

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.

BRANDON MAYHEW HILLMAN,
Appellant.

Opinion
No. 20240123-CA
Filed October 1, 2026

Third District Court, Salt Lake Department
The Honorable Dianna Gibson
No. 211906669

Erick Grange, Attorney for Appellant

Derek E. Brown and Jeffrey D. Mann,
Attorneys for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which
JUDGES RYAN M. HARRIS and RYAN D. TENNEY concurred.

ORME, Judge:

¶1 Brandon Mayhew Hillman appeals his convictions on two counts of aggravated sexual abuse of a child, arguing that his trial counsel (Counsel)¹ provided ineffective assistance in several respects and that his mandatory sentence to life in prison without the possibility of parole, as applied to him, is cruel and unusual punishment under Utah’s constitution. We disagree with Hillman and affirm his convictions and sentence.

1. For at least part of the proceedings, Hillman was represented by two attorneys. But because his claims appear to focus on the attorney who represented him through trial, we refer to “Counsel” singularly.

BACKGROUND²

The Abuse

¶2 In 2021, then-11-year-old K.B.³ spent alternating weekends with his father (Father). On a Sunday night during one of these visits, Father’s friend, Hillman, joined them to watch TV. Father fell asleep on a loveseat while K.B. and Hillman sat on a larger couch. K.B. got up to go to the kitchen, and when he came back, Hillman told him to sit next to him. K.B. lay next to Hillman on the couch, and Hillman asked if he could massage K.B.’s hand. K.B. allowed Hillman to do so, but Hillman then moved K.B.’s hand onto Hillman’s penis, using K.B.’s hand to “rub[]” and “massag[e]” himself. Hillman next put his own hand on K.B.’s penis, moving his hand “up and down,” first over and later under K.B.’s clothing.

¶3 The touching stopped when the TV show ended, and Hillman carried K.B. to his bedroom, saying, “We don’t talk about this.” When K.B. heard Hillman leave the house, he went back to the couch to sleep near Father.

¶4 Father woke up the next morning to find K.B. on the couch. After he took K.B. to school, Father got a call from Hillman asking, “Is [K.B.] all right? Is everything okay?” Hillman told Father he was concerned because K.B. “didn’t want to go to his bedroom and go to bed” the night before. Father later testified at trial that he thought this was “odd because [Hillman] never” calls him.

2. “We recite the facts from the record in the light most favorable to the jury’s verdict and present conflicting evidence only as necessary to understand issues raised on appeal.” *State v. Hart*, 2026 UT App 40, n.2, 588 P.3d 1034 (quotation simplified).

3. We follow the parties’ lead in referring to K.B. and another victim from a previous case—R.R.—by their initials.

When Father later spoke to Hillman again, Hillman told Father that K.B. “laid on [Hillman’s] lap and that [K.B.] was falling asleep, so [Hillman] was rubbing his belly.”

¶5 Father was supposed to pick K.B. up from school that afternoon, but K.B. went home with his mother (Mother) instead. Mother noticed that K.B. was having “mood swings” and his “emotions were just very erratic.” She later testified that when she asked K.B. whether she should take him back to Father’s house, he “had a look of horror on his face . . . as if he’d seen a ghost or something was coming after him.” This prompted Mother to talk to Father, who told her that Hillman had been at his house during K.B.’s visit. Mother had a “gut feeling” that something was “off,” and after searching Hillman’s name online, she discovered that he had previously been convicted of child sexual abuse. K.B. eventually opened up to Mother about the abuse, and she arranged for him to be interviewed by police.

¶6 Based on K.B.’s statements, Hillman was charged with two counts of aggravated sexual abuse of a child. The counts were aggravated because in 1996 Hillman had pled guilty to two counts of attempted aggravated sexual abuse of a child and one count of attempted sexual abuse of a child. *See* Utah Code Ann. § 76-5-404.3(2)(e) (LexisNexis Supp. 2025).⁴ The current counts were also enhanced to first-degree felonies subject to a sentence of life without the possibility of parole (LWOP) based on these prior convictions. *See id.* § 76-5-404.3(3)(c).

¶7 Before trial, the State filed notice of its intent to introduce evidence of Hillman’s prior convictions under rule 404(c) of the Utah Rules of Evidence. *See* Utah R. Evid. 404(c)(2)(A) (“In a

4. Renumbering and some minor changes aside, the current versions of the statutory provisions cited throughout this opinion do not differ substantively from the versions in effect at the time of the events. We thus cite the current versions for convenience.

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[.]”). At an evidentiary hearing on the State’s motion to introduce this evidence, one of the prior victims of Hillman’s abuse—R.R.—testified that Hillman was his Boy Scout leader when R.R. was around 13 years old. R.R. recounted that on a scouting trip at a cabin, Hillman asked him to sit next to him on the couch. Hillman then started “tickling” R.R., “rubbing” from his stomach “down to the groin region and just all around [his] genital area.” R.R. stated that he did not “know the extent of . . . other situations with some of the other boys at the time” and that since the abuse, he had “kind of blanked it out of [his] mind.” The court granted the State’s motion to admit the plea statements underlying Hillman’s prior convictions and allowed R.R. to testify at trial under rule 404(c).

¶8 During the evidentiary hearing, the prosecutor also pointed out that “there has been an enhancement in this case with the grievous previous conviction” and asked, “[D]o we need to bifurcate that element?” Counsel said, “Yeah, that’s fine.” The trial was later bifurcated.⁵

5. As noted, both charges against Hillman were aggravated and subject to a sentencing enhancement. *See supra* ¶ 6. The prosecutor’s reference here to a “grievous previous conviction” seemed to indicate the State’s understanding that the second portion of the trial would address the sentencing enhancement. *See* Utah Code Ann. § 76-5-404.3(3)(c) (LexisNexis Supp. 2025) (providing that aggravated sexual abuse of a child is “a first degree felony punishable by . . . life without parole, if the trier of fact finds that at the time of the commission . . . , the defendant was previously convicted of a *grievous sexual offense*”) (emphasis added). And Hillman later argued in his presentence briefing that he intended the second portion of the bifurcated trial to address
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The Jury Trial

¶9 At the beginning of the first portion of trial, the prosecutor pointed out that the plea statements from Hillman’s prior convictions “mention[ed] imprisonment” and offered to “redact any language . . . that references prison” or “anything Defense would request related to that.” The prosecutor clarified that the State did not intend “to reference prison or anything about punishment, but the jury may see that in the document.” Counsel appeared unconcerned, saying that Hillman “may be discussing that as part of his rehabilitation anyway.” Thus, nothing in the plea statements was redacted, which allowed the jury to see that Hillman’s two prior convictions for attempted aggravated sexual abuse of a child had been first-degree felonies and that his previous conviction for attempted sexual abuse of a child had been a third-degree felony.

¶10 During trial, R.R. testified consistently with his testimony at the evidentiary hearing. In the course of R.R.’s trial testimony, the State introduced the plea statements from Hillman’s previous convictions. R.R. read aloud the plea statement from the case

the sentencing enhancement to prevent the jury from hearing about possible penalties. But during the eventual second portion of the trial, which was a bench trial, the court asked, with our emphasis, “[T]his is the factor that you’re asking the Court to consider for purposes of the *aggravation* and the level of the offense, the first-degree felony; is that correct?” The prosecutor responded, “That’s correct, Your Honor.” And neither party objected when the court indeed addressed only the aggravation. *See infra* ¶ 16. *See also* Utah Code Ann. § 76-5-404.3(2)(e) (LexisNexis Supp. 2025) (stating that sexual abuse of a child is aggravated if “the actor, prior to sentencing for this offense, was previously convicted of any sexual offense”). In fact, Counsel requested that the sentencing enhancement be decided separately at the end of the bench trial. *See infra* ¶ 17.

relating to his own abuse. The statement indicated that in 1996, Hillman attempted to abuse R.R. and two other named victims. During cross-examination, Counsel pointed out, “And you seemed to maybe break up a little when you heard the names [of the other two victims].” Counsel then asked, “Probably friends of yours?” R.R. answered, “Yes. . . . I knew that other people in my Scout group had been affected. I did not—we didn’t talk about who it was until that.”

¶11 Mother then testified about K.B.’s disclosure of his abuse. She testified that K.B. had not “been the same” since. And during redirect examination of Mother, the State introduced two photos of K.B.—one of him smiling in a cowboy hat and the other of him holding a fishing pole and a fish. Mother confirmed that they were “a fair and accurate depiction of what [K.B.] looks like,” though they were taken “sometime in the past.” The photos were admitted into evidence as the State’s exhibits.

¶12 K.B. testified that he was “11 or 10” when the abuse happened, though he did not remember whether it was winter or summer at the time. He testified that Hillman put K.B.’s hand on Hillman’s penis, over his clothing, guiding K.B.’s fingers and using them to “rub[]” and “massag[e]” himself. This went on for what K.B. testified felt like “a really long time.” And K.B. recounted that Hillman then put his hand on K.B.’s penis, moving the hand “up and down” both over and under K.B.’s clothes. K.B. recalled being “scared.”

¶13 On cross-examination, Counsel asked K.B., “[H]ow about when he touched you, how did that happen?” K.B. responded, “I don’t really remember that.” On redirect, the prosecutor addressed this interaction, asking K.B., “[D]o you remember him touching your penis?” K.B. said, “Yes.” The prosecutor then asked whether K.B. remembered “how [Hillman] transitioned from [K.B.] touching [Hillman’s] penis to [Hillman] touching” K.B.’s

penis. K.B. stated that “it would be like he went from my stomach down to my pants and then went down from there.”

¶14 During closing argument, the prosecutor told the jury,

I want you to focus on that moment during [R.R.’s] testimony when he testified to you and he read off the names of the individuals that were listed in the defendant’s statement from the 1996 conviction and he choked up because it wasn’t until that moment that he realized that his friends were the other people who were involved. Think of the destruction, the wake of pain that this man has caused in the lives of so many people and now [K.B.] is added to that list.

Immediately thereafter, the prosecutor stated, “Members of the jury, your verdict here today tells [K.B.] that you believe him, that you’ll protect him.” The prosecutor also displayed the two photos of K.B. under the words “We Don’t Talk About This” at the end of rebuttal closing argument.

¶15 The jury found Hillman guilty on both counts.

The Bench Trial

¶16 After the jury was excused, the court clarified that the second portion of the bifurcated trial was meant to “consider . . . the aggravation and the level of the offense.” The prosecutor replied, “That’s correct, Your Honor.” The State then had Hillman’s plea statements from his prior convictions readmitted. And the court admitted certified judgments from two of these cases. Based on this documentation, the court found that “Hillman was previously convicted of a sexual offense” and, thus, that the present charges were aggravated. *See* Utah Code Ann. § 76-5-404.3(2)(e) (LexisNexis Supp. 2025) (“An actor commits aggravated sexual abuse of a child if, in conjunction with the

offense . . . the actor, prior to sentencing for this offense, was previously convicted of any sexual offense[.]”).

¶17 The prosecutor also noted the applicable sentencing enhancement, which elevated the charges to first-degree felonies and imposed LWOP if the court found that Hillman’s prior convictions were “grievous sexual offense[s].” *See id.* § 76-5-404.3(3)(c). The parties opted to brief the enhancement issue prior to sentencing.

Sentencing

¶18 In its presentence memorandum, the State argued that Hillman’s prior convictions were “grievous” and thus that he should be sentenced to LWOP under Utah Code section 76-5-404.3(3)(c). Hillman countered that the court erred in deciding whether he was previously convicted of a sexual offense in the first place because that was an aggravating element of the offense that the jury should have determined. And he argued that LWOP, as applied to him, violated Article 1, Section 9 of the Utah Constitution.

¶19 The court ordered additional briefing on whether Hillman had waived his right to have the jury decide the aggravation element. In its supplemental sentencing memorandum, the State argued that failing to hold a colloquy with Hillman on the issue was harmless error. And the State argued that LWOP was a mandatory sentence under section 76-5-404.3(3)(c). Hillman argued in his supplemental sentencing memorandum that the jury needed to find the aggravating element before the court could determine—for purposes of the sentencing enhancement—whether those sexual offenses were “grievous.” Hillman also argued that he had agreed to bifurcate the trial concerning the prior sexual offense issue for purposes of the sentencing enhancement, not the aggravating element.

¶20 At the sentencing hearing, the court determined that while “it did err by not conducting a colloquy to make a record establishing that . . . Hillman, as opposed to his attorney, was waiving his right to have the jury decide if his prior conviction was an aggravating circumstance,” there were factors indicating that Hillman “intended to proceed with the bifurcated trial.” The court found that both parties agreed to bifurcation, both parties’ proposed jury instructions did not include the aggravating circumstances element that Hillman argued the jury should have decided, the defense did not object to the jury instructions given, no one objected when the jury was dismissed, and no one objected in the moment when the court found in the bench trial that aggravating circumstances existed. The court stated, “Notably, under the circumstances, no one requested that the Court change course at any time. So to the extent that the Defense now asserts that there was error, it was arguably invited.” The court further concluded that because the fact of Hillman’s prior convictions “was never in dispute,” the jury would have come to the same conclusion as the court that the aggravating element had been satisfied.

¶21 Next, the court concluded that it had no discretion in sentencing Hillman, as the “evidence submitted both at trial and during the bifurcated portion show that Mr. Hillman was, in fact, convicted of attempted aggravated sexual abuse of a child in October of 1996,” which was a “grievous sexual offense.” The court also noted that “the legislature has clearly determined that [LWOP] is proper in cases where an individual has been repeatedly convicted of sexual crimes against children” and that the court of appeals “recently upheld the validity of this mandatory sentence . . . for individuals convicted under the statute” in *State v. Garcia*, 2022 UT App 77, 526 P.3d 1238, *cert. denied*, 525 P.3d 1260 (Utah 2022). The court thus sentenced Hillman to LWOP on both charges.

ISSUES AND STANDARDS OF REVIEW

¶22 On appeal, Hillman argues that Counsel provided ineffective assistance in several respects. “Because these issues are raised for the first time on appeal and there is no lower court ruling to review, we decide them as a matter of law.” *State v. Fitzwater*, 2026 UT App 10, ¶ 38, 584 P.3d 357, *cert. denied*, 594 P.3d 1110 (Utah 2026).

¶23 Alternatively, Hillman argues that, as applied to him, his LWOP sentence under Utah Code section 76-5-404.3 violates Article I, Section 9 of the Utah Constitution. “Whether a statute is constitutional presents a question of law that we review for correctness.” *State v. Garcia*, 2022 UT App 77, ¶ 27, 526 P.3d 1238 (quotation simplified), *cert. denied*, 525 P.3d 1260 (Utah 2022).

ANALYSIS

I. Ineffective Assistance of Counsel

¶24 Hillman argues that Counsel provided ineffective assistance in several respects. “To succeed on an ineffective assistance claim, a defendant must make a two-part showing.” *State v. Cartwright*, 2026 UT App 78, ¶ 19, 592 P.3d 614, *cert. denied*, 594 P.3d 1083 (Utah 2026). “First, the defendant must show that counsel’s performance was deficient” in that it “fell below an objective standard of reasonableness.” *Id.* ¶¶ 19–20 (quotation simplified). “And second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* ¶ 19 (quotation simplified). “Prejudice exists when there is a reasonable probability that the case would have had a different outcome had trial counsel not performed deficiently.” *Id.* ¶ 21 (quotation simplified). “A defendant must prove both elements to be successful.” *Id.* ¶ 19.

¶25 We evaluate Hillman’s claims under this standard, ultimately concluding that they fail for either lack of deficient performance or lack of prejudice.

A. The Prosecutor’s Improper Statements

¶26 During the State’s closing argument, the prosecutor addressed the jury, stating,

I want you to focus on that moment during [R.R.’s] testimony when he testified to you and he read off the names of the individuals that were listed in the defendant’s statement from the 1996 conviction and he choked up because it wasn’t until that moment that he realized that his friends were the other people who were involved. Think of the destruction, the wake of pain that this man has caused in the lives of so many people, and now [K.B.] is added to that list.

The prosecutor went on, saying, “Members of the jury, your verdict here today tells [K.B.] that you believe him, that you’ll protect him.” Hillman argues that Counsel’s failure to either object to both statements or to ask for a curative instruction in their aftermath constituted ineffective assistance. But improper though these statements were, *see State v. Akok*, 2015 UT App 89, ¶ 30, 348 P.3d 377; *State v. Campos*, 2013 UT App 213, ¶ 50, 309 P.3d 1160, *cert. denied*, 320 P.3d 676 (Utah 2014), Hillman has not demonstrated that Counsel’s failure to intervene harmed him.

¶27 In determining prejudice, “we consider the totality of the evidence before the judge or jury.” *State v. Mason*, 2024 UT App 171, ¶ 32, 562 P.3d 1158 (quotation simplified), *cert. denied*, 570 P.3d 658 (Utah 2025). “We also assess counterfactual scenarios of what would have happened but for the” deficient performance. *Id.* (quotation simplified). “This counterfactual analysis requires

us to consider a hypothetical—an alternative universe in which the trial went off without the error.” *Id.* (quotation simplified). Here, even in the hypothetical scenario in which Counsel objected to the improper statements or requested a curative instruction, there is not a reasonable likelihood of a different outcome.

¶28 The evidence had steadily mounted against Hillman during trial. K.B. testified that Hillman both touched K.B.’s penis and moved K.B.’s hand to touch Hillman’s penis. Hillman contacted Father the morning after the abuse—itself an odd thing for him to do—and later felt the need to proactively justify his behavior by saying he was rubbing K.B.’s belly. K.B. exhibited changed behavior after the abuse. And most notably, Hillman did not dispute that he had previously sexually abused several other children, including R.R., in circumstances remarkably similar to these. Given this evidence, we do not see a reasonable likelihood that absent the improper statements by the prosecutor, the jury would have acquitted Hillman. Without such a showing of prejudice, we cannot say that Counsel provided ineffective assistance in this regard.⁶

6. To be clear, the prosecutor should not have made these statements. *See State v. Thompson*, 2014 UT App 14, ¶ 67, 318 P.3d 1221 (“A prosecutor may not make arguments calculated to appeal to the prejudices of the jury . . . by asking jurors to put themselves in the victim’s place, . . . suggesting that the jury should find the defendant guilty out of vengeance or sympathy for the victim, or contending that the jury has a duty to protect the alleged victim—to become her partisan.”) (quotation simplified); *id.* ¶ 44 (“It is misconduct for a prosecutor to make statements during closing argument that prompt the jury to consider matters outside the evidence.”) (quotation simplified). We reiterate that “in our judicial system, the prosecution’s responsibility is that of a minister of justice and not simply that of an advocate, which
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B. The Photos of K.B.

¶29 During Mother’s testimony, the State introduced two photos of K.B. as exhibits—one showing him smiling in a cowboy hat and another of him holding a fishing pole and a fish. During closing argument, the State displayed the photos. And the exhibits were with the jury during deliberation. Hillman argues that Counsel should have objected to the introduction of the photos as irrelevant and unfairly prejudicial under rules 402 and 403 of the Utah Rules of Evidence. But even assuming, for purposes of argument, that Counsel performed deficiently in failing to object, we again perceive no prejudice to Hillman.

¶30 Mother testified that though the photos were taken “sometime in the past,” they were “a fair and accurate depiction of what [K.B.] looks like.” And K.B. himself testified and was observed by the jury. Ultimately, there was compelling evidence that Hillman had abused K.B. and that he had the propensity to do so based on his prior convictions. Under these circumstances, we see no reasonable likelihood that the jury would have acquitted Hillman had they not seen these photos. And again, without such prejudice, we cannot say that Counsel was ineffective in this regard.

includes a duty to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” *State v. Todd*, 2007 UT App 349, ¶ 17, 173 P.3d 170 (quotation simplified), *cert. denied*, 186 P.3d 957 (Utah 2008). We caution prosecutors to uphold this “high standard” and to “act within the constraints imposed upon their office.” *Id.* ¶¶ 17–18. The fact that we do not see prejudice here is no guarantee that we would not conclude there was prejudice in another case involving improper statements made by a prosecutor.

C. The Plea Statements

1. R.R.'s Reading of the Plea Statement into the Record

¶31 Hillman argues that Counsel should have anticipated that R.R. would “have an emotional reaction in front of the jury” when reading the names of his friends in the plea statement related to his case and thus should have objected to R.R. reading the statement under rule 403 of the Utah Rules of Evidence. We disagree.

¶32 R.R. did not read the plea statement at the evidentiary hearing. He did state at the hearing that he did not “know the extent of . . . other situations with some of the other boys at the time.” But reasonable counsel could not be expected to preemptively object to R.R. reading the plea statement at trial with no prior indication that he would have an emotional reaction to reading the names of those other boys for the first time in front of the jury. *See State v. Green*, 2023 UT 10, ¶ 104, 532 P.3d 930 (“We must eliminate the distorting effects of hindsight and evaluate the conduct from counsel’s perspective at the time.”) (quotation simplified). Importantly, Hillman does not argue that Counsel should have objected *after* R.R. became “choked up.” He argues only that Counsel should have objected beforehand. But Counsel reasonably did not do so, and this ineffective assistance claim thus fails.

2. Redaction of the Plea Statements

¶33 Hillman also argues that reasonable counsel would have moved to redact the plea statements admitted into evidence to prevent the jury from seeing that his prior convictions for attempted aggravated sexual abuse of a child were first-degree felonies. Again, we disagree.

¶34 At the beginning of trial, the prosecutor pointed out that the plea statements “mention[ed] imprisonment.” The prosecutor stated, “[W]e can certainly redact anything Defense would request related to that.” But Counsel appeared unconcerned, stating that Hillman “may be discussing that as part of his rehabilitation anyway.” Counsel did not dispute Hillman’s prior convictions. In fact, the defense strategy was to acknowledge them. Given this strategy, it was reasonable for Counsel to choose not to request that the plea statements be redacted. Thus, he did not provide ineffective assistance here either.⁷

7. Hillman argues that the cumulative prejudice stemming from the alleged ineffective assistance addressed in Part I.A–C requires reversal. The cumulative error doctrine “is used when a single error may not constitute grounds for reversal, but many errors, when taken collectively, do.” *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 39, 428 P.3d 1038 (quotation simplified). “To reverse under the cumulative error doctrine, this court must determine that (1) an error occurred, (2) the error, standing alone, has a conceivable potential for harm, and (3) the cumulative effect of all the potentially harmful errors undermines its confidence in the outcome.” *State v. Mancía*, 2026 UT App 30, ¶ 68, 587 P.3d 1018 (quotation simplified), *cert. denied sub nom. State v. Saedt*, 594 P.3d 1082 (Utah 2026). We have assumed that Counsel erred in failing to object to the prosecutor’s closing statements and introduction of photos of K.B. We have concluded that these errors, standing alone, did not prejudice Hillman. But we must now determine whether they cumulatively did so. “As explained above, when evaluating prejudice . . . , we assess counterfactual scenarios.” *Id.* ¶ 69 (quotation simplified). Here, even in the counterfactual scenario in which the prosecutor did not make these statements or introduce the photos, our confidence in the verdict is not undermined, given the strong evidence against Hillman. *See supra* ¶ 29. This argument is thus unavailing.

D. Failure to Object to Bifurcation

¶35 Finally, Hillman argues, as an alternative to his constitutional challenge, *see infra* Part II, that Counsel provided ineffective assistance by failing to object to the bifurcation of the trial, resulting in the court—not the jury—finding that the charges against Hillman were aggravated. But here too, Hillman has not convinced us that he was prejudiced.

¶36 As the State recognizes, the jury must decide each element of an offense. *See State v. Walker*, 2017 UT App 2, ¶ 20, 391 P.3d 380 (noting that “criminal convictions in state proceedings” must “rest upon a jury determination that the defendant is guilty of *every element* of the crime charged, beyond a reasonable doubt”) (emphasis added). Here, this would include the aggravating element that Hillman “was previously convicted of any sexual offense.” Utah Code Ann. § 76-5-404.3(2)(e) (LexisNexis Supp. 2025). But the only evidence presented to the court on this element was the plea statements and certified judgments from those convictions. With this undisputed evidence, there is no reasonable likelihood that the jury would have reached a different conclusion than the court did. Thus, Hillman has not demonstrated prejudice, and this final ineffective assistance claim necessarily fails.

II. Constitutionality of Hillman’s Sentence

¶37 Article I, Section 9 of the Utah Constitution states that “cruel and unusual punishments [shall not] be inflicted.” Hillman argues that, as applied to him, the mandatory LWOP sentence imposed under Utah Code section 76-5-404.3(3)(c) constitutes cruel and unusual punishment. We disagree.

¶38 “We recognize that while the State has the power to punish, we must assure that this power be exercised within the limits of civilized standards.” *State v. Houston*, 2015 UT 40, ¶ 64, 353 P.3d 55 (quotation simplified). “The standard to be used in

determining whether a penalty constitutes cruel and unusual punishment . . . is whether the sentence imposed in proportion to the offense committed is such as to shock the moral senses of all reasonable men as to what is right and proper under the circumstances.” *State v. Lafferty*, 2001 UT 19, ¶ 138, 20 P.3d 342 (quotation simplified). “Only rarely will a statutorily prescribed punishment be so disproportionate to the crime that the sentencing statute is unconstitutional.” *State v. Garcia*, 2022 UT App 77, ¶ 53, 526 P.3d 1238 (quotation simplified), *cert. denied*, 525 P.3d 1260 (Utah 2022).

¶39 Hillman argues that his sentence is unconstitutional because “46 other states would not mandate sentencing Hillman to LWOP, . . . the gravity of the offense is disproportionate to the harshness of the penalty, and . . . aggravated murder of a child can impose a less severe sentence than the current offense.” We addressed these points in *Garcia*. *See id.* ¶ 54. There, Garcia was convicted of three counts of aggravated sexual abuse of a child and, under the version of the statute in effect at the time, was sentenced to LWOP based on his prior conviction on the same offense. *Id.* ¶ 23. On appeal, Garcia argued that a mandatory LWOP sentence violated both the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Utah Constitution. *Id.* ¶ 50. We rejected both arguments.

¶40 First, we addressed Garcia’s Eighth Amendment argument, acknowledging that “several states . . . do not mandate LWOP under circumstances similar to this case” but that “22 other states *do* mandate LWOP in these circumstances,” with two states—Alabama and Delaware—mandating LWOP for certain first-time child sex offenders. *Id.* ¶ 57 (emphasis added). We also recognized that “several other states impose similar sentences for child sex offenders with prior sex offense convictions.” *Id.* ¶ 58. And we recognized that under Utah law, LWOP “is only permitted for the gravest of offenses,” with “sexual abuse of a

child [being] one of the most heinous crimes recognized by our penal code.” *Id.* ¶ 56 (quotation simplified). We stated that

given the seriousness and heinousness of sexual crimes against children, although it may seem odd to some that a defendant with a prior conviction of a grievous sexual offense could potentially serve a lesser sentence for aggravated murder than for aggravated sexual abuse of a child, this does not amount to a cruelly inhumane or disproportionate punishment in violation of the Eighth Amendment.

Id. ¶ 58 (quotation simplified). Next, because “Article I, Section 9 of the Utah Constitution closely approximates the language of the Eighth Amendment,” we held that Garcia’s Utah constitutional argument failed for the same reasons. *Id.* ¶¶ 59–60 (quotation simplified).

¶41 Hillman attempts to distinguish *Garcia*, arguing that “[w]hile Garcia was convicted of aggravated sexual abuse, the victim’s testimony included claims of oral sex and vaginal penetration,” which Hillman ranks as “more severe” than his abuse of K.B. But we do not compare or rank the severity of different conduct giving rise to the same charges. *See id.* ¶ 56 (recognizing that “it is not possible to objectively rank-order each crime by seriousness” and thus “the best available source of those aggregate values is the criminal code itself, which is the collective judgment of the people as expressed through their representatives in the Legislature”) (quotation simplified). Hillman was charged with aggravated sexual abuse of a child, as was Garcia. Given Garcia’s prior convictions, the mandatory LWOP sentence was not disproportionate and thus not unconstitutional as applied to him. *See id.* ¶ 55 (“Absent a showing that a particular punishment is cruelly inhumane or disproportionate, we are not apt to substitute our judgment for that of the legislature regarding the

wisdom of a particular punishment or of an entire sentencing scheme.”) (quotation simplified). So too here.

CONCLUSION

¶42 Hillman has not persuaded us that Counsel provided ineffective assistance in any respect. Nor has he shown that, as applied to him, his mandatory LWOP sentence was cruel and unusual in violation of Utah’s constitution. Accordingly, we affirm.
