

IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee,

v.

FRANK VAL MODES

Defendant/Appellant.

BRIEF OF APPELLANT

Appellate Case No. 20180265

District Ct. No. 161912922

BRIEF OF APPELLANT FRANK VAL MODES

Appeal from the Third District Court- Salt Lake City, Salt Lake County, from a conviction of one First Degree Felony before the Honorable Judge Keith Kelly

GREGORY G. SKORDAS
KAYTLIN V. BECKETT
SKORDAS, CASTON & HYDE, LLC
560 South 300 East, Suite #225
Salt Lake City, UT 84111
gskordas@schhlaw.com
kbeckett@schhlaw.com
Attorneys for Appellant

THOMAS B. BRUNKER
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854
tbrunker@agutah.gov
Attorney for Appellee

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has original jurisdiction over this matter pursuant to U.C.A. §78a-3-102(3)(h), as an appeal from the Final Sentence, Judgment, and Commitment of the District Court following conviction of a First Degree Felony. The Utah Supreme Court transferred jurisdiction to the Utah Court of Appeals on April 24, 2018.

ISSUES, STANDARD OF REVIEW, PRESERVATION

Issue 1: Whether the Trial Court erred in admitting testimony of the alleged prior victim beyond the scope necessary for Rule 404(c).

Standard of Review: The standard of review for admission of evidence where no objection was made at the trial court level is plain error. *State v. Holgate*, 2000 UT 74, ¶ 11.

Preservation: This issue is raised for the first time on appeal.

Issue 2: Whether Appellant was denied his Sixth Amendment right to a fair trial through effective assistance of counsel where counsel allowed the testimony of a key eyewitness to be presented at trial without any cross-examination and such testimony was the sole basis for finding an aggravating element.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344.

Preservation: An ineffective assistance of counsel claim need not be preserved at the trial court level. *State v. Kozlov*, 2012 UT App 114, ¶ 28 (Utah Ct. App. 2012) (noting an ineffective assistance claim is allowed on appeal without preservation at trial).

Issue 3: Whether Appellant was denied his Sixth Amendment right to a fair trial through effective assistance of counsel where counsel failed to object to testimony of prior sexual abuse of a child under Rule 404(c), where sufficient notice and basis of the testimony was not provided in advance of trial.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344.

Preservation: An ineffective assistance of counsel claim need not be preserved at the trial court level. *State v. Kozlov*, 2012 UT App 114, ¶ 28 (Utah Ct. App. 2012) (noting an ineffective assistance claim is allowed on appeal without preservation at trial).

Issue 4: Whether Appellant was denied his Sixth Amendment right to a fair trial through effective assistance of counsel where counsel failed to call any witnesses or provide any evidence on Appellant’s behalf despite having been provided numerous potential witnesses by Appellant before trial and having been provided evidence of Defendant residing elsewhere during the time period.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344.

Preservation: An ineffective assistance of counsel claim need not be preserved at the trial court level. *State v. Kozlov*, 2012 UT App 114, ¶ 28 (Utah Ct. App. 2012) (noting an ineffective assistance claim is allowed on appeal without preservation at trial).

Issue 5: Whether Appellant was denied his Sixth Amendment right to a fair trial through effective assistance of counsel where counsel failed to inquire into the tender age

of the victim and the potential for faulty memory where the child was alleged to be between the ages of 6 months and 4 years when the abuse occurred and more than 14 years have passed since the alleged abuse occurred.

Standard of Review: “An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law.” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344.

Preservation: An ineffective assistance of counsel claim need not be preserved at the trial court level. *State v. Kozlov*, 2012 UT App 114, ¶ 28 (Utah Ct. App. 2012) (noting an ineffective assistance claim is allowed on appeal without preservation at trial).

Issue 6: Whether Appellant was denied Due Process where the charging information alleged the events offense occurred at some point over a 15 year period and the State failed to provide a specific timeline of the alleged offense.

Standard of Review: “Claims of inadequate notice of the charged conduct presents a question of law that an appellate court reviews for correctness.” *State v. Braggs*, 2013 UT App. 282, ¶17.

Preservation: Counsel made an oral motion on the issue at the trial Court level. (R. at 441-442)

Issue 7: Whether the effect of the errors outlined in issues 1-6 amounted to cumulative error requiring reversal under the circumstances.

Standard of Review: A defendant's cumulative error claim requires the Court first apply the standard of review applicable to each underlying claim of error and reverse under the cumulative error doctrine only if the cumulative effect of the several errors undermines

confidence that a fair trial was had. *State v. Perea*, 2013 UT 68, ¶ 33 (Utah 2013).

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

On January 23, 2018, Appellant was convicted of Aggravated Sexual Abuse of a Child. The alleged offense occurred at Appellant's now ex-wife's daycare. (R. at 363). The alleged victim K.V. is a niece of the Appellant K.V. was born in September 1999. (R. at 361). K.V. alleged that when she was a very young toddler, Appellant would sexually abuse her at her aunt's daycare; including touching himself in front of her and taking off her shirt and making her lay with other children in the daycare. (R. at 364). K.V. alleged that these offense occurred some time between 2000 and 2004.¹ K.V. is unclear on her age when these offenses occurred. K.V. did not speak about these offenses until over ten years after they occurred. (R. at 428). K.V. was interviewed by two separate investigators. (R. at 428 & 439). K.V. initially refused to discuss the offense with investigators. (R. at 429-430). No other party has corroborated the allegations made by K.V.

One of the aggravating factors relied on by the State was that Appellant had previously pled No contest to a Class A Misdemeanor of Sexual Battery in 2003. (R. at Exhibit 1). It is believed, that the alleged offenses in the instant matter occurred

¹ K.V. testified at the preliminary hearing that the abuse occurred when she was 4 years old, stating, "Well I turned 4 into 2004, so that's when it took place. Positive." (R. at 589). Importantly, K.V. actually turned four- years-old in September 2003. (R. at 361). The charging information alleges a different time period, between 2000 and 2015 (R. at 1-3), the CJC interview alleges a different time period, and the investigator is also unclear on the date of the alleged abuse. (R. at 439-442). Similarly, K.V. testified at trial that the abuse occurred "some time between 2000 and 2004." (R. at 372).

sometime between February 2000 and February 2004, but an actual timeline of when these events occurred is unknown.²

The prior matter involved an alleged victim who is believed to have been between 6-7 years old at the time she was allegedly abused by Appellant. (R. at 392). The evidence of the prior conviction was admitted under Rule 404 (c) of the Utah Rules of Evidence. (R. at 104-106). The prior conviction was admitted into evidence in two ways: (1) a certified copy of the docket from the original criminal matter in 2002(R. at Exhibit 1); (2) graphic, detailed testimony of the alleged prior victim. (R. at 391-397). Trial counsel did not cross-examine the prior victim (R. at 398) or object to the details provided in that testimony (R. at 391-398). The prior conviction and the allegations in the instant matter are substantially different.

Appellant puts forth multiples errors on appeal. First that the Court improperly admitted the testimony of the prior victim beyond the scope contemplated under Rule 404(c). Second that his trial counsel was ineffective in several instances. Next, Appellant's right to Due Process of law was violated when he was not given proper notice of the charges against him to defend against the charged offense. Lastly, Appellant puts forth that the cumulative errors at the trial court level seriously undermine any confidence the ultimate outcome.

DETAIL OF THE ARGUMENT

I. THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS VIOLATED.

The right to a fair trial is a fundamental constitutional right secured by the due process

² *Ibid.* at fn 1.

and equal protection guarantees of the Sixth and Fourteenth Amendments. *State v. Daniels*, 2002 UT 2 (Utah 2002) (citing, e.g. *Holbrook v. Flynn*, 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986); *Estelle v. Williams*, 425 U.S. 501, 502-03, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976)). These rights are also protected under the Utah State Constitution. Utah Const. Art. I, §§7, 12. (See Addendum E). A defendant's right to a fair trial is intended to assure access to the necessary tools and materials to mount an effective defense. *State v. Bakalov*, 1999 UT 45 ¶ 51 (Utah 1999) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). The Defendant's right to a fair trial was violated when the trial court improperly admitted testimony of alleged prior victim, his trial counsel was ineffective, his due process rights were violated, and the cumulative effect of those errors undermines confidence in the final outcome.

A. The Trial Court's admission of the uncorroborated testimony of the alleged prior victim was improper and beyond the scope contemplated by Rule 404(c).

Utah Rule of Evidence 404(c) allows for the admission of propensity evidence "in a criminal case in which a defendant is accused of child molestation." More specifically, Rule 404 (c) allows "evidence that the defendant committed any other act of child molestation." However, 404(c) is not an express mode of admitting any and every type of evidence about an alleged prior act of child molestation. *See e.g., State v. Cuttler*, 2015 UT 95.

Generally, prior acts are kept from the Court under Utah Rules of Evidence 404 (b) and 403, unless specific circumstance are met. Rule 404(b) is not applicable to this

matter, but Rule 403 is.³ *State v. Ring*, 2018 UT 19, ¶28. Rule 403 states, “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” It is understood that the intention of 404(c) is to admit propensity evidence and such does not *immediately* result in unduly prejudicial impact, but the trial court must still work to prevent the danger of unfair prejudice by limiting the details and facts of the prior conviction. *Id.* at ¶ 27. Presenting inflammatory details and evidence beyond what is necessary or appropriate to establish propensity is improper under 404(c). *Id.* In short, evidence admitted under 404(c) must still meet the requirements of Rule 403- the probative value must outweigh the prejudicial impact.

The standard of review for the admission of evidence under these circumstances is a plain error analysis. *State v. Holgate*, 2000 UT 74, ¶ 11. Plain error analysis requires the Appellant to establish the following: (1) an error exist; (2) the error should have been obvious to the trial court; (3) the error was harmful. *Id.* at ¶13. Prejudicial impact is inferred where there is a reasonable likelihood that but for the error the defendant would have had a more favorable outcome. *Id.*

In the instant matter, the Trial Court committed plain error when it improperly admitted testimony of the alleged victim in the prior conviction. The admission of significant

³ State’s Counsel only put forth the evidence under rule 404(c) (R. at Exhibit 1) when notice was provided to Trial Counsel and no such analysis of 404(b) was performed whereby the Court could have made any sort of finding on the admissibility of the proffered evidence under 404(b).

portions of M.E.'s testimony was in error. State's Counsel provided notice to Trial Counsel of its intent to admit evidence under Rule 404(c) of an alleged prior act of sexual abuse perpetrated by the Defendant (Notice). (R. at 104-106). The Notice provided to Trial Counsel included a statement that the State would introduce testimony of a Detective in the prior matter as well as the alleged victim in the prior matter. (R. at 104-105). The Notice also provided that the State would introduce a certified copy of the prior conviction for sexual battery. (R. at 104). The original conviction was the result of a no contest plea where the factual allegations were contested by the defendant. (R. at 104). The State did not seek admission of the Statement of Defendant in Advance of Guilty Plea, which presumably would outline the factual basis for the plea entered. Instead, at trial the State admitted the conviction for sexual battery as an exhibit and then the State called M.E., the alleged victim in the prior matter, as a witness. (R. at 391-398).

M.E. testified in graphic detail about the alleged sexual abuse perpetrated on her by the Appellant when she was between the ages of 6-7 years old. (R. at 392). This included the following statements:

- "[The Defendant] was[] telling me to close my eyes and put my fingers in my mouth." (R. at 394).
- "[The Defendant] told me to put both of my legs around him and he started moving his hips." (R. at 394).
- "[The Defendant] would call me his girlfriend." (R. at 394).
- "[The Defendant] was putting his private parts up against mine." (R. at 396).
- "I felt like [the Defendant] got a sick pleasure from it." (R. at 396).

-“[The Defendant] put a blanket over [another boy at the daycare] and says ‘okay’, lay there. And [the Defendant] went to get on top of the boy. And he says ‘okay, now kiss him and then makeout with him.’” (R. at 397).

-“I told [the Defendant] I didn’t want to do it. And [the Defendant] says you need to do it for your uncle.” (R. at 397).

None of the above outlined statements were necessary to the admission of evidence under 404(c) or properly admissible under 404(c).

As outlined in *State v. Cuttler*, the admission of extraneous and inflammatory details is not contemplated under 404(c) and trial courts should seek to limit such from coming into evidence absent a showing of specific pattern of conduct. *Cuttler*, at ¶ 27. In *Cuttler* the Court reasoned that specific details which go to a pattern of conduct may be necessary to establish a specific propensity. *Id.* at ¶ 29 (noting that a trial court could properly admit specific factual allegations from a prior offense because those factual allegations were similar in mode, method, or context to the instant allegations). The testimony proffered by M.E. does not meet this standard.

The error should have been obvious to the trial court. The similarities between the allegations of K.V. and M.E. are minimal. M.E. and K.V. were both pre-pubescent females (R. at 365 & 392); K.V. and M.E. were both accessible to the Appellant by virtue of his ex-wife’s daycare business (R. at 363 & 392); and both K.V. and M.E. alleged the offenses occurred some time between 2001-2004 (R. at 372 & Exhibit 1). The differences between the testimony of K.V. and M.E. are numerous and significant. K.V. was between the ages

of 6 months and 4 years when the alleged abuse occurred.⁴ M.E. was between the ages of 6-7 years old when the alleged abuse occurred. (R. at 392). K.V. alleged that the Appellant removed her clothes, touched himself in front of her, touched her while she was unclothed, and stuck his fingers inside her vagina. (R. at 364-367). M.E. did not testify that Appellant did any of those particular acts to her. (R. at 393-397). M.E.'s testimony, as described above, was not similar to K.V.'s in mode, method, or context of the offense.

The admission resulted in prejudice against the Appellant. The graphic details of M.E.'s testimony were not controverted or cross-examined in any manner by Appellant's Trial Counsel, as furthered outlined below. The graphic details of that uncontroverted testimony undoubtedly influenced the ultimate outcome. In fact, the testimony of M.E. was an aggravating factor the Court relied on in finding Appellant guilty of the charged offense. (R. at 479). The purpose of 404(c) is to establish propensity for committing the type of offense alleged; the purpose of 404(c) is not to parade the extraneous and inflammatory facts of a prior offense before the Court, as such is clearly designed to detract from the facts being dealt with and in direct contravention of Rule 403 of the Utah Rules of Evidence.

There was no other purpose for admitting the evidence other than prejudicing the Appellant. The purpose of providing such information to the Court is designed to detract from the ultimate issue; whether Appellant sexually abused K.V. This information is especially problematic where the alleged offense resulted in a misdemeanor, no contest

⁴ *Ibid.* at fn 1.

conviction with apparently no jail time. (R. at Exhibit 1). The likelihood that the Court may believe Appellant had committed such a graphic offense previously and received minimal punishment would have significant impact.

This would undoubtedly lead the Court to give the testimony of M.E. unnecessary and improper weight in the ultimate determination as strictly forbidden by Rule 403. Rule 403 is designed to restrict the admission of relevant evidence where it become clear that the admission of such evidence would do more than good. Rule 404(c) does not work to subvert the prohibitions of Rule 403; instead, Rule 404(c) must still work within those confines. The admission of the detailed testimony under 404(c), which goes far beyond the scope of propensity, was improper and inherently prejudicial. This prejudicial impact is undeniable when coupled with the fact that K.V. was only able to provide minimal testimony and no corroboration for the allegations she put forth over a decade after the offense are alleged to have occurred; whereas 6-7 year old M.E. came forward at the exact time of her alleged abuse and could provide significant details of her abuse. In short, K.V.'s testimony and all of its inconsistencies, even coupled with the prior conviction, would not have been enough to convict Appellant of the charged offenses absent the graphic and detailed testimony of M.E. As such, the admission of M.E.'s testimony in such graphic detail was improper, plain error, and should result in a reversal of the conviction and remand for a new trial.

B. Appellant was denied his right to a fair trial through effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment and Utah Constitution Art. I §§ 7, 12, where Trial Counsel failed to cross-examine the alleged prior victim in any manner regarding the facts and circumstances of the alleged prior abuse, failed to object to testimony of prior sexual abuse of a child under 404(c), and failed to present expert testimony on the issue of

early childhood memory recovery.

Utah Courts have noted one “essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant . . .” *State v. Arguelles*, 2002 UT 104 ¶ 87 (Utah 2002) (citing *Wheat v. United States*, 486 U.S. 153, 159, 100 L. Ed. 2d 140, 108 S. Ct. 1692 (1988)).” To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial.” *Menziess v. State*, 2014 UT 40, ¶ 75 (Utah 2014). “To satisfy the first part of the test, defendant must overcome the ‘strong presumption that [his] trial counsel rendered adequate assistance.’” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344 (Utah 2010) (quotations in original). Conversely, “whenever there is a legitimate exercise of professional judgment in the choice of trial strategy, the fact that it did not produce the expected result does not constitute ineffectiveness of counsel.” *Id.* (quoting *State v. Bullock*, 791 P.2d 155, 160 (Utah 1989)). The question to be examined then is whether, “the failure to raise the objections before the trial court [was] the result of a consciously chosen strategy of trial counsel rather than an oversight, and if it was a strategic decision, did the making of that choice constitute ineffective assistance of counsel?” *Id.*

The Sixth Amendment of the United States Constitution likewise requires counsel to make a reasonable investigation and inquiry into the factual underpinnings of the charges and any strategic choices made by trial counsel after a less than reasonable investigation are likely unreasonable. *Lynch v. State*, 2017 UT App. 86, ¶

66; *See also, State v. Templin*. 805 P.2d 182, 187-188 (Utah 1990). The Utah Supreme Court noted, “when trial counsel fails to . . . present evidence that [is] crucial to the defense, it amounts to prejudice when this evidence would have affect[ed] the entire evidentiary picture.” *State v. Griffin*, 2015 UT 18, ¶ 34 (Utah 2015). “When no possible explanation or tactical reason exists for such a decision,” the first prong of the ineffective assistance of counsel analysis is presumed met. *State v. Finlayson*, 2000 UT 10, ¶ 24 (Utah 2000).

Where trial counsel fails to adequately investigate the basic facts and underpinning of a case or fails to investigate the availability of prospective defense witnesses, counsel’s performance does not comport with the “wide range of reasonable professional assistance.” *State v. Thompson*, 2014 UT App. 14 ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). In determining whether trial counsel’s failure to investigate and present evidence amounts to prejudice against an Appellant, the Utah Supreme Court has instructed the appellate court to examine the totality of the evidence and determine whether the final outcome was in fact supported by the evidence presented. *Gregg v. State*, 2012 UT 32, ¶26. Importantly, though the Appellant carries a difficult burden under a claim of ineffective assistance of counsel, that burden is not impossible to overcome. *State v. Thompson*, 2014 UT App. 14 ¶ 36.

In examining ineffective assistance claims for failure to engage expert witnesses, the Utah Court of Appeals noted:

[A]lthough [we are] generally reluctant to question trial strategy, including whether to call an expert witness, where there is no reasonable basis for that

decision, [we] will conclude there was deficient performance by trial counsel. The specific facts of a case may require trial counsel to investigate potential witnesses to determine whether such [expert] testimony would be appropriate.

Landry v. State, 2016 UT App. 164 ¶32. The importance in seeking out expert testimony or expert guidance on difficult issues is that it provides trial counsel with an opportunity to address inconsistencies and inadequacies as well as address and cross-examine State's witnesses on those issues. *Id.* at ¶ 41. This is especially true where the crux of a conviction rests on the unquestioned testimony of a witness that could be contradicted with proper expert guidance. *Id.* Where such is the case, the Court will presume trial counsel's failure to diligently seek expert guidance was not a strategic one, but an objectively deficient one. *Id.* (citing *State v. Thompson*, 2014 UT App. 14 ¶¶ 84-86).

- i. Trial Counsel's failure to provide any evidence to contradict the allegations other than the Defendant's testimony was objectively deficient.*

Trial Counsel's failure to present evidence to contradict the allegations, other than Appellant's testimony, was objectively deficient. Trial counsel failed to call any of Defense witnesses or present evidence. Specifically, Trial Counsel failed to introduce the CJC interview of the alleged victim. Those interviews contained several inconsistencies.⁵ K.V. was interviewed twice by investigators. (R. at 428 & 439). In the first interview K.V.

⁵ Appellant recognizes the restrictions to the record on appeal under Rule 11 of the Utah Rules of Appellate Procedure with regard to evidence not addressed by Trial Counsel at the trial court level and thus does not examine the specific statements contained therein, which are inconsistent with testimony of witnesses at trial.

declined to tell investigators anything about the alleged prior abuse. (R. at 429-430). In the second interview, K.V. spoke in significant detail about the allegations. (R. at 437). At the conclusion of the second interview K.V. tells investigators that she had previously been molested by someone else and again declines to provide information on that particular issue. Trial Counsel never addressed this issue at Court or sought to address the CJC interviews in any manner despite the inconsistencies. Trial Counsel never questioned K.V. about declining to cooperate with investigators. Trial Counsel never inquires of either investigator if the second suspect had been investigated with regard to allegations made by K.V. Trial Counsel never asks either investigator if they conducted any follow-up of the allegation made by K.V. at the end of the second interview.

The CJC interview would have proven many inconsistencies in the alleged victim's testimony. Inconsistencies about the allegations were crucial to the entirety of the evidentiary picture at the trial court level, especially given the passing of time and the lack of corroboration. Likewise, as discussed in *State v. Ott* and *State v. Bullock*, there does not appear to be any sound strategy behind failing to inquire into these inconsistencies on the part of trial counsel and a failure to even address such is clearly ineffective. In short, there appears to be no tactical reason to ignore the CJC interviews where the inconsistencies are obvious, and nothing from the interview would have harmed the defense. As noted by the Utah Supreme Court, when no such strategic reason for a decision exists, it is presumed the first prong of the ineffective assistance of counsel test is satisfied.

- ii. *Trial Counsel's failure to cross-examine the alleged victim in the prior matter or object to the testimony of prior sexual abuse of a*

child under 404(c) was objectively deficient.

Given the nature of the charges that the Defendant was facing, Trial Counsel's failure to cross-examine the alleged victim in the prior matter was objectively deficient. Similarly, failing to object to the admission of certain testimony of the alleged prior victim under 404(c) was objectively deficient. There is no conceivable strategy to failing to object to the testimony of the alleged victim in the prior matter *and* failing to inquire into that testimony when it was proffered. If trial counsel's legitimate intention in failing to cross-examine the prior victim was intended to lessen the impact of such testimony, then trial counsel should have objected to the testimony as a whole given it was far the scope contemplated by 404(c). Instead, Trial Counsel chose to ignore the testimony in its entirety making no attempt to narrow the scope of the testimony or limit its impact through strategic cross-examination.

Trial Counsel's decision to ignore the testimony its entirety was not based in sound professional judgment as required by case law. Trial Counsel was aware of Appellant's theory of the case that he was in the home daycare when the K.V. was attending and would have been physically unable to commit the sexual abuse as alleged by M.E. due to a prior injury.⁶ Yet trial Counsel makes no attempt to address this theory through cross

⁶ Trial Counsel examined other witnesses about the timeline and contentions that Appellant was not living in the home during most of the time when K.V. alleged these offenses occurred. (R. at 374, 450, 453, 526). Similarly, Trial Counsel examined other parties about Appellant's workplace injury which limited his ability to lift and/or bend over during the time period in which M.E. alleged Appellant committed the prior offense. (R. at 374, 414, 416, 418, 448).

examination. As outlined above, the testimony of the prior alleged victim was inherently prejudicial to the Appellant's case, thus it was vital to cross-examine. In the alternative, if Trial Counsel strategically chose not to further inquire into the factual allegations of the prior matter in order to limit their impact, then Trial Counsel's failure to object to the detailed and graphic testimony was objectively deficient. As outlined, *State v. Ott* and *State v. Bullock*, it is unlikely that trial counsel made a strategic choice to not cross-examine the alleged prior victim *and* chose not to object to the admission of the testimony when it exceeded the scope of 404(c). As noted by the Utah Supreme Court, when no such strategic reason for a decision exists, it is presumed the first prong of the ineffective assistance of counsel test is satisfied.

iii. Trial Counsel's failure to inquire into the faulty memory of a tender age witness when such witness was the sole basis of the conviction was objectively deficient.

Where Trial Counsel is ill-equipped to counter the testimony of an eyewitness, but such testimony is susceptible to legitimate contentions, it is objectively deficient to fail to inquire into the assistance of expert testimony in countering that eyewitness testimony. The victim in the instant matter was between the ages of 6 months and 4 years when the alleged abuse occurred.⁷ The offenses are alleged to have occurred sometime between February 2000 and early 2004- over 14 years before the victim testified and more than 10 years before the victim spoke with investigators. (R. at 428 & 439). Trial Counsel's failure to inquire about tender age of the victim and its impact on memory recall, or the limited

⁷ *Ibid.* at fn 1.

capacity of a child under two years of age to recall such facts, would have clearly impacted the evidentiary picture. Trial Counsel made no inquiry into concerns about recall and made minimal attempts to establish a timeline of other events that may have occurred contemporaneously with the alleged sexual abuse. (R. at 371-379). It is clear from the attempts to establish a timeline of the allegations, that Trial Counsel knew the information was crucial to the Appellant's defense. There were no other eyewitnesses to the alleged abuse, there was no disclosure made at the time of the alleged abuse (R. at 369) or for many years after the alleged abuse (R. at 370), nor did the State call a witness who could corroborate the factual allegations in any manner. (R. at 441). Instead, the State relied solely on that testimony of K.V. to establish the elements of the offense for which Appellant was convicted.⁸

Similar to *Landry*, the facts of the instant matter made the alleged victim's testimony particularly susceptible to direct inquiry and failing to make that inquiry or, at a minimum, seek guidance from an expert was objectively deficient. Proving that alleged victim was inherently unreliable given her young age and lack of specific recall would have abolished any basis for finding the State had met its burden. Trial Counsel makes several arguments and inquiries regarding the timeline, but no such timeline is ever established. This line of questioning supports a finding that Trial Counsel knew the recall and memory issue was important and yet no sufficient inquiry or argument regarding that issue is ever properly

⁸ The State called other witnesses, including Appellant's ex-wife (R. at 408), K.V.'s mother and father (R. at 380 & 399), and two investigators (R. at 423 & 431). None of these other witnesses provided any independent knowledge of the allegations.

made by Trial Counsel. As discussed at length in *Landry v. State*, there appears no plausible strategic reason for failing to address this issue with expert guidance and input.

- iv. *Had Trial Counsel cross-examined the alleged prior victim, presented evidence of inconsistencies by the alleged victim, made a 404(c) objection, presented evidence for Defendant, or inquired into the potential for faulty memory in a tender age child witness the Defendant would have obtained a more favorable outcome.*

Trial Counsel's failure to present any evidence favorable to the Appellant or address the lack of evidence brought forth by the State resulted in an unfavorable outcome for Appellant. As outlined above, there were significant inconsistencies between trial testimony, preliminary hearing testimony, and prior statements, but no such evidence was brought before the Trial Court. The failure to provide this evidence or address it in manner allowed the Trial Court to find the testimony of those witnesses credible at trial and make findings based on their testimony without any contradiction from the defense. Given the lack of evidence presented by the State as to the actual elements of the offense, the failure to present any favorable evidence had a clear impact on the ultimate outcome.

Trial Counsel's failure to cross-examine the alleged prior victim, failure to make a 404(c) objection, and failure to present any evidence resulted in unfavorable outcome for Appellant. The Judge never heard the defense's theory of the case as to the prior allegations due to Trial Counsel's failure to cross-examine. The Judge was permitted to hear extraneous details of the alleged prior victim's assault due to Trial Counsel's failure to object. The Judge never heard any evidence from the defense that could have helped disprove the allegations against Appellant. Trial counsel had evidence in hand to disprove

allegations against Appellant and show inconsistencies and decided not to utilize such evidence. As a result of Trial Counsel's failure Judge was never able to consider the full weight of the Appellant's defense and the proper context of the testimony of M.E. in making the ultimate decision. Instead, the Trial Court was allowed to consider the improperly admitted testimony of M.E. without any objection or limitation. Given the lack of factual support for K.V.'s testimony it appears obvious that the Trial Court relied a great deal on the testimony of M.E. in making its final decision on the merits of the State's case.

The only eyewitness to the alleged offense and only individual capable of establishing the elements or the charged offense was K.V. As discussed at great length through this brief, K.V. was and remained unable to establish a consistent timeline of when the alleged offenses occurred. K.V. was unable even recall the age at which she was no longer attending daycare at her aunt's home. (R. at 374). K.V.'s very selective recall of the factual allegations was unchecked by Trial Counsel and allowed the Trial Court to find her testimony credible despite the significant concerns that even a lay-practitioner should have regarding the recall of a 6 month to four-year-old child 10 years after the fact. By failing to inquire into this specific issue, Trial Counsel offered no testimony to counter the only eyewitness other than the Appellant, whose testimony was already undercut by the unchecked allegations of the alleged prior victim.

C. Appellant's Due Process rights were violated when he was not provided adequate notice of the alleged timeline of the charged offenses and there appears to be overlap between the instant offenses and the previous offenses.

The Utah Constitution states that, "no person shall be deprived of life, liberty,

or property without due process of law.” Utah Const. Art. 1 § 7. Coupled with that right to due process of law is a criminal defendant’s right to “demand the nature and cause of the accusation against them.” *Id.* Due process requires that a criminal defendant be given sufficiently precise notification of the date of the alleged crime in order to prepare his defense. *State v. Nelson-Waggoner*, 2004 UT 29, ¶20. A defendant’s constitutional right to sufficient notice may through one, or all, of the following forms: Charging information; bill of particulars provided pursuant to Utah Rule of Criminal Procedure R. 4(e); a response to a request for a time, date, and place of the charged offense pursuant to Utah Code Annotated §77-14-1. The adequacy of such notice is analyzed by weighing the completeness of the notice and whether it is adequate for defendant’s purposes against the background of all of the information available to the prosecution. *State v. Taylor*, 2005 UT 40, ¶9.

Defendant was deprived of his right to due process because the charging information alleged the offense occurred at some point over a fifteen year period and failed to provide a specific timeline. (R. at 1-4). At the Preliminary Hearing the dates of the offense were then alleged to have been in 2004. (R. at 589). At the subsequent trial the offenses were alleged to have occurred sometime between 2000 and 2004. (R. at 372). Every attempt to establish a timeline of the offense was met with a differing response. A three-and-a-half-year time period is not a specific enough notice to protect the Constitutional right to Due Process. While it is true that trial courts are afforded wide latitude as to the date of

alleged sex offense involving a young child, no such wide latitude appears to apply to instances where the date of offense very clearly varies at every stage of the criminal proceeding. *See e.g., State v. Hattrich*, 2013 UT App 177 (noting that a change of dates/times in an amended information did not violate due process because the prosecution provided defense counsel with the basis for those dates and times).

In the instant matter, the distinction from *Hattrich* is important. The Defendant was incapable of preparing a defense with such a broad timeline as outlined in the charging information. Subsequent to the Preliminary Hearing, Trial Counsel would have properly narrowed the time frame down to 2004 given the unequivocal testimony of the alleged victim that the offense occurred in 2004. Unlike *Hattrich*, the victim's subsequent testimony at trial sufficiently changed the constitutionality of the previously provided notice as her testimony increased the date of the alleged offenses from 2004 to any time between 2000 and 2004.

Appellant's defense was severely and unconstitutionally hindered by this moving target. This lack of proper notice and lack of evidence as to the basis for any timeline provided by the State is in clear contravention to the requirements of Due Process. As discussed, in *State v. Taylor*, The failure to provide adequate basis for the date and time of the alleged offenses and subsequent proffering of differing evidence is a Due Process violation

warranting reversal and remand for a new trial. 2005 UT 40.

D. Under the Doctrine of Cumulative Error, this Court should reverse the trial court as the effect of the preceding issues seriously undermines confidence that fair trial was had.

Under the Doctrine of Cumulative Errors, the Court should reverse and remand for a new trial. The Doctrine of Cumulative Errors requires the Appellant establish three things: (1) an error occurred; (2) the error, standing alone, has conceivable potential for prejudicial impact; (3) the cumulative effect of the potential prejudicial impact undermines confidence in the ultimate outcome. *State v. Martinez-Castellanos*, 2018 UT 46, ¶42. In examining these errors the Court should consider all identified errors as well as those errors the Court assumes may have occurred. *Id.* at ¶40. The cumulative effect of the preceding errors, seriously undermines confidence in the fairness of the proceedings below requiring reversal.

Appellant's defense consisted of only his testimony, no witnesses or evidence was presented by Trial Counsel. Trial counsel never cross-examined or countered significant testimony despite clear inconsistencies. Trial Counsel clearly failed to make adequate inquiry into the factual underpinnings of the allegations as well as the Appellant's theory of the defense. Trial Counsel's failure to object to the improper 404(c) evidence and the Trial Court's plain error in admitting the evidence was also a significant error. As described above, each of those errors, standing alone, had a significant impact on the

Appellant's case and a prejudicial impact on the ultimate outcome. Under the Doctrine of Cumulative Errors, the Court should reverse and remand in the interests of justice.

CONCLUSION

Defendant was denied his Sixth and Fourteenth Amendment rights to a fair trial and due process of law, these rights are also protected under Article I, Sections 7 & 12 of the Utah State Constitution. The individual and cumulative effect of these errors requires a reversal of the trial courts. Wherefore, Defendant-Appellant, respectfully requests this court to reverse and remand accordingly.

SUBMITTED this 5th day of November, 2018.

I hereby certify that the contents and length of this brief comply with the requirements of Utah R. App. P. 24(g) and 21(g).



Gregory G. Skordas

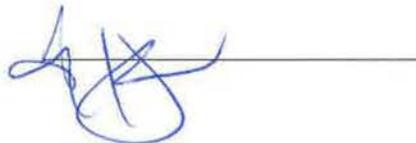
CERTIFICATE OF SERVICE

I hereby certify that on the 5TH November, 2018, I filed a true and correct copy of the foregoing, **BRIEF OF APPELLANT**, with the Utah Supreme Court, via email, pursuant to Utah Supreme Court Standing Order No. 11 and caused a copy to be served upon the following:

Thomas B. Brunker
Utah Attorney General's Office
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114
tbrunker@agutah.gov

Forthwith, pursuant to Utah Supreme Court Standing Order Nos.8 and 11, I shall provide the Utah Court of Appeals with one original, signed, unbound copy, CD Copy with searchable PDF, and six bound copies as well as provide opposing counsel with two bound copies.

SKORDAS, CASTON & HYDE, LLC



ADDENDUM 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Utah Const. Art. I Sec 7, 12:

Sec. 7. [**Due process of law.**] No person shall be deprived of life, liberty or property, without due process of law.

Sec. 12. [**Rights of accused persons.**] In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ADDENDUM 2

RULES

404(c) Evidence of Similar Crimes in Child-Molestation Cases.

- (1) **Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.
- (2) **Disclosure.** If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
- (3) For purposes of this rule “child molestation” means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.
- (4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.