ever did decide to come forward." R.825.

F.L. began seeing therapists and told them "parts of the details". R.833-834. She denied saying she did not remember the details when meeting with her therapists. R.834. Instead, she said she "did not want to talk about it a lot of the time because [she doesn't] like to talk about it, and [she] did tell them that." R.834. When confronted with the allegation that she had specifically told therapists at Wasatch Mental Health that she did not remember the details of sexual abuse F.L. said she was not sure. R.835. F.L. asked which therapist she said that to, because she was not going to "talk to a therapist that [she] did not know". R.835. When asked again, F.L. said she told the therapists she couldn't remember the details of the abuse in order to avoid talking about them." R.844-845.

F.L. said she did find at least two therapists she trusted, Sandy Moody and "Brian" at Wasatch. R.836. She went to therapy to work through trauma, to receive coping skills. R.837. F.L. had "been in a car accident" (R.838), "watched a cow get shot in the head" (R.842), and was abused by two other people "bad enough to be addressed in therapy" (R.843).

Chadwick testified he has lived in Eagle Mountain for 21 years. R.900. In 1999 he worked with the Army National Guard full-time as an Active Guard Reserve. R.900. Chadwick has a large video collection, about 1500 videos, of which 150 to 200 are Disney movies. R.901. He's been a fan of Disney movies since he was a kid and has been collecting them since he first got a job. R.902.

Chadwick remembers F.L.'s family. R.902. "They were friends of the family that lived near" him. R.902. They were living in a house with the other family

approached him "to see if [he] could put them up for a little while". R.902. Chadwick agreed to finish his basement for them and during the construction they could live with him on the first floor. R.902. Before the construction was completed, F.L. and her family "spent a considerable time upstairs". R.913.

Chadwick knew F.L. R.904. "She was a friendly kid", "talkative, enjoyed life." R.904. F.L. did not come over to his house by herself before her family moved in. R.911. Chadwick and F.L. were friendly, and occasionally he "did watch movies with her", a "couple times a week" during that time period, and a few times a month with F.L. alone. R.904-905. F.L. would sit on Chadwick's lap "[m]aybe one time out of five that [they] were together." R.905. Chadwick doesn't ever remember watching a movie in the evening with F.L. R.917.

Of those times, maybe "once in five times that she sat on [his] lap" F.L. would come in contact with his penis, and "[w]hen there's contact, [he] got an erection. It was just a physical response to the contact." R.905. Chadwick "felt no sexual stimuli about it. [He] didn't enjoy it. [He] didn't try to get her to touch [him]." R.905. He would "either push [the penis] out of the way or move her body so that her hand could move away from it." R.906. "There were a couple of occasions where [Chadwick] just ignored it and she removed her hand after a few seconds." R.906. When F.L.'s "buttocks would brush up against his genital area" Chadwick would "either move her over to the other knee so there wouldn't be any contact, or [he'd] set her off to the side." R.906. He would move her away from his penis "and the arousal would go away." R.906.

Chadwick denied that the "catch it" game every occurred. R.907. "That never happened." R.907. Chadwick never directed F.L. to touch his penis, he never placed her hand on his penis, he never reached inside his pants and moved his penis around while F.L. was there, and he never took his penis out or rubbed it on any part of F.L.'s body. R.907.

Chadwick admits that he did tickle F.L. R.907. It included "just playing around and tickling her sides or under her arms" when she was between 8 and 11. R.908. Chadwick denies ever touching her breasts or having any sexual contact with F.L. in any way. R.908.

B. Procedural history of the case

In the original information, David Chadwick was charged with 4 counts of Sexual Abuse of a Child, each a second degree felony. R.001-003. The information does not attribute each count with a specific act. Count 1 was alleged to have occurred "on or about May 1, 1999." R.001. Counts 2-4 were alleged to have occurred "on or about January 1, 2000." R.002. The probable cause statement in the information described that Chadwick put F.L. "on his lap and she could feel that he was having an erection," that he "had her touch his penis through the clothing", "[h]e did this numerous times", and that Chadwick "would also take his penis and place his bare skin against the victim's underwear as she sat on his lap." R.002.

The district court held a preliminary hearing on June 21, 2017. During the hearing F.L. testified that she seen four therapists over the last few years. R.050.

When asked whether she discussed the allegations against Chadwick with those therapists the State objected that it was "dangerously close to the medical privilege" and the court sustained the objection. R.050. At the conclusion of the hearing the court found the State had "met its burden of proof." R.079, R.080. Chadwick then entered a not guilty plea on each count. R.094, R.512.

Following the preliminary hearing, Chadwick filed a discovery motion asking the court for an order requiring the State to disclose the "[n]ames and contact information for any therapist seen by alleged victim" based on her testimony at the preliminary hearing. R.028. The State responded to the request and acknowledged that although Chadwick had "only requested 'names and contact information' for the therapists, there is no reason to contact them other than to attempt to glean from them privileged information related to the alleged victim." R.096-097. The State argued that Chadwick had not met the required showing for an in camera review of F.L.'s privileged medical records. R.097. Chadwick responded by arguing that the State's position prematurely assumed that Chadwick intended to contact the therapists and that the names and contact information was not protected or privileged information or records. R.102.

The State later withdrew its objection and agreed to get Chadwick the information he requested in the discovery motion. R.520. However, when the State did not provide the information Chadwick filed yet another discovery request, this time for "any and all communications, written or oral, between the alleged victim and any member of the Utah County Attorney's Office or the Utah County Sheriff's

Office regarding any therapy received by the alleged victim regarding the alleged abuse." R.109. Chadwick also requested "Any and all health treatment records of the alleged victim that have been obtained by the Utah County Attorney's Office." R.109. According to the transcript of the oral argument, the State "provided a response to [Chadwick's] discovery request…" so the issue became moot. R.533.

On January 17, 2018, Chadwick filed a motion for In Camera Review of Therapy Records, and a Motion for Release of Therapy Records. R.115-123. In it, Chadwick discussed the right of a defendant to access otherwise privileged medical records that are exculpatory or that related to a witness's mental impairment or ability to testify with accuracy and truthfulness. R.119-120. Chadwick asserted that because F.L. had indicated that she discussed the alleged incidents with many therapists and school counselors and had provided a list of those therapists, Chadwick was entitled to an in camera review for relevant and material information to discover the possibility of inconsistent statements about the alleged abuse, evidence probative of bias or improper motive, evidence of exaggeration, evidence of memory recovery techniques, and evidence relevant to statute of limitations defenses. R.115-123.

At a hearing following the motion, the State stipulated to the in camera review and the parties were to prepare orders and subpoenas. R.537-538. The court then issued an order authorizing the subpoenas for "all therapy and counseling records for" F.L. [redacted]

[redacted]

authorizing Chadwick to issue subpoenas to these entities with instructions to provide the records to the court for in camera review. R.234-236.

[redacted]

[7] The records reviewed by the court in camera are found at R.1015.
[8] Compare with R.1015, especially R.1015:7 where the "History of Present Illness" describes an allegation by F.L. that she was sexually abused by "a landlord when she was 10 to 13 years old".
[9] The records reviewed by the court in camera from Wasatch Mental Health are found at R.1016.

[redacted]

[redacted]

[redacted]

Chadwick was tried on 4 identical counts of sexual abuse of a child, each a second degree felony. In opening statements the State explained to the jury that they would present evidence that F.L. would sit on Chadwick's lap and "[w]henever her little bum was sitting in his lap on top of his penis he was sexually aroused", that they played the 'Catch it" game, that another time he rubbed his exposed penis "against her bum", and finally that "there were many times that [Chadwick] would

[redacted]

tickle her" and "touch her around her breasts and her nipple area." R.742-744.

During trial, Chadwick attempted to use the limited mental health information he had received as a result of his 14(b) motion. It must be clear, Chadwick was not provided copies of any of the records, redacted or otherwise. The district court only issued its ruling which purported to quote from those records. The context, the dates, the meaning of these individual statements were withheld from Chadwick. As counsel pointed out at trial, the district court was "more aware of what is in the records that have been provided by the therapists than Counsel is. Only portions were released to Counsel." R.840. And during trial when defense counsel was questioning F.L., he asked the court to release portions "that become relevant as the trial progresses." R.841. The court did not provide anything else from the records because it said it was not in a "position to have digested the full import of those records." R.842.

During deliberations, the jury sent a series of questions to the judge related to which factual allegations corresponded with which counts. See R.435, R.486. In the first question the jury asked, "if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect to each count." R.486. The court called counsel on a conference call and "read aloud the question it had received and then read aloud a written response the court had already formulated." R.1110. The court's planned response was to inform the jury that it was the jury's job "to determine if the State had proven one, two, three, or four incidents of sexual abuse of a child beyond a reasonable doubt, and the order of

the counts is unimportant." R.1110. Defense counsel objected and asked the court to "identify for the jury the particular incident for each count." R.1111. Counsel "argued that failure to do so was an invitation for [the jury] to reach a non-unanimous verdict on each incident". R.1111.

The court overruled Chadwick's objection and "declined to instruct the jury more specifically regarding the identification of the counts with particular alleged incidents." R.1111. Instead, the court responded that they jury "should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence." R.486.

Sometime later the court received a second question from the jury the court recorded as:

> "Does Count 1 represent the "catch it" game as described in court?"
> "Does Count 2 represent David Chadwick rubbing his bare penis against [F.L.'s] legs, buttocks, and/or vagina?"
> Does Count 3 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"
> Does Count 3 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"

R.435.

The court again spoke with defense counsel and the prosecutors on a conference call. R.1111. "The [c]ourt again had a pre-formulated response ready prior to calling for attorney input." R.1111. "The [c]ourt was going to instruct the jury that no, the counts alleged do not apply to specific incidents of conduct, and

that what is important is the number of events proved." R.1111. Because defense counsel's objections on this point had "been overruled twice already", he did not object a third time. R.1111.

After discussing the jury question with counsel on the phone, the court responded to the jury question as follows:

> "Counsel may have suggested specific behaviors to correspond to specific counts during closing argument, but arguments and characterization of the evidence by counsel are neither pleadings nor facts. It is for you to determine from a consideration of all the facts if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof. You may choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case."

R.435.

The jury eventually returned a guilty verdict in Count 1, and acquitted Chadwick in Counts 2, 3, and 4. R.436, R.978. Though the State argued in closing that Count 1 "was the catch it game", (R.952-953), the court specifically instructed the jury that "[t]he order of the counts is of no particular consequence" and that it was for the jury to "determine from a consideration of all the fact if the State has proven beyond a reasonable doubt that the statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof." R.435. The jury could "choose to relate a specific conduct or incident to a particular count to assist [its] deliberations, but that [was] up to [them]." R.435.[18]

[18] See also R.486 ("You should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the

It is important to be clear here, the jury was told that they need not relate specific conduct with a particular count. Thus, the record does not reveal which act the jury as a whole, or any individual juror, found the State had proved beyond a reasonable doubt for Count 1.

C. Disposition in the court below

On September 19, 2019 Chadwick was sentenced to serve 1 to 15 years in prison and pay a fine. R.602. The court suspended the prison sentence and placed Chadwick on probation for 48 months, and ordered 180 days in jail. R.602-603, R.495.

Chadwick filed a timely notice of appeal on September 30, 2019. R.501. Following the notice of appeal, Chadwick filed two motions to correct or complete the record. The first related to the absence of the rule 14(b) therapy records reviewed by the district court in the appellate record. This Court granted Chadwick's motion and the district supplemented the record with documents it reviewed in camera. See R.1015, 1016, 1017, 1018.

The second motion related to the lack of any recording of the district court's consultations and discussions with counsel following the jury's questions during deliberations. This Court granted Chadwick's motion and temporarily remanded the case to correct or supplement the record. The district court held several hearings, received a declaration from trial counsel, and made findings about what

occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence.").

occurred during those conversations. The court found that trial counsel "made an adequate and timely objection" to the jury instructions, and that his affidavit is "factually correct" and a "recitation of what occurred". R.1123-1125.

## SUMMARY OF THE ARGUMENT

David Chadwick was charged with four identical counts of sexual abuse of a child based on several allegations that were distinct in their nature and time of occurrence. However, at trial the jury was never instructed that their verdict on each count must be unanimous or that each juror must agree that the same conduct constituted the same offense in each count. When the jury asked for such an instruction it was refused and told specifically that the jury need only agree on how many counts of sexual abuse Chadwick had committed. That failure to instruct the jury denied Chadwick the right to a unanimous verdict because we can have no confidence that the one count that resulted in a guilty verdict was the result of each juror being convinced beyond a reasonable doubt that Chadwick engaged in the same conduct that would satisfy the elements of the charged offense.

The trial court erred in its ruling and review of the therapy records made following Chadwick's motion to access those records pertinent to his defense. A review of those sealed records on appeal demonstrates that the trial court either missed obvious references throughout the records that should have been disclosed, or erred in its assessment whether that information was material to Chadwick's defense. In either case, the court erred and that error prejudiced Chadwick's defense.

## ARGUMENT

### I. The Trial Court Incorrectly Instructed the Jury on the Unanimous Verdict Requirement

#### A. The Unanimous Verdict Clause

"In criminal cases the verdict shall be unanimous." UTAH CONST. ART. I, SECTION 10. The requirement of jury unanimity "is not met if a jury unanimously finds only that a defendant is guilty *of a crime*.'" *State v. Hummel*, 2017 UT 19, ¶26, 393 P.3d 314 (citing *State v. Saunders*, 1999 UT 59, ¶60, 992 P.2d 951 (plurality opinion)). "The Unanimous Verdict Clause requires unanimity as to each count of *each distinct crime charged* by the prosecution and submitted to the jury for decision." *Hummel*, 2017 UT 19, ¶26 (emphasis in original). A verdict would not be valid if some jurors found the defendant guilty for a robbery at 7-11 in Salt Lake on Tuesday and others for a robbery at Smiths in Provo on Wednesday, "even though all jurors found him guilty of the elements of the crime of robbery." *Hummel*, ¶28 (citing *Saunders*, ¶60). "These are distinct counts or separate instances of the crime of robbery, which would have to be charged as such." *Id*. Though it is true that time itself is not an element of an offense and jurors need not "unanimously agree as to just when the criminal act occurred," jurors do have to unanimously agree that a particular act occurred, they have to be unanimous about which robbery they believe occurred. *State v. Alires*, 2019 UT App 206, fn.4, 455 P.3d 636. "Jury unanimity means unanimity as to a specific crime and as to each element of the crime." *Saunders*, ¶60.

In *Saunders* the defendant was charged with one count of attempted rape of a child and one count of sexual abuse of a child for allegations made against him by

his eight-year-old daughter. *Saunders*, ¶4. At trial the complaining witness "gave somewhat conflicting, confused testimony" that cumulatively alleged defendant had touched her "thirty-one times", though the touchings were not linked "to any specific date or event" and some of the touchings were associated with the application of ointment. *Saunders*, ¶5. The defendant's testimony claimed he had applied Desitin to the child's vaginal and buttocks area to treat diaper rash-like irritation caused by the wetting [urinating in pants] but had done so no more than five times." *Saunders*, ¶6. The jury was instructed that "[t]here is no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred. The only requirement is that each juror believe, beyond a reasonable doubt, that at least one prohibited act occurred sometime between October of 1991 and May of 1992, in Salt Lake County, involving the victim and the defendant." *Id.*, ¶58. There was no special verdict form. The defendant was convicted of one count of sexual abuse of a child. *Id.*, ¶7.

On appeal the defendant challenged the quoted jury instruction under the plain error doctrine, but this Court rejected the claim by concluding that the jury unanimity cases "provide no uniform rule… that… would have made it obvious to the trial court that Instruction No. 26 would be erroneous." *State v. Saunders*, 893 P.2d 584, 589 (Utah Ct. App. 1995), see *Saunders*, 1999 UT 59, ¶61. On certiorari, Utah Supreme Court examined the applicable case law and concluded that there was adequate support for the "fundamental proposition that unanimity was necessary as to all elements of an offense" and thus, the "trial court should have been aware of the

defects in instruction 26." *Saunders*, 1999 UT 59, ¶61.[19] The error was thus plain. "Instruction 26 violated the constitutional requirement of jury unanimity" because it "stated that 'there is no requirement that the jurors be unanimous about precisely which act occurred or when or where the act or acts occurred." *Saunders*, 1999 UT 59, ¶65. "Thus, some jurors could have found the touchings without the use of Desitin to have been criminal; others could have found the touchings with Desitin to have been criminal; and the jurors could have completely disagreed on when the acts occurred that they found to have been illegal." *Saunders*, 1999 UT 59, ¶65. Because the "jury could have returned a guilty verdict with each juror deciding guilt on the basis of a different act by [the] defendant," the court held that "it was manifest error under Article I, section 10 of the Utah Constitution not to give a unanimity instruction." *Saunders*, ¶62.

In *State v. Alires*, 2019 UT App 206 the defendant "was charged with six counts of aggravated sexual abuse of a child based on distinct touches prohibited by the statute." *Alires*, ¶22. The evidence at trial was that the defendant had touched the complaining witness at least six times and the defendant's daughter twice, but the jury was not instructed which alleged touches related to which counts. Rather,

[19] Though the justices in *Tillman* disagreed about whether the instruction actually complied with the unanimity requirement, there was no disagreement "as to the proposition that there had to be unanimity as to each specific aggravating circumstance. In other words, *Tillman* held that a guilty verdict was not valid if some jurors found one aggravating circumstance and other jurors found another aggravating circumstance; it was not enough that they simply unanimously agree on guilt." *Saunders*, ¶64 (citing *State v. Tillman*, 750 P.2d 546 (Utah 1987).

"the State argued that the jury could convict Alires on four counts based on any of the six alleged touches of the [complaining witness] in 'any combination.'" *Id*, ¶22.

Because the jury was

> "never instructed that it must unanimously agree that Alires committed the same unlawful act to convict on any given count… some jurors might have found that Alires touched the [complaining witness's] buttocks while dancing, while others might have found that he touched the [complaining witness's] breast while tickling. Or the jury might have unanimously agreed that all of the touches occurred, but some might have found that Alires had the required intent to gratify or arouse sexual desires only while trying to dance with the friend, while others might have found that he only had sexual intent when he tickled the friend. In other words, the jurors could have completely disagreed on which acts occurred or which acts were illegal."

*Id*., ¶23. Because elements instructions did not "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*.

### B. The Original Jury Instructions in this Case

After the close of evidence in this case they jury was instructed on the elements of the four counts of sexual abuse of a child in a single instruction. See 468. R.468. The jury was told each count "makes an identical charge but must still be considered separately" but the instructions do not explain how that is supposed to happen. R.468. They were told that a guilty verdict must be proved "by separate and distinct conduct for each count," though the instruction does not associate any count with any alleged conduct. R.468. Nor does the instruction inform the jury that they must be unanimous as to which elements of the offense they found beyond a reasonable doubt.

The jury was instructed that their "verdict must be in writing, signed by [the] foreperson" and that their "verdict for each separate count must be either: A. Guilty of sexual abuse of a child as charged in the Information; or B. Not guilty." R.485. Finally, the jury was instructed that "[b]ecause this is a criminal case, [they] must all agree to find a verdict." R.485.

### C. **The Jury's Questions and the District Court's** Supplemental Instructions

After some time unknown time deliberating, the jury sent a question to the court asking, "if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect with each count." R.486. It appears from the question that the jury instructions, and primarily the elements instruction, did not provide sufficient clarity to the jury about how they were to apply the elements to the separate and distinct counts. The jury wanted to know how to consider each identical charge "separately", how to determine whether the identical offenses were proved "by separate and distinct conduct for each count". R.486.

Chadwick told the court it should "identify for the jury the particular incident alleged for each count" and that "failure to do so was an invitation for them to reach a non-unanimous verdict on each incident as long as there was unanimous agreement regarding the number of incidents that occurred." R.1111. But rather than answer the question and clarify, as Chadwick requested and law required it to do, the trial court responded that the jury need not concern itself with that question and only needed "to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as

described in the evidence. The order of the counts is of no particular consequence." R.486. In other words, 'don't trouble yourselves with trying to identify which facts each of you agree on, and just focus on what number you can all agree on.' This instruction erroneously and prejudicially directed the jury away from unanimity and toward assessing only how many convictions they could convict on.

To the jury's credit, it was not so easily deterred. Sometime later the jury sent another question asking whether four specific incidents represented specific counts. See R.435. This time the jury provided a suggested designation, presumably based on the State's closing argument.[20] But the court's second response was even more erroneous than the first. After repeating its earlier instruction that the jury need only decide how many times Chadwick broke the law and could ignore the order of the counts, the court then told the jury that counsels' closing arguments connecting facts to counts were "neither pleadings nor facts", and that the jury could "choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case." R.435. When the jury asked whether specific conduct needed to relate to a specific count,

[20] See R.435 ("Does Count 1 represent the 'catch it' game described in court?"
"Does Count 2 represent David Chadwick rubbing his bare penis against [F.L.'s] legs, buttocks, and/or vagina?"
"Does Count 3 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?"
"Does Count 4 represent David Chadwick touching [F.L.'s] breasts and/or nipple area while tickling her?").
See R.952-953 (State's closing argument where the State called Count 1 the "catch it" game, Count 2 rubbing his penis against her buttocks and vagina, Count 3 and 4 touching her breasts and nipples while tickling on more than one occasion.).

the jury was told that it did not. It was up to them, and they could choose whether or not they wanted to specifically associate the distinct incidents with separate counts. The only thing they were required to do was to "determine... if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice three time (sic), or four times or if the State has failed to meet that burden of proof." R.435.

### D. The Jury Instructions Violated the Unanimous Verdict Clause

This case is very like *Alires*, though the error here is more troubling given the jury's repeated request for clarification, trial counsel's request to give it to them, and the trial court's repeated refusal to require unanimity. In this case Chadwick was charged with four identical counts of sexual abuse of a child based on distinct conduct prohibited by the statute. *Compare Alires*, ¶22. The information charged Chadwick with four identically-worded counts[21] of sexual abuse of a child without distinguishing the counts by act or timeframe. *Compare Alires*, ¶22. At trial F.L. testified that Chadwick unlawfully held her on his lap while he had an erection multiple time, caused her to touch his clothed penis, rubbed his bare penis against her buttocks, and touched her breasts while tickling multiple times.[22]

[21] Count 1 in the Information did have an earlier "on or about" date than Counts 2, 3, and 4, (R.001-002) but that distinction was invisible in the single elements instruction (R.468).

[22] The State's closing argument characterized the 4 counts as (1) the 'catch it' game, (2) rubbing his penis on her buttocks/vagina, (3) and (4) at least two incidents of tickling and touching her breast. See R.952-953. However, because the jury was specifically instructed that this characterization was not a pleading or fact, and because the State presented other evidence that could have arguably met the elements of the crime, the jury was not obliged to apply that characterization.

As case law makes clear, the Unanimous Verdict Clause requires that a jury be adequately instructed not only that their verdict must be unanimous but about what unanimity means, they must know that their verdict "must be unanimous on all elements of a criminal charge for a conviction to stand." *Hummel*, 2017 UT 19, ¶26. "A jury is not unanimous if the jury instructions allow for conviction 'with each juror deciding guilt on the basis of a different act by [the] defendant.'" *State v. Percival*, 2020 UT App 75, ¶26 (*citing Saunders*, 1999 UT 59, ¶62). Yet this is exactly what the jury instructions allowed in this case. In fact, the district court explicitly directed the jury away from unanimity when they were seeking clarification. The court told them now to worry about which facts were associated with which counts and to only worry about how many counts were proved. "[T]he jury was never instructed that it must unanimously agree that [Chadwick] committed the same unlawful act to convict on any given count." *Alires*, ¶23.

Without such an instruction, some jurors might have found that Chadwick played the 'catch it' game, while others might have believed he rubbed his penis on F.L.'s buttocks, another might have believed one, but not more than one, incident of tickling involved an illegal touching of the breast, while another might have believed none of these and convicted Chadwick for letting F.L. sit on his lap while he had an erection as an indecent liberty. Because "neither the charges nor the elements instructions link[ed] 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." *Alires*, ¶23. Without that instruction, especially following

the jury's questions demonstrating its confusion on the issue, Chadwick's right to a unanimous jury evaporated and the State was allowed to procure one guilty verdict from a handful of allegations, any one of which each individual juror might have accepted. This was an error and a violation of the constitutional right to a unanimous verdict. The trial court should have corrected the error and failing to do so was unreasonable under the circumstances.

### E. Harmful Error

Not all errors in jury instructions are reversible. Defendants who successfully demonstrate error on appeal must also demonstrate that the instruction error was harmful. *See State v. Leech*, 2020 UT App 116, fn. 7 (*citing* UTAH R. CRIM. PROC. 30(a)). A trial court's error is not harmful unless there is a reasonable likelihood of a more favorable result, unless confidence in the verdict is undermined. See *State v. Reece*, 2015 UT 45, ¶¶39-40, 349 P.3d 712. The facts and outcome in this case demonstrate that there is a reasonable likelihood of a more favorable result and this Court's confidence in the verdict in Count 1 should be undermined.

Much like the evidence in *Alires*, the evidence in this case was far from overwhelming. See *Alires*, ¶¶28-30. The difficult part about discussing the weakness of the evidence in this case is that, given the ambiguity in the verdict and acquittal on Counts 2, 3, and 4, it's impossible to know which allegation to focus on, though some problems are applicable to each of the allegations. For example, F.L.'s memory and the remoteness of these allegations. This trial occurred on August 6, 2019 and charges claimed the offenses occurred in 1999-2000, nearly 20 years earlier. See

R.961-962. F.L. admitted that her memory was impaired by post-traumatic stress disorder. R.061.

[redacted]

F.L.'s allegations were not supported by any other witness and no physical evidence was presented in support. Chadwick denies anything inappropriate happened. He did admit that he was sensitive to unintentional physical touch and acknowledged he may have become aroused while F.L. sat on his lap, but denied sexual intent. As with the evidence in *Alires*, "the surrounding circumstances" for much of the complained of conduct "were sufficiently ambiguous that members of the jury could have easily reached different conclusions as to which acts were done with the required sexual intent." *Alires*, ¶29.

Another way to look at the prejudice analysis is as a statistical one. In other words, asking whether there is a reasonable likelihood of a more favorable result by

examining the probability of having the incorrectly instructed jury reach a unanimous verdict. What is the probability that every single juror connected the same factual scenario with Count 1?[23] To do so, first assume for the sake of argument that the only four factual scenarios the jury was considering were those included in the second jury question,[24] and let's call those scenarios A, B, C, and D. There is a 1 in 4 chance that any given juror associated scenario A (or scenario B, etc.) with Count 1, that is a 25% chance. Now since there were 8 jurors, each with his/her own 1 in 4 chance of matching scenario A with Count 1, that means there is a 1 in 32 chance that all eight jurors associated scenario A with Count 1, that is a 3.125% chance. Statistically, just considering Count 1, there is a 96.875% chance that at least one of the jurors attributed a totally different factual scenario to the guilty verdict in Count 1 than the other jurors. Statistically, there is a 96.875% chance the verdict in Count 1 was not unanimous. Meaning, it's highly likely some of the jurors found the defendant guilty in Count 1 based on scenario A, while other jurors found him guilty based on scenario B, C, or D. And because Chadwick was acquitted on Counts 2, 3, and 4, had the counts and the allegations been linked, it's also highly likely, without the error, there would have been a more favorable outcome. How much confidence can there be in such a verdict? Don't those numbers alone show there is a reasonable

[23] Since Chadwick was acquitted on all other counts, ignore how unlikely it is that all the jurors associated all the same scenarios with the same counts. Those numbers get incredibly small, by the way.

[24] See R.435. It is not entirely clear that such a presumption is warranted when the State also presented other factual allegations that may have been part of the jury's analysis.

likelihood of a more favorable outcome in a trial where all the jurors were considering the same facts for Count 1?

Though the statistical analysis is not conclusive, it is persuasive, especially in light of the appellate requirement that courts "presume that a jury followed the instructions given it unless the facts indicate otherwise." *State v. Lee*, 2014 UT App 4, ¶25 (cleaned up). That means we presume the jury did not trouble itself with the order of the charges or require each juror to associate Count 1 with the 'catch it' game. This Court must presume that the jury only asked how many instances the State had proved. That presumption makes the low statistical likelihood very troubling.

And even ignoring those numbers, the totality of the evidence shows there is a reasonable likelihood of a more favorable outcome if the judge had required unanimity. As explained above, the jury acquitted Chadwick on 3 of the 4 counts, signaling the jury had at least some hesitation in accepting some of F.L.'s testimony. And because there is no way to know which conduct the jury did find occurred, it is impossible to contrast the persuasiveness of one allegation against another, making it impossible to defend the guilty verdict on the strength of the record evidence. It's not as if the State can respond and say that the evidence for the 'catch it' game (or any other allegation) was strong, since we have no way of knowing which allegation the jury believed. Nor can the State challenge harmfulness by trying to argue the strength of each of the allegations, since we know each of the juror rejected all but

one of the allegations. For all these reasons the error in requiring juror unanimity is a harmful one and must result in reversal.

### F. Chadwick Cannot be Retried on Remand

Because Chadwick was denied his constitutional right to a unanimous verdict, this Court must reverse his conviction on Count 1. Chadwick cannot be retried on any of the allegations contained within the information, or any allegations within the same criminal episode. First, Counts 2, 3, and 4 resulted in acquittal, and thus, double jeopardy prohibits retrial on those counts. Second, where the facts supporting conviction in Count 1 cannot be distinguished from the counts on which he was acquitted, retrial is also prohibited by double jeopardy. See *Dunn v. Maze*, 485 S.W.3d 735, 747-749 (Ken. 2016), *Goforth v. State*, 70 So.3d 174, 190 (Miss.2011), *Madsen v. McFaul*, 643 F.Supp.2d 962, 968 (N.D. Ohio 2009).[25]

Finally, the same criminal episode statute prohibits the State from filing a new information and alleging any charges that occurred within the jurisdiction of the district court below and were known to the prosecuting attorney at the time of the original information. UTAH CODE §76-1-402.

### G. Plain Error

Though it seems unlikely given the information contained in the supplemental

[25] Chadwick acknowledges that this Court characterized the double jeopardy issue as not yet being ripe in footnote 7 in *Alires*. However, given the fact that no Utah Court has actually addressed the question, and this Court did not express an opinion on the merits of the issue, Chadwick raises the issue here to avoid any later claim of waiver, and asks the Court to include directions to the district court consistent with the right against double jeopardy in its reversal order.

record, in the event that this Court finds the error was not preserved, Chadwick asserts that the error was plain and the trial court should have corrected the error without prompting. Errors are obvious when the law governing the error was clear at the time the error was made. *State v. Dean,* 2004 UT 63, ¶16, 95 P.3d 276. The error in this case was plain because the jury asked its question on August 6, 2019, more than ten years after the Supreme Court issued its decision in *Saunders*. From that decision it would have been obvious as "a fundamental tenet of criminal law" that courts must instruct jurors that they must be "unanimous about precisely what act occurred." *Saunders*, 1999 UT 59, ¶¶58-59. The trial court should have known that the single elements instruction, especially in light of the jury's repeated questions, did not require the jurors to agree on which conduct related to separate the counts.

As for harm requirement for plain error, the above described harmfulness argument applies here as well.

## II. The District Court Erred In Its Ruling On Chadwick's Motion For Access To The Complaining Witness's Mental Health Records

Chadwick moved for an in camera review of F.L.'s therapy records. R.115-123. Following the motion, the State stipulated that the threshold had been met and that the court should perform an in camera review. R.537-538. The parties filed a series of stipulated proposed orders (R.148-181) and the court eventually issued the order, authorizing the subpoenas and setting forth the criteria upon which Chadwick's motion had satisfied the requirements. See R.234-236. The court would review the records and "disclose only those portions that contain a

factual description of the alleged abuse by Mr. Chadwick and circumstances surrounding those events, any report of those events by the counselor to law enforcement, and any methods used to refresh or enhance the memory of the alleged victim regarding those events." R.235.

After a party has met the threshold showing that the alleged victim's records will reasonably contain relevant and exculpatory evidence, the court is obliged to authorize the subpoenas and conduct an analysis of the materiality of the requested records by means of an in camera review. *State v. Worthen*, 2009 UT 79, ¶43, 222P.3d 1144 (citing *State v. Blake*, 2002 UT 113, ¶23, 63 P.3d 56).

The records were then provided to the district court and the court made its ruling. Of course, at the time, no one other than the court knew what was in the records or whether the portions quoted by the court in its ruling where the only portions material to Chadwick's defense. However, now that the records are available in the record, this Court can review the district court's materiality ruling. Chadwick asserts that the records plainly reveal that the district court erred in its materiality analysis and that the records contain many references and details which should have been disclosed to Chadwick under the court's order authorizing the subpoenas and Chadwick's unopposed motion.

### A. The records included many differing factual descriptions of the alleged abuse which were not disclosed

The district court's disclosure of portions of the records, when compared with the records themselves, fell far short of giving Chadwick access to the information he was entitled to based on the Confrontation Clause and the

Compulsory Process Clause. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40. As the preliminary hearing testimony and F.L.'s statements to the police made plain, [redacted]. [redacted] Yet the district court failed to disclose numerous instances of factual descriptions included in these records, even instances which the district court would have known were inconsistent with F.L.'s preliminary hearing testimony.

[redacted] This is a factual description of the alleged abuse by Chadwick, her landlord, and it is inconsistent with her testimony at the preliminary hearing that she met Chadwick when she was 8 and was abused the first time before they moved in and that the abuse stopped about the time she turned 11. R.035, R.046. That inconsistency is certainly material to Chadwick's defense and relevant to either F.L.'s credibility or the accuracy of her memory, or both.

[redacted] These relevant disclosures are again inconsistent with her preliminary hearing account and are extremely relevant to her credibility as a witness.

[redacted] How the district court missed this factual description on the very same page it cited above is unclear. What is clear is that it missed it. [redacted]

[redacted]

[redacted]

B. The records included descriptions of F.L. EMDR treatment, none of which were disclosed

[redacted]

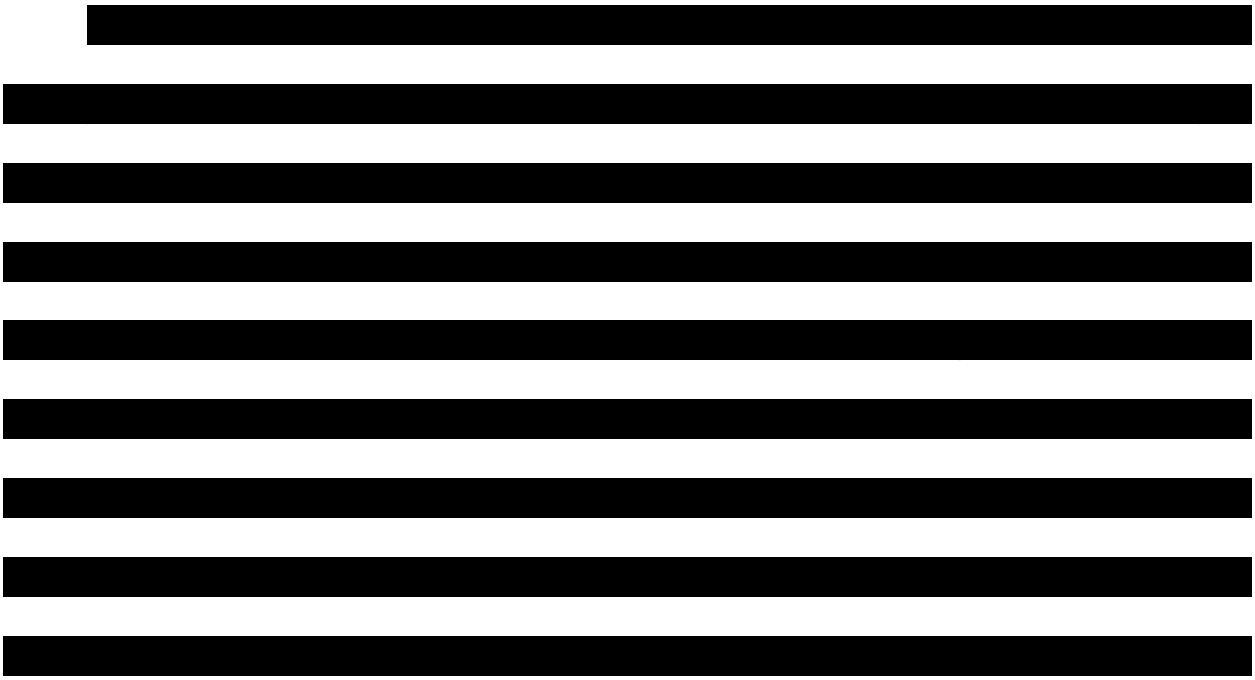
[redacted] Chadwick provided the court with references in an interview with the investigating officer where F.L.

[redacted]

C. This undisclosed information was material

Granting a criminal defendant access to reliability evidence is "important in the case of documentary evidence, [and] it is even *more important* where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy." *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105,

39 L.Ed.2d 347 (1974). It must be clear, Chadwick maintains his innocence and denies he committed any of the offenses described at trial. His defense, which proved to be mostly successful at trial, was to demonstrate that F.L.'s claims against him were unreliable, that her memory was incorrect or incomplete. The fact that he was almost entirely prevented from admitting significant evidence that was highly probative on the question of F.L.'s reliability, and still managed to be acquitted on 3 of the 4 counts, shows that the suppressed evidence would have had an impact on Count 1.



[redacted]

### D. The Trial Court's Error was Harmful

It is strange to imagine what a traditional harm analysis looks like in this case for the trial court's 14(b) error, since it is impossible to know what illegal conduct the jury, or individual jurors, believed Chadwick committed. But it is not impossible to see how the suppressed therapy records could have had an effect on the jury's assessment of the accuracy of F.L.'s memory and her credibility. In a case where the only two relevant witnesses were F.L. and Chadwick, and where each juror found F.L.'s allegations unpersuasive on 3 of the 4 counts, [redacted]

[redacted]

This is a case where every piece of evidence which calls F.L.'s already doubted testimony into question has the reasonable likelihood of a more favorable result. And this is a case where the district court's error in failing to recognize the relevance and materiality of these records was an error that prejudiced Chadwick and his right to a fair trial. Chadwick should have been given these records and should have been given the chance to present the admissible portions to the jury. This Court should reverse the conviction in Count 1 and for the reasons described in Section 1 F above, order the district court not to retry Chadwick.

## CONCLUSION AND SPECIFIC RELIEF SOUGHT

Because the trial court erred in instructing the jury, Chadwick was denied the right to a unanimous verdict and his conviction should be reversed. Because the district court erred in denying Chadwick access to relevant and material therapy records, this Court should order his conviction reversed.

RESPECTFULLY SUBMITTED this 1st day of September, 2020.

/s/ Douglas Thompson
Appointed Appellate Counsel

## CERTIFICATE OF COMPLIANCE WITH RULE 24(a)(11)

I certify that this brief complies with the following requirements of Rule 24(a)(11) of the Utah Rules of Appellate Procedure:

A. The total word count of this brief is 13,892. It was prepared in Microsoft Word.

B. This brief contains non-public information, therefore, a version with all such information removed is also being filed.

/s/ Douglas Thompson

## CERTIFICATE OF MAILING

I certify that I emailed a copy of the foregoing brief to the Utah State Attorney General, Appeals Division, criminalappeals@agutah.gov, P.O. Box 140854, Salt Lake City, Utah 84114-0854 on this 1st day of September, 2020. When the Court requests paper copies, pursuant to the current Administrative Order, two paper copies will also be sent by mail.

/s/ Douglas Thompson

# ADDENDA

A – R.486 First Response to Jury Question
B – R.435 Second Response to Jury Question
C - R.234 Order to Authorize Subpoena for Material to be Reviewed *in camera*

Addendum A – R.486 First Response to Jury Question

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | : | |
| | | Jury Question |
| Plaintiff, | : | |
| vs. | | |
| | : | |
| David M. Chadwick | | Case No. 171400984 |
| | : | |
| | | Judge James R. Taylor |
| Defendant. | : | |

During deliberation the Court received a communication via the bailiff in charge of the jury that asked if they could have a verdict form that specifically identified, in some way, a particular course of conduct to connect with each count. After discussion with counsel the Court informs the jury as follows:

You should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence.

August 6, 2019

Judge James R Taylor

Addendum B – R.435 Second Response to Jury Question

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

| | | |
|---|---|---|
| STATE OF UTAH, | : | |
| | | Jury Question |
| Plaintiff, | : | |
| vs. | | |
| | : | |
| David M. Chadwick | | Case No. 171400984 |
| | : | |
| | | Judge James R. Taylor |
| Defendant. | : | |

During deliberation the Court received a written question from the deliberating jury:

"Does Count 1 represent the "catch it" game as described in court?"
"Does Count 2 represent David Chadwick rubbing his bare penis against Ms. Larsen's legs, buttocks, and/or vagina?"
"Does Count 3 represent David Chadwick touching Ms. Larsen's breasts and/or nipple area while tickling her?"
"Does Count 4 represent David Chadwick touching Ms. Larsen's breasts and/or nipple area while tickling her?"

After consultation with Counsel the Court responds:

In response to an earlier question the Court noted that "You should consider the evidence and argument of counsel to determine if the State has or has not proven beyond a reasonable doubt the occurrence of one, two, three, or four behaviors that violate the law as described in the evidence. The order of the counts is of no particular consequence."

Counsel may have suggested specific behaviors to correspond to specific counts during closing argument, but arguments and characterization of the evidence by counsel are neither pleadings nor facts. It is for you to determine from a consideration of all of the facts if the State has proven beyond a reasonable doubt that the defined statute was violated, in some way, once, twice three time, or four times or if the State has failed to meet that burden of proof. You may choose to relate a specific conduct or incident to a particular count to assist your deliberation, but that is up to you. It is your sole province to determine the facts of this case.

August 6, 2019

Judge James R Taylor

Addendum C – R.234 Order to Authorize Subpoena for Material to be Reviewed *in camera* (omitted in the PUBLIC copy)