PUBLIC

No. 20160439-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee,

v.

MICHAEL ALAN JORDAN,
Defendant/Appellant.

Appellant is incarcerated.

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for four counts of aggravated sexual abuse of a child, all first-degree felonies; four counts of sodomy on a child, all first-degree felonies; three counts of forcible sodomy of a child, all first-degree felonies; sixteen counts of sexual exploitation of a minor, all second-degree felonies; one count of tampering with a witness, a third-degree felony; and four counts of dealing in materials harmful to minors, all third-degree felonies; in the Third District Court, Salt Lake County, Utah, the Honorable Ann Boyden presiding.

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INTRODUCTION

In opening, Jordan argues that he received ineffective assistance of counsel in multiple ways. *See* Aplt. Br. at 15-40. Specifically, he contends that his trial counsel (1) failed to investigate and/or take the steps necessary to present his primary defense; (2) failed to object when the prosecution argued an incorrect legal standard to the jury; (3) and failed to present evidence that he did not have actual possession of allegedly obscene images. *See id.*

Jordan also contends that the evidence was insufficient to convict him on various child pornography charges because the jury was allowed to speculate about the ages of the persons depicted in the photographs. *See id.* at 40-46. Alternatively, he argues that his trial counsel was ineffective for failing to call an expert to testify about the ages of these persons and for failing to request an affirmative-defense jury instruction. *See id.* at 46-49. Finally, he asserts that the

cumulative effect of these errors requires reversal. *See id*. at 49-51. Jordan now files this reply.

In Part I of this reply, Jordan responds to the State's claim that his trial counsel "met her obligations with respect to investigating and pursuing the possibility of evidence of [redacted];" and "properly chose not to object to the prosecutor's closing argument." Aple. Br. at 16. Additionally, in Part II, Jordan addresses the State's argument that the prosecution "adduced sufficient evident to permit the jury to determine the age element." *Id.* at 50. He also responds to the State's contention that trial counsel properly chose not to pursue an affirmative defense jury instruction. *Id.* at 55-57.

As required by Utah Rules of Appellate Procedure 24(b), this reply brief is "limited to responding to the facts and arguments raised in the appellee's . . . principal brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

I. Jordan's trial counsel was constitutionally ineffective for failing to investigate and timely pursue a rule 412 motion, for failing to object to misstatements of the law, and for failing to present evidence that Jordan did not have possession of the images found on the computer.

This Court should reverse and remand for a new trial based on the three areas of ineffective assistance identified in opening. *See* Aplt. Br. at 15-40. Contrary to the State's contentions, Jordan's trial counsel was ineffective for (A) failing to adequately investigate and/or timely pursue a rule 412 motion that

would have allowed Jordan to present his primary defense; and (B) for allowing the prosecutor's legal misstatement regarding what constitutes sexual exploitation of a minor. The opening brief adequately addresses Jordan's contention that counsel was ineffective for failing to present evidence that Jordan did not have actual possession of the allegedly obscene images. *See id.* at 33-40.

A. Jordan received ineffective assistance of counsel when his trial counsel failed to adequately investigate and timely pursue a rule 412 motion.

In opening, Jordan argues that his trial counsel failed to take the basic steps needed to present his defense—that the charges against him were fabricated by his Ex-wife to gain an advantage in their impending divorce proceeding and that [redacted]. and [redacted]. were complicit in this plan. *See* Aplt. Br. at 16-28. Evidence of [redacted] was critical to this defense and the credibility of the State's witnesses. *See id.* It showed that Ex-wife employed a strategy of [redacted] to gain an advantage in custody proceedings. *See id.* It also explains why [redacted]

The record shows that trial counsel recognized the importance of [redacted] in the context of Jordan's defense. *See* R.763, 904-05, 1923. But where [redacted] were concerned, the trial court required defense counsel to follow the admissibility procedures of rule 412. *See* R.763-64, 771.

To present Jordan's primary defense, therefore, trial counsel needed to adequately investigate and timely pursue a rule 412 motion. *See id.* However, as demonstrated in opening, Jordan's trial counsel did not fulfill these duties. *See* Aplt. Br. at 16-28. And, as shown, a rule 412 motion would not have been futile as it would have been well taken under either the [redacted] or the [redacted] *See id.* at 21-27. Because of counsel's failure to adequately investigate and timely pursue a rule 412 motion, Jordan could not present evidence or cross-examine the witnesses regarding the [redacted]. *See id.* at 27-28. Thus, counsel's deficient performance prejudiced Jordan. *See id.*

The State disagrees, arguing that Jordan failed to satisfy both *Strickland* prongs. For the reasons below and in opening, the State is incorrect.

i. Trial counsel performed deficiently by failing to adequately pursue a rule 412 motion.

Evidence of [redacted] warranted an investigation by trial counsel. The State does not argue otherwise. *See* Aple. Br. at 17-29. Instead, it argues that trial counsel conducted an adequate investigation that ultimately unearthed no support (aside from Jordan's testimony) to show that [redacted]. *See id.* at 21-29. Thus—in the State's view—it was reasonable to forgo a 412 motion. *See id.* The State is incorrect.

First, in making its argument, the State does not address whether [redacted] would be admissible under the [redacted]. Nor does it address whether—in light of the available evidence—it was reasonable for

counsel to forgo a rule 412 motion on [redacted]. As shown in opening, evidence of [redacted] were admissible under the [redacted]. *See* Aplt. Br. at 25-27. And because the State has not challenged this argument, the Court should hold that the [redacted] evidence would have been admissible had counsel followed the procedures of rule 412. *See State v. Roberts*, 2015 UT 24, ¶¶19-20, 345 P.3d 1226 (holding that the State risks default where it "fails to respond to the merits of an appellant's argument"); *Broderick v. Apartment Management Consultants, L.L.C.*, 2012 UT 17, ¶¶19-20, 279 P.3d 391 (accepting appellant's claim where appellee failed to address argument).

Second, the State is incorrect to say that trial counsel adequately investigated and reasonably rejected a rule 412 motion based on [redacted]. *See* Aple. Br. 21-29. In arguing that counsel conducted an adequate investigation, the State heavily relies on trial counsel's in-court statements regarding the scope of her investigation and her assessment of the viability of a rule 412 motion. *See id.* at 22-26. Counsel's statements are not determinative of the deficient performance question. Rather, *Strickland*'s deficient performance prong relies on an objective standard. *Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000) ("A defendant claiming ineffective assistance of counsel must show [] that counsel's representation 'fell below an objective standard of reasonableness'" (citation omitted) (quoting *Strickland*, 466 U.S. 688, 694 (1984))). Trial counsel's comments may be one consideration

in the overall objective analysis, but the real focus is on the attorney's performance in representing the defendant. *See State v. Larrabee*, 2013 UT 70, ¶28, 321 P.3d 1136.

Ultimately, in addressing deficient performance, appellate courts analyze whether an attorney's performance and strategy were "unreasonable" "[w]ithin the context of" the "case." *Larrabee*, 2013 UT 70, ¶28. As *Strickland* explained, "deficient performance" is about "the challenged action[s]" or "decisions," not the challenged attorney. *See* 466 U.S. at 682, 689.

Here, in context, the record suggests that counsel did not perform a reasonable investigation. Counsel knew of a potential [redacted] defense as early as the February 18, 2015, preliminary hearing. *See* R.82-85, 763. Counsel also knew that a timely rule 412 motion was necessary to present that defense. R.763-64. Nearly 6 months passed without mention of a rule 412 hearing. R.763-64, 904-05. But on August 10, 2015, counsel explained that it was unlikely that she would pursue a rule 412 motion because the [redacted] witnesses she sought to put on the stand were not cooperating. R.904-05. After trial counsel was reminded that the filing deadline was about to lapse, counsel filed a request for a rule 412 hearing. *Id.*; R.1923. But counsel ultimately withdrew the motion, explaining that her inability to procure the testimony of the [redacted] witnesses "pretty much shut down" a rule 412 motion. R.1059, 2767-68.

The record suggests that trial counsel had additional evidence to support a rule 412 motion, but failed to investigate and/or take the steps to present it. Trial

counsel's request for a rule 412 hearing acknowledged evidence apart from the testimony of the [redacted] witnesses that could be used to support Jordan's defense—[redacted]. R.1923. Jordan's police interview provided additional support for the [redacted] *See, e.g.*, R.268-73, 278, 286-88, 309.

The State nevertheless attempts to discount the utility of Jordan's police interview. *See* Aple. Br. at 25, 28-29. To the extent the State suggests that is was reasonable for counsel to overlook the interview evidence because its use would require Jordan to take the stand, it is incorrect. *See* Aple. Br. at 25, 29. In deciding whether [redacted], the trial court could consider Jordan's interview directly and for its truth. *See* Utah R. Evid. 104(a).

Rule 104(a) provides that in deciding "any preliminary question about whether ... evidence is admissible," "the court is not bound by evidence rules, except those on privilege." *Id*. Whether [redacted] is a preliminary question; it is a question that decides whether [redacted] are admissible at trial under rule 412. *See id*. Thus, the trial court was not bound by the rules of evidence in deciding [redacted] and it could consider Jordan's interview—even if it was otherwise hearsay. *See id*. Jordan did not need to testify in court to the information therein, and there was "only upside" in presenting the interview for the court's consideration. *State v. Barela*, 2015 UT 22, ¶27, 349 P.3d 676.

The State further points to Jordan's interview statements that—in the State's view—demonstrate that Jordan himself believed in the truth of [redacted]. Aple. Br. 28-29, 33-34. It argues that "[b]ased on these statements, counsel had no reason to believe that any [redacted] would contain any evidence that the [redacted]." *Id.* at 34. But this claim is undermined by the record. Notwithstanding Jordan's interview statements, trial counsel evidently believed that [redacted] was worthy of *some* investigation. *See* R.904-05, 1059, 1923, 2767-68. In other words, the record suggests that trial counsel was not swayed by what [redacted] Jordan did or did not believe to be true. *See id.* Thus, "[w]ithin the context of" the "case," any decision to forgo investigation of supporting documentation was unreasonable. *Larrabee*, 2013 UT 70, ¶28.

In short, counsel performed deficiently by failing to investigate and/or take the steps necessary to present evidence of [redacted]—evidence critical to Jordan's defense.

ii. Trial counsel's deficient performance in failing to properly investigate and pursue a timely rule 412 motion prejudiced the defense.

Contrary to the State's claim, Jordan did not need to establish the admissibility of the evidence supporting his rule 412 motion under traditional evidentiary rules. *See* Aple. Br. 31. Nor is it speculative to say that—based on the available information—Jordan would have established [redacted] by a preponderance

of the evidence. *See id.* at 30-36. Finally, the State is wrong to suggest that evidence of [redacted] would have made no difference at trial. *See id.* at 36-37.

First, to satisfy prejudice, Jordan did not need to justify the admissibility of the evidence supporting [redacted] under the Utah Rules of Evidence. As explained above, [redacted] is a preliminary question of admissibility. *See* Utah R. Evid. 104(a); *supra* pgs. 6-7. And the trial court was not bound by the rules of evidence in deciding this question. *See id.*

Second, despite the State's contentions otherwise, the existing sources of information are not too speculative to show the [redacted]. *See* Aple. Br. at 30-36. In arguing to the contrary, the State discounts the value of circumstantial evidence supporting [redacted]. For instance, the State acknowledges evidence of a [redacted]. *See id.* 34-35. However, the State discounts this evidence, arguing that it does not show the [redacted]" *See id.* at 34-35. Direct evidence of [redacted] or not, a [redacted] provides compelling circumstantial evidence of [redacted]. If circumstantial evidence can support a conviction beyond a reasonable doubt, then circumstantial evidence is certainly relevant to a finding of [redacted] by a preponderance of the evidence. *See State v. Harris*, 2015 UT App 282, ¶9, 363 P.3d 555 ("it 'is a well-settled rule that circumstantial evidence alone may be sufficient to establish the guilt of the accused'").

Additionally, the State disputes the value of Jordan's statements at sentencing. Aple. Br. at 32. True, the statements were not available during trial counsel's pretrial investigation. However, Jordan's post-trial statements are appropriate to consider in the analysis of prejudice. *Gregg v. State*, 2012 UT 32, ¶¶25, 36-42, 279 P.3d 396 (considering evidence obtained post-trial in the prejudice analysis).

Finally, the State is wrong to say that the [redacted] evidence was insufficient to overcome the other evidence adduced at trial. On the contrary, had the evidence been admitted, there was a reasonable likelihood of a more favorable result for Jordan. Evidence that [redacted] supported an inference that [redacted]. *Cf.* Aple. Br. at 36 (State arguing that "[e]vidence that [redacted] would have had little value to impeach [redacted] accusations"). That is, it rendered believable the defense that [redacted] Presented with this defense, the jury also had reason to doubt the physical evidence supporting Jordan's convictions. If the jury believed that the State's witnesses fabricated their testimony, it was reasonable for them to believe that the physical evidence was fabricated as well. Thus, the [redacted] evidence tended to alter the entire evidentiary picture, and its absence prejudiced Jordan. *See Gregg*, 2012 UT 32, ¶21.

B. Trial counsel was ineffective for failing to object to the prosecutor's misstatement of the law about what constitutes sexual exploitation of a minor and for failing to request an accurate jury instruction.

In opening, Jordan argues that his trial counsel performed deficiently by failing to object when the prosecution told the jury to apply the wrong legal standard to some of the sexual exploitation of a minor counts. *See* Aplt. Br. 29-31. Trial counsel was also deficient by allowing jury instructions that reinforced the prosecutor's arguments. *See id.* 31-32. This reply responds to the State's claim that the prosecutor's argument did not misstate the law; that counsel was not deficient for permitting the argument; and that trial counsel reasonably chose not to object to the jury instructions. *See* Aple. Br. 38-44.

Contrary to the State's suggestion, an objection to the prosecutor's argument would have been well taken because the prosecutor's argument conflicted with Utah law. *See id.* 38-41. *Dost* factors aside, Utah law is clear about what *is not* determinative of whether an image is child pornography: the intent of the possessor. *See State v. Morrison*, 2001 UT 73, ¶¶6- 12, 31 P.3d 547. As *Morrison* correctly notes, when criminal liability turns on the intent of the particular possessor—or relatedly, on the intent of the particular photographer—the exploitation statute starts to run into first amendment problems with overbreadth. *Id.* ¶12; *New York v. Ferber*, 458 U.S. 747, 765 n. 18 (1982) (noting that "nudity, without more[,] is protected expression"); *See also United States v. Villard*, 700 F. Supp. 803, 812 (D.N.J. 1988), *aff'd*, 885 F.2d 117 (3d Cir. 1989) ("The crime punished by the statutes against the sexual exploitation of children ...

does not consist in the cravings of the person posing the child or in the cravings of his audience" (emphasis added)). To avoid constitutional infirmities, analysis of whether an image is child pornography is limited to the "materials themselves." *Morrison*, 2001 UT 73, ¶10. The prosecutor's argument conflicted with Utah law because it encouraged the jurors to tie this analysis to Jordan's intent. Thus, an objection to the prosecutor's argument would not have been futile.

Moreover, trial counsel's failure to object constituted deficient performance. The State is wrong to suggest that absent "clear law proscribing [the prosecutor's] argument," "counsel could not have been deficient for declining to object." Aple. Br. 40. Counsel may not overlook a meritorious claim simply because the law is not "clear." *See id.* Obviousness is an element of the plain error test, not the *Strickland* test. A judge is not an advocate. It is not a judge's duty to "constantly survey or second-guess the nonobjecting party's best interests or trial strategy." *State v. Labrum*, 925 P.2d 937, 939 (Utah 1996). Thus, "in the absence of an objection," the appellate court will fault a judge for failing to act only if "the error must have been obvious to the trial court." *Id.*

By contrast, counsel is the defendant's advocate. "[T]he purpose of ensuring that counsel's assistance is effective is to provide the defendant with his constitutional right to a fair trial." *State v. Moore II*, 2012 UT 62, ¶17, 289 P.3d 487. "'An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.'" *Id.*

Counsel's duty to investigate, introduce important evidence, and perform other important tasks extends beyond the obvious. *See State v. Eyre*, 2008 UT 16,¶¶11-21, 179 P.3d 792 (ineffective for failing to object even though Utah caselaw had not yet spoken on issue); *State v. Ison*, 2006 UT 26,¶32, 135 P.3d 864 (performed deficiently even though issue presented an "open question").

Thus, under *Strickland*'s first prong, the question is not whether the error was "clear[ly] [] proscrib[ed]." Aple.Br.42, 44. Rather, the question is whether counsel's act or omission constituted "sound trial strategy." *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1993). Here, there is no sound strategy in allowing the jury to apply the incorrect and harsher legal standard articulated by the prosecution.

The State also argues that "even if the prosecutor's argument was technically objectionable," "counsel could have reasonably concluded that objecting to the prosecutor's alleged misstatement would have given the prosecutor another opportunity to clarify his argument in a way that would have ended up in the same place and allowed the prosecutor to again emphasize why the jury should infer an inappropriate purpose behind the two depictions." Aple. Br. 42-43. This argument is not persuasive. Any belief that Jordan would "end[] up in the same place" is not reasonable. *See id.* As shown here and in opening, an objection to the prosecutor's legally incorrect instructions would have been well taken. *See* Aplt. Br. 29-33. Additionally, it is true that an objection might allow the prosecution to take a "second stab" at its argument. But an objection would have ensured that any "second stab" conformed to Utah law. It is unreasonable to

withhold an objection when the only argument that would be emphasized is a correct one. *See Barela*, 2015 UT 22, ¶27.

Finally, the jury instructions did not cure the prosecutor's incorrect statements. The State disagrees, arguing that "defense counsel was not required to object" because the instruction presented an "accurate statement of the law." Aple. Br. 42. But performance can be deficient even if the instructions are legally correct. *See State v. Hutchings*, 2012 UT 50, ¶¶19, 23 & n.9, 285 P.3d 1183. An objection is required when an instruction is misleading in the context of the particular case. *Id.* 23 ("counsel's failure to object or otherwise act in any way to remove the ambiguity of the instructions was objectively deficient").

Here, as explained in opening, Instruction 62 was potentially misleading in light of the prosecutor's incorrect argument and without more precise language. *See* Aplt. Br. at 31-32. Even if the instruction was technically correct, it was misleading in the context of this case. Trial counsel had a duty to remove this misleading impression, and her failure to do so constituted deficient performance. *See Hutchings*, 2012 UT 50, ¶¶19, 23 & n.9.

II. There was insufficient evidence to convict Jordan of charges relating to Exhibits 33–36, and the jury should not have been allowed to speculate about the ages of the unidentified persons in those exhibits.

Contrary to the State's claims, the evidence was insufficient where the trial court allowed the jurors to speculate about the ages of the persons in the Exhibits 33-36. *See infra* Part II.A. Moreover, trial counsel was ineffective for failing to

request an affirmative-defense jury instruction. *See infra* Part II.B. The opening brief adequately addresses Jordan's contention that counsel was ineffective for failing to call an age expert. *See* Aplt. Br. at 46-48.

A. Without expert testimony about the ages of the persons appearing in Exhibits 33–36, there was insufficient evidence to convict Jordan of the charges associated with these exhibits.

On this issue, both Jordan and the State discuss the Utah Supreme Court's decision in *State v. Alinas*, 2007 UT 83, 171 P.3d 1046. *See* Aplt. Br. at 42-44; Aple. Br. at 50-51. In opening, Jordan argues that *Alinas* did not create a categorical rule that expert witnesses on age would never be necessary. *See* Aplt. Br. at 43. Instead, *Alinas*—which addressed images of children "far below the age of majority"—should be read to hold that the necessity of an expert depends upon the facts of the case. *See id.* at 43-44; *Alinas*, 2007 UT 83, ¶18.

By contrast, the State argues that the *Alinas* court "stated, without alluding to any limitation, that whether children depicted in images are minors 'is a question of fact for the jury.'" Aple. Br. at 51. To support this contention, the State looks to the cases "favorably cited" by the *Alinas* court in footnote five. *Id.* at 50-51; *see also Alinas*, 2007 UT 83, ¶31 n.5 (citing *United States v. Riccardi*, 258 F. Supp. 2d 1212, 1218 (D. Kan. 2003); *United States v. Villard*, 700 F. Supp. 803, 814 (D.N.J.1988); *People v. Phillips*, 805 N.E.2d 667).

These cases do not support a blanket rule that expert testimony will never be needed. On the contrary, *Riccardi*, a case cited in footnote five, supports a case-by-case approach. *See* 258 F. Supp. 2d at 1218 ("whether expert testimony is

necessary depends upon the facts of any given case"). Additionally, *Villard* recognizes generally that the requisite evidentiary showings may differ depending on whether images picture teenagers or those in their earliest years. 700 F. Supp. at 814-15 (finding insufficient evidence of age in the absence of the photographs themselves and noting that "[w]hen the individual depicted may well be in his late teens, proof of age becomes critical"); *see id.* ("It is conceivable that a lay witness can perceive the clear differences between a child in the earliest years of life and a young adult aged eighteen").

In short, these cases support Jordan's reading of *Alinas*. And in this case, it was error for the trial court to allow the jury to speculate about the ages of the persons in Exhibits 33–36 when those persons could all have been adults. Without expert testimony, there was insufficient evidence to convict Jordan of the charges associated with those exhibits.

B. In the alternative, Jordan's counsel was ineffective for failing to request an affirmative-defense jury instruction.

In opening, Jordan argues that he received ineffective assistance of counsel when his trial lawyer failed to request an affirmative defense instruction. *See* Aplt. Br. 46-49. The State counters that reasonable trial counsel would see "no need to force the State to prove that the boys depicted were not 18 years old or older because the State already had to prove that they were under 18 years old." Aple. Br. at 55-56. The State is incorrect.

True, the State had to prove beyond a reasonable doubt that the persons were under 18 years old. *See* R.540-44, 549. But the existing instructions did not

clearly explain this. *See id*. An affirmative defense instruction would have simplified Jordan's defense and clarified the State's burden of proof regarding the age of the persons pictured.

The Utah Supreme Court has recognized the importance of a simplifying affirmative defense instruction in other contexts. For instance, in *State v. Torres*, the supreme court rejected the State's argument that, considered together, four separate instructions adequately explained the State's burden of proof vis-à-vis self-defense. 619 P.2d 694, 696 (Utah 1980). The court reasoned that the instructions failed "to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury w[ould] understand how to discharge its responsibilities." *Id*. It further pointed out that it was "neither fair nor necessary" to require the jury to go through the "tortuous process" of parsing multiple instructions to understand the State's burden "when that result could have been achieved by giving the defendant's requested [self-defense] instruction, or one of that substance." *Id*. The *Torres* court therefore reversed because the trial court "failed to give an appropriate instruction concerning the burden of proof as to self-defense, which related to an important aspect of the defendant's theory of the case." *Id*.

As in *Torres*, the jury had to engage in an unnecessarily "torturous process" to comprehend that the State had to prove beyond a reasonable doubt that that the persons were under 18 years old. *See* 619 P.2d at 696. To understand this requirement, the jury was required to tie together legal concepts

contained in multiple instructions and parse various statutory definitions. Specifically, to understand that the State had to prove beyond a reasonable doubt that the persons were under 18 years old, the jury had to go through the following steps: With the elements instruction on sexual exploitation of a minor as a starting point, the jury had to locate the definition of "child pornography" contained in the separate Instruction 56; glean from that definition the requirement that the person had to be a "minor"; look to another instruction to locate the definition of minor, which means "any person under the age of eighteen years"; and, finally, relate the age requirement back to the elements instruction, understanding that the State had to prove beyond a reasonable doubt that that the persons were under 18 years old. *See* R.540-44, 549.

There is an appreciable risk that while engaging in this complicated process, the jury's understanding of the age requirement was confused or lost in translation. *See Nielsen v. Pioneer Valley Hosp.*, 830 P.2d 270, 274 (Utah 1992). Under these circumstances, trial counsel should have requested an affirmative defense instruction, which would have clearly set forth Jordan's defense and explained the State's burden of proof relative the age requirement. *See Hutchings*, 2012 UT 50, ¶¶19, 23 & n.9 ("counsel's failure to object or otherwise act in any way to remove the ambiguity of the instructions was objectively deficient"). The failure to do so constituted deficient performance.

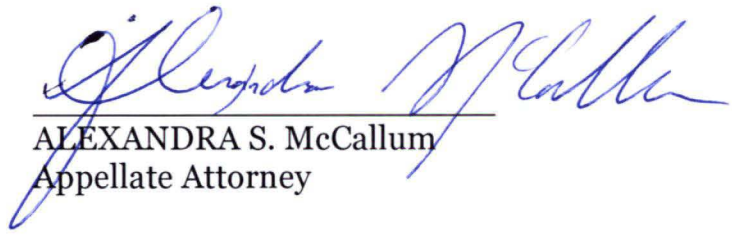
The State also contends that Jordan did not establish prejudice because the jury "found on the evidence before it that the State carried its burden of proving

the boys to be under 18." Aple. Br. 56-57. But again, the instructions given did not clearly explain the State's high burden of proof relative to the age requirement. *See* R.540-44, 549. Accordingly, there was a reasonable likelihood that the jury did not fully grasp this important point of law. Had counsel requested a simplifying affirmative defense instruction, it is reasonably likely that the jury would have doubted that the State met its high burden of proving age.

CONCLUSION

For the reasons here and in opening, Jordan respectfully asks this Court to reverse and remand for a new trial. He also asks this Court to reverse on Counts 25–28 with an order to dismiss.

SUBMITTED this 9th day of February 2018.

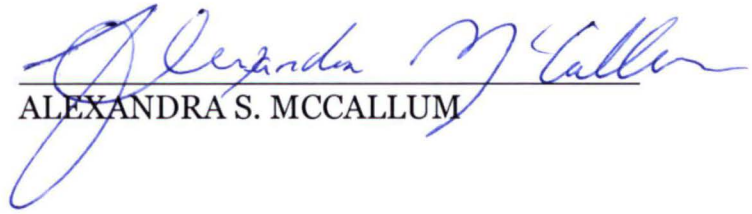


ALEXANDRA S. McCallum
Appellate Attorney

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 4,743 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

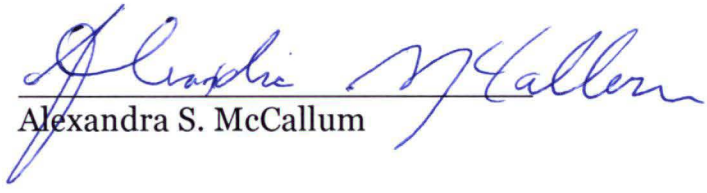
In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted or redacted from the public version of the foregoing opening brief of defendant/appellant.



ALEXANDRA S. MCCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. MCCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the private brief, and one copy of the public brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies of the private brief, and one copy of the public brief to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf of the private and public briefs to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 9th day of February 2018.



Alexandra S. McCallum

DELIVERED this _____ day of February 2018.

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