

Potential Objections to Police and Expert Testimony

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Preserving Objections

- Framing objections
- Avoid waiving or abandoning objections
- Standing objections / objecting to each instance
- Grounds for objections



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Framing Objections

Standard 4-1.5 Preserving the Record

- At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review. . . [including] making objections and ***placing explanations on the record***; requesting evidentiary hearings; requesting or objecting to jury instructions; and ***making offers of proof*** and ***proffers of excluded evidence***.



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Preserving Objections – Avoid Waiver

- *State v. Johnson*, 2017 UT 76, ¶ 15, 416 P.3d 443 “An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it. To provide the court with this opportunity, the issue must be **specifically** raised . . . , in a **timely** manner, and must be **supported** by evidence and relevant legal authority.”
 - *State v. Williams*, 2020 UT App 67, ¶¶ 34–35, 37 (waiver example)
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Vouching

- Direct vouching – truthfulness on an occasion
- Functional vouching – “human lie detector”
- Anecdotal statistical evidence



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Direct Vouching

State v. Rimmasch, 775 P.2d 388, 391 (Utah 1989)

- “[Rule 608] permits testimony concerning a witness’s general character or reputation for truthfulness or untruthfulness but ***prohibits any testimony as to a witness’s truthfulness on a particular occasion.***” (Emphasis added.)



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Direct Vouching

State v. Valdez, 2021 UT App 13, ¶ 55, 482 P.3d 861

¶55 The testimony the State elicited from Second Detective regarding his opinion of the veracity of Ex-Girlfriend's statements was improper and inadmissible “vouching” testimony, and the trial court was correct to step in, of its own accord, and strike that testimony. Our law “prohibits any testimony as to a witness's truthfulness on a particular occasion.”



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Functional Vouching

State v. Valdez, 2021 UT App 13, ¶ 55, 482 P.3d 861

- And in our view, these principles would have applied not only to Second Detective's testimony that he believed Ex-Girlfriend was telling the truth, but also to his claims regarding his status as a sort of *human lie detector*, including his description of the *techniques he employed in his efforts to ferret out lies*.



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Vouching vs. Improper Expert Testimony

State v. Lewis, 2020 UT App 132, ¶ 18

- ¶18 Lewis asserts the district court erred in admitting Sergeant's testimony that sexual assault victims commonly give multiple statements and those statements commonly have variations. Lewis argues this testimony improperly bolstered Victim's credibility in violation of rule 608(a) of the Utah Rules of Evidence and that Sergeant's testimony in this regard was prejudicial. We disagree.



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Anecdotal Statistical Testimony

State v. Rammel, 721 P.2d 498, 500 (Utah 1986)

- [T]he trial judge abused his discretion in admitting the evidence as expert testimony because its foundation was utterly lacking. There was no showing that the anecdotal data from which the detective drew his conclusions had any statistical validity.
- Nor was there any evidence to establish that Detective Welti's experience uniquely qualified him as an expert under [the precursor to rule 702] to give such testimony. Absent such showings, Welti's opinions lacked sufficient foundation to be admitted.



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Anecdotal Statistical Testimony

State v. Iorg, 801 P.2d 938, 941 (Utah Ct. App. 1990)

- The Utah Supreme Court has continued to condemn anecdotal “statistical” evidence concerning matters not susceptible to quantitative analysis such as witness veracity, as one of the categories of evidence leading to undue prejudice. Thus, when this type of evidence is offered the burden shifts, and the proponent must show that the evidence’s probativeness outweighs its prejudice.

Anecdotal Statistical Testimony

State v. Iorg, 801 P.2d 938, 941 (Utah Ct. App. 1990)

- As in *Rammel*, Deputy Purdy used her “anecdotal statistical experience” with late reporting in sexual abuse cases to conclude that late reporting does not mean a victim is not telling the truth. Whether Deputy Purdy’s testimony on the frequency of late reporting of child sexual abuse is admitted as expert testimony under Rule 702, or as lay testimony under Rule 701, there is still the same potential for prejudice.



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Anecdotal Statistical Testimony

State v. Burnett, 2018 UT App 80, ¶ 36, 427 P.3d 288, 298

- The clear import of Expert’s testimony is that only in a “small percentage” of sexual abuse cases—especially cases in which the allegations emerge in tandem with a divorce in the family—are the allegations fabricated, and that most cases of fabrication involve a child “with an ax to grind” and/or a child who is making only “garden-variety” allegations. Even though Expert stopped short of offering an opinion that Victim herself was telling the truth, there is no question that, by presenting (and later, in closing argument, emphasizing) this testimony, the prosecution was clearly “invit[ing] the jury to draw inferences about” Victim’s credibility “based upon [Expert’s] past experience with other” cases and studies.
-

Improper Expert Testimony

- Expert vs. lay testimony
- Exceeding witness's qualifications / scope of expertise
- Lack of foundation / reliability
- Notes on notice



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Expert v. Lay Testimony

- Utah R. Evid. 701–702: Based on scientific, technical, or other specialized knowledge
- Utah R. Evid. 703: An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.
- State v. Lewis, 2020 UT App 132, ¶ 17 n.2: [W]hen expressed in the form of an opinion ***based on training and experience***, rule 702 on expert testimony may come into play.



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Reliability

Utah R. Evid. 702

- (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony only if there is a threshold showing that the principles or methods that are underlying in the testimony (1) are reliable, (2) are based upon sufficient facts or data, and (3) have been reliably applied to the facts.
 - (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.
-

Reliability

State v. Lopez, 2018 UT 5, ¶ 24, 417 P.3d 116

- Holding that evidence did not meet threshold where witness could not testify to how “effective” the theory was to the relevant application or “whether there was any peer-reviewed literature”



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Notes on Notice

Utah Code § 77-17-13

- (1)-(3) Expert notice requirements
- (4) Continuance
- (5) Testimony of an expert at a preliminary hearing
- (6) Employees of the State or a political subdivision



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Notes on Notice

Utah Code § 77-17-13(6)

- This section does not apply to the use of an expert who is an ***employee of the state or its political subdivisions***, so long as the opposing party is ***on reasonable notice through general discovery*** that the expert may be called as a witness at trial, and ***the witness is made available to cooperatively consult*** with the opposing party upon reasonable notice.



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Improper Lay Testimony

- Not based on personal knowledge
- Not helpful to the jury



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Improper Lay Testimony

Utah R. Evid. 701

- If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
 - (a) rationally based on the witness's perception;
 - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Utah R. Evid. 602

- A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.
-

Improper Lay Testimony

State v. Barner, 2020 UT App 68, ¶ 14, 464 P.3d 190

- ¶14 The district court ruled that the detective's opinion as to what the surveillance video showed would not be "helpful to the trier of fact." The court's reasoning focused on the fact that the detective based his conclusion solely on viewing the same surveillance video that would be shown to the jury. . . . The jury could just as easily observe what the video does or does not show without the aid of the detective's testimony.
- Importantly, the detective did not witness the incident firsthand, did not have access to a higher resolution copy of the video, and did not have any unique insight into what the video showed. Because the jury had the same opportunity to watch the video and draw its own conclusions about what was depicted, the court acted within its discretion in concluding that the detective's opinion would not be helpful to the jury.

Hearsay

- Articulating the harm from hearsay
- Objecting to potential exceptions that may be invoked by State
- Purpose & narrow scope of the “investigative exception”
- Narrow scope of the residual exception
- Hearsay within hearsay



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Articulating the harm from hearsay

McCray v. State, 716 A.2d 302, 308 (1998)

- These statements, because they are prior consistent statements, are cumulative, but that does not make them harmless because **it is their consistency that is the very nature of the harm**. By allowing Ms. Burgess to testify about Howell's prior consistent statements, the State impermissibly bolstered Howell's credibility.... [W]hen the States case depends virtually exclusively on the credibility of a witness, as in this case, the bolstering of the witness's credibility by prior consistent statements cannot be harmless error.



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Potential Hearsay Exceptions

Utah R. Evid. 801(d)(1)

- (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or
 - (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;
 - *State v. Bujan*, 2008 UT 47, ¶ 11, 190 P.3d 1255
 - Applies only to premotive, consistent, out-of-court statements.
 - Purpose is to rebut a charge of recent fabrication or improper influence/motive
 - Not to bolster the believability of a statement already uttered at trial.
-

Potential Hearsay Exceptions

Utah R. Evid. 803

- (1) Present Sense Impression
 - (2) Excited Utterance - *State v. Williams*, 2020 UT App 67, ¶ 25
 - (3) Then-Existing Mental, Emotional, or Physical Condition - not including a statement of memory or belief to prove the fact remembered or believed
 - (4) Statement Made for Medical Diagnosis or Treatment.
 - (A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
-

Investigative Exception

State v. Valdez, 2021 UT App 13, ¶ 56, 482 P.3d 861

- [W]e are concerned about the State’s—and the trial court’s—conception of the scope of the so-called “police investigation exception” to the usual ban on hearsay testimony. . . . [I]t is our view that the entirety of First Detective’s lengthy narrative testimony about what Ex-Girlfriend told him was not admissible under that exception.



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Investigative Exception

U.S. v. Hinson, 585 F.3d 1328, 1337 (10th Cir. 2009)

- Ascertaining the purpose evidence serves, while essential to a determination of whether it constitutes inadmissible hearsay or admissible background information, is not an easy task. One useful clue that courts have looked to is whether the purported background evidence is necessary for the government to be able to tell a coherent story about its investigation.



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Residual Exception

Utah R. Evid. 807

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

State v. Nelson, 777 P.2d 479, 482 (Utah 1989) - “rare cases”



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Hearsay within Hearsay

Utah R. Evid. 805

- Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.



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Irrelevant, Unhelpful, Prejudicial Testimony

- Stand alone objection
- Backstop objection



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Irrelevant, Unhelpful, Prejudicial

Utah R. Evid. 403

- 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.



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Exhibits Going Back to Jury

- Utah R. Crim. P. 17(k)
- *Wyatt v. State*, 2021 UT 32, ¶¶ 19–23,



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Exhibits Going Back to Jury

Utah R. Crim. P. 17(k)

- Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury....

Wyatt v. State, 2021 UT 32, ¶¶ 19–23, 493 P.3d 62

- The language of [rule 17(k)] unambiguously allows testimonial exhibits to go back with the jury to deliberations.
- The district court is given broad discretion to determine whether, “in the opinion of the court,” an exhibit should be withheld from the jury room.
- In considering whether to prohibit an exhibit from going back with the jury, a district court may consider whether the jury’s unfettered access to the exhibit would lead to undue emphasis.