Case No. 20220896-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

DUSTIN GILES ANDRUS,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions for human trafficking of a child, a first-degree felony, and other crimes, in the Second Judicial District, Davis County, the Honorable David Connors presiding

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INTRODUCTION

Dustin Giles Andrus engaged in sex acts with sixteen-year-old Laura multiple times after meeting her online under the pseudonym "Timothy." He requested and received nude pictures from Laura, gave her marijuana, and offered her money and other items to continue having sex with him. When Laura disclosed this activity, a member of the FBI's joint state-federal Child Exploitation Task Force issued federal subpoenas to communications companies to investigate "Timothy" and to identify him as Andrus. Laura confirmed that Andrus was the person who had been exploiting her, leading to the issuance of search warrants and the discovery of additional evidence. Laura testified about Andrus's actions at trial, and a jury convicted him of

human trafficking of a child, sexual exploitation of a minor, distribution of a controlled substance, and other related sex crimes.

On appeal, Andrus contends that the district court should have suppressed "the State's evidence" because the federal subpoenas that identified him to Utah authorities violated Utah's Electronic Information or Data Privacy Act and, therefore, the Utah Constitution. As a matter of federal law, Andrus lacks standing to challenge federal subpoenas served on third-party businesses. Regardless, the district court correctly found that the federal subpoenas in this case were lawful because the Task Force officer sought them to investigate potential federal crimes. The court's ruling is correct regardless of any subjective intent to prosecute Andrus under state rather than federal law.

Nor does the Act require a different result as a matter of state law. Other provisions of the Utah Code continue to allow State use of federal warrants and subpoenas to access electronic information, and the Act does not expressly contradict those provisions. Rather, the apparent purpose of the Act is to ensure that Utah authorities use the appropriate state-law processes when they use *those* processes to access electronic data or records. But even if Utah law could be interpreted to prohibit the State's use of the subpoenaed materials in this case, Andrus is still not entitled to reversal of his convictions,

because there is no reasonable likelihood that suppression of information obtained through the subpoena and its fruits would have made any difference to Andrus's convictions. Andrus does not challenge Laura's trial testimony or his Snapchat messages to her after the relationship ended, and the challenged evidence adds little to the combined persuasive effect of Laura's testimony and the strongly corroborative messages.

Andrus also contends that the district court erred in not arresting judgment or directing the verdict on his convictions for human trafficking of a child, sexual exploitation of a child, and distribution of a controlled substance. Andrus argues that the State presented insufficient evidence of these crimes. But Laura's testimony alone is more than enough evidence to defeat his sufficiency challenges—she described him offering (and likely giving) her marijuana, money, and other items to continue having sex with him; his requests for nude images, including live video of her masturbating, which she provided; and his giving and offering her marijuana on multiple occasions.

Finally, Andrus contends that the district court erred in admitting uncharged conduct relating to his interactions with Laura in Summit County, when the charged acts occurred in Davis County. He argues that this evidence was other-acts evidence that should have been excluded under rule

404(b), Utah Rules of Evidence. But Andrus fails to demonstrate an abuse of discretion in the district court's ruling that this additional evidence was admissible as narrative evidence of the overall illicit relationship between the adult Andrus and the teenager Laura. Regardless, any error in the district court's ruling was harmless in light of the totality of the evidence.

STATEMENT OF THE ISSUES

1. Did the district court err in denying Andrus's motion to suppress the results of federal subpoenas obtained by a Task Force officer investigating potential federal crimes in his capacity as a state-federal task-force member?

Standard of Review. The Court reviews a district court's denial of a motion to suppress "for correctness, including its application of the law to the facts." *Brierley v. Layton City*, 2016 UT 46, ¶ 18, 390 P.3d 269 (citation omitted). The Court reviews the supporting factual findings for clear error. *See State v. Evans*, 2021 UT 63, ¶ 20, 500 P.3d 811.

2. Did the district court err in denying Andrus's motions to arrest judgment and for directed verdict where Laura's testimony alone provided believable evidence establishing human trafficking, sexual exploitation of a minor, and distribution of a controlled substance?

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

3. Did the district court err in admitting uncharged acts between Andrus and Laura as narrative evidence that completed the story of his illicit relationship with Laura?

Standard of Review. The district court has "broad discretion" to admit evidence, and this Court reviews its evidentiary rulings only for an abuse of that discretion. *State v. Thornton*, 2017 UT 9, ¶¶ 43, 56–57, 391 P.3d 1016.

STATEMENT OF THE CASE

A. Summary of relevant facts.

In September 2020, 16-year-old Laura reported to police that a man she knew as "Timothy" had been having sex with her, provided her with alcohol and marijuana, and had her send him nude photographs, after the two met online in September 2019. R8–10, 944. "Timothy" told Victim that he was 27 years old; in reality, he was 34-year-old Dustin Andrus. R1, 71–72.

Andrus and Laura initially met on the now-defunct videochat service Omegle.[1] R1098–99. They soon began conversing mostly on a different instant-messaging service, Snapchat. R1099–1100. "Very quickly," their conversation turned to sex, with Andrus telling Laura that he wanted to meet up to have sex with her. R1100–01. Laura told him that she was only 16 years old. R1102.

Andrus and Laura first met in person outside a pizza restaurant near her father's home in Davis County. R1102-03. They ended up in Andrus's car, where Andrus gave her marijuana and had her "touch his groin." R1103–04. Andrus wanted Laura to give him a "hand job," but she didn't do that, she just "touched it." R1117.

The two continued to message over Snapchat, and Andrus asked Laura for nude pictures so he could "ejaculate to them." R1105. Laura sent him nude pictures, and he would send her videos of him masturbating. R1105–06. Andrus would have Laura take her clothes off and masturbate for him on video. R1106, 1116–17. This happened regularly, almost daily. R1106.

[1] Omegle was a was a "free, web-based online chat service" that "randomly paired users in one-on-one chat sessions where they could chat anonymously." *Omegle*, Wikipedia, https://en.wikipedia.org/wiki/Omegle (last visited February 20, 2024). Omegle's operator voluntarily shuttered the site in 2023 due to "challenges" that "included online exploitation of children." *Id.*

Andrus met up with Laura for sexual acts on multiple occasions. R1108. They would meet and walk to Andrus's car, where they had "penetrated sex" and, at least once, oral sex. R1108. Andrus would sometimes bring marijuana. R1108.

Andrus offered Laura a car, money, and marijuana to continue having sex with him. R1109–10. He offered to have her live with him, where they "would be doing sexual acts a lot." R1109. Once, when she declined a sexual request, he offered her "thousands of dollars for [her] to continu[e] doing acts with him." R1110.

The last time Laura met Andrus in person was around the end of February 2020. R962. He took her to his house in Summit County, where they had sex and Andrus gave her alcohol and marijuana. R1112–14. At the house, Andrus took and kept a pair of Laura's underwear. R1112–13.

Sometime after this, Laura blocked Andrus on Snapchat and contacted the police. R1113–14. Andrus would continue to contact Laura via new Snapchat accounts. R1114. In October 2020, Andrus contacted Laura using the Snapchat name timmy_daddy2020 while Laura was speaking with the State's lead investigator (Detective). R945–46, 985–86; State's Exh. 1. Detective took pictures of Laura's phone screen, capturing Andrus's explicit sexual

dialogue including requests for sex, requests for another picture, and an offer to "hang out sometime and smoke." R985–86; State's Exh. 1.

Detective asked another officer (Agent) for assistance in identifying "Timothy." R1065. Agent was another detective at the Clearfield Police Department, but he was also a task-force officer with the FBI's Child Exploitation Task Force. R1063. Using federal subpoenas in his capacity as a Task Force officer, Agent obtained information from several internet and wireless providers suggesting that "Timothy" was Andrus. R1067-72.

Detective obtained Andrus's driver license photo, and Laura identified him as "Timothy" from a photo lineup. R105, 989–90. Thereafter, police served warrants on Andrus's home, where they found marijuana and Laura's missing underwear. R1074; State's Exhs. 3–6.

B. Summary of proceedings and disposition of the court.

The State initially charged Andrus with rape, multiple child-sex crimes, and two controlled-substance counts. R3–7. The State later dismissed the rape count and a count of possession of a controlled substance on venue grounds, due to those alleged counts occurring in Summit County. R458. An amended information ultimately charged Andrus with human trafficking of a child, sexual exploitation of a minor, distribution of a controlled substance, four counts of unlawful sexual contact with a 16- or 17-year-old, and two

counts of enticement of a minor, all of which allegedly occurred in Davis County. R520–27.

Motion to suppress. Andrus filed a motion to suppress evidence obtained via Agent's federal subpoenas. R80–86. Andrus initially argued that the State illegally obtained the federal subpoenas under federal law because the investigation was only looking into potential state offenses, rendering the subpoenas invalid under the Fourth Amendment and the Utah Constitution. R82–85. The State responded that Laura's allegations included the production of child pornography and would support both state and federal charges. R181–86. The State also argued that third-party subscriber records such as those sought by the subpoenas are not protected by the Fourth Amendment. R186–87. Andrus replied that the subpoenas were also unlawful under Utah's Electronic Information or Data Privacy Act and expanded his argument under the Utah Constitution. R294–304. In his reply, Andrus conceded that the "enticement and/or child pornography offenses" that Laura alleged "could be federal offenses." R293.

The district court held an evidentiary hearing at which Agent and the technician who processed the subpoenas (FBI Technician) testified. Agent confirmed that he was employed by the Clearfield police department but was also a "task force officer with the FBI's Child Exploitation Task Force." R370–

71. Agent described Detective asking him to help identify Andrus from a Snapchat username and two TextNow phone numbers. R372. He then "asked the FBI to send subpoenas to TextNow and Snapchat in order to identify the suspect." R373. He described this as standard procedure in investigating child pornography and enticement cases, and he had not used a state judicial order since joining the Task Force. R373–74, 391–92. He explained the chain of subpoenas that revealed an IP address; associated that IP address with a business, the Andrus Family Carwash; and ultimately identified Andrus as the subscriber of a Verizon Wireless cellphone account. R375–77.

FBI Technician testified that she was an administrative assistant with the FBI who processed subpoenas for the Task Force in child pornography and online enticement cases. R404–05. And she confirmed that the Task Force is "part of the FBI." R413. She worked with Agent on the Andrus investigation. R405. FBI Technician saw nothing unusual in Agent's request for federal subpoenas. R405. She got similar requests "every day, all day" from state investigators who were Task Force members. R405. She explained, "[w]e have about 25 to 30 task force guys on the child exploitation and they're all state." R405. FBI Technician confirmed that subpoena requests had to "meet the child exploitation requirement" or she couldn't send them off, but she explained that she did not make that determination. R408–09.

Both parties filed supplemental post-hearing briefing, and the district court heard argument. R316–27, 329–36, 1980–2024. After arguments, the parties submitted additional materials and authorities. R341–63, 435–36, 439–40.

The district court denied Andrus's suppression motion in a written order. R441–51. The court ruled that Agent's use of the federal subpoenas was lawful because he had objectively reasonable grounds to believe that Andrus had committed a federal offense. R445–49. The court acknowledged that the parties had raised a myriad of "complex" collateral issues—including Andrus's standing to challenge the subpoenas generally, his standing to challenge subpoenas issued to his employer, and the State's assertion of the inevitable discovery doctrine—but it declined to address those issues in light of its conclusion that "the use of the federal subpoenas was not in violation of the law or in violation of [Andrus's] constitutional rights." R445, 449.

Other-acts evidence. After the State dismissed the Summit County charges, it sought pretrial approval to introduce evidence relating to Andrus's Summit County home, both as intrinsic evidence of the overall illicit relationship and as non-character evidence of motive, intent, plan, identity, and rebuttal of fabrication under rule 404(b), Utah Rules of Evidence. R476–86. This evidence included Laura's allegation that the two had sex at Andrus's

home, as well as physical evidence recovered from a search of that home—alcohol, marijuana, and Laura's missing underwear. R478. Over Andrus's opposition, the court granted the State's motion. R495–96, 1897–98. The court ruled that the challenged evidence was not "404(b) evidence" but rather "evidence that is part of the narrative of the relationship between these two individuals during that period of time." R1898. The court concluded, "the State is entitled to present that narrative." R1898.

Jury trial. Laura testified about meeting Andrus online and their interactions thereafter, as described above. R1095–1118.

Detective and Agent testified generally about their investigation of Laura's allegations, the process of identifying Andrus via the federal subpoenas, and the evidence discovered at Andrus's house including marijuana and Laura's missing underwear. R942–1042, 1062–93.

Detective described taking photos of Laura's phone in October 2020, when "Timothy" began messaging Laura while Detective was interviewing her. R945–46, 985–86; State's Exh. 1. The State admitted these photos, which showed Andrus propositioning Laura for sex, referencing an earlier sleepover, asking her for another photo, and suggesting they get together again to "smoke." State's Exh. 1.

Detective described Laura identifying Andrus from a photo lineup. R989–90. About six weeks after Laura had confirmed that "Timothy" was in fact Andrus, police served warrants on Andrus's home. R951,990–91. Andrus was not present, so police went to the Andrus Family Carwash. R951–52. As police arrived, Andrus fled in his car at a "high rate of speed." R953–54. Police were unable to stop the car, and Andrus was eventually arrested by the U.S. Marshals' VFAST fugitive-apprehension team. R954–55. The VFAST team gave Detective two cell phones recovered from Andrus. R955–56. Detective searched those phones pursuant to a warrant, but retrieved no information other than that the phones were new, "still in the beginning of setup mode." R956.

Agent testified about identifying Andrus via the federal subpoenas. 1064–72. He described his role in executing a search warrant on Andrus's home. R1072–77. The search revealed a "a pair of underwear matching the description [Laura] gave" and marijuana. R1074; State's Exhs. 3–6. Laura had also described Andrus giving alcohol in his home from a flask-shaped bottle, and the search also found a similar bottle. R1074–75; State's Exh. 2.

The State presented two other law-enforcement witnesses. An investigator with the Davis County Attorney's Office testified about finding the underwear during the search of Andrus's home. R687–88; State's Exh. 6.

And a U.S. Marshal testified about arresting Andrus near a motel where he appeared to be staying. R691–93. The marshal's testimony suggested that Andrus had checked into the motel under a different name. R693–95.

The State rested, and Andrus sought a directed verdict as to all counts, arguing generally that Laura's "simple testimony without any other evidence . . . does not meet the counts in various ways." R696, 701. As to Count 3, distribution of a controlled substance, he argued that "the only evidence of marijuana being given would, I guess, be this reference to a cart. Carts can contain nicotine. That's the only evidence of the count." R704. He also argued that circumstantial evidence of marijuana found in Andrus's Summit County home months after the charged acts could not support a conviction for the charged distribution in Davis County. R705. The district court denied the motion, ruling that the evidence and inferences therefrom provided a "rational basis for the jury to conclude that the defendant could be found guilty on each of the events of the charges brought by the State." R711.

The defense case consisted of recalling Detective to the stand. R715. Andrus questioned Detective about her photographs of the messaging between Laura and Andrus, the delay between the charged events and the search warrants, and the possibility that the cartridges found in Andrus's house could have contained something other than THC. R715–25.

The jury found Andrus guilty on all counts. R868–69.

Post-trial proceedings. Andrus filed a motion to arrest judgment, challenging several of his convictions including those for human trafficking and sexual exploitation of a minor. R1196–1214.

As to human trafficking, Andrus argued that Laura testified only that he had *offered* her items of value for sex, not that he had actually given her any of those things or that she actually received them. R1197, 1206–11, 1819–21. According to Andrus, her testimony of offers alone did not satisfy the statutory definition of commercial sexual activity as required for his human trafficking conviction. R1197, 1206–11, 1819–21. As to sexual exploitation of a minor, Andrus argued that the State failed to produce evidence that Laura created any sexually explicit images of herself at his direction. R1211–14, 1821–22.

The district court granted the motion in part but denied it as to Andrus's human-trafficking and sexual-exploitation convictions. R1936–38. Viewing the evidence and reasonable inferences in the light most favorable to the verdict, the court could not "determine that the verdict was so in conclusive [sic] or so inherently improbable that reasonable minds must have entertained reasonable doubt." R1937–38.

Sentencing and appeal. The district court sentenced Andrus to prison for five years to life for human trafficking, one to fifteen years for sexual exploitation of a minor, and zero to five years for each of four convictions for unlawful sexual conduct with a 16- or 17-year-old. R1832–33. The court imposed a mix of concurrent and consecutive sentences, and also imposed jail time on Andrus's three misdemeanor convictions to be served at the prison. R1833.

Andrus filed a timely notice of appeal. R1835–36.

SUMMARY OF ARGUMENT

The district court correctly denied Andrus's motion to suppress. As a matter of federal law, Andrus lacks standing to challenge the federal subpoenas served on third-party businesses in this case. Regardless, the district court correctly found that the federal subpoenas in this case were lawful because Agent sought them as a Task Force member to investigate potentially federal crimes. The court's ruling is correct regardless of any subjective intent to prosecute Andrus under state rather than federal law.

Nor is suppression required under Utah's Electronic Information and Data Privacy Act. Interpreted in light of other Utah statutory provisions that expressly authorize access to electronic information via federal warrants and subpoenas, the Act only provides a mandatory roadmap for the proper use

of state-law processes *when* those state-law processes are employed to access protected information. Nothing in the plain language or legislative history of the Act suggests an interpretation that would bar the use of the federal processes otherwise allowed by the Utah Code. And such an interpretation would work an absurd result—today's internet crimes often cross state and even national borders, requiring cooperation between agencies and jurisdictions to effectively protect public safety.

Even if the Act could be interpreted to prohibit the State's use of the federal subpoenas in this case, Andrus is still not entitled to reversal of his convictions, because there is no reasonable likelihood that suppression of information obtained through the subpoena and its fruits would have made any difference to Andrus's convictions. Andrus does not challenge Laura's trial testimony or his own sexually explicit Snapchat messages to her after the relationship ended, and the challenged evidence adds little to the combined persuasive effect of Laura's testimony and Andrus's strongly corroborative messages to her.

Andrus also contends that the district court erred in not arresting judgment or directing the verdict on his convictions for human trafficking of a child, sexual exploitation of a child, and distribution of a controlled substance. Andrus argues that the State presented insufficient evidence of

these crimes. But Laura's testimony provides more than enough evidence to defeat his sufficiency challenges.

As to human trafficking of a child, Laura described Andrus offering her marijuana, money, and other items to continue having sex with him. These offers alone constituted solicitation of Laura's commercial sexual activity and thereby completed the crime of human trafficking of a child. But Laura's testimony also gave rise to the reasonable inference that Andrus actually gave her marijuana and possibly money over the course of their four-month illicit relationship "on account of" their ongoing sexual acts.

As to sexual exploitation of a minor, Laura testified that Andrus had her disrobe and masturbate on video on multiple occasions. Andrus thereby produced child pornography by directing Laura to create sexually explicit images of herself, as prohibited by statute and described in the jury instructions. But Laura also described sending Andrus nude pictures at his request, which supports the reasonable inference that she created those images when he asked for them.

As to distribution of a controlled substance, Laura testified that Andrus gave and offered her marijuana on multiple occasions. Laura's testimony indicated that she was familiar with marijuana and able to identify it. And either Andrus's acts of giving her marijuana or his acts of offering her

marijuana satisfy the statutory definition of distribution of a controlled substance.

Finally, Andrus contends that the district court erred in admitting uncharged conduct and other evidence relating to his interactions with Laura in Summit County, when the charged acts occurred in Davis County. He argues that this evidence was extrinsic other-acts evidence that should have been excluded under rule 404(b), Utah Rules of Evidence. But Andrus fails to demonstrate an abuse of discretion in the district court's ruling that this additional evidence was admissible as narrative evidence that completed the story of the overall illicit relationship between the adult Andrus and the teenager Laura. Regardless, any error in the district court's ruling was harmless in light of the totality of the evidence, which included Laura's uncontradicted testimony as supported by Andrus's Snapchat messages to her. Those messages strongly corroborated Laura's testimony of prior sexual behavior, requests for nude images, provision of marijuana, and other aspects of her overall allegations against Andrus.

ARGUMENT

I.

The district court correctly denied Andrus's motion to suppress the results of federal subpoenas, obtained by a member of the FBI's Child Exploitation Task Force to investigate potential federal crimes, but any error was harmless.

Andrus contends that the district court erred when it denied his motion to suppress the results and fruits of federal subpoenas that revealed his identity as "Timothy," the man who 16-year-old Laura alleged had been meeting her for sex, giving her marijuana, and asking for and receiving her nude photos. Aplt.Brf.15–34. Andrus lacks standing to challenge the federal subpoenas, but in any event, Agent's use of federal subpoenas to investigate Laura's allegations of federal offenses was lawful. Utah law governing third-party electronic data does not prohibit the use of evidence discovered via valid federal subpoenas or other lawful methods. And any possible error is harmless—the challenged evidence adds little to the combined probative effect of Laura's testimony and Andrus's explicit Snapchat messages, which Andrus does not challenge, so exclusion of the challenged evidence is not reasonably likely to have changed the result of Andrus's trial.

A. The federal subpoenas of Andrus's internet and telecommunications subscriber records to investigate potential federal crimes were valid and lawful under federal law.

The district court correctly concluded that "the use of federal subpoenas was permissible here." R447. Andrus did not even have standing to challenge the federal subpoenas under prevailing federal law. Regardless, the district court correctly concluded that Agent's use of the federal subpoenas was permissible under 18 U.S.C. § 3486 because Laura's allegations against "Timothy" involved federal offenses for sexual exploitation of children. And Utah law recognizes that providers may disclose "a record or other information pertaining to a subscriber to or customer of the service" to governmental entities in response to "an administrative subpoena authorized by a state *or federal* statute." Utah Code Ann. § 77-23b-4(3)(a)(ii) (West 2019) (emphasis added).

As a preliminary matter, Andrus lacked standing to challenge the federal subpoenas in this case. That right belonged instead to the subpoena recipients, who did not challenge the subpoenas' validity. The Court has recognized that "the overwhelming weight of authority find[s] no reasonable expectation of privacy in subscription information, like an IP address, given to an internet service provider." *State v. Roberts*, 2015 UT 24, ¶ 29, 345 P.3d 1226; *see United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) ("Every

federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation."). Rather, the privacy interest in third-party records belongs to the third-party, who alone has standing to challenge a federal subpoena. *See United States v. Gmoser*, 30 F.4th 646, 648 (7th Cir. 2022) ("[P]erhaps the University could have moved to quash the [section 3486] subpoena, but it did not. It produced the evidence without protest. Gmoser is not entitled to enforce the University's rights . . . ."); *cf. United States v. Moffett*, 84 F.3d 1291, 1293 (10th Cir. 1996) (criminal defendant who was not the direct recipient of a subpoena had no standing to challenge the subpoena).

Andrus's complaints about the validity of the federal subpoenas vis-à-vis federal law are not his to make. Ignoring his concession below that Laura's allegations made out potential federal crimes, Andrus argues that section 3486 authorizes subpoenas only for investigations of federal offenses. R293; Aplt.Brf.26–27. He also suggests that the "Supervisory Special Agent" who authorized the subpoenas may not have been an authorized designee of the United States Attorney General under section 3486. Aplt.Brf.26 n.16. These may have been valid grounds for the subpoena *recipients* to have sought to quash the subpoenas. *See Gmoser*, 30 F.4th at 648. But the recipients failed to do so—instead, they "produced the evidence without protest." *Id.* Andrus

did not try to assert the recipients' rights below, nor was he entitled to do so. *See id.* And absent action by the recipients to assert such arguments against the validity of the subpoenas, those arguments have been "forfeited." *Id.*

Regardless, the district court properly rejected Andrus's sole federal-law challenge to the subpoenas below—that they were issued for purely state-law purposes and therefore did not satisfy the requirements of the federal administrative subpoena statute, 18 U.S.C. § 3486. Section 3486 provides, in pertinent part, "In any investigation of a Federal offense involving the sexual exploitation or abuse of children, the Attorney General may issue in writing and cause to be served a subpoena requiring the production of any records relevant to the investigation." 18 U.S.C. § 3486(a)(1) (multiple ellipses omitted for readability). The district court applied the plain language of section 3486 to conclude that "the phrase 'any investigation of' does not draw a distinction between a state investigation and a federal investigation," so long as the acts being investigated constitute federal crimes. R447–48.

The district court relied on Andrus's concession that Laura's allegations made out potential federal crimes. R447. Specifically, Andrus stated in his reply memorandum, "This Court can consider the State's position that the potential offenses of child enticement and/or child

pornography could be federal offenses, as unopposed." R293. Andrus's concession was well taken. Laura described sending Andrus nude pictures over Snapchat at his request, thereby alleging that he committed a federal child-pornography offense by "knowingly receiv[ing] . . . any [child pornography] using any means or facility of interstate or foreign commerce or that has been mailed, or has been shipped or transported in or affecting interstate or foreign commerce . . . by any means including by computer." 18 U.S.C. § 2252(a)(2); R9. Andrus also used Snapchat to persuade, induce, entice, or coerce Laura to have illicit sex with him, thereby committing the federal crime of enticement. *See* 18 U.S.C. § 2422(b); R9. Receipt of child pornography and enticement are both enumerated "Federal offense[s] involving the sexual exploitation or abuse of children" under the federal administrative subpoena statute. 18 U.S.C. § 3486(D)(i).

The district court acknowledged that Agent's request for federal subpoenas appeared to be subjectively motivated by an intent to investigate "Timothy" for state prosecution under Utah law. R446–47. Nevertheless, the court applied the plain language of section 3486 and the objective facts known to Agent to conclude that the federal subpoenas here were valid. R447–48. The court ruled that the statutory language "any investigation of" does not distinguish between state and federal investigations. R447. Andrus "never

disputed that the information sought by this investigation could have led to the filing of federal charges." R447. The court observed that the subpoenas simply sought information "without regard to which charges may eventually be filed," and that "the information could lead to charges in either or both realms." R447. The court concluded, "based on an objective review of the information possessed by [Agent] when the subpoenas were requested, the investigation could have been for both state and federal offenses simultaneously." R447.

The court reiterated that search-and-seizure analysis under the Fourth Amendment applies an objective analysis and declined to speculate about Agent's subjective intentions. R447. Rather, applying an objective test, the court concluded that Agent knew that the subpoenas "related to an investigation of allegations concerning an underage victim of sexual abuse and possession of child pornography," that the allegations could support the charging of federal child-sex crimes under section 3486, and that "therefore the use of the federal administrative subpoenas was permissible." R448.

Andrus fails to demonstrate error in the district court's analysis. He cites and even emphasizes the statutory text of section 3486, requiring "any investigation of . . . *a Federal offense*." Aplt.Brf.26–27 (citation omitted). He argues that "[t]he language 'a Federal offense' (rather than any offense) does

indeed distinguish between a federal and state investigation." Aplt.Brf.27. But it doesn't—it distinguishes between federal offenses and things that are *not* federal offenses. That distinction was met here because Andrus's alleged actions constituted potential federal offenses. R447–48. Additional requirements of federal involvement such as a federal case number, the participation of solely federal agents or prosecutors, or the intent to pursue federal charges are simply not reflected in the statutory language.

Andrus also understates the amount of federal involvement that did occur here. Agent is a member of the FBI's Child Exploitation Task Force, which is "part of the FBI." R413. Agent requested the assistance of FBI Technician, who is employed by the FBI, to issue the federal subpoenas. R404–05. FBI Technician saw nothing unusual about the request—she got similar requests "every day, all day," from state investigators who were Task Force members, and these requests did not necessarily include federal case numbers. R405. And FBI Technician got the subpoenas signed by her supervisor, an FBI Supervisory Special Agent who was presumably an

authorized designee of the United States Attorney General, as required by section 3486.[2] R194, 406.

In sum, Andrus lacks standing to challenge the subpoenas to a third-party. In any event, the federal subpoenas in this case were sought by a member of an FBI task force via an FBI technician, as authorized by an FBI Supervisory Special Agent, to investigate acts that constituted federal child-exploitation offenses. The district court correctly ruled that "the use of the federal administrative subpoenas was permissible" under 18 § U.S.C. 3486. R448.

B. Utah's state-law subpoena and electronic privacy provisions do not require suppression of the valid federal subpoenas or their fruits.

Despite the district court's correct application of 18 U.S.C. § 3486, Andrus argues that Utah's Electronic Information or Data Privacy Act ("the Act") required suppression of evidence against him "[e]ven if the federal

[2] Andrus concedes that "the U.S. Attorney General's authority to issue subpoenas has been delegated to the FBI," but cites a twenty-year-old report suggesting that Supervisory Special Agents were not among the category of agents authorized as designees as of 2001. Aplt.Brf.26 n.16. Andrus provides no authority for the proposition that the Supervisory Special Agent who signed his subpoenas in 2020 was not an authorized designee with authority to issue subpoenas on behalf of the Attorney General, nor did he question FBI Technician on that issue. Regardless, only the subpoena recipients—not Andrus—would have had standing to raise this alleged defect. *See United States v. Gmoser*, 30 F.4th 646, 648 (7th Cir. 2022).

subpoenas were valid." Aplt.Brf.20; *see* Utah Code §§ 77-23c-101.1 to -105. Without analysis, Andrus presumes that the Act is intended to apply to the entire universe of possible ways that State law enforcement can access certain information, requiring various state-law processes and forbidding all other lawful avenues such as the state-federal cooperation that occurred here. Andrus's reading of the statute is inconsistent with its plain language and the legislature's intent as expressed in other statutory provisions.

Andrus ignores other provisions of the Utah Code that clearly authorize Utah law enforcement to use federal warrants and subpoenas to obtain electronic information. Utah Code section 77-23b-4 authorizes Utah governmental entities to require a provider to disclose the contents of stored electronic communications "pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant." Utah Code Ann. § 77-23b-4(1) (West 2019). It also authorizes Utah law enforcement to require the disclosure of "a record or other information pertaining to a subscriber to or customer of the service," via "an administrative subpoena authorized by a state *or federal* statute." *Id.* § 77-23b-4(3)(a)(ii) (emphasis added). Section 77-23b-4 was in effect when the Legislature enacted the Act in 2019.

Read against the backdrop of section 77-23b-4, which remains in effect, the Act does not preclude Utah law enforcement from utilizing federal warrant or subpoena processes when authorized by federal courts or statutes. Rather, it governs a closed system of state-law investigative processes—from ordinary subpoenas duces tecum, to investigative subpoenas and court orders, up to state-court warrants—and requires the State to employ the appropriate procedure when it uses its state-law authority to obtain certain electronic information or data for criminal investigations under those investigative processes. When the State obtains the same information via a lawful federal avenue without using the state-law processes governed by the Act, as authorized by Utah Code section 77-23b-4, there is no violation or circumvention of the Act. There is merely the lawful obtaining of information via an alternative lawful route, as occurred here with the lawful federal subpoenas. *See* Argument I.A, *supra*.

Looking just to state law, Utah law-enforcement agencies have a range of options available to obtain information from third-party sources such as the telecom and internet companies at issue in this case. The rules of civil and criminal procedure provide for subpoena duces tecum requiring the production of documents or electronic information. *See generally* Utah R. Civ. P. 45(a)(1)(C)(iii); Utah R. Crim. P. 14(c) (adopting consistent provisions of

civil rule 45 in criminal matters). Utah Code Title 77, Chapter 22, allows prosecutors to seek investigative subpoenas in formal court-authorized investigations, based on a showing "that the requested information is reasonably related to the criminal investigation authorized by the court." *See* Utah Code Ann. § 77-22-2(3) (West 2019). Law enforcement agencies investigating certain crimes, including child-sex crimes, can also obtain court orders for subscriber information when they have "reasonable suspicion that an electronic communications system or service or remote computing service has been used in the commission of a criminal offense." S*ee id.* § 77-22-2.5. And court-authorized search warrants are available upon a showing of probable cause to a court. *See generally* Utah R. Crim. P. 40.

In 2019, the Legislature enacted the Act to govern which of these state-law procedures must be employed to access various types of electronic data associated with telecommunication and internet use. *See* Utah Code Ann. §§ 77-23c-101.1 to -105 (West 2019).[3] The Act generally requires a warrant for law-enforcement access to "the location information, stored data, or transmitted data of an electronic device," "electronic information or data transmitted by the owner of the electronic information" to or through a

[3] The Act has been since been amended, but the original 2019 version was in effect at the time of Andrus's crimes and the subpoenas in this case.

remote computing service or electronic communication service, or any "record or information, other than a subscriber record, of a provider" of communication or remote computing services. *Id.* §§ 77-23c-102(1), -104(3).

For "subscriber record[s]" such as that at issue in this case—name, address, telephone number, and the like—a warrant is not required. *Id.* § 77-23c-104(1), (4). Rather, Utah law enforcement may proceed via investigative subpoena or court order under sections 77-22-2(3) and 77-22-2.5. *See id.* § 77-23c-104(2). Specifically, the Act provides, "Except as provided in Chapter 22, Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity, a law enforcement agency may not obtain, use, copy, or disclose a subscriber record." *Id.*

Thus, the Act provides a mandatory roadmap for Utah law enforcement use of state-law investigative powers to obtain covered electronic information. Most information requires a warrant with its probable cause showing to a judge or magistrate. Subscriber information is available from third-party providers via lesser means—the investigative subpoenas and court orders authorized in Title 77, Chapter 22. And none of the information governed by the Act can be obtained via ordinary subpoenas duces tecum under civil rule 45.

With no analysis whatsoever, Andrus reads the Act much more broadly, to encompass not just state-law investigative procedures but, rather, the entire universe of possible ways that state investigators might come into possession of electronic information. Aplt.Brf.16–17. Under Andrus's global reading, the Act not only requires Utah investigators using state-law procedures to obtain subscriber information via investigative subpoenas or court orders, it *forbids* them from accessing such information through any other avenue, even entirely lawful ones such as the federal subpoenas here. There is no reason to believe the Legislature intended the Act to sweep that broadly, particularly against the backdrop of Utah Code section 77-23b-4 and its express authorization of federal warrants and subpoenas.

When interpreting a statute, the "primary goal is to evince the true intent and purpose of the Legislature." *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863 (citation omitted). "The best evidence of the legislature's intent is 'the plain language of the statute itself.'" *Id.* (quoting *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92). But the Act contains no language, plain or otherwise, expressly delineating its scope. The absence of such language renders the statute potentially ambiguous on that point, and Court must therefore "resort to other methods of statutory interpretation."

Cardiff Wales, LLC v. Washington Cnty. Sch. Dist., 2022 UT 19, ¶ 23, 511 P.3d 1155 (citation omitted).

The Court may "look to the legislative history" in determining the Legislature's intent. *State v. Outzen*, 2017 UT 30, ¶ 22, 408 P.3d 334. Part of the legislative history of the Act is certainly the preexistence of Utah section 77-23b-4 and its express authorization of federal warrants and subpoenas. The Legislature's enactment of the Act without repealing or amending section 77-23b-4 and without expressly contradictory language should alone be dispositive that federal warrants and subpoenas remain a lawful option for Utah law enforcement, particularly when the investigations involve cooperative state-federal efforts like the Task Force here.

Additionally, according to the Act's legislative sponsor, "[t]he intention of this bill" was "to make clear that the protections in place for the paper world are also in place for the electronic world." House Judiciary Comm., H.B. 57, 63rd Leg., 2019 Gen. Sess. (January 31, 2019) (statements of Rep. Craig Hall). In the physical "paper world," nothing bars Utah authorities from cooperating with their federal and sister-state counterparts so long as that cooperation is otherwise lawful. Nothing that the State has been able to locate regarding the legislative history indicates a contrary intent regarding electronic information and other computer data.

Nor was such an intent apparently communicated to Utah's Task Force officers. Agent was unaware of any statutory limits on his actions with the Task Force, testifying that there was nothing unusual about using federal subpoenas to investigate Andrus in October 2020. R373. Indeed, as of the July 2021 suppression hearing, Agent still testified that he "commonly use[d]" the federal subpoena process. R373–74. Similarly, FBI Technician testified that she got federal subpoena requests "every day, all day" from the "25 to 30 task force guys" who were "all state," none of whom apparently thought that this was a violation of the Act. R405.[4] Even Andrus's own trial counsel did not at first claim the subpoenas violated the Act, initially seeking suppression as a matter of federal law and relying on the Act only after the State argued the legitimacy of the federal subpoena. R80–85, 293–96.[5]

Finally, and most persuasively, the Court's "absurd consequences canon" resolves ambiguity in statutory language "by choosing 'the reading that avoids absurd results.'" *Bagley v. Bagley*, 2016 UT 48, ¶ 27, 387 P.3d 1000

[4] FBI Technician did not specify that the "25 to 30 task force guys" were all Utah officers, rather than officers of other states, but that seems reasonably clear from the context of her testimony. R194.

[5] The State has also been unable to locate any contemporaneous media accounts documenting Andrus's proposed interpretation of the Act and its significant implications for the detection and prosecution of child-sex crimes in Utah.

(quoting *Utley v. Mill Man Steel, Inc.*, 2015 UT 75, ¶ 46, 357 P.3d 992 (Durrant, C.J., concurring)). Andrus's global interpretation would hamstring the function of the state-federal task forces that are prevalent in today's law-enforcement environment. The cooperation of those task forces helped identify Andrus as Laura's exploiter in this case. Limiting that cooperation would be an absurd result given Utah's strong interest in identifying and prosecuting child-sex criminals.

But Andrus's interpretation would prevent more than that. If Utah law enforcement literally could not "obtain, use, copy, or disclose a subscriber record" that is initially obtained via a lawful non-Utah subpoena, then they cannot receive that information from the federal government or a sister state, *even if* the other jurisdiction acted entirely on their own and discovered a Utah crime via lawful access to subscriber records. Utah Code Ann. § 77-23c-104(2). Instead, Utah authorities would have to initiate a new subpoena or warrant to access the same information that the other jurisdiction had lawfully obtained. In this case, Andrus could arguably have sought to suppress his "transmitted data" in the form of his Snapchat messages to Laura, because Utah officers obtained that data from Laura's phone rather than via "a search warrant issue by a court upon probable cause." *Id.* § 77-23c-102(1)(a); State's Exh. 1.

These are absurd results that are not mandated or even suggested by the statutory language of the Act. They are also inconsistent with Utah Code section 77-23b-4's express authorization of federal warrants and subpoenas in the electronic-communications context, as well as the sponsor's expressed intent that electronic data be treated coequally with data obtained in the physical world. The Court should interpret the Act as the roadmap for use of state-law provisions it is apparently intended to be and decline Andrus's offer to bar Utah officers from obtaining electronic information via the same lawful methods they can employ in the physical world.[6]

C. There is no prejudice because the challenged evidence adds little to Laura's unchallenged trial testimony and Andrus's messages to Laura corroborating that testimony.

Whatever the proper scope of the Act, it is not ambiguous about its exclusion remedy. Information, data, or records "that are obtained in

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[6] Andrus also argues that a violation of the Utah Constitution occurred in this case. Aplt.Brf.21–28. However, his constitutional argument is entirely dependent on the establishment of a statutory violation. He concedes that there is no constitutional violation "when the state acts under a *valid* warrant or subpoena." Aplt.Brf.25 (quoting *Schroeder v. Utah Att'y Gen.'s Off.*, 2015 UT 77, ¶ 22, 358 P.3d 1075). The State relies on its statutory arguments to establish the validity of the federal subpoena in this case and, thus, the absence of a Utah constitutional violation. But even if Andrus could establish a statutory violation, he would still have to convince the Court that the public-facing communication tools he used to meet and exploit Laura are entitled to the same constitutional expectation of privacy as are the bank records that the Court analyzed in *State v. Thompson*, 810 P.2d 415, 416 (Utah 1991). Andrus has not even attempted to make that showing.

violation of the provisions of [the Act] shall be subject to the rules governing exclusion as if the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14." Utah Code Ann. § 77-23c-105 (West 2019). But even if the district court erred in not suppressing evidence under the Act, Andrus is not entitled to relief unless that error "was harmful—i.e., 'there is a reasonable likelihood that, absent the error, there would have been a result more favorable to [him].'" *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 42 n.32, 428 P.3d 1038 (citation omitted).

Andrus claims the court should have suppressed "testimony about the subpoena process and the evidence obtained from the subpoenas (including [Andrus's] identity, the location and search of his home, and his arrest)." Aplt.Brf.34. The jury would thus not have heard that Andrus's subscriber records bolstered Laura's identification of him as "Timothy," nor would it have heard about evidence found in the search of his house. Aplt.Brf.32–34. Andrus posits that suppression of this evidence would have resulted in three of the State's four law-enforcement witnesses not testifying at all and would have "limited" Detective's testimony about her investigation. Aplt.Brf.34. Thus, according to Andrus, "[t]he State's case would have been limited to Laura and her credibility before the jury." Aplt.Brf.34.

Even if Andrus could suppress all the evidence he claims flowed from the alleged violation of the Act, there is no reasonable likelihood of a different result here. The unchallenged evidence provides compelling proof of his guilt, to which the challenged evidence adds very little. Andrus concedes in his brief that Laura's trial testimony, including her in-court identification, was admissible regardless of the alleged subpoena problem.[7] Aplt.Brf.32–34. Further, Andrus's own explicit Snapchat messages to Laura in October 2020, which he has not challenged, substantially confirm Laura's uncontradicted version of events. The additional information obtained from the search warrants, and even the subpoena results themselves, added little to Laura's credibility that Andrus's messages did not.

Without the challenged evidence, the jury would still have heard Laura's sworn testimony about her four-month physical relationship with

[7] Andrus's concession that Laura could identify him in court is well-taken as a constitutional matter. The Supreme Court has declined to suppress in-court identifications, even if the defendant's identity is only discovered via a constitutional violation. *See United States v. Crews*, 445 U.S. 463, 471–74 (1980) ("Respondent is not himself a suppressible 'fruit,' and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct."); *see also I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred.").

Andrus. That testimony was uncontradicted—this is not a "he said, she said" case, as the jury *only* heard Laura's version of events. Her testimony recounted her four-month relationship with Andrus, from meeting him online to their final physical encounter at his home in Summit County. Laura described Andrus's multiple sex acts with her over that period, requesting explicit photos and video from her, and providing her with marijuana. R1098–1119. Based on this intimate familiarity with Andrus, Laura identified him in court as the man who had sexually exploited her for months under the pseudonym "Timothy." R1116.

Andrus's subsequent Snapchat messages to Laura in October 2020 confirm multiple aspects of her testimony. State's Exh. 1. In addition to explicit requests for additional sex acts, the messages strongly corroborated Laura's testimony about prior sex with Andrus ("I want to have you over for another sleepover"; "I won't have a roommate this time so we can be loud"; "Do you miss what we do?"); his requests for nude pictures to ejaculate to ("send me a selfie . . . daddy can bust to that for now"; "Got any good ones saved baby?"; "Can you send me some sexy pics please babe?"); his video masturbation ("I really need to cum can you watch me"); his provision of marijuana ("maybe we could hang out sometime and smoke"; "Do you still

use puff bars?"); and his offers of money ("I can give you some ya Gas money since it's far"). State's Exh. 1.

Nothing that Andrus claims should have been excluded under the Act added much to the combined effect of Laura's testimony and Andrus's corroborative messages. *See* Aplt.Brf.32–33. The State's brief summaries of the subpoena process explained to the jury *how* Laura came to know that "Timothy's" real name was Andrus, but they added nothing to her sworn testimony identifying Andrus in court as the man she had an illicit sexual relationship with for several months. R949–51, 1067–72. The discovery of marijuana and an alcohol flask in Andrus's home months after the relationship somewhat supported Laura's description of Andrus giving her marijuana over their relationship, but no more than his own messages suggesting that they get together again to hang out and "smoke" and asking if she "still use[d] puff bars." State's Exh. 1.[8] Even the discovery of Laura's underwear in Andrus's house provided little confirmation of Laura's

[8] "Puff Bar" is a particular brand of electronic cigarette. *Puff Bar*, Wikipedia, https://en.wikipedia.org/wiki/Puff_Bar (last visited February 20, 2024). From the context, it appears Andrus is referring to vaping more generally, consistent with the THC "carts" Laura described at trial. R1117–18.

allegation of sex with Andrus at his home that his own sexualized descriptions of "another sleepover" didn't provide. State's Exh. 1.[9]

In sum, even if Andrus could obtain the exclusion of all of the evidence he claims flowed from the alleged violation of the Act, there is no reasonable likelihood that he would have been acquitted on any of the charges supported by Laura's detailed and unchallenged testimony identifying Andrus and describing his criminal conduct. Andrus not only failed to contradict Laura, but his later messages corroborated their sexual relationship, his requests for nude photos, and his prior provision of marijuana. While the challenged evidence added to the narrative, there is no "reasonable likelihood" that exclusion of that evidence would have changed the result. *See Martinez-Castellanos*, 2018 UT 46, ¶ 42 n.32 (citation omitted). There is therefore no

[9] Andrus also complains that the jury heard evidence of Andrus's flight from his initial encounter with police and efforts to avoid apprehension by U.S. Marshals. Aplt.Brf.33; R692–93, 945–56. These later independent acts by Andrus are almost certainly attenuated from the alleged violation of the Act that occurred weeks earlier. *See, e.g.*, *United States v. Bailey*, 691 F.2d 1009, 1016–17 (11th Cir. 1982) ("[N]otwithstanding a strong causal connection in fact between lawless police conduct and a defendant's response, if the defendant's response is itself a new, distinct crime, then the police constitutionally may arrest the defendant for that crime."). Nevertheless, Andrus's attempts to avoid justice added little to the evidentiary picture of the specific crimes for which he was convicted, especially when compared to Laura's testimony and his explicit messages to her. State's Exh. 1.

prejudice from the admission of the evidence even if it should have been excluded under the Act. *See id.*

II.

Andrus identifies no insufficiency of the evidence supporting his convictions for human trafficking of a child, sexual exploitation of a child, and distribution of a controlled substance.

Andrus contends that the district court erred in denying his motion to arrest judgment on his convictions for human trafficking of a child and sexual exploitation of a minor. He also contends that the court erred in denying his motion for directed verdict on the charge of distribution of a controlled substance.

This Court will "reverse the denial of a motion to arrest judgment only if the evidence, viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." *State v. Miller*, 2023 UT 3, ¶ 50, 527 P.3d 1087 (citation omitted). The Court's verdict-favorable review includes not only the trial evidence, but also "all reasonable inferences drawn therefrom." *State v. Steed*, 2014 UT 16, ¶ 15, 325 P.3d 87 (citation omitted). Similarly, "a defendant seeking a directed verdict must show that, when viewed in the light most favorable to the State, *no evidence existed* from which a reasonable jury could find beyond a

reasonable doubt that the defendant committed the crime." *State v. Stricklan*, 2020 UT 65, ¶ 30, 477 P.3d 1251 (citation and internal quotation marks omitted).

If "some evidence exists from which a reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt," the denial of the motion to arrest judgment or for directed verdict must stand. *Miller*, 2023 UT 3, ¶ 50 (citation omitted). The State's evidence adequately supported each of the challenged convictions, and Andrus identifies no error in the court's rulings below.

A. Andrus's offers of marijuana, money, and other things for Laura to continue having sex with him adequately support his conviction for human trafficking of a child.

The jury convicted Andrus of human trafficking of a child after Laura testified that he gave her marijuana during their encounters for sex and offered her marijuana, money, lodging, and even a car to continue having sex with him "when [she] didn't want to." R1104–10. Andrus contends that the district court erred when it would not arrest judgment for the human-trafficking conviction, arguing that the State failed to prove that "anything of value was given or received (as opposed to merely offered) on account of a sexual act with a child." Aplt.Brf.35–42.

The district court correctly denied Andrus's motion to arrest judgment for two reasons. First, human trafficking of a child includes the *solicitation* of a child for sexual exploitation, which encompasses the offers of money and other things for continued sexual liaisons with a child that Laura described at trial. R1109–10. Second, even if Andrus was correct that human trafficking requires the actual giving or receipt of value, Laura's testimony supported a reasonable inference that Andrus actually gave her marijuana or money because of the sexual acts in which the two continued to engage. R1104, 1108–10. In light of this evidence, the district court correctly denied Andrus's motion to arrest judgment on his conviction for human trafficking of a child.

Under the statute in effect at the time of Andrus's charged acts, a person committed human trafficking of a child if the person "recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation." Utah Code Ann. § 76-5-308.5(2) (West 2019). "Child" meant "a person younger than 18 years of age." *Id.* § 76-5-307(1). Sexual exploitation included "all forms of commercial sexual activity with a child." *Id.* § 76-5-308.5(3)(b). And commercial sexual activity with a child meant "any sexual act with a child, on account of which anything of value is given to or received by any person." *Id.* § 76-5-308.5(1). The jury was instructed accordingly, and it convicted Andrus on the human trafficking count. R573,

598. Andrus challenged his human-trafficking conviction in a post-trial motion to arrest judgment, which the district court denied. R1773–78; 1936–38.

Andrus argues that human trafficking of a child requires proof that something of value was actually given or received on account of sex with a child. Aplt.Brf.36–40. But the plain language of section 76-5-308.5 imposes no such requirement. Rather, the crime is complete once a person "recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation." Utah Code Ann. § 76-5-308.5(2).

There is no statutory requirement that child sexual exploitation actually occur. Child sexual exploitation, whether shown by commercial sexual activity or otherwise, is only an element of the crime to the extent that it must be proved as the objective for which a trafficker "recruits, harbors, transports, obtains, patronizes, or solicits a child." Utah Code Ann. § 76-5-308.5(2). As the State argued below, "The actus reus in this statute is the recruitment, harboring, transporting, obtaining, patronizing, or soliciting of a child. The State must show the purpose of those acts was for sexual exploitation, but not that sexual exploitation occurred." R1796.

The Court rejected Andrus's premise to the contrary years ago in *State v. Gates*, 221 P.2d 878 (Utah 1950), when it held that a similar crime involving

encouragement of prostitution was completed upon the solicitation of unlawful sexual conduct. The governing statute provided, in relevant part, "Any person who encourages a female person to become a prostitute is guilty of pandering." *Id.* at 880. A jury convicted Gates of pandering after he offered a woman employment as a prostitute, even though no act of prostitution ever took place because the "young lady did not accept the proffered job." *Id.* at 879. Similar to Andrus here, Gates argued that the statute "does not provide that it is a crime to try to induce or persuade or encourage a female to become a prostitute, but requires that the female not being a prostitute change her condition and become one because of the acts charged." *Id.*

The Court disagreed, noting that statutes "such as" the pandering statute "are meant to discourage the nefarious activities of persons who seek to foster immorality and prostitution." *Id.* at 880. Under the pandering statute, "the crime is complete when a person 'encourages a female person to become a prostitute.' Success is not a necessary component of the crime." *Id.* "It is the act of encouragement, persuasion or inveiglement which is forbidden." *Id.* Therefore, "solicitation of unlawful intercourse, even though refused, is sufficient to complete the crime." *Id.*

Gates's rationale applies equally to the human trafficking statute here. Andrus conceded below that he was "*not* contesting" the evidence

supporting the actus reus of element human trafficking of a child, which he referred to as the "solicitation element." R1819–20, 1929. Just as the pandering statute in *Gates* did not require the woman to "actually become" a prostitute, 221 P.2d at 880, the human trafficking statute does not require that sex with a child, or the giving or receipt of value on account thereof, actually occur, *see* Utah Code Ann. § 76-5-308.5. Rather, Andrus's crime was "complete" once he solicited Laura for sexual exploitation, regardless of whether there was ultimately any transfer of value on account of their sexual activity. *Gates*, 221 P.2d at 880.

Thus, Laura's testimony that Andrus offered her marijuana and money, as well as a car and lodging, "to try to convince [her] to do sexual things when [she] didn't want to," was sufficient evidence to defeat an arrest of judgment for the conviction of human trafficking of a child. R1110; *see also* R1109 (The State asked Laura, "When he would offer things to you, would he ever ask for anything in return for things that he gave you?", and Laura answered, "Yes," and testified that Andrus "would ask for sexual acts" in return for those things).

Although no actual transfer of value is required, the evidence and inferences here also support a finding that Andrus actually gave Laura things of value in exchange for sex. Laura testified that Andrus gave her marijuana

the first time the two met, when Andrus requested a "hand-job" in his car. R1104, 1117. Andrus then brought her marijuana *at least* one more time in the "multiple times" they met up for sex acts in the parking lot of her dad's house. R1108. Laura didn't remember Andrus messaging her about bringing her marijuana, but he would message her with offers to "give [her] marijuana." R1108–09.

Viewed in the light most favorable to the State, and applying reasonable inferences, Laura's testimony supports a finding that Andrus didn't just offer, but also gave her marijuana or money "on account of" the illicit sexual acts he engaged with her in over the course of four months. Utah Code Ann. § 76-5-308.5(1). Laura's testimony was that Andrus had access to and actually gave her marijuana at the beginning of, during, and at the end of their physical relationship; that he offered her marijuana and money to continue having sex with her over the course of that relationship; and agreed that Andrus "gave" her things "when he would offer things to [her]" and asked for sex acts in return.

It is a reasonable inference that the things—plural—Andrus "gave" Laura expecting sex in return *included* the marijuana or money that Andrus offered her to continue having sex with him. This could have occurred one of the times Laura expressly described or, inferentially, when Andrus followed

through on one or more of his offers. A jury could reasonably infer from this evidence that Andrus actually gave Laura "anything of value," "on account of" their ongoing sexual acts. Utah Code Ann. § 76-5-308.5(1).[10]

In sum, the mere evidence that Andrus solicited Laura for sexual exploitation by offering her things of value to continue having sex with him adequately supports his conviction for human trafficking of a child. The evidence additionally supports a finding that Andrus followed through with his offers and actually gave Laura marijuana or money to continue having sex. Under either theory or both, the district court committed no error in refusing to arrest judgment on human trafficking of a child. *See Miller*, 2023 UT 3, ¶ 50.

B. Andrus's requests that Laura send him nude images and masturbate over videochat, both of which she did, adequately support his conviction for sexual exploitation of a minor.

The jury convicted Andrus of one count of sexual exploitation of a minor on the theory, as stated in the jury instructions, that he knowingly produced child pornography by directing Laura to create sexually explicit

[10] Andrus concedes in his brief that marijuana "may have value," but complains that the State never proved how much value the marijuana had. Aplt.Brf.40. The statutory element "anything of value" imposes no such requirement. Utah Code Ann. § 76-5-308.5(1). In any event, the jury was entitled to evaluate the overall circumstances and infer that the quantity of marijuana or money given or offered had enough value—i.e., *some* value—to induce Laura to engage in sexual activity with Andrus.

images of herself. R576. He contends that the district court should have arrested judgment because the State's evidence failed to establish that he directed Laura to create sexually explicit images of herself (as opposed to sending him pre-existing nude photos). Aplt.Brf.43–47.

Again, Andrus is wrong for two reasons. First, Laura expressly testified that Andrus "would have me take off my clothes" and masturbate for him over video chat, thereby satisfying the statutory definition of producing child pornography. R1106, 1116. Second, the jury could reasonably infer that Andrus's requests for nude photos were knowing requests for Laura to take nude pictures of herself to send to him, which the jury could also reasonably infer that she did. R1105. Each of these theories independently supports Andrus's conviction for sexual exploitation of a minor by directing Laura to create sexual images of herself, thereby producing child pornography.

Under the controlling statutes, sexual exploitation of a minor is committed when a person "knowingly produces" child pornography. Utah Code Ann. § 76-5b-201(1) (West 2019); R576–77. "Produce" includes "the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography." Utah Code Ann. § 76-5b-103(9)(a). "Child pornography" includes "any visual depiction, including any live performance, photograph, film, video, [or] picture, . . . of sexually explicit

conduct," where "the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct" or "the visual depiction is of a minor engaging in sexually explicit conduct." *Id.* § 76-5b-103(1). And "sexually explicit conduct" includes actual or simulated "masturbation," "lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person," and "visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person." *Id.* § 76-5b-103(10). The jury instructions correctly stated these provisions and required a finding that Andrus knowingly produced child pornography, "[t]o wit, [he] directed [Laura] to create sexually explicit images of herself." R576–77. So instructed, the jury convicted Andrus of sexual exploitation of a minor.

Andrus challenged this conviction in a post-trial motion to arrest judgment, which the district court denied. R1778–81; 1936–38. Again, the Court will disturb that ruling only if the evidence and all reasonable inferences therefrom, "viewed in the light most favorable to the verdict, is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element." *Miller*, 2023 UT 3, ¶ 50 (citation omitted); *see Steed*, 2014 UT 16, ¶ 15. Here, Andrus's successful requests for live video masturbation and nude

photos each adequately support the jury's finding that he produced child pornography.

Laura testified that she regularly masturbated for Andrus at his direction, "through video chat on Snapchat." R1106, 1116–17. Andrus would send her videos of him masturbating, and the two would "video call" each other. R1105–06. Laura testified, "He would have me take off my clothes and video—and touch myself on the video." R1106. This happened regularly, probably every week or even every day. R1106. Laura later reiterated that when she and Andrus would "video chat online," he would ask her to take off her clothes and ask her "to masturbate." R1116. She "[d]id that for him" multiple times. R1116–17. And of course, all of this was in the context of the sexually exploitative relationship between the 16-year-old Laura and the 34-year-old Andrus, which included Andrus giving her marijuana and offering her marijuana and other things for continued sexual activity. R1104–1110.

The requested video masturbation is ample evidence of Andrus producing child pornography, under both the statutory language and the jury instruction. By "hav[ing]" Laura undress and touch herself on video, and by asking her to undress and masturbate while they were video-chatting,

Andrus was producing child pornography by "directing" Laura's video performances. Utah Code Ann. § 76-5b-103(9)(a).[11]

These actions also satisfied the jury instruction's requirement that Andrus "directed [Laura] to create sexually explicit images of herself." R576. Contrary to Andrus's argument on appeal, the instructions use of the word "images" did not limit the jury's consideration only to still images. Rather, the "sexually explicit images" language is an apparent reference to the list of media types in the immediately following definition of child pornography: "any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture." R576. If the district court and the parties intended the instruction to exclude video images, they could have drafted it to clearly say so; instead, counsel below approved the existing instruction, and Andrus does not challenge the instruction itself on appeal. R754–55.

Laura's express video-masturbation testimony thus provides "some evidence" of Andrus's production of child pornography and therefore

[11] Andrus's directions that Laura perform various sexually explicit acts on video could also be characterized as "designing" or "composing" child pornography. Utah Code Ann. § 76-5b-103(9)(a).

defeats his challenge to the district court's denial of his motion to arrest judgment. *Miller*, 2023 UT 3, ¶ 50 (citation omitted).

Andrus also identifies and challenges an alternative theory of child-porn production—that he successfully asked Laura to send him nude photographs. Aplt.Brf.45–47. According to Andrus, this theory cannot support his sexual-exploitation conviction because the State "did not ask Laura about the creation of the nude photographs." Aplt.Brf.45. "Laura did not testify that she created nude photographs of herself at [Andrus's] direction," and "did not even testify that she created nude photographs of herself after [Andrus's] request," as opposed to having "previously taken them prior to his request." Aplt.Brf.45.

The Court need not reach this issue because the video production discussed above is sufficient to defeat this claim. But the evidence also supports a reasonable inference that Andrus produced child pornography by having Laura take nude photos of herself and send them to him so he could "ejaculate to them." R1105. Andrus's argument to the contrary ignores the reasonable inferences that can be drawn from Laura's testimony. *See Steed*, 2014 UT 16, ¶ 15. That testimony supports the reasonable inference that Laura took nude photos herself over the course of the four-month physical

relationship, at Andrus's request, consistent with his later October 2020 request for "a snap of you today." State's Exh. 1.

Laura testified that Andrus would ask her for "nude photos" of herself, and that she sent him nude photos. R1105. He told her he "wanted to ejaculate to them." R1105. Later, when Andrus was messaging Laura in October 2020, he made similar requests. State's Exh. 1 ("send me a selfie . . . daddy can bust to that for now"; "Got any good ones saved baby?"; "Can you send me some sexy pics please babe?"). When Laura explained that she had deleted her prior photos, Andrus asked her to take a new one, "Like a snap of you today." State's Exh. 1.

Laura had just turned sixteen years old when she met Andrus in September 2019. R1096, 1098–99. There is no evidence that she, particularly at that age, had existing nude photos of herself available to send Andrus—much less a multi-month supply—before he began asking for them. Absent such evidence, there is a reasonable inference that she instead took nude "selfies" at his request. The jury could reasonably consider the taking of nude photos to be within the realm of the "sexual things" for which Andrus offered and likely gave her marijuana and money. R1109–10. Her descriptions of the repeated explicit video chats, as well as Andrus's subsequent request for a current "snap," suggest Andrus's desire for current, particularized images

that would arouse him, i.e., so he could "ejaculate to them." R1105; State's Exh. 1. And Andrus was clearly not shy about telling Laura what he wanted from her—she described him having her disrobe and masturbate for her on video nearly "every day," and his subsequent messages included multiple explicit sexual propositions. R1106, 1116; State's Exh. 1.

Taking the evidence in the light most favorable to the jury's verdict, and applying reasonable inferences, there was at least "some evidence" that Andrus produced child pornography by directing Laura to take the nude selfies that she sent him. *See Miller*, 2023 UT 3, ¶ 50 (citation omitted). This provides an independent reason that the Court must affirm the district court's refusal to arrest judgment on Andrus's sexual-exploitation conviction.

C. Andrus giving and offering Laura marijuana on multiple occasions adequately supports his conviction for distribution of a controlled substance.

Andrus was convicted of one count of distribution of a controlled substance based on Laura's testimony that he gave and offered her marijuana on multiple occasions. R576, 868, 1104–10. He contends that the district court should have directed a verdict on this count because Laura's "simple testimony" was insufficient to prove that Andrus distributed marijuana. Aplt.Brf.48. Andrus is wrong because Laura's knowledgeable firsthand

testimony described Andrus giving or offering her marijuana on multiple occasions. R1104–10.

At the time of Andrus's charged acts, a person committed distribution of a controlled substance by knowingly or intentionally "distribut[ing]" or "offer[ing] to distribute" a controlled substance, including marijuana. *See* Utah Code Ann. § 58-37-8(1)(a)(ii), (b)(ii) (West 2019). "Distribute" meant "to deliver other than by administering or dispensing a controlled substance or a listed chemical." *Id.* § 58-37-2(1)(o). Andrus's jury was instructed accordingly. R578–79.

Andrus demonstrates no error in the district court's mid-trial denial of his directed-verdict motion on this count. The State's evidence—primarily Laura's firsthand testimony—was more than adequate to establish that Andrus gave or offered her marijuana in Davis County as charged.[12]

[12] Andrus accurately states that the only physical drug evidence was marijuana found in Andrus's house in Summit County months after Laura was there, which may or may not have belonged to Andrus. Aplt.Brf.52–53. The district court instructed the jury that it could consider "evidence and testimony about events and things" in Summit County "to support the charged offenses, [but] the acts charged must be found to have occurred in Davis County." R570. Thus, although it is irrelevant to the directed-verdict analysis, there was no danger that Andrus was ultimately convicted for giving Laura marijuana in Summit County.

Despite her youth, Laura had used marijuana and was familiar with the drug and its effects by the time she met Andrus. She was "smoking marijuana" at a friend's house when she first met Andrus online. R1099. Detective testified that Laura described being "high" at the time. R976. Andrus's counsel emphasized this familiarity to the district court during his directed-verdict motion: "The evidence shows by the way that she is perfectly capable and apparently often does possess marijuana herself. She was high when she instigated all of this . . . ." R1560. And the Court has recognized that a drug user's own testimony provides an "evidentiary basis" for a finding that the witness was using the drug as described. *See State v. Garcia*, 2017 UT 53, ¶ 64, 424 P.3d 171 ("Garcia's statements demonstrate that there was an evidentiary basis for the jury to conclude that Garcia was a user of cocaine.").

Laura went on to describe Andrus giving or offering her marijuana on multiple occasions. The first time was the first time they met in person. R1104. She testified that Andrus brought marijuana to the meeting, gave some to her, and that she smoked marijuana on that occasion. R1104. Andrus would come to Davis County to meet Laura for sexual activity, and at least once during "those times" he brought her marijuana. R1108. Andrus messaged her offering "to give me a car, give me money, give me marijuana." R1109. He offered her marijuana "to try to convince [her] to do sexual things when [she]

didn't want to." R1110. Laura also described using marijuana the one time she was at Andrus's house in Summit County. R1112. Police later found marijuana and electronic cigarette cartridges in Andrus's house. R1074–76; State's Exhs. 3–5. Laura identified the cartridges as visually similar to the "carts"—cartridges "filled with THC"—that Andrus "would give [her]." R1117–18.[13]

Taken as a whole, Laura's testimony expressly described at least one instance of actual distribution in Davis County—when Andrus gave her marijuana at their first physical meeting—and at least one instance of Andrus offering her marijuana before their final meeting in Summit County. R1104. Inferentially, the jury could also conclude that Andrus "would give" her "carts" on occasions other than her single visit to his Summit County house, where she only described using marijuana. R1112, 1117–18. And Laura twice described him offering her marijuana during the relationship, before her only visit to Summit County. R1109–10.

On review of the denial of a directed-verdict motion, the Court's "sufficiency of the evidence inquiry ends if there is some evidence, including

[13] Agent also testified, with no objection from Andrus, that Laura "had reported that [Andrus] had provided her with marijuana multiple times." R1074.

reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *State v. Pierce*, 2022 UT 22, ¶ 32, 511 P.3d 1164 (citation omitted). Because Laura's testimony provided "some evidence" that Andrus gave her marijuana in Davis County, and "some evidence" that he offered her marijuana in Davis County, the Court must affirm the district court's denial of a directed verdict on distribution of a controlled substance. *See id.*

III.

The district court properly admitted the Summit County evidence as narrative evidence that completed the story of Andrus's illicit relationship with Laura.

Finally, Andrus contends that the district court erred in admitting evidence pertaining to Andrus's home in Summit County, when the charged acts all occurred in Davis County. Andrus contends that the Summit County evidence was "other acts" evidence barred by rule 404(b), Utah Rules of Evidence. Aplt.Brf.54-63. The district court did not abuse its broad discretion when it agreed with the State that this was narrative evidence, admissible to tell the complete story of Andrus's illicit relationship with Laura over time.

The Court has recognized that rule 404(b) does not govern other-acts evidence that "is part of the continuing narrative rather than an independent act." *State v. Lucero*, 2014 UT 15, ¶ 14 n.7, 328 P.3d 841, *abrogated on other grounds by State v. Thornton*, 2017 UT 9, ¶ 53, 391 P.3d 1016. This is so because

rule 404(b) applies only "to evidence that is *extrinsic* to the crime charged." *Id.* (quoting *United States v. Mower*, 351 F.Supp.2d 1225, 1230 (D. Utah 2005)). If the other-acts evidence is "'inextricably intertwined' with the crime that is charged," or if all of the acts are considered "part of a single criminal episode," then rule 404(b) does not apply. *Id.* (quoting *Mower*, 351 F.Supp.2d at 1230). Rather, such acts are "considered part of the case narrative and have important probative value that bears directly on the crime charged." *Id.*; *see United States v. Bush*, 944 F.3d 189, 196 (4th Cir. 2019) (evidence is intrinsic when it "complete[s] the story of the crime on trial." (citation omitted)).

Here, Andrus was charged with a human trafficking count that potentially encompassed the whole of the illicit relationship, not just the charged sexual acts in Davis County. As discussed above, the State presented evidence that Andrus solicited Laura for sexual activity by offering her money, a car, and more marijuana "to continu[e] doing acts with him." R1110. Most of those acts occurred in Davis County; only the final sexual encounter was in Summit County. R1108, 1112–14. "Evidence of uncharged conduct arising out of the same series of transactions as the charged offense" is not "subject to scrutiny under Rule 404(b)." *United States v. McBride*, 676 F.3d 385, 396 (4th Cir. 2012); *see United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) ("Rule 404(b) is not implicated when the other crimes or wrongs evidence is

part of a continuing pattern of illegal activity."). Thus, evidence about Andrus's final exploitative sexual encounter with Laura is not excludable as "other act" evidence merely because it occurred in a different county than the similar charged acts in Davis County and fell outside the current prosecution for that reason.

The Summit County evidence is also intrinsic to the charged conduct because it "complete[s] the story" of the illicit relationship between Andrus and Laura over the charged period. *Bush*, 944 F.3d at 196 (citation omitted). As the State argued below in support of admission of the evidence, "when we have a case involving a four-month long illegal sexual relationship, we're going to describe that sexual relationship from its inception to its end." R1888. The end of the sexual relationship was the final Summit County encounter between Laura and Andrus. R1112–14. The existence and details of that final encounter gave context and meaning to the later messages between Andrus and Laura, discussing Andrus's desire for "another sleepover" and Laura's expressed inability to remember how to get to his house.[14] And evidence found at Andrus's house—particularly a pair of underwear that Laura

[14] The district court excluded any mention of Laura's allegation that the visit to Andrus's house ended with an act of nonconsensual sex, which formed the basis of the dismissed Summit County rape charge. R1898.

described Andrus taking and keeping—had "important probative value that bears directly on the crime[s] charged" because it corroborated the sexually exploitative relationship that Laura generally described at trial. *See Lucero*, 2014 UT 15, ¶ 14 n.7; R1113; State's Exh. 6.

In sum, the Summit County evidence was not other-acts evidence under rule 404(b), because it described one final sexual transaction in the overall illicit relationship that already formed the charges against Andrus, and because it "complete[d] the story" of Andrus's crimes and the "circumstances surrounding" those crimes. *Bush*, 944 F.3d at 196 (citations omitted). The district court acted within its discretion in admitting the evidence as "narrative" evidence of the four-month sexual relationship that formed the basis of the charges against Andrus. *Lucero*, 2014 UT 15, ¶ 14 n.7.

Even if Andrus could establish error in the court's narrative-evidence ruling, he fails to establish prejudice, i.e., "'a reasonable likelihood of a more favorable result' for the accused had the error not occurred." *State v. Lopez*, 2018 UT 5, ¶ 61, 417 P.3d 116 (citation omitted). He makes no showing that any of the Summit County evidence would have been excluded under rule 404(b) had the court not admitted it as narrative evidence. His only argument to that effect is that the State essentially defaulted any 404(b) argument by "not identify[ing] any non-character purpose for admitting that evidence"

and relying instead on the claimed intrinsic nature of the evidence. Aplt.Brf.59–60.

Andrus's characterization of the State's argument below is incomplete. The State argued that the other-acts evidence was intrinsic, but in the alternative offered "that evidence pursuant to Rule 404(b) as evidence of motive, modus operandi, intent, identity, and to rebut claims of fabrication." R485. Andrus's argument that the State failed to identify non-character purposes for admission is thus not supported by the record, and he makes no other argument that the evidence would have been excluded under rule 404(b) had the district court reached that issue. Because Andrus fails to demonstrate that any of the Summit County evidence would have been excluded, he fails to meet his "burden of showing harmfulness." *State v. Argueta*, 2020 UT 41, ¶ 44, 469 P.3d 938, *abrogated on other grounds by State v. Green*, 2023 UT 10, ¶ 59, 532 P.3d 930.

Andrus also fails to show that exclusion of any or even all of the Summit County evidence was reasonably likely to alter the result here. Identity was not an issue, as Laura was intimately familiar with Andrus and identified him at trial. And even in the absence of the Summit County evidence, Andrus's sexually explicit messages to Laura in October 2020 substantially corroborated her overall story of sexual exploitation. State's

Exh. 1. In addition to explicit requests for additional sex acts, the messages strongly corroborated Laura's testimony about prior sex with Andrus ("I want to have you over for another sleepover"; "I won't have a roommate this time so we can be loud"; "Do you miss what we do?"); his requests for nude pictures ("send me a selfie . . . daddy can bust to that for now"; "Got any good ones saved baby?"; "Can you send me some sexy pics please babe?"); his video masturbation ("I really need to cum can you watch me"); his provision of marijuana ("maybe we could hang out sometime and smoke"; "Do you still use puff bars?"); and his offers of money in relation to their liaisons ("I can give you some ya Gas money since it's far"). State's Exh. 1. The jury was thus likely to continue to believe Laura's uncontradicted version of events even without the Summit County evidence.

In sum Andrus fails to establish error in the district court's narrative-evidence ruling, fails to establish that any of the Summit County evidence would have been excluded under rule 404(b) had the district court reached the State's alternate argument, and fails to establish that exclusion of Summit County evidence was reasonably likely to have changed the result.

CONCLUSION

Andrus identifies no reversible error as to any of his convictions, and the Court should affirm the judgment below.

Dated February 20, 2024.

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CERTIFICATE OF COMPLIANCE

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/s/ *Jonathan S. Bauer*
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Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on February 20, 2024, the Brief of Appellee, including any addenda, was filed with the Court by email in a searchable PDF attachment and served upon appellant Dustin Giles Andrus's counsel of record at:

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/s/ *Melanie Kendrick*

* No more than 7 days after filing by email, the State will file with this Court the required number of paper copies of the brief and any addenda (six to Court of Appeals or 8 to Supreme Court). Upon request, the State will serve two paper copies thereof to the appellant's counsel of record. *See* Utah R. App. P. 26(b).

Addenda

Addendum A

Utah Code Ann. § 58-37-2. Definitions (2019)

(1) As used in this chapter:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(i) a practitioner or, in the practitioner's presence, by the practitioner's authorized agent; or

(ii) the patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or practitioner but does not include a motor carrier, public warehouseman, or employee of any of them.

(c) "Consumption" means ingesting or having any measurable amount of a controlled substance in a person's body, but this Subsection (1)(c) does not include the metabolite of a controlled substance.

(d) "Continuing criminal enterprise" means any individual, sole proprietorship, partnership, corporation, business trust, association, or other legal entity, and any union or groups of individuals associated in fact although not a legal entity, and includes illicit as well as licit entities created or maintained for the purpose of engaging in conduct which constitutes the commission of episodes of activity made unlawful by Title 58, Chapter 37, Utah Controlled Substances Act, Chapter 37a, Utah Drug Paraphernalia Act, Chapter 37b, Imitation Controlled Substances Act, Chapter 37c, Utah Controlled Substance Precursor Act, or Chapter 37d, Clandestine Drug Lab Act, which episodes are not isolated, but have the same or similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated by distinguishing characteristics. Taken together, the episodes shall demonstrate continuing unlawful conduct and be related either to each other or to the enterprise.

(e) "Control" means to add, remove, or change the placement of a drug, substance, or immediate precursor under Section 58-37-3.

(f)(i) "Controlled substance" means a drug or substance:

(A) included in Schedules I, II, III, IV, or V of Section 58-37-4;

(B) included in Schedules I, II, III, IV, or V of the federal Controlled Substances Act, Title II, P.L. 91-513;[1]

(C) that is a controlled substance analog; or

(D) listed in Section 58-37-4.2.

(ii) "Controlled substance" does not include:

(A) distilled spirits, wine, or malt beverages, as those terms are defined in Title 32B, Alcoholic Beverage Control Act;

(B) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(C) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which:

(I) are not otherwise regulated by law; and

(II) may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(g)(i) "Controlled substance analog" means:

(A) a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513; or

(C) A substance which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.

(ii) "Controlled substance analog" does not include:

(A) a controlled substance currently scheduled in Schedules I through V of Section 58-37-4;

(B) a substance for which there is an approved new drug application;

(C) a substance with respect to which an exemption is in effect for investigational use by a particular person under Section 505 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 355, to the extent the conduct with respect to the substance is permitted by the exemption;

(D) any substance to the extent not intended for human consumption before an exemption takes effect with respect to the substance;

(E) any drug intended for lawful use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals, which contains ephedrine, pseudoephedrine, norpseudoephedrine, or phenylpropanolamine if the drug is lawfully purchased, sold, transferred, or furnished as an over-the-counter medication without prescription; or

(F) dietary supplements, vitamins, minerals, herbs, or other similar substances including concentrates or extracts, which are not otherwise regulated by law, which may contain naturally occurring amounts of chemical or substances listed in this chapter, or in rules adopted pursuant to Title 63G, Chapter 3, Utah Administrative Rulemaking Act.

(h)(i) "Conviction" means a determination of guilt by verdict, whether jury or bench, or plea, whether guilty or no contest, for any offense proscribed by:

(A) Chapter 37, Utah Controlled Substances Act;

(B) Chapter 37a, Utah Drug Paraphernalia Act;

(C) Chapter 37b, Imitation Controlled Substances Act;

(D) Chapter 37c, Utah Controlled Substance Precursor Act; or

(E) Chapter 37d, Clandestine Drug Lab Act; or

(ii) for any offense under the laws of the United States and any other state which, if committed in this state, would be an offense under:

(A) Chapter 37, Utah Controlled Substances Act;

(B) Chapter 37a, Utah Drug Paraphernalia Act;

(C) Chapter 37b, Imitation Controlled Substances Act;

(D) Chapter 37c, Utah Controlled Substance Precursor Act; or

(E) Chapter 37d, Clandestine Drug Lab Act.

(i) "Counterfeit substance" means:

(i) any controlled substance or container or labeling of any controlled substance that:

(A) without authorization bears the trademark, trade name, or other identifying mark, imprint, number, device, or any likeness of them, of a manufacturer, distributor, or dispenser other than the person or persons who in fact manufactured, distributed, or dispensed the substance which falsely

purports to be a controlled substance distributed by any other manufacturer, distributor, or dispenser; and

(B) a reasonable person would believe to be a controlled substance distributed by an authorized manufacturer, distributor, or dispenser based on the appearance of the substance as described under Subsection (1)(i)(i)(A) or the appearance of the container of that controlled substance; or

(ii) any substance other than under Subsection (1)(i)(i) that:

(A) is falsely represented to be any legally or illegally manufactured controlled substance; and

(B) a reasonable person would believe to be a legal or illegal controlled substance.

(j) "Deliver" or "delivery" means the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not an agency relationship exists.

(k) "Department" means the Department of Commerce.

(l) "Depressant or stimulant substance" means:

(i) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid;

(ii) a drug which contains any quantity of:

(A) amphetamine or any of its optical isomers;

(B) any salt of amphetamine or any salt of an optical isomer of amphetamine; or

(C) any substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found and by regulation designated habit-forming because of its stimulant effect on the central nervous system;

(iii) lysergic acid diethylamide; or

(iv) any drug which contains any quantity of a substance which the Secretary of Health and Human Services or the Attorney General of the United States after investigation has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(m) "Dispense" means the delivery of a controlled substance by a pharmacist to an ultimate user pursuant to the lawful order or prescription of a practitioner, and includes distributing to, leaving with, giving away, or disposing of that

substance as well as the packaging, labeling, or compounding necessary to prepare the substance for delivery.

(n) "Dispenser" means a pharmacist who dispenses a controlled substance.

(o) "Distribute" means to deliver other than by administering or dispensing a controlled substance or a listed chemical.

(p) "Distributor" means a person who distributes controlled substances.

(q) "Division" means the Division of Occupational and Professional Licensing created in Section 58-1-103.

(r)(i) "Drug" means:

(A) a substance recognized in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, or Official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or animals;

(B) a substance that is required by any applicable federal or state law or rule to be dispensed by prescription only or is restricted to administration by practitioners only;

(C) a substance other than food intended to affect the structure or any function of the body of humans or other animals; and

(D) substances intended for use as a component of any substance specified in Subsections (1)(r)(i)(A), (B), and (C).

(ii) "Drug" does not include dietary supplements.

(s) "Drug dependent person" means any individual who unlawfully and habitually uses any controlled substance to endanger the public morals, health, safety, or welfare, or who is so dependent upon the use of controlled substances as to have lost the power of self-control with reference to the individual's dependency.

(t) "Food" means:

(i) any nutrient or substance of plant, mineral, or animal origin other than a drug as specified in this chapter, and normally ingested by human beings; and

(ii) foods for special dietary uses as exist by reason of a physical, physiological, pathological, or other condition including but not limited to the conditions of disease, convalescence, pregnancy, lactation, allergy, hypersensitivity to food,

underweight, and overweight; uses for supplying a particular dietary need which exist by reason of age including but not limited to the ages of infancy and childbirth, and also uses for supplementing and for fortifying the ordinary or unusual diet with any vitamin, mineral, or other dietary property for use of a food. Any particular use of a food is a special dietary use regardless of the nutritional purposes.

(u) "Immediate precursor" means a substance which the Attorney General of the United States has found to be, and by regulation designated as being, the principal compound used or produced primarily for use in the manufacture of a controlled substance, or which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit the manufacture of the controlled substance.

(v) "Indian" means a member of an Indian tribe.

(w) "Indian religion" means any religion:
(i) the origin and interpretation of which is from within a traditional Indian culture or community; and
(ii) which is practiced by Indians.

(x) "Indian tribe" means any tribe, band, nation, pueblo, or other organized group or community of Indians, including any Alaska Native village, which is legally recognized as eligible for and is consistent with the special programs, services, and entitlements provided by the United States to Indians because of their status as Indians.

(y) "Manufacture" means the production, preparation, propagation, compounding, or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis.

(z) "Manufacturer" includes any person who packages, repackages, or labels any container of any controlled substance, except pharmacists who dispense or compound prescription orders for delivery to the ultimate consumer.

(aa) "Marijuana" means all species of the genus cannabis and all parts of the genus, whether growing or not; the seeds of it; the resin extracted from any part

of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or resin. The term does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks, except the resin extracted from them, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. Any synthetic equivalents of the substances contained in the plant cannabis sativa or any other species of the genus cannabis which are chemically indistinguishable and pharmacologically active are also included.

(bb) "Money" means officially issued coin and currency of the United States or any foreign country.

(cc) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) opium, coca leaves, and opiates;

(ii) a compound, manufacture, salt, derivative, or preparation of opium, coca leaves, or opiates;

(iii) opium poppy and poppy straw; or

(iv) a substance, and any compound, manufacture, salt, derivative, or preparation of the substance, which is chemically identical with any of the substances referred to in Subsection (1)(cc)(i), (ii), or (iii), except narcotic drug does not include decocainized coca leaves or extracts of coca leaves which do not contain cocaine or ecgonine.

(dd) "Negotiable instrument" means documents, containing an unconditional promise to pay a sum of money, which are legally transferable to another party by endorsement or delivery.

(ee) "Opiate" means any drug or other substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability.

(ff) "Opium poppy" means the plant of the species papaver somniferum L., except the seeds of the plant.

(gg) “Person” means any corporation, association, partnership, trust, other institution or entity or one or more individuals.

(hh) “Poppy straw” means all parts, except the seeds, of the opium poppy, after mowing.

(ii) “Possession” or “use” means the joint or individual ownership, control, occupancy, holding, retaining, belonging, maintaining, or the application, inhalation, swallowing, injection, or consumption, as distinguished from distribution, of controlled substances and includes individual, joint, or group possession or use of controlled substances. For a person to be a possessor or user of a controlled substance, it is not required that the person be shown to have individually possessed, used, or controlled the substance, but it is sufficient if it is shown that the person jointly participated with one or more persons in the use, possession, or control of any substances with knowledge that the activity was occurring, or the controlled substance is found in a place or under circumstances indicating that the person had the ability and the intent to exercise dominion and control over it.

(jj) “Practitioner” means a physician, dentist, naturopathic physician, veterinarian, pharmacist, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis a controlled substance in the course of professional practice or research in this state.

(kk) “Prescribe” means to issue a prescription:
(i) orally or in writing; or
(ii) by telephone, facsimile transmission, computer, or other electronic means of communication as defined by division rule.

(ll) “Prescription” means an order issued:
(i) by a licensed practitioner, in the course of that practitioner's professional practice or by collaborative pharmacy practice agreement; and
(ii) for a controlled substance or other prescription drug or device for use by a patient or an animal.

(mm) “Production” means the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(nn) “Securities” means any stocks, bonds, notes, or other evidences of debt or of property.

(oo) “State” means the state of Utah.

(pp) “Ultimate user” means any person who lawfully possesses a controlled substance for the person's own use, for the use of a member of the person's household, or for administration to an animal owned by the person or a member of the person's household.

(2) If a term used in this chapter is not defined, the definition and terms of Title 76, Utah Criminal Code, shall apply.

Utah Code Ann. § 58-37-8. Prohibited acts — Penalties (2019)

(1) Prohibited acts A--Penalties and reporting:

(a) Except as authorized by this chapter, it is unlawful for a person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled or counterfeit substance with intent to distribute; or

(iv) engage in a continuing criminal enterprise where:

(A) the person participates, directs, or engages in conduct that results in a violation of Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, that is a felony; and

(B) the violation is a part of a continuing series of two or more violations of Chapters 37, Utah Controlled Substances Act, 37a, Utah Drug Paraphernalia Act, 37b, Imitation Controlled Substances Act, 37c, Utah Controlled Substance Precursor Act, or 37d, Clandestine Drug Lab Act, on separate occasions that are undertaken in concert with five or more persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management.

(b) A person convicted of violating Subsection (1)(a) with respect to:

(i) a substance or a counterfeit of a substance classified in Schedule I or II, a controlled substance analog, or gammahydroxybutyric acid as listed in Schedule III is guilty of a second degree felony, punishable by imprisonment for not more than 15 years, and upon a second or subsequent conviction is guilty of a first degree felony;

(ii) a substance or a counterfeit of a substance classified in Schedule III or IV, or marijuana, or a substance listed in Section 58-37-4.2 is guilty of a third degree felony, and upon a second or subsequent conviction is guilty of a second degree felony; or

(iii) a substance or a counterfeit of a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction is guilty of a third degree felony.

(c) A person who has been convicted of a violation of Subsection (1)(a)(ii) or (iii) may be sentenced to imprisonment for an indeterminate term as provided by law, but if the trier of fact finds a firearm as defined in Section 76-10-501 was used, carried, or possessed on the person or in the person's immediate possession

during the commission or in furtherance of the offense, the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently.

(d) A person convicted of violating Subsection (1)(a)(iv) is guilty of a first degree felony punishable by imprisonment for an indeterminate term of not less than seven years and which may be for life. Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(e) The Administrative Office of the Courts shall report to the Division of Occupational and Professional Licensing the name, case number, date of conviction, and if known, the date of birth of each person convicted of violating Subsection (1)(a).

(2) Prohibited acts B--Penalties and reporting:

(a) It is unlawful:

(i) for a person knowingly and intentionally to possess or use a controlled substance analog or a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of the person's professional practice, or as otherwise authorized by this chapter;

(ii) for an owner, tenant, licensee, or person in control of a building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations; or

(iii) for a person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance.

(b) A person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony; or

(ii) a substance classified in Schedule I or II, or a controlled substance analog, is guilty of a class A misdemeanor on a first or second conviction, and on a third or subsequent conviction is guilty of a third degree felony.

(c) Upon a person's conviction of a violation of this Subsection (2) subsequent to a conviction under Subsection (1)(a), that person shall be sentenced to a one degree greater penalty than provided in this Subsection (2).

(d) A person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i) or (ii), including a substance listed in Section 58-37-4.2, or marijuana, is guilty of a class B misdemeanor. Upon a

third conviction the person is guilty of a class A misdemeanor, and upon a fourth or subsequent conviction the person is guilty of a third degree felony.

(e) A person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by a correctional facility as defined in Section 64-13-1 or a public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b), and if the conviction is with respect to controlled substances as listed in:

(i) Subsection (2)(b), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and:

(A) the court shall additionally sentence the person convicted to a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) Subsection (2)(d), the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted to a term of six months to run consecutively and not concurrently.

(f) A person convicted of violating Subsection (2)(a)(ii) or (iii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(g) A person is subject to the penalties under Subsection (2)(h) who, in an offense not amounting to a violation of Section 76-5-207:

(i) violates Subsection (2)(a)(i) by knowingly and intentionally having in the person's body any measurable amount of a controlled substance; and

(ii) operates a motor vehicle as defined in Section 76-5-207 in a negligent manner, causing serious bodily injury as defined in Section 76-1-601 or the death of another.

(h) A person who violates Subsection (2)(g) by having in the person's body:

(i) a controlled substance classified under Schedule I, other than those described in Subsection (2)(h)(ii), or a controlled substance classified under Schedule II is guilty of a second degree felony;

(ii) marijuana, tetrahydrocannabinols, or equivalents described in Subsection 58-37-4(2)(a)(iii)(S) or (AA), or a substance listed in Section 58-37-4.2 is guilty of a third degree felony; or

(iii) a controlled substance classified under Schedules III, IV, or V is guilty of a class A misdemeanor.

(i) A person is guilty of a separate offense for each victim suffering serious bodily injury or death as a result of the person's negligent driving in violation of

Subsection(2)(g) whether or not the injuries arise from the same episode of driving.

(j) The Administrative Office of the Courts shall report to the Division of Occupational and Professional Licensing the name, case number, date of conviction, and if known, the date of birth of each person convicted of violating Subsection (2)(a).

(3) Prohibited acts C--Penalties:

(a) It is unlawful for a person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent oneself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to a person known to be attempting to acquire or obtain possession of, or to procure the administration of a controlled substance by misrepresentation or failure by the person to disclose receiving a controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make a false or forged prescription or written order for a controlled substance, or to utter the same, or to alter a prescription or written order issued or written under the terms of this chapter; or

(iv) to make, distribute, or possess a punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render a drug a counterfeit controlled substance.

(b)(i) A first or second conviction under Subsection (3)(a)(i), (ii), or (iii) is a class A misdemeanor.

(ii) A third or subsequent conviction under Subsection (3)(a)(i), (ii), or (iii) is a third degree felony.

(c) A violation of Subsection (3)(a)(iv) is a third degree felony.

(4) Prohibited acts D--Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act that is unlawful under Subsection (1)(a) or Section 58-37b-4 is upon conviction subject to the penalties and classifications under this Subsection (4) if the trier of fact finds the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools during the hours of 6 a.m. through 10 p.m.;

(ii) in a public or private vocational school or postsecondary institution or on the grounds of any of those schools or institutions during the hours of 6 a.m. through 10 p.m.;

(iii) in or on the grounds of a preschool or child-care facility during the preschool's or facility's hours of operation;

(iv) in a public park, amusement park, arcade, or recreation center when the public or amusement park, arcade, or recreation center is open to the public;

(v) in or on the grounds of a house of worship as defined in Section 76-10-501;

(vi) in or on the grounds of a library when the library is open to the public;

(vii) within an area that is within 100 feet of any structure, facility, or grounds included in Subsections (4)(a)(i), (ii), (iii), (iv), (v), and (vi);

(viii) in the presence of a person younger than 18 years of age, regardless of where the act occurs; or

(ix) for the purpose of facilitating, arranging, or causing the transport, delivery, or distribution of a substance in violation of this section to an inmate or on the grounds of a correctional facility as defined in Section 76-8-311.3.

(b)(i) A person convicted under this Subsection (4) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (4) would have been a first degree felony.

(ii) Imposition or execution of the sentence may not be suspended, and the person is not eligible for probation.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (4), a person convicted under this Subsection (4) is guilty of one degree more than the maximum penalty prescribed for that offense. This Subsection (4)(c) does not apply to a violation of Subsection (2)(g).

(d)(i) If the violation is of Subsection (4)(a)(ix):

(A) the person may be sentenced to imprisonment for an indeterminate term as provided by law, and the court shall additionally sentence the person convicted for a term of one year to run consecutively and not concurrently; and

(B) the court may additionally sentence the person convicted for an indeterminate term not to exceed five years to run consecutively and not concurrently; and

(ii) the penalties under this Subsection (4)(d) apply also to a person who, acting with the mental state required for the commission of an offense, directly or

indirectly solicits, requests, commands, coerces, encourages, or intentionally aids another person to commit a violation of Subsection (4)(a)(ix).

(e) It is not a defense to a prosecution under this Subsection (4) that:

(i) the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; or

(ii) the actor mistakenly believed that the location where the act occurred was not as described in Subsection (4)(a) or was unaware that the location where the act occurred was as described in Subsection (4)(a).

(5) A violation of this chapter for which no penalty is specified is a class B misdemeanor.

(6)(a) For purposes of penalty enhancement under Subsections (1) and (2), a plea of guilty or no contest to a violation or attempted violation of this section or a plea which is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

(b) A prior conviction used for a penalty enhancement under Subsection (2) shall be a conviction that is:

(i) from a separate criminal episode than the current charge; and

(ii) from a conviction that is separate from any other conviction used to enhance the current charge.

(7) A person may be charged and sentenced for a violation of this section, notwithstanding a charge and sentence for a violation of any other section of this chapter.

(8)(a) A penalty imposed for violation of this section is in addition to, and not in lieu of, a civil or administrative penalty or sanction authorized by law.

(b) When a violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) In any prosecution for a violation of this chapter, evidence or proof that shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(10) This section does not prohibit a veterinarian, in good faith and in the course of the veterinarian's professional practice only and not for humans, from

prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under the veterinarian's direction and supervision.

(11) Civil or criminal liability may not be imposed under this section on:

(a) a person registered under this chapter who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) a law enforcement officer acting in the course and legitimate scope of the officer's employment.

(12)(a) Civil or criminal liability may not be imposed under this section on any Indian, as defined in Section 58-37-2, who uses, possesses, or transports peyote for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion as defined in Section 58-37-2.

(b) In a prosecution alleging violation of this section regarding peyote as defined in Section 58-37-4, it is an affirmative defense that the peyote was used, possessed, or transported by an Indian for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

(c)(i) The defendant shall provide written notice of intent to claim an affirmative defense under this Subsection (12) as soon as practicable, but not later than 10 days before trial.

(ii) The notice shall include the specific claims of the affirmative defense.

(iii) The court may waive the notice requirement in the interest of justice for good cause shown, if the prosecutor is not unfairly prejudiced by the lack of timely notice.

(d) The defendant shall establish the affirmative defense under this Subsection (12) by a preponderance of the evidence. If the defense is established, it is a complete defense to the charges.

(13)(a) It is an affirmative defense that the person produced, possessed, or administered a controlled substance listed in Section 58-37-4.2 if the person was:

(i) engaged in medical research; and

(ii) a holder of a valid license to possess controlled substances under Section 58-37-6.

(b) It is not a defense under Subsection (13)(a) that the person prescribed or dispensed a controlled substance listed in Section 58-37-4.2.

(14) It is an affirmative defense that the person possessed, in the person's body, a controlled substance listed in Section 58-37-4.2 if:

(a) the person was the subject of medical research conducted by a holder of a valid license to possess controlled substances under Section 58-37-6; and

(b) the substance was administered to the person by the medical researcher.

(15) The application of any increase in penalty under this section to a violation of Subsection (2)(a)(i) may not result in any greater penalty than a second degree felony. This Subsection (15) takes precedence over any conflicting provision of this section.

(16)(a) It is an affirmative defense to an allegation of the commission of an offense listed in Subsection (16)(b) that the person:

(i) reasonably believes that the person or another person is experiencing an overdose event due to the ingestion, injection, inhalation, or other introduction into the human body of a controlled substance or other substance;

(ii) reports in good faith the overdose event to a medical provider, an emergency medical service provider as defined in Section 26-8a-102, a law enforcement officer, a 911 emergency call system, or an emergency dispatch system, or the person is the subject of a report made under this Subsection (16);

(iii) provides in the report under Subsection (16)(a)(ii) a functional description of the actual location of the overdose event that facilitates responding to the person experiencing the overdose event;

(iv) remains at the location of the person experiencing the overdose event until a responding law enforcement officer or emergency medical service provider arrives, or remains at the medical care facility where the person experiencing an overdose event is located until a responding law enforcement officer arrives;

(v) cooperates with the responding medical provider, emergency medical service provider, and law enforcement officer, including providing information regarding the person experiencing the overdose event and any substances the person may have injected, inhaled, or otherwise introduced into the person's body; and

(vi) is alleged to have committed the offense in the same course of events from which the reported overdose arose.

(b) The offenses referred to in Subsection (16)(a) are:

(i) the possession or use of less than 16 ounces of marijuana;

(ii) the possession or use of a scheduled or listed controlled substance other than marijuana; and

(iii) any violation of Chapter 37a, Utah Drug Paraphernalia Act, or Chapter 37b, Imitation Controlled Substances Act.

(c) As used in this Subsection (16) and in Section 76-3-203.11, "good faith" does not include seeking medical assistance under this section during the course of a law enforcement agency's execution of a search warrant, execution of an arrest warrant, or other lawful search.

(17) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

(18) A legislative body of a political subdivision may not enact an ordinance that is less restrictive than any provision of this chapter.

(19) If a minor who is under 18 years of age is found by a court to have violated this section, the court may order the minor to complete:

(a) a screening as defined in Section 41-6a-501;

(b) an assessment as defined in Section 41-6a-501 if the screening indicates an assessment to be appropriate; and

(c) an educational series as defined in Section 41-6a-501 or substance use disorder treatment as indicated by an assessment.

Utah Code Ann. § 76-5-308.5. Human trafficking of a child—Penalties (2019)

(1) "Commercial sexual activity with a child" means any sexual act with a child, on account of which anything of value is given to or received by any person.

(2) An actor commits human trafficking of a child if the actor recruits, harbors, transports, obtains, patronizes, or solicits a child for sexual exploitation or forced labor.

(3)(a) Human trafficking of a child for forced labor includes labor in industrial facilities, sweatshops, households, agricultural enterprises, or any other workplace.

(b) Human trafficking of a child for sexual exploitation includes all forms of commercial sexual activity with a child, including sexually explicit performance, prostitution, participation in the production of pornography, performance in a strip club, and exotic dancing or display.

(4) Human trafficking of a child in violation of this section is a first degree felony.

Utah Code Ann. § 76-5b-201. Sexual exploitation of a minor—Offenses (2019)

(1) A person is guilty of sexual exploitation of a minor:
(a) when the person:
(i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or
(ii) intentionally distributes or views child pornography; or
(b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).

(2)(a) Except as provided in Subsection (2)(b), sexual exploitation of a minor is a second degree felony.
(b) A violation of Subsection (1) for knowingly producing child pornography is a first degree felony if the person produces original child pornography depicting a first degree felony that involves:
(i) the person or another person engaging in conduct with the minor that is a violation of:
(A) Section 76-5-402.1, rape of a child;
(B) Section 76-5-402.3, object rape of a child;
(C) Section 76-5-403.1, sodomy on a child; or
(D) Section 76-5-404.1, aggravated sexual abuse of a child; or
(ii) the minor being physically abused, as defined in Section 78A-6-105.

(3) It is a separate offense under this section:
(a) for each minor depicted in the child pornography; and
(b) for each time the same minor is depicted in different child pornography.

(4) It is an affirmative defense to a charge of violating this section that no minor was actually depicted in the visual depiction or used in producing or advertising the visual depiction.

(5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.

(6) This section may not be construed to impose criminal or civil liability on:
(a) an entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:
(i) reporting or data preservation duties required under federal or state law; or

(ii) implementing a policy of attempting to prevent the presence of child pornography on tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;

(b) a law enforcement officer acting within the scope of a criminal investigation;

(c) an employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;

(d) a juror who may be required to view child pornography during the course of the individual's service as a juror;

(e) an attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment;

(f) an employee of the Department of Human Services who is required to view child pornography within the scope of the employee's employment; or

(g) an attorney who is required to view child pornography within the scope of the attorney's responsibility to represent the Department of Human Services, including the divisions and offices within the Department of Human Services.

Utah Code Ann. § 77-23b-4. Disclosure by a provider--Grounds for requiring disclosure--Court order (2019)

(1) A government entity may only require the disclosure by a provider of electronic communication services of the contents of an electronic communication that is in electronic storage in an electronic communication system pursuant to a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant.

(2) Subsection (1) applies to any electronic communication that is held or maintained on that service:

(a) on behalf of and received by means of electronic transmission from or created by means of computer processing of communications received by means of electronic transmission from a subscriber or customer of the remote computing service; and

(b) solely for the purpose of providing storage or computer processing services to the subscriber or customer, if the provider is not authorized to access the contents of any communication for purposes of providing any services other than storage or computer processing.

(3)(a)(i) Except under Subsection (3)(a)(ii), a provider of electronic communication services or remote computing services may disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to any person other than a governmental agency.

(ii) A provider of electronic communication services or remote computing services shall disclose a record or other information pertaining to a subscriber to or customer of the service, not including the contents of communication covered by Subsection (1), to a governmental entity only when the entity:

(A) uses an administrative subpoena authorized by a state or federal statute or a state or federal grand jury subpoena;

(B) obtains a warrant issued under the Utah Rules of Criminal Procedure or an equivalent federal warrant;

(C) obtains a court order for the disclosure under Subsection (4); or

(D) has the consent of the subscriber or customer to the disclosure.

(b) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(4)(a) A court order for disclosure under this section may be issued only if the governmental entity shows there is reason to believe the contents of a wire or

electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry.

(b) A court issuing an order under this section, on a motion made promptly by the service provider, may quash or modify the order, if the information or records requested are unusually voluminous in nature or compliance with the order otherwise would cause an undue burden on the provider.

(5) A cause of action may not be brought in any court against any provider of wire or electronic communications services, its officers, employees, agents, or other specified persons, for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

§ 77-23c-104. Third-party electronic information or data (2019)

(1) As used in this section, "subscriber record" means a record or information of a provider of an electronic communication service or remote computing service that reveals the subscriber's or customer's:

(a) name;

(b) address;

(c) local and long distance telephone connection record, or record of session time and duration;

(d) length of service, including the start date;

(e) type of service used;

(f) telephone number, instrument number, or other subscriber or customer number or identification, including a temporarily assigned network address; and

(g) means and source of payment for the service, including a credit card or bank account number.

(2) Except as provided in Chapter 22, Subpoena Powers for Aid of Criminal Investigation and Grants of Immunity, a law enforcement agency may not obtain, use, copy, or disclose a subscriber record.

(3) A law enforcement agency may not obtain, use, copy, or disclose, for a criminal investigation or prosecution, any record or information, other than a subscriber record, of a provider of an electronic communication service or remote computing service related to a subscriber or customer without a warrant.

(4) Notwithstanding Subsections (2) and (3), a law enforcement agency may obtain, use, copy, or disclose a subscriber record, or other record or information related to a subscriber or customer, without a warrant:

(a) with the informed, affirmed consent of the subscriber or customer;

(b) in accordance with a judicially recognized exception to warrant requirements;

(c) if the subscriber or customer voluntarily discloses the record in a manner that is publicly accessible; or

(d) if the provider of an electronic communication service or remote computing service voluntarily discloses the record:

(i) under a belief that an emergency exists involving the imminent risk to an individual of:

(A) death;

(B) serious physical injury;

(C) sexual abuse;
(D) live-streamed sexual exploitation;
(E) kidnapping; or
(F) human trafficking;
(ii) that is inadvertently discovered by the provider, if the record appears to pertain to the commission of:
(A) a felony; or
(B) a misdemeanor involving physical violence, sexual abuse, or dishonesty; or
(iii) subject to Subsection 77-23c-104(4)(d)(ii), as otherwise permitted under 18 U.S.C. Sec. 2702.

(5) A provider of an electronic communication service or remote computing service, or the provider's officers, employees, agents, or other specified persons may not be held liable for providing information, facilities, or assistance in good faith reliance on the terms of a warrant issued under this section, or without a warrant in accordance with Subsection (3).

Utah Code Ann. § 77-23c-105. Exclusion of records (2019)

All electronic information or data and records of a provider of an electronic communications service or remote computing service pertaining to a subscriber or customer that are obtained in violation of the provisions of this chapter shall be subject to the rules governing exclusion as if the records were obtained in violation of the Fourth Amendment to the United States Constitution and Utah Constitution, Article I, Section 14.

Addendum B

The Order of the Court is stated below:
Dated: September 25, 2022 08:05:01 PM **/s/** DAVID CONNORS District Court Judge

2nd District- Farmington

DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH ATTORNEY GENERAL, Plaintiff, vs. DUSTIN GILES ANDRUS, Defendant.	MINUTES SENTENCE, JUDGMENT, COMMITMENT Case No: 211700097 FS Judge: DAVID CONNORS Date: September 23, 2022

Custody: Davis County Jail

PRESENT

Clerk: kristylm

Prosecutor: RYAN HOLTAN

Prosecutor: KAYTLIN BECKETT

Defendant Present

The defendant is in the custody of the Davis County Jail

Defendant's Attorney(s): CARA TANGARO

Defendant's Attorney(s): SCOTT WILLIAMS

Defendant's Attorney(s): EMILY ADAMS

DEFENDANT INFORMATION

Date of birth: October 7, 1985

Audio

Tape Number: F5-09232022 Tape Count: 145-300

CHARGES

1. HUMAN TRAFFICKING OF A CHILD - 1st Degree Felony Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

2. SEXUAL EXPLOITATION OF A MINOR - 2nd Degree Felony Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

3. DISTRIBUTE/OFFER/ARRANGE DISTRIBUTION OF CONTROLLED SUBSTANC - 2nd Degree Felony Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

4. UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD (amended) - Class A Misdemeanor Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

5. UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD - 3rd Degree Felony Plea: Not Guilty -

Disposition: 03/31/22 Guilty - Jury

6. UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD - 3rd Degree Felony Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

7. UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD - 3rd Degree Felony Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

8. ENTICE A MINOR BY INTERNET OR TEXT (DEPENDING ON AGE) - Class A Misdemeanor Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

9. ENTICE A MINOR BY INTERNET OR TEXT (DEPENDING ON AGE) - Class A Misdemeanor Plea: Not Guilty - Disposition: 03/31/22 Guilty - Jury

HEARING

This is the time set for oral arguments on defendant's motion to arrest judgment and sentencing.
Attorney Adams submits on the briefs.
Attorney Holtan gives open arguments.
Attorney Adams responds.
Attorney Holtan presents rebuttal.
Attorney Adams presents rebuttal.
Attorney Holtan gives closing statements.
Attorney Adams gives closing statements and submits on the briefs.
The court grants and denies the motion in part.
The court orders count 4 be reduced to a class A misdemeanor, as stipulated to by counsel.
The court denies the motion to arrest judgment on counts 1, 2, and 7.

Respective counsel addresses the court and stipulates that the current presentence investigation report is subject to a post sentencing amendment.
The victim addresses the court.
The state addresses the court regarding recommendations for sentencing.
The court finds no legal reason why the sentence should not be imposed.

SENTENCE PRISON

Based on the defendant's conviction of HUMAN TRAFFICKING OF A CHILD a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of SEXUAL EXPLOITATION OF A MINOR a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of DISTRIBUTE/OFFER/ARRANGE DISTRIBUTION OF CONTROLLED SUBSTANC a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

Based on the defendant's conviction of UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in

the Utah State Prison.

To the DAVIS County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

The court orders counts two and three run concurrent to each other, but consecutive to count one. The court futher orders counts four, five, six, seven, eight and nine to run concurrent with each other, but consecutive to counts one, two and three.

SENTENCE JAIL

Based on the defendant's conviction of UNLAWFUL SEXUAL CONDUCT W/ 16-17 YEAR OLD a Class A Misdemeanor, the defendant is sentenced to a term of 364 day(s)

Based on the defendant's conviction of ENTICE A MINOR BY INTERNET OR TEXT (DEPENDING ON AGE) a Class A Misdemeanor, the defendant is sentenced to a term of 364 day(s)

Based on the defendant's conviction of ENTICE A MINOR BY INTERNET OR TEXT (DEPENDING ON AGE) a Class A Misdemeanor, the defendant is sentenced to a term of 364 day(s)

SENTENCE JAIL SERVICE NOTE

The court orders the sentences on the Class A Misdemeanors be served at the Utah State Prison.

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

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 211700097 by the method and on the date specified.

EMAIL: UTAH STATE PRISON UDC-Records@utah.gov

EMAIL: DAVIS COUNTY JAIL jailorders@co.davis.ut.us

EMAIL: SEX AND KIDNAP REGISTRY registry@utah.gov

09/25/22 /s/ KRISTY MARTINEZ

Date: _____ _____

Signature

Addendum C

IN THE SECOND JUDICIAL DISTRICT IN AND FOR DAVIS COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. DUSTIN GILES ANDRUS, Defendant.	**RULING AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE** Case No.: 211700097 Judge: David Connors

This matter comes before the Court on Defendant Dustin Giles Andrus' Motion to Suppress Evidence Derived from Investigative Subpoenas Obtained in Violation of Law ("Motion") filed on May 3, 2021. Multiple filings were submitted by both sides while the issues in the Motion were being presented to the Court.

On May 10, the State filed its response, requesting denial of the Motion. Defendant filed a reply memorandum on June 18. An evidentiary hearing was held on July 28, where the Court heard the testimony of Clearfield Police Detective Joshua Carlson and FBI Administrative Assistant Teilani Palmer. Three exhibits were also received at that hearing.[1] On August 18, the State filed a supplemental brief to address issues presented at the evidentiary hearing. The Defendant filed his supplemental brief on August 30. On September 17 the parties returned to court for a hearing to give closing arguments about the Motion. During that hearing, the Court felt that additional information was needed on a standing issue and the Defense was permitted to file supplemental exhibits. Four exhibits were submitted by the Defense on October 13 without

[1] These exhibits included a transcript of the preliminary hearing on March 17, 2021 an email from Detective Carlson to Ms. Palmer on October 7, 2020, and a subpoena to Text Now on October 7, 2020.

objection.[2] At a status conference on October 26, the State indicated it wished to submit one final supplemental table of case law authorities that the Court should consider. The Defense was invited to do the same by the end of the week, but declined to do so. The Court took the matter under advisement on October 29.

The Court, having reviewed the submissions of the Parties and considered the arguments, issues its Ruling **DENYING** the Motion based on the following analysis.

FINDINGS OF FACT

1. Some time in September, 2020, the alleged victim in this case, a minor, reported an occurrence of rape to the Clearfield City Police Department. She also reported the perpetrator was in possession of child pornography. The alleged victim gave police a Snapchat username and two TextNow phone numbers which she had been using to contact the unknown suspect. [Exhibit 1A, Transcript Preliminary Hearing]
2. Detective Ginny Vance of the Clearfield Police Department was assigned as the lead investigating agent to the case. [Exhibit 1A, Transcript Preliminary Hearing]
3. Shortly after being assigned, Detective Vance approached Detective Joshua Carlson for assistance with the investigation. [Testimony of Joshua Carlson]
4. Detective Carlson works for the Clearfield Police Department and he is also assigned to the FBI's Child Exploitation Task Force ("CETF"). As a member of CETF, he investigates cases involving online enticement and child pornography. CETF is

[2] These exhibits pertained to the Defendant's partial ownership of the Andrus Family Carwash, and included two versions of the Operating Agreement for the Andrus Family Car Wash, LLC, a Utah Department of Commerce information sheet for the company, and a declaration of the Defendant's father, Martin Andrus. At the October 26 hearing, the State indicated that it would object to the declaration, but was choosing to forego making that objection because it felt that the nature of the Defendant's employment or ownership of the business was not relevant to the most important issues in the Motion.

comprised of both state and federal law enforcement officers. [Testimony of Joshua Carlson]

5. Detective Vance is not a member of CETF. [Testimony of Joshua Carlson]
6. Detective Vance approached Detective Carlson on October 7, 2020, to request assistance with the investigation. Detective Carlson's report indicated that he was asked to perform an extended search on the alleged victim's cell phone. During cross examination, Detective Carlson admitted that he was also asked for help getting an administrative subpoena for the TextNow and Snapchat information. He sent the request for this subpoena to Teilani Palmer on the same day. [Testimony of Joshua Carlson]
7. Detective Carlson sent an email to Teilani Palmer asking for the federal administrative subpoenas. Ms. Palmer is an administrative assistant with the FBI. Part of her job is to coordinate investigations with the CETF members. She helps coordinate federal service of process for those investigators. [Testimony of Teilani Palmer]
8. Since becoming a CETF member, Detective Carlson has always requested subpoenas in his investigations from the FBI. Since becoming a CETF member, he has never requested the assistance of the Davis County Attorney's Office in obtaining a judicial order for an administrative subpoena. [Testimony of Joshua Carlson]
9. The email to Ms. Palmer indicated that Detective Carlson was seeking a federal subpoena to assist in an investigation where they had learned that a "16 year old victim" met a man on the internet website Omegle, spoke to the male over Snapchat and a TextNow phone number, the male had sexually assaulted her, and he allegedly possessed child pornography. The email also indicated that Detective Carlson was seeking Ms. Palmer's assistance because the Davis County Attorney's Office is "just so slow." During his

testimony, Detective Carlson agreed that the information Detective Vance wanted could have been sought through the Davis County Attorney's Office instead of through the FBI issuance of a federal subpoena. [Exhibit 1, Email from October 7, 2020; Testimony of Joshua Carlson]

10. Ms. Palmer prepared the federal subpoenas in this case. She indicated that subpoena requests submitted from CETF members are all grouped together in the FBI's records, but there is nothing on the subpoenas themselves indicating that there is a specific federal crime being investigated. Ms. Palmer also testified that she is not informed about any specific crime contemplated by an officer who is requesting the federal subpoena. [Testimony of Teilani Palmer]
11. Detective Carlson, through Ms. Palmer, sent federal subpoenas to TextNow and Snapchat. The TextNow subpoena revealed subscriber information and IP address logs connecting to Comcast. The Snapchat subpoena revealed subscriber information connected to Verizon Wireless. Between the Comcast information and the Verizon Wireless information, a single phone number was isolated as being consistent among all of the information. A final federal subpoena was sent to Verizon Wireless to obtain all of the call detail records and subscriber information for that phone number. The listed subscriber for that phone number was the Defendant. [Testimony of Joshua Carlson]
12. Having narrowed their investigation to the Defendant by the use of these federal subpoenas, the detectives conducted additional investigation into the Defendant. This included searching the driver's license registry, the sex offender registry, the Defendant's criminal history, and conducting a photo lineup with the alleged victim. Through this investigation, law enforcement ultimately obtained a search warrant of the Defendant's

home, and arrested the Defendant on the charges currently before the Court. [Testimony of Joshua Carlson; Exhibit 1A, Transcript of Preliminary Hearing]

13. Neither Detective Vance nor Detective Carlson screened the case with a federal prosecutor while the investigation was occurring or after it was concluded. Detective Carlson agreed during cross examination that no federal case number was associated with any of his reports. He indicated that he did not have any specific federal crime in mind that he was investigating when he requested the subpoena, nor did he contact any CETF supervisor or authority before contacting Ms. Palmer about the administrative subpoenas. [Exhibit 1A, Transcript of Preliminary Hearing; Testimony of Joshua Carlson]

ANALYSIS

The Defendant filed this Motion based on the argument that the use of federal administrative subpoenas under 18 U.S. Code § 3486 violated the Defendant's Fourth Amendment and Due Process rights, and that any subpoenas in this case should have been issued through the state subpoena power under Utah Code Ann. § 77-22-2.5. The Defendant argues that the investigation in this case was done by state law enforcement who were investigating alleged violations of state statutes, and thus the use of the federal subpoenas amounted to an unlawful search in violation of his statutory and constitutional rights. He argues that because of this unlawful search, evidence discovered as a result of the federal subpoenas must be suppressed.

I. The Use of Federal Subpoenas was Appropriate in This Case

The complex questions in this case are all dependent on the answer to the threshold question, which is whether the use of federal subpoenas was permissible in this case. The federal

administrative subpoena statute says that a subpoena under that section is authorized in "any investigation of... a Federal offense involving the sexual exploitation or abuse of children." 18 U.S.C. § 3486(a)(1)(A)(i)(II). A "Federal offense involving the sexual exploitation or abuse of children," is defined as "an offense under [numerous federal code sections, including sexual abuse, child pornography offences, or enticement] in which the victim is an individual who has not attained the age of 18 years." 18 U.S.C. § 3486(a)(1)(D)(i). For investigations pertaining to Utah state cases, subpoenas of electronic data are controlled by U.C.A. § 77-22-2.5(2). It requires law enforcement agents investigating sexual offenses against minors who want access to electronic communications to present a request to a prosecutor for review, and to submit a request for a court order for access to the electronic communications through the service providers. U.C.A. § 77-22-2.5(2)(b) and (c). These requests must "articulate specific facts showing reasonable grounds to believe that the records or other information sought... are relevant and material to an ongoing investigation." U.C.A. § 77-22-2.5(2)(a).

The Defendant's primary contention is that because the crimes for which he was being investigated are all state crimes, the use of federal subpoenas was unlawful. He supports his argument with a number of facts, including: the lead investigator was Detective Vance, who is not a CETF agent; at the time of Detective Carlson's testimony, the case had not been sent to or screened by a federal prosecutor; no specific federal offenses were listed on the subpoenas or the email that requested them; Detective Carlson was aware that he could seek an alternate subpoena through the Davis County Attorney's Office; and Detective Carlson was not working with or communicating with other CETF members or supervisors during this investigation, except Ms. Palmer. On the surface, these facts appear to support the Defendant's assertion that the investigation was for state crimes, and an officer who happened to have federal connections was

using convenient shortcuts to circumvent the more arduous process of obtaining the correct subpoena under U.C.A. § 77-22-2.5.

However, further consideration of 18 U.S.C. § 3486 leads the Court to conclude that the use of federal subpoenas was permissible here. That statute indicates that "any investigation of… a Federal offense involving the sexual exploitation or abuse of children," may utilize a subpoena authorized by that statute. The Court is persuaded by the State that the phrase "any investigation of" does not draw a distinction between a state investigation and a federal investigation. Defendant has never disputed that the information sought by this investigation could have led to the filing of federal charges.[3] The Court observes that the investigation was for the information itself, without regard to which charges may eventually be filed. The investigation was performed by Detective Carlson who, as a CETF member, would reasonably be aware that the information could lead to charges in either or both realms. Put more simply, based on an objective review of the information possessed by Detective Carlson when the subpoenas were requested, the investigation could have been for both state and federal offenses simultaneously.

Although the Defendant asks the Court to conclude that Detective Carlson was truthfully working only on the state investigation, the Court must put aside speculation about his subjective intentions. The Defendant seeks to suppress evidence in this case as being a violation of a statute which implicates his Fourth Amendment rights against unreasonable searches and seizures. "Whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind at the time the challenged action was taken." *State v. Lopez*, 873

[3] See Defendant's Reply Memorandum, filed June 18, 2021, at p. 3 ("The Court can consider the State's position that the potential offenses of child enticement and/or child pornography could be federal offenses, as unopposed.").

P.2d 1127, 1136 (Utah 1994) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)). Even if Detective Carlson had been acting solely with the subjective intent to help Detective Vance with her state investigation, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provided the legal justification for the officer's action does not invalidate the action taken, as long as the circumstances, viewed objectively, justify the action." *Id* (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). In this case, the objective circumstances show that Detective Carlson was aware that his subpoenas related to an investigation of allegations concerning an underage victim of sexual abuse and possession of child pornography. These allegations could support charging the subject of the investigation with "a Federal offense involving the sexual exploitation or abuse of children" (see 18 U.S.C. § 3486(1)(A)(i)(II)), and therefore the use of the federal administrative subpoenas was permissible.

Notwithstanding these conclusions, the Court remains troubled by the methodology deployed in this case. Detective Vance seems to have been able to circumvent the state statute by virtue of Detective Carlson's fortuitous dual-role position with CETF. This case presents a close call for an important question concerning an individual's right to privacy in their online information, and the procedure by which the government is able to access an individual's information. It is apparent that the state of Utah has implemented more protections for electronic information than the federal government. Although the Court finds that the use of the federal subpoenas in this specific case was not a violation of the Defendant's rights, the Court would admonish agents in similar situations to better document their actions in the future to ensure that these questions are more easily resolved. If Detective Carlson had advised task force leadership of the information he had and gotten specific permission to use the federal subpoena process based on the undisputed rationale that these facts could support federal criminal charges, the link

between his subpoena request and a potential federal investigation conducted through CETF would have been much clearer. Nonetheless, the Court does not find error in the use of the federal subpoenas in this case, and therefore declines to suppress evidence thereby obtained.

II. Collateral Issues Need Not be Addressed by This Court

There were numerous other issues raised and argued during the litigation of the Motion. These included whether a person has standing in the state of Utah to challenge the collection of internet subscriber records at all, and whether the Defendant had standing to challenge the collection of the internet subscriber records of his place of employment. An argument about inevitable discovery was also raised, subject to the standing issues. The Court has determined that all of these issues are dependent on a finding that the use federal subpoenas was improper. Having concluded that the use of the federal subpoenas was not in violation of the law or in violation of the Defendant's constitutional rights, the Court declines to address these collateral issues.

CONCLUSION

The question presented to the Court is whether it was permissible for Detective Carlson to use federal subpoenas through his contacts with CETF, instead of state subpoenas. While the Court believes that it would have been more appropriate for Detective Carlson to use the state subpoenas, or take actions which more clearly tied the subpoenas to his federal task force membership, the Court concludes that using the federal subpoenas was not unlawful, given the totality of the facts presented. Viewed objectively, it is clear that when Detective Carlson requested the subpoenas he possessed information that the investigation concerned allegations of an underaged victim, potential child pornography, and the use of various internet platforms

which would give federal authorities the option of pursuing federal charges based on the information uncovered. Detective Carlson's subjective intentions are not material to this analysis. Therefore, the subpoenas were appropriate under 18 U.S. Code § 3486 as an investigation of facts that could support charges of a federal offense involving the sexual exploitation or abuse of children. The Defendant's Motion to Suppress Evidence is **DENIED**.

This constitutes the Order of the Court and no additional filing is required.

Dated this 18th day of November, 2021.

David M. Connors

DAVID CONNORS
DISTRICT COURT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that I emailed a true and correct copy of the Ruling and Order to the following on this 18 day of November, 2021.

Ryan N. Holtan
rholtan@agutah.gov
Assistant Utah Attorney General

Scott C Williams
scwlegal@gmail.com
Attorney for Defendant

Judicial Assistant

Addendum D

They continue to beat them. If they never give in, that person has not committed human trafficking. That is absolutely human trafficking, which is why the word "solicits" is in there.

THE COURT: Anything else?

MR. HOLTAN: No, Your Honor.

THE COURT: Ms. Adams, you do get the final word.

MS. ADAMS: There is a sexual solicitation statute, Your Honor, that would criminalize that conduct. So it's not like anybody who engages in that conduct would be immune from the law. They would be -- they would -- they would be prosecutable under possibly the human trafficking statute and also the sex solicitation statute.

Other than that, Your Honor, we submit on the briefs.

THE COURT: All right. Thank you. I have, as I indicated, reviewed carefully the memoranda that have been submitted and your arguments here today. I am going to grant the motion in part and deny it in part.

The part that I'm granting applies to Count 4, which has been essentially stipulated to by the State. That Count 4, which is unlawful sexual conduct with a 16- or 17-year-old, which is one -- and I think there were four separate counts of that. But one of them, Count 4, will, essentially, by consensus between the parties, be reduced to a class A misdemeanor.

I'm denying the motion as to the other three counts. I understood this was Counts 1, 2, 7 -- 1, 2, 4, and 7. I'm

granting it as to 4 and denying it as to 1, 2, and 7 and for several reasons.

First of all, as has already been recited to the Court, the standard is that the Court has to review the evidence in the light most favorable to the verdict and would have to determine that it is so inconclusive or so inherently improbable as to an element of the crime that reasonable minds must have entertained a reasonable doubt as to that element. And it's the State v. Workman, repeated again many times, including State v. Giles and others.

Furthermore, at this point in time, the jury's verdict needs to be upheld, where the jury returns a verdict that is reasonably sustained by circumstantial evidence and the inferences drawn from it. That, I believe, is State v. Nielsen, 2014 UT. 10. And the jury's inference is reasonable unless it falls to a level of inconsistency or incredibility that no reasonable jury could accept. That's State v. Ashcraft, 2015 UT. 5.

At the end of the day, this Court, in reviewing these three counts, is not in the position to reach that conclusion that the inferences drawn by the jury fall to such a level of inconsistency or incredibility that no reasonable jury could accept. And, therefore, I can't determine -- when I view this in the light most favorable to the verdict, I can't determine that the verdict was so in conclusive or so inherently

improbable that reasonable minds must have entertained reasonable doubt.

And from my perspective, in light of the inferences that the jury could reasonably draw from the facts that were presented to the jury during the trial, I don't believe that I'm in a position to grant the motion that has been brought by the defendant at this time.

So again, we are stipulating, essentially, that Count 4 will be reduced from a third-degree felony to a class A misdemeanor. I'm denying the motion as to counts 1, 2, and 7.

Now, with that, are we ready to proceed with sentencing?

MR. HOLTAN: The State is ready to proceed, Your Honor.

MR. WILLIAMS: I think we are. I think the first order of business with that is to seek a few modifications of the presentence report.

THE COURT: Well, that was going to be my first question to you. I have not seen any revised presentence report. I just have the one that was prepared back in June. Is that right? Has there been a revised one that anybody has seen?

MR. WILLIAMS: Not that we've seen. So --

THE COURT: All right.

MR. HOLTAN: Did we ask for a revised one?

THE COURT: Well, I thought we did. I'd have to go

Addendum E

THE COURT: Well, hang on. He hasn't finished his thought yet. I guess what's your --

MR. HOLTAN: I guess, yeah. If it is to -- it's just a timing issue then I don't -- if we're going to rely on evidence they present and then make a directed verdict after the defense rests, procedurally that's -- that's inappropriate. You make a motion for directed verdict following the conclusion of the State's evidence. If their motion for a directed verdict is going to rely on evidence they themselves present, that's an entirely different --

THE COURT: Well, I assume that's not the case.

MS. TANGARO: No, that's not the case.

THE COURT: All right. I mean, I assume you are not saying that you rely on anything you want to present as part of your directed evidence or your directed verdict motion.

MR. WILLIAMS: At this time, the Defense makes a motion for a directed verdict, Your Honor. The motion is as follows as to count -- as to all the counts.

THE COURT: Okay.

MR. WILLIAMS: The simple testimony without any other evidence by Lexie does not meet the counts in various ways. The totality of the circumstances that are described by her, or in relationship instigated by her and contact instigated by her and engaging by her as she said on her volition, the circumstances thus do not meet the requirement that anything

that might have been transferred of value at or during those occasions to the extent that the evidence by her testimony is sufficient to even find beyond a reasonable doubt that anything was transferred. In other words, she said she smoked marijuana. She never actually said how she received it. The evidence shows by the way that she is perfectly capable and apparently often does possess marijuana herself. She was high when she instigated all of this on September 6 --

THE COURT: I'm not sure I'm understanding. Is your motion directed only at the trafficking count or at all counts?

MR. WILLIAMS: All of it for the purpose of this sufficiency of the evidence argument, Your Honor.

THE COURT: Okay.

MR. WILLIAMS: With specificity now to the trafficking count. When I was talking about relying on the fact that there has got to be a causal connection, you've heard that argument in connection with the jury instructions. I don't want to reiterate. You are asked to incorporate it for this record.

So totality of what she has described is not indicative in any way of anything that was done in connection with receiving anything. Now there's testimony of further testimony that things were offered; although, it's not -- as you know, nothing of the communications is captured and presented as evidence in this trial other than Exhibit 1 which

was -- which occurred in the presence of police officers and Lexie's mother, which we think is relevant, but I don't know for this argument whether it is because all inferences are in favor obviously of the State for a directed verdict.

But our argument is that no reasonable jury could conclude that there was -- if they believed there was proof beyond a reasonable doubt that there was anything given or received, which we submit that -- I don't think she ever said that that occurred. She -- I don't think she ever said that something was given or received.

Now there was -- we might be wrong in terms of what a transcript would show because I heard the word "cart". Well, I heard a word that I didn't think was "cart" and somebody told me they thought it was "cart". So we'll all just have to have our collective recollection of that. We don't have a transcript.

But still, under the totality of the circumstances, somewhere along the line, she received to possess in connection with apparently what she frequently possessed at the time, which is marijuana, that that would not have been -- in any circumstance there was causal connection to the fact that they also allegedly had a sexual relationship. So that would be the specific focus I would ask the Court to have on the trafficking count.

She mentioned the word "oral sex" and she mentioned a

brief touching of a penis, of Mr. Andrus's penis -- sorry, but that's all we heard. That would mean that four counts of unlawful sex ought not to go to the jury.

If the penis touching is determined to be sufficient for an unlawful sexual act on its statute, then that may be a count in talking about how they had sexual intercourse could -- it wasn't described about how many times, and there wasn't specific information, as the jury instructions indicate, time and number of counts. So we don't believe there is sufficient evidence for four counts of the unlawful sexual conduct, the age -- the age-based counts as four. We'll submit that there is not sufficient evidence of four distinct occasions.

There is a general reference to sexual vaginal intercourse, she did say those words, didn't say how many times, just said it happened. And then touching, like I said, a brief touching of the penis.

There is insufficient evidence to go to the jury, in our opinion, of solicitation under the -- under the elements of that statute as they exist. And because the evidence -- the only evidence of marijuana being given would, I guess, be this reference to a cart. Carts can contain nicotine. That's the only evidence of the count.

One thing that we want to be clear of and we're going to ask for some jury instruction on this because we -- we realized it's probably not clear right now, is that the jury

can't convict Mr. Andrus of anything on the basis of activity in Kamas. They can use it as circumstantial evidence of what happened in Davis County, but they cannot convict him. And we need to make sure this jury understands that they can't come -- they can't charge -- convict him, for instance, of unlawful sex count -- one of those counts for having sex in Kamas. That's not charged. Now anything that happened in Kamas as we know from the 404(b) discussion has been admitted as narrative, as intrinsic evidence to the narrative of the relationship, but it can't be the basis for any conviction in this case, and I submit that applies to the directed verdict motion here as well.

And we realize that that -- we're going to ask you to make that clear in the jury instruction, and we're going to in argument to make it clear. So I'm bringing it now because I think it also applies to this.

Circumstantial evidence of whether something happened in Davis County, but it's not the basis for any count. And so something that happened almost a year after she claimed she was there is being -- or found, I'm sorry, is being offered apparently as circumstantial evidence that some transfer or giving of marijuana would have happened in Davis County. I submit that while the jury can consider that, it's not sufficient to support an actual distribution count.

Could I have just one second?

THE COURT: You can.

MR. WILLIAMS: Now you've seen the trial, Judge, and you know how directed verdict motions are. If you want me to ferret it out any further, but I hope I have made the record that we believe the evidence as it stands now does not -- no rational jury could find beyond a reasonable doubt that these counts occurred.

THE COURT: All right. Thank you. Input from the State?

MS. BECKETT: Yes, Your Honor. Initially, I want to make something clear that apparently I'm not sure is clear to Mr. Williams that was made clear from testimony. The State's Exhibit 1 is not correspondence that occurred between Mr. Andrus and law enforcement. These were provided to law enforcement by Lexie Thurgood. They occurred before her contact with law enforcement, and she provided them to law enforcement. There were subsequent text messages, but those weren't part of evidence. These were between Mr. Andrus and Lexie Thurgood.

These particular text messages are very clear. And Lexie's testimony -- I'll start with Count 2, which is the sexual exploitation count. Lexie testified that Mr. Andrus requested nude photos of her and she sent them. These text messages are circumstantial --

THE COURT: Just to make sure that I'm -- where are

the exhibits by the way?

MS. BECKETT: They are right there, Your Honor.

THE COURT: Can someone hand me the exhibits just so I can follow along while you're talking to us? Thank you. All right.

MS. BECKETT: These text messages are circumstantial evidence of some of those as well, of some of these counts and also the basis of some of these counts. On page 10 of these, I don't believe those are numbered, but page 10, Mr. Andrus requests sexy pics. And then in these particular text messages she responds with, "I deleted all those because my phone got tracked." And he tells her, "Oh, they don't have to be nudes." That is circumstantial evidence that the images provided previously were, in fact, nude photos of Lexie Thurgood.

So the basis for the child pornography or sexual exploitation in Count No. 2, circumstantial evidence is here and Lexie's testimony supports that she was requested to provide nude photos and did, in fact, provide nude photos on multiple occasions.

In terms of the distribution, I think that there is a bit of confusion. Lexie testified that when she first met Mr. Andrus in a vehicle at Lucky Slice in Davis County that he provided her with marijuana. She says marijuana. She also says vape carts. And during the testimony of what she received and what was found in Kamas, there is a picture, I believe it's

State's Exhibit 5, that is marijuana vape carts. And Lexie's testimony was, "Those look like the vape carts I received. They contained," and her exact words were "THC." She said that.

She stated that, that she had previously received those. She referenced those same vape carts during the initial sexual encounter with Mr. Andrus. So I think without a doubt that is State's Count 3.

And in the same exhibit, State's Exhibit 1, Mr. Andrus references puff bars. That's another reference to drugs. "You still smoke puff bars?" Again, circumstantial evidence.

The four counts of unlawful sexual activity, the State vehemently disagrees with what Mr. Williams has said here. There are not just the fact that Lexie testified that she was asked to give a hand job, Mr. Andrus wanted a hand job, she did, in fact, touch his penis at his request because he intended and wanted her to perform a hand job. That's the basis of the first count.

The basis of the second count, she testified that there was oral sex that occurred. She testified under oath that that's what happened. She also testified that there was vaginal, in her words, "penetrative sex". She said that that happened on multiple occasions.

There's also a particular incident that she

references where Mr. Andrus instructs her over video chat to touch herself and masturbate for him. Again, unlawful sexual conduct of a 16 or 17 year old. She testified to each one of those incidences separately. That's the basis for the four counts of unlawful sexual conduct for the 16 or 17 year olds.

The two counts of enticement. On page 9 of State's Exhibit 1, the defendant says to Lexie, mind you the defendant has stipulated to identity that he is the individual communicating with a minor, he says, "You want daddy to fuck like a good little girl?" That's an enticement.

On page 10 of that, "And if you want, I can fuck your brains out." These are the statements of the defendant and the basis for counts, State's Counts 8 and 9 of the enticement counts.

There are multiple references in State's Exhibit 1 that deal with circumstantial evidence as Mr. Williams points out. This circumstantial evidence is admissible. It isn't the basis for these counts. None of the conduct we're alleging and charging criminally here in this court is what occurred in Kamas and what occurred in Summit County, but it is indicative. Because of this argument, especially that Mr. Williams is making that somehow Lexie's testimony isn't enough, it isn't just Lexie's testimony. It's Mr. Andrus's own statements. He is admitting every single one of these statements. They have been stipulated to. There are multiple references to the

sleepover that occurred in Kamas, that they can get loud because he doesn't have a roommate. This is -- this isn't a matter of Lexie jumped on an app and sought out an adult. We know that. We've made these arguments before Your Honor in reference in jury instructions. It doesn't matter if Lexie as a 16-year-old girl showed up on Mr. Andrus's porch butt naked and said, "Let's have sex." He's a 34-year-old man. It doesn't matter that she was on an app. He knew she was 16 years old and that's not even an element that the State has to prove. And we have gone beyond what is necessary to meet the requirements of a directed verdict.

I haven't gone over the HT count, Your Honor, because I think that that is sort of a separate argument from these others. Lexie's testimony is very clear in that she met up with the defendant, that the defendant, in fact, provided her marijuana and used that as an instrument to convince her to perform a hand job on him in that vehicle. The circumstantial evidence of that, in addition to what she is saying happened in that first encounter, is that she says later when she didn't want to do those things again, he offered her more drugs, he offered her money, he offered her a car, and he offered her housing if she agreed to continue engaging in that conduct. That is circumstantial evidence that the jury without a doubt gets to consider in terms of whether or not his initial intent and whether or not they believe that he did, in fact, offer

marijuana to her to engage in that initial sexual contact.

Those elements are exactly what the HT count is based on. And I think that we've gone beyond that. And the argument we had before evidence was even this issue that witness testimony is enough. So now we're here before Your Honor saying that a victim who took the stand and testified subject to zero cross-examination is somehow now no longer enough evidence, and we can't believe her. I -- there -- I just don't see how we are at a point where we can even argue that there is no cause to put this before a jury at this point, Your Honor.

THE COURT: Thank you. Reply?

MR. WILLIAMS: No, Your Honor. Submit.

THE COURT: All right. Thank you. All right. Well, I'm going to under the circumstances deny the motion for a directed verdict. It appears to me that there is a rational basis from which at this stage in the procedure giving the State the benefit of all inferences believes there is a rational basis for the jury to conclude that the defendant could be found guilty on each of the events of the charges brought by the State.

Now, does the defendant intend to call witnesses?

MR. WILLIAMS: Excuse me, I'm sorry.

THE COURT: Does the Defense intend to call its witness?

MR. WILLIAMS: Yes.

Addendum F

Summit County. The allegations that he was giving drugs in exchange for sex, the fact that he was giving drugs to a child at all, again, we go up to Summit County, and all of a sudden, there's marijuana in the house. They are having unlawful sex in the house.

This entire narrative from the point this relationship begins to the point that it ends is an unlawful sexual relationship. And that evidence is intrinsic to this case because we've charged this as, essentially, an unlawful sexual relationship amongst the other things that the defendant committed during the course of this unlawful sexual relationship.

Arguing about rape or even bringing up the fact that that's why it's centered -- or the rape occurred up there doesn't open the door to arguing about consent because we're not trying a rape charge up there. None of our other counts have a rape defense. So we're not opening up the window to argue about consent because it's not relevant to any other charges.

So I'll leave it at that, Your Honor. I know we're close on time.

THE COURT: All right. Well, let me tell you how I feel about this one because this one is a little more complicated, I think, than the others.

I'm going to start with the State's proposal to introduce evidence about the prior convictions from 2004 and

2005 which, to me, is, you know -- I'll get to this in a moment -- but to me is the primary 404(b) issue in this case. And I -- at this point in time, I don't really know enough about those underlying charges to do a real analysis on probative value versus relevance and, you know, versus prejudice on those matters.

But probably more importantly, the fact that they're 17 and 18 years old, the fact that they would have occurred at a time when this defendant, who is now somewhere in his mid-thirties or later thirties, you know, was maybe 18 or 19 years old, to me, I have real trouble finding those to be significantly similar in any way, shape, or form as to allow them.

So I'm going to exclude, at least for the purposes of any general use of them by the State. Now, if the defendant were to testify, that'd be a different [inaudible]. I understand if the defendant was trying to raise a defense, that, you know, that raised impeachable sort of issues or rebuttal sort of issues that might make that pertinent, we'll decide that at trial. But for today's purposes, I'm going to exclude the reference to the prior convictions.

The rest of the evidence -- and I think we may need to talk a little bit about this last issue we've been talking about about the rape charge, but the rest of the evidence, I certainly believe the uncharged -- other uncharged conduct, whether it's

of that relationship occurred in Summit County versus Davis County, I think all of that -- that's all part of the narrative of the interaction between these two people, and I think the State is allowed to present that. And I don't think that implicates Rule 404(b).

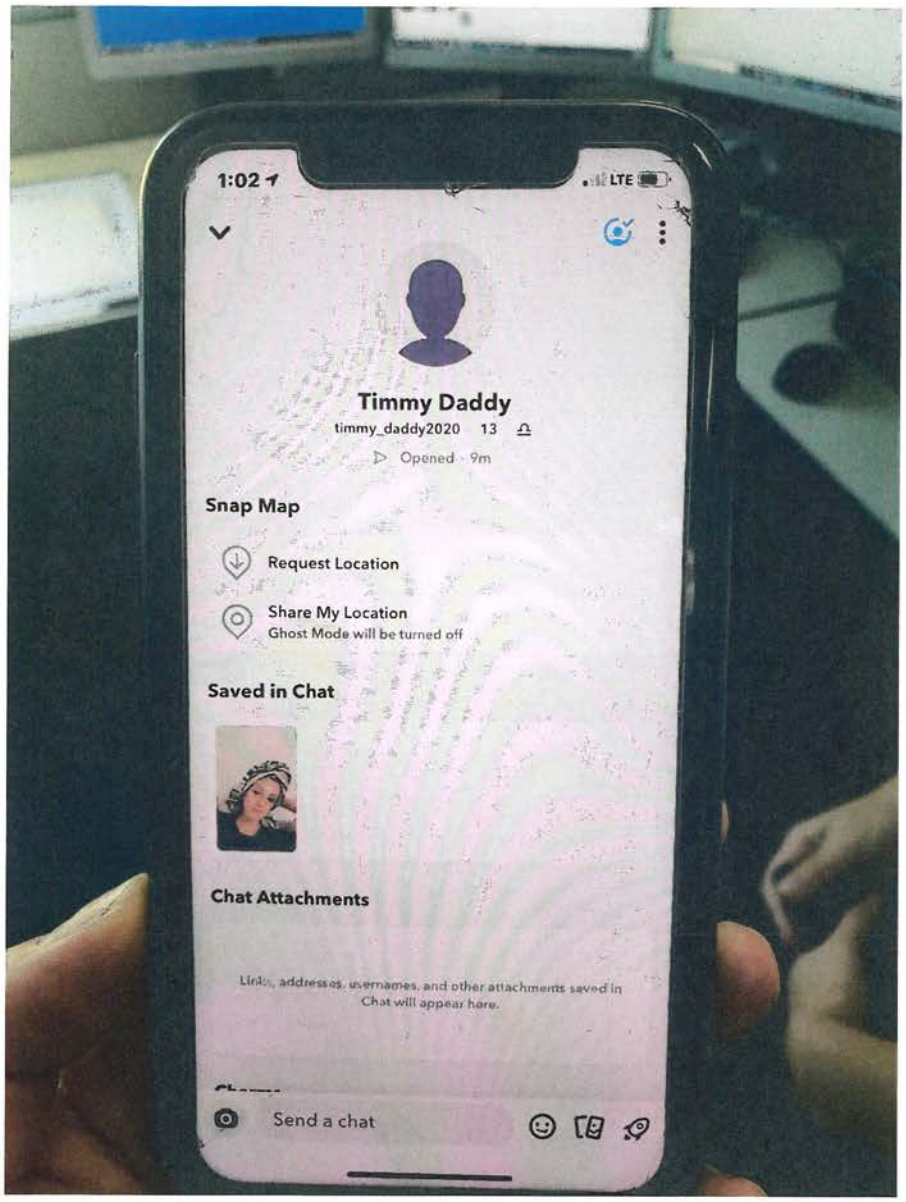
And so I hope I've made myself clear, and I think there's a boundary line for you there, Mr. Holtan, a little bit on how you -- especially how you touch on that very final episode, if you want to call it that. But other than that, I don't think that this really is 404(b) evidence. I think it's just a narrative regarding the relationship between these two individuals.

I think that brings us back to the consent motion that we had earlier. And on that one, I really think it's a little premature in the sense -- let me tell you how I feel about it.

I certainly don't think there ought to be any discussion, one way or the other on any side, about consent, if you will, in the opening arguments, okay? And depending how the evidence -- and I also, I can't -- I haven't really read carefully what your proposed jury instruction is yet. And we're going to have to deal with that before we get to the end of the case. I understand that.

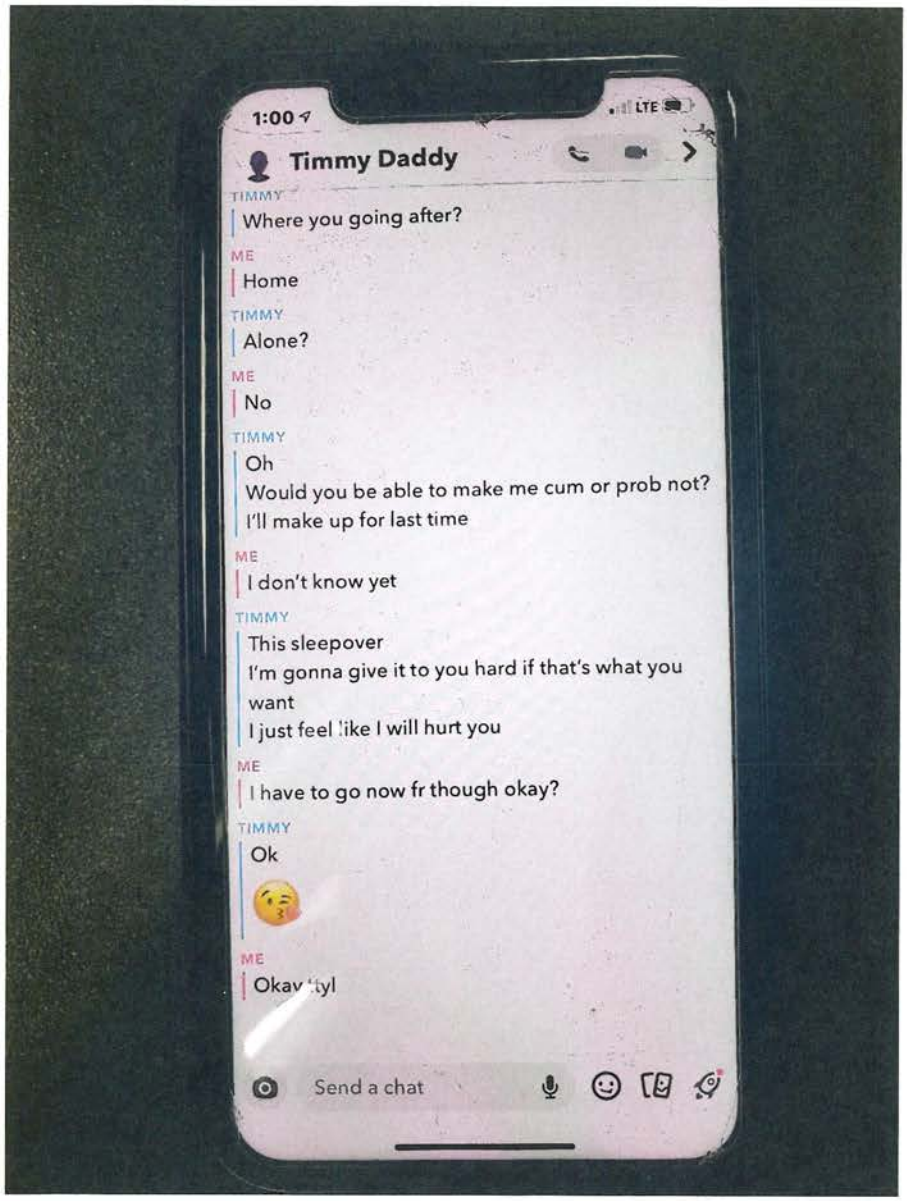
So I'm not going to pre -- you know, prejudge how I might, you know -- what finding or what ruling I might make on the proposed instruction. I'm not offended by you proposing an

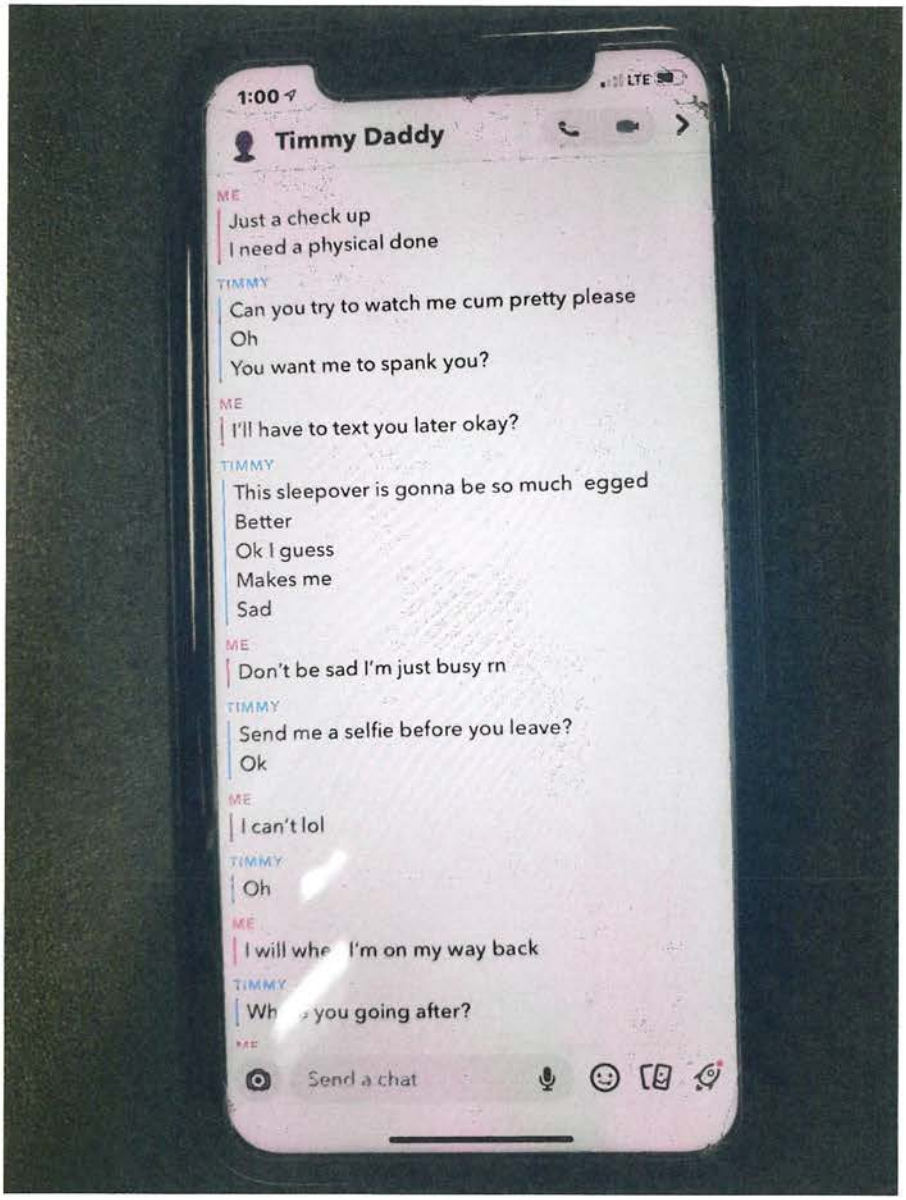
Addendum G

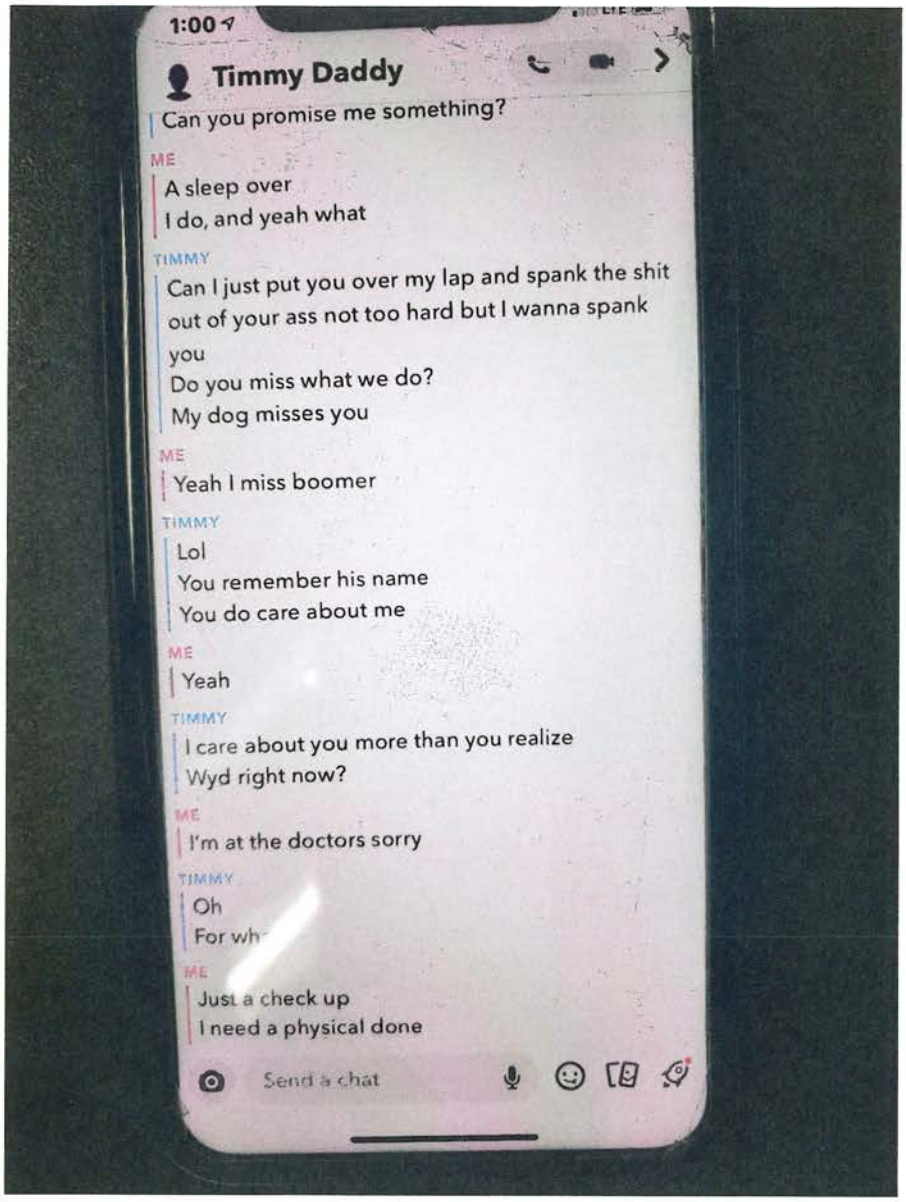


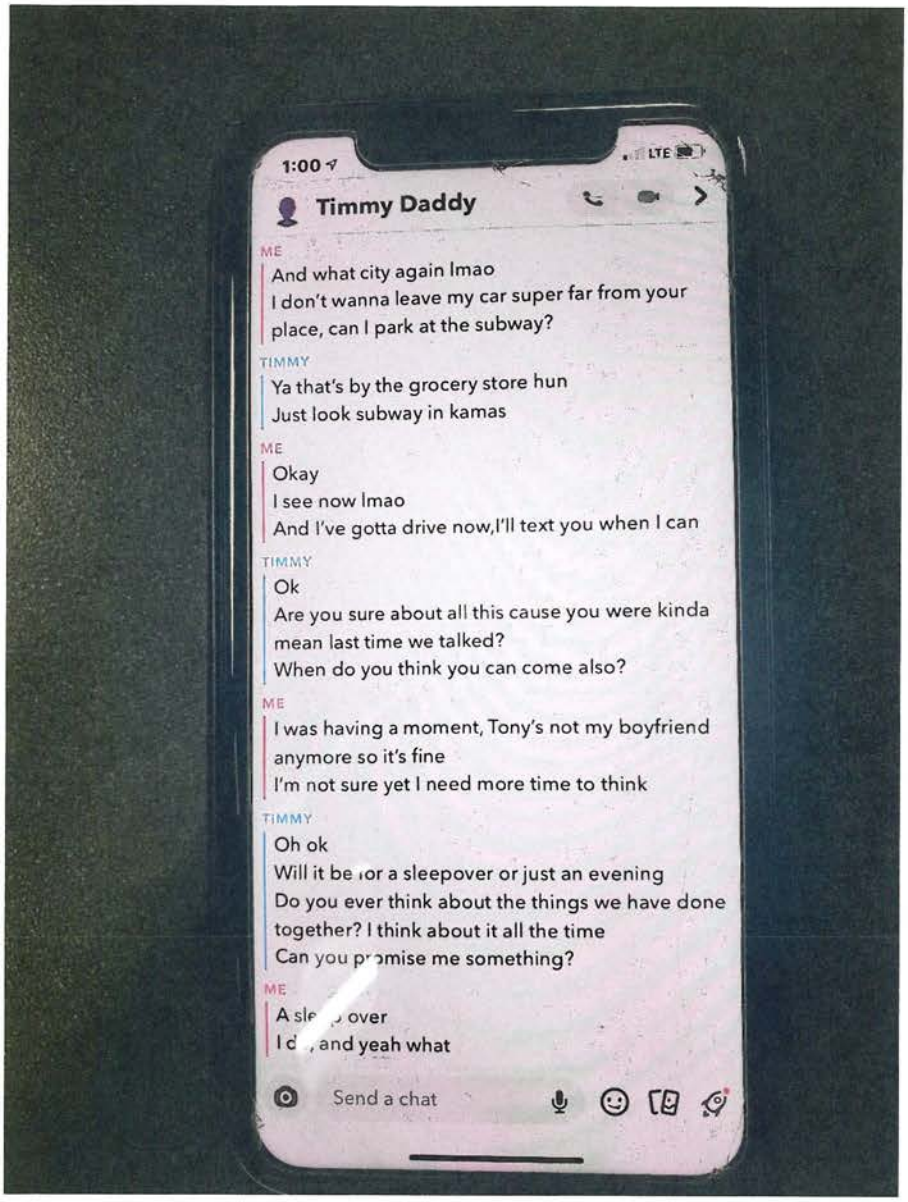
STATE'S EXHIBIT

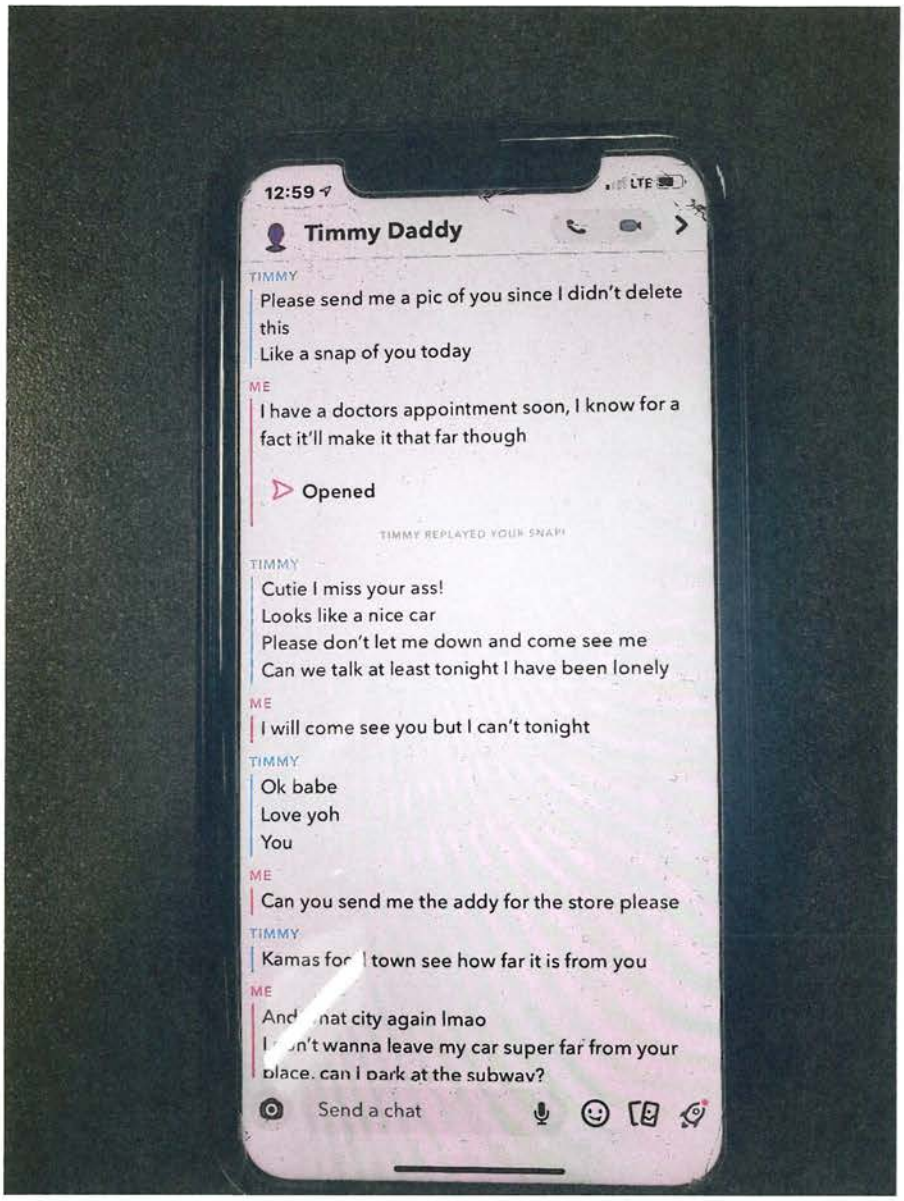
1

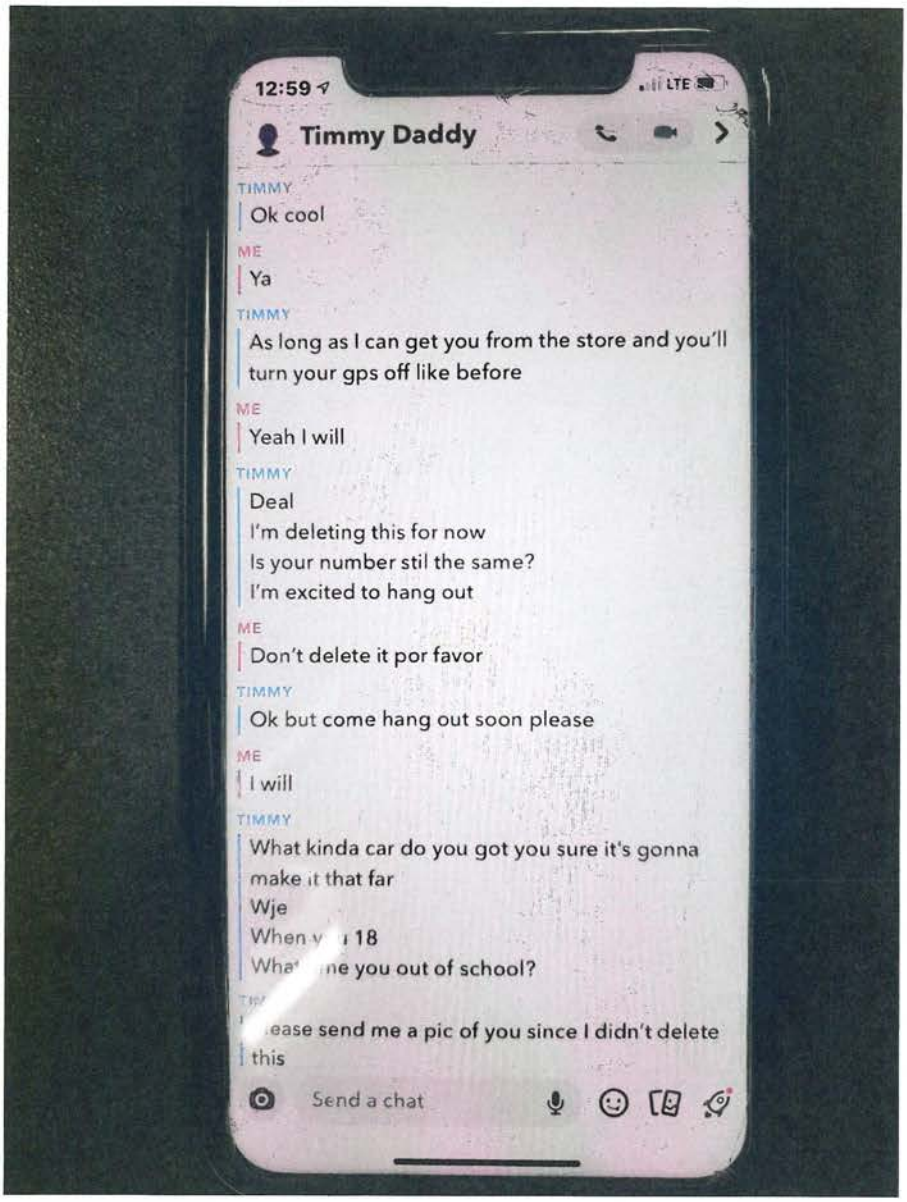

1:00
LTE
Timmy Daddy
TIMMY
Where you going after?
ME
Home
TIMMY
Alone?
ME
No
TIMMY
Oh
Would you be able to make me cum or prob not?
I'll make up for last time
ME
I don't know yet
TIMMY
This sleepover
I'm gonna give it to you hard if that's what you want
I just feel like I will hurt you
ME
I have to go now fr though okay?
TIMMY
Ok
ME
Okay tyl
Send a chat

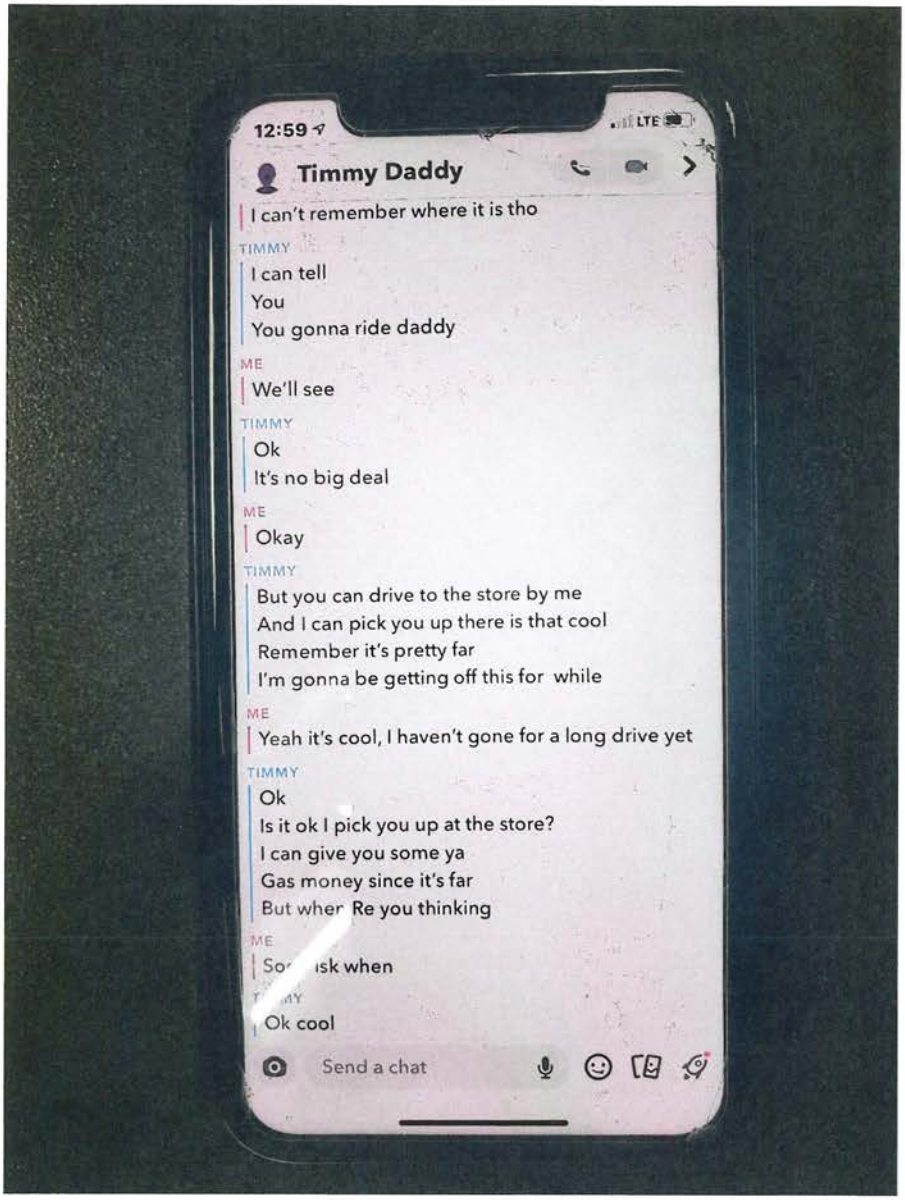

1:00
LTE
Timmy Daddy
ME
Just a check up
I need a physical done
TIMMY
Can you try to watch me cum pretty please
Oh
You want me to spank you?
ME
I'll have to text you later okay?
TIMMY
This sleepover is gonna be so much egged
Better
Ok I guess
Makes me
Sad
ME
Don't be sad I'm just busy rn
TIMMY
Send me a selfie before you leave?
Ok
ME
I can't lol
TIMMY
Oh
ME
I will whe I'm on my way back
TIMMY
Wh you going after?
Send a chat

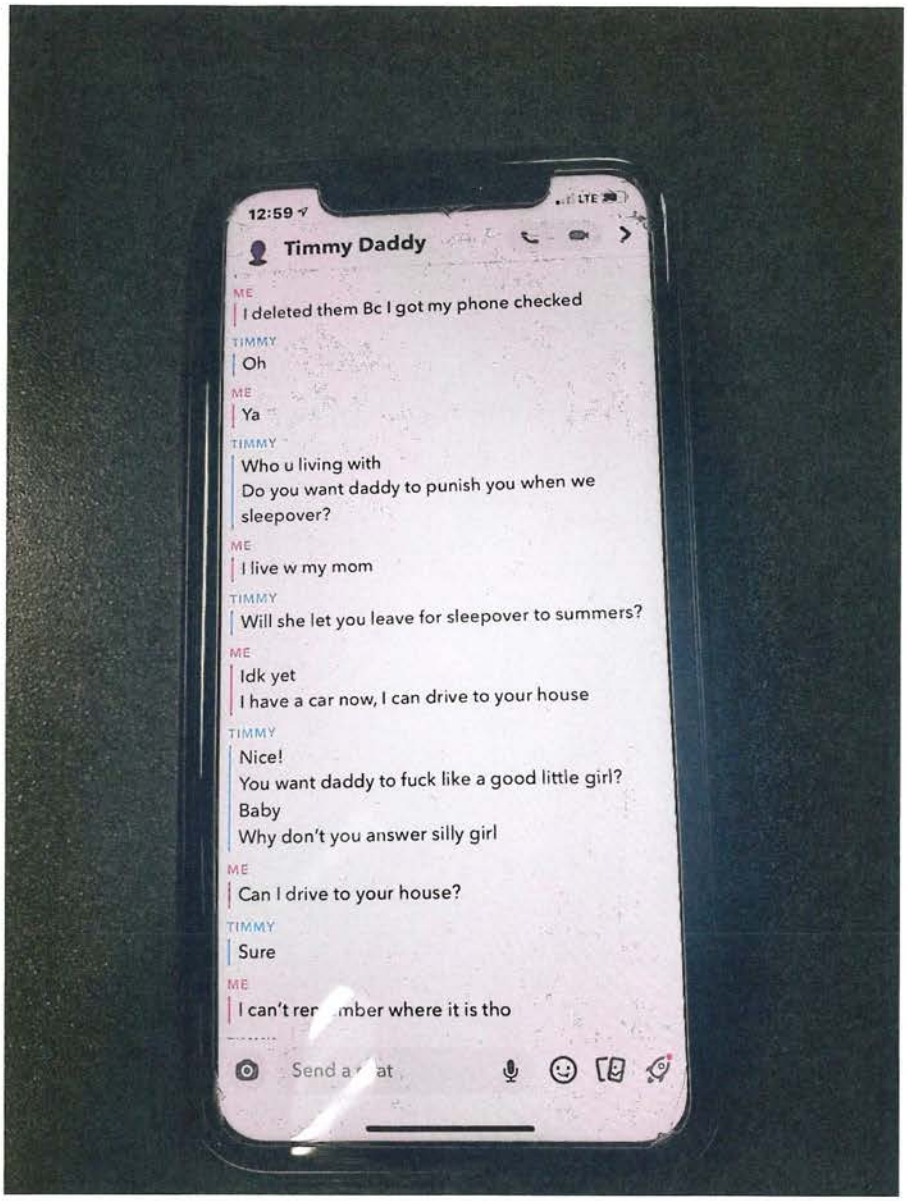

1:00
Timmy Daddy
Can you promise me something?
ME
A sleep over
I do, and yeah what
TIMMY
Can I just put you over my lap and spank the shit out of your ass not too hard but I wanna spank you
Do you miss what we do?
My dog misses you
ME
Yeah I miss boomer
TIMMY
Lol
You remember his name
You do care about me
ME
Yeah
TIMMY
I care about you more than you realize
Wyd right now?
ME
I'm at the doctors sorry
TIMMY
Oh
For wh
ME
Just a check up
I need a physical done
Send a chat

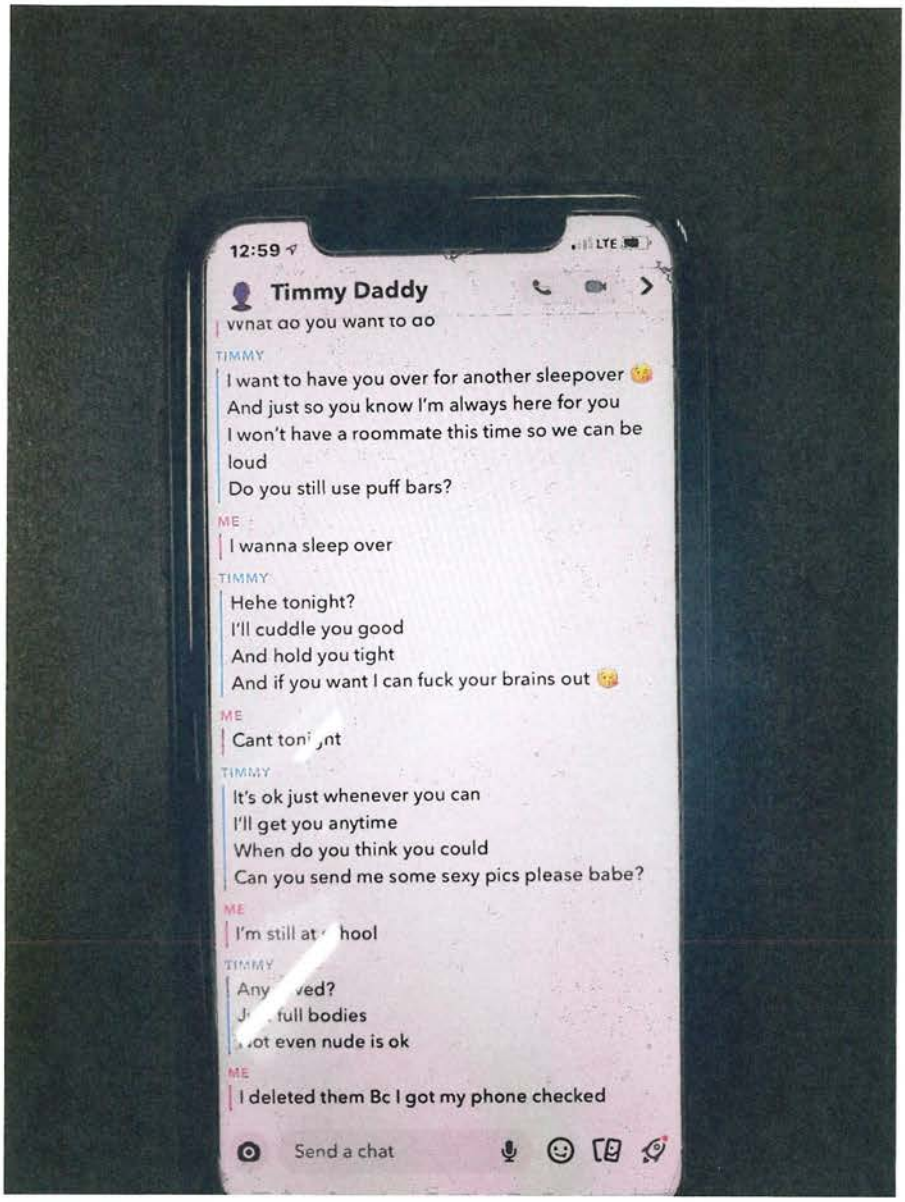

1:00
LTE
Timmy Daddy
ME
And what city again lmao
I don't wanna leave my car super far from your place, can I park at the subway?
TIMMY
Ya that's by the grocery store hun
Just look subway in kamas
ME
Okay
I see now lmao
And I've gotta drive now,I'll text you when I can
TIMMY
Ok
Are you sure about all this cause you were kinda mean last time we talked?
When do you think you can come also?
ME
I was having a moment, Tony's not my boyfriend anymore so it's fine
I'm not sure yet I need more time to think
TIMMY
Oh ok
Will it be for a sleepover or just an evening
Do you ever think about the things we have done together? I think about it all the time
Can you promise me something?
ME
A sleepover
I do, and yeah what
Send a chat

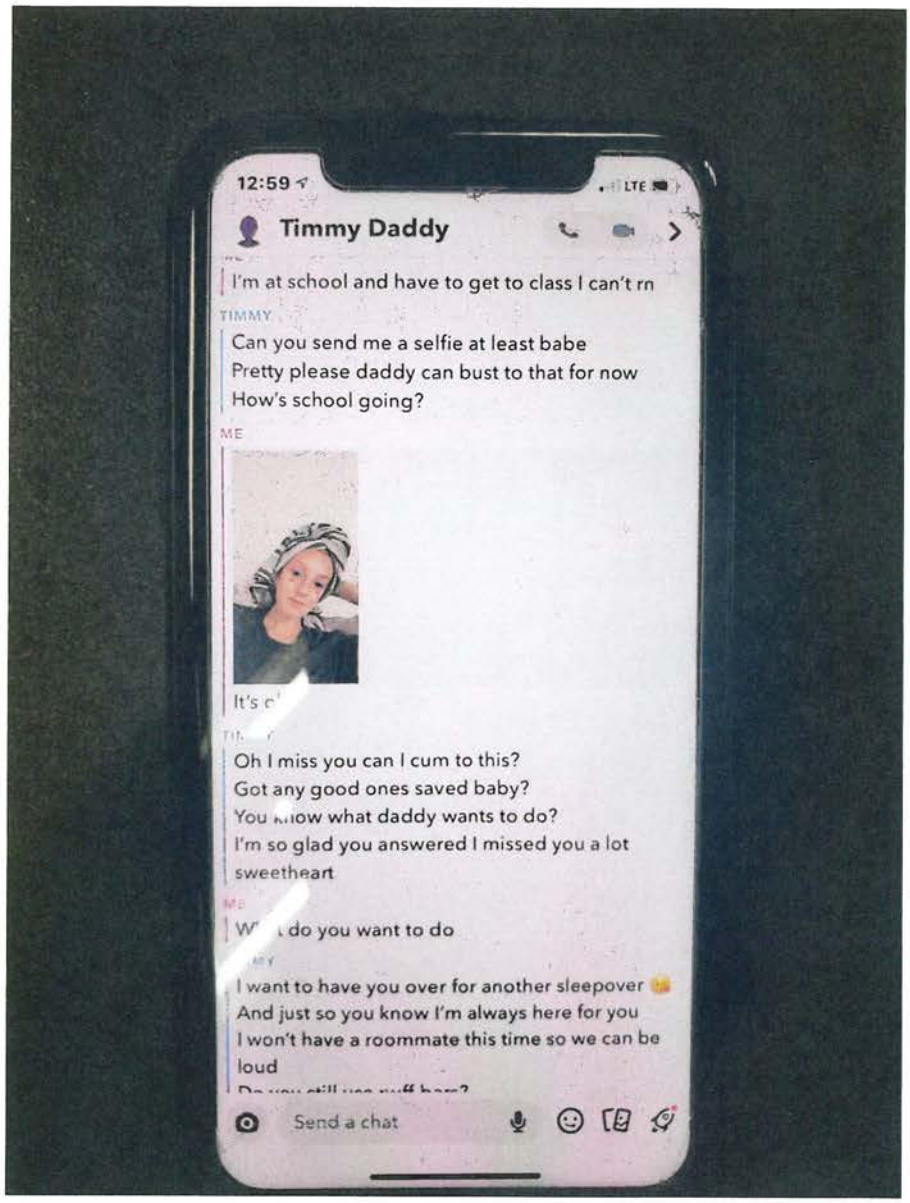

12:59
LTE
Timmy Daddy
TIMMY
Please send me a pic of you since I didn't delete this
Like a snap of you today
ME
I have a doctors appointment soon, I know for a fact it'll make it that far though
Opened
TIMMY REPLAYED YOUR SNAP!
TIMMY
Cutie I miss your ass!
Looks like a nice car
Please don't let me down and come see me
Can we talk at least tonight I have been lonely
ME
I will come see you but I can't tonight
TIMMY
Ok babe
Love yoh
You
ME
Can you send me the addy for the store please
TIMMY
Kamas for town see how far it is from you
ME
And nat city again lmao
I n't wanna leave my car super far from your place. can I park at the subway?
Send a chat

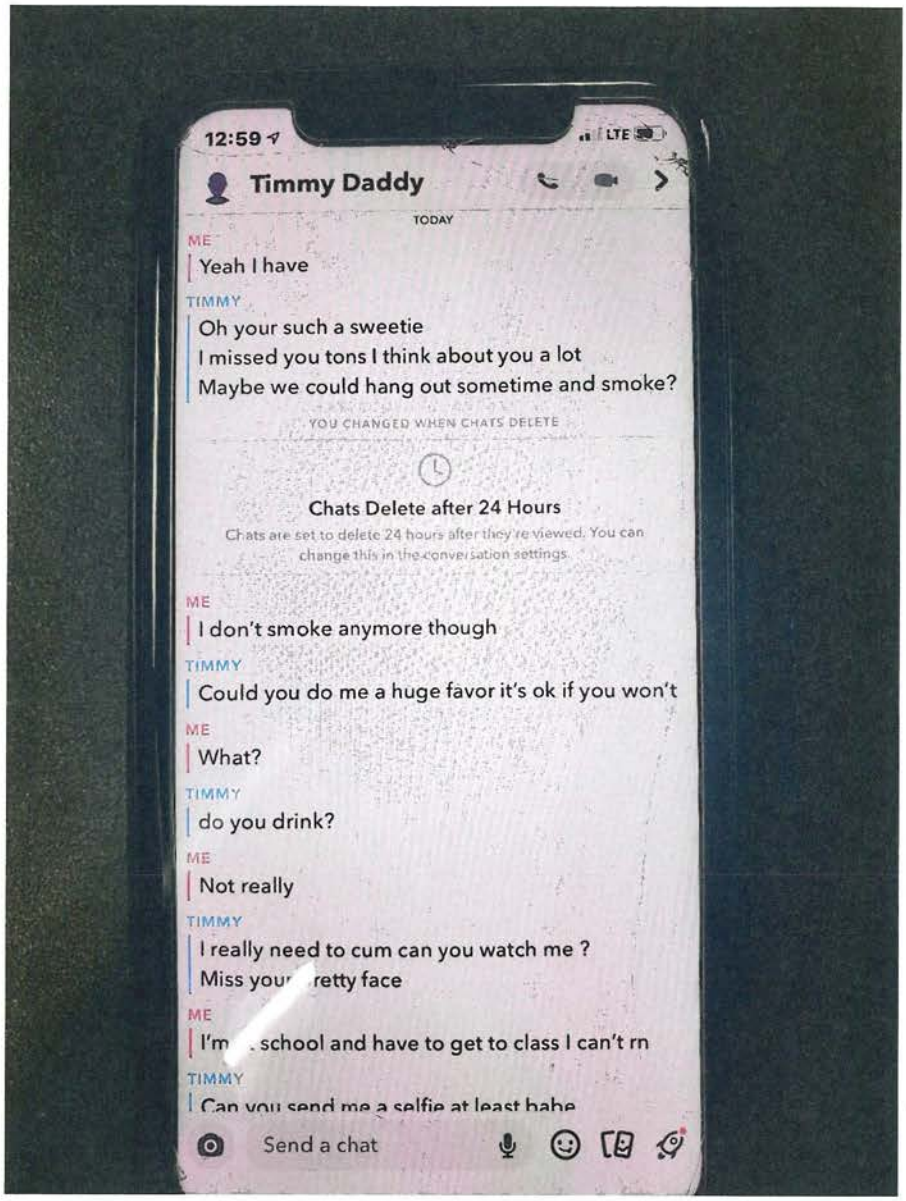

12:59
LTE
Timmy Daddy
TIMMY
Ok cool
ME
Ya
TIMMY
As long as I can get you from the store and you'll turn your gps off like before
ME
Yeah I will
TIMMY
Deal
I'm deleting this for now
Is your number stil the same?
I'm excited to hang out
ME
Don't delete it por favor
TIMMY
Ok but come hang out soon please
ME
I will
TIMMY
What kinda car do you got you sure it's gonna make it that far
Wje
When
18
ne you out of school?
ease send me a pic of you since I didn't delete this
Send a chat


12:59
LTE
Timmy Daddy
I can't remember where it is tho
TIMMY
I can tell
You
You gonna ride daddy
ME
We'll see
TIMMY
Ok
It's no big deal
ME
Okay
TIMMY
But you can drive to the store by me
And I can pick you up there is that cool
Remember it's pretty far
I'm gonna be getting off this for while
ME
Yeah it's cool, I haven't gone for a long drive yet
TIMMY
Ok
Is it ok I pick you up at the store?
I can give you some ya
Gas money since it's far
But wher Re you thinking
ME
So sk when
Ok cool
Send a chat


12:59
LTE
Timmy Daddy
ME
I deleted them Bc I got my phone checked
TIMMY
Oh
ME
Ya
TIMMY
Who u living with
Do you want daddy to punish you when we sleepover?
ME
I live w my mom
TIMMY
Will she let you leave for sleepover to summers?
ME
Idk yet
I have a car now, I can drive to your house
TIMMY
Nice!
You want daddy to fuck like a good little girl?
Baby
Why don't you answer silly girl
ME
Can I drive to your house?
TIMMY
Sure
ME
I can't rer mber where it is tho
Send a at


12:59
LTE
Timmy Daddy
What do you want to do
TIMMY
I want to have you over for another sleepover
And just so you know I'm always here for you
I won't have a roommate this time so we can be loud
Do you still use puff bars?
ME
I wanna sleep over
TIMMY
Hehe tonight?
I'll cuddle you good
And hold you tight
And if you want I can fuck your brains out
ME
Cant tonight
TIMMY
It's ok just whenever you can
I'll get you anytime
When do you think you could
Can you send me some sexy pics please babe?
ME
I'm still at school
TIMMY
Any saved?
Just full bodies
Not even nude is ok
ME
I deleted them Bc I got my phone checked
Send a chat


12:59
LTE
Timmy Daddy
I'm at school and have to get to class I can't rn
TIMMY
Can you send me a selfie at least babe
Pretty please daddy can bust to that for now
How's school going?
ME
Oh I miss you can I cum to this?
Got any good ones saved baby?
I'm so glad you answered I missed you a lot
sweetheart
I want to have you over for another sleepover
And just so you know I'm always here for you
I won't have a roommate this time so we can be
loud
Send a chat


12:59
LTE
Timmy Daddy
TODAY
ME
Yeah I have
TIMMY
Oh your such a sweetie
I missed you tons I think about you a lot
Maybe we could hang out sometime and smoke?
YOU CHANGED WHEN CHATS DELETE
Chats Delete after 24 Hours
Chats are set to delete 24 hours after they're viewed. You can change this in the conversation settings.
ME
I don't smoke anymore though
TIMMY
Could you do me a huge favor it's ok if you won't
ME
What?
TIMMY
do you drink?
ME
Not really
TIMMY
I really need to cum can you watch me ?
Miss you retty face
ME
I'm school and have to get to class I can't rn
TIMMY
Can you send me a selfie at least babe
Send a chat


STATE'S
EXHIBIT
2

STATE'S
EXHIBIT
3
ISIDRO Y E
RIPNDIP

STATE'S EXHIBIT
4

STATE'S
EXHIBIT
5


PARE
ADV
EXPLICIT
STATE'S
EXHIBIT
6