PUBLIC

No. 20160794-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

JAMIE ERNESTO NUNEZ-VASQUEZ,
Defendant/Appellant.

Appellant is incarcerated

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Forcible Sodomy, a First Degree Felony, in violation of Utah Code 76-5-403(2); and Possession or Use of a Controlled Substance, a Class B. Misdemeanor, in violation of Utah Code 58-37-8(2)(A)(I) in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris, presiding

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INTRODUCTION

This case involves an accusation of forcible sodomy made by a man, CC, who alleged that he passed out or blacked out and did not remember the incident. CC accused Jamie Nunez-Vasquez, a man who had spent the evening clubbing and drinking with CC before they both spent the night in the living room of another man's apartment. Nunez-Vasquez's defense was consent: he testified that CC indicated that he was awake and that he consented. This brief raises six issues. First, the court erred when it excluded evidence that CC [redacted] under Utah Rule of Evidence 412. Second, the court erred when it declined to instruct the jury on the mistake-of-fact defense. Third, the court erred when it excluded testimony about the conditions surrounding Nunez-Vasquez's statements to police. Fourth, trial counsel failed to move for the exclusion of Nunez-Vasquez's statements about CC's sexuality in light of the

court's rulings. Fifth, counsel failed to object to a nurse's testimony that it is "very common" for a victim to have no "real recollection" of a crime because of "trauma." Individually and cumulatively, these errors warrant reversal.

JURISDICTIONAL STATEMENT

This is an appeal from first degree felony forcible sodomy and class B misdemeanor possession of a controlled substance in the Third Judicial District, Salt Lake County, Utah, the Honorable Judge Mark Kouris presiding. R:348. A copy of the sentence, judgment, commitment is attached as Addendum A. This Court has jurisdiction after transfer from the Utah Supreme Court under Utah Code section 78A-3-102(4). R:360.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether the court erred when it excluded under rule 412 critical evidence to the defense that CC identified as [redacted]

Standard of Review/Preservation: "When reviewing a trial court's decision to limit cross-examination, [this Court will] review the legal rule applied for correctness and the application of the rule to the facts of the case for an abuse of discretion." *State v. Marks*, 2011 UT App 262, ¶11, 262 P.3d 13 (internal quotation marks omitted). This issue was preserved by counsel's motion and argument. R:1155-56; 639-42. Otherwise, this Court may review it for ineffective assistance of counsel. *State v. Kozlov*, 2012 UT App 114, ¶28, 276 P.3d 1207.

Issue II: Whether the court erred when it declined to give a mistake-of-fact instruction on consent.

Standard of Review/Preservation: The appellate court will "review a district court's refusal to give a jury instruction for abuse of discretion. But in certain circumstances, the court's discretion will be strictly cabined. For instance, a criminal defendant is generally entitled to have the charged offense defined for the jury." *Miller v. Utah Dep't of Transp.*, 2012 UT 54, ¶13, 285 P.3d 1208 (footnote omitted). This issue was preserved. R:246-47; 1042-47.

Issue III: Whether the court erred when it sustained the State's objection to Nunez-Vasquez's testimony explaining the circumstances of his police interview.

Standard of Review/Preservation: This Court reviews a district court's decision to admit or exclude evidence for abuse of discretion. *State v. Perea*, 2013 UT 68, ¶31, 322 P.3d 624. The evidence was excluded on the State's objection — the issue was preserved for appeal by counsel's questioning. R:1008. To the extent it was unpreserved, this Court may review it for ineffective assistance of counsel. *Kozlov*, 2012 UT App 114, ¶28.

Issue IV: Whether counsel was ineffective for failing to exclude Nunez-Vasquez's comment that CC was straight and that Nunez-Vasquez had "a thing for straight guys."

Standard of Review/Preservation: "Whether Defendant's counsel was ineffective in this regard presents a question of law." *State v. Doutre*, 2014 UT

App 192, ¶9, 335 P.3d 366. Ineffective assistance of counsel is an exception to the preservation rule. *Kozlov*, 2012 UT App 114, ¶35.

Issue V: Whether counsel was ineffective when he failed to object to a nurse's testimony that CC's purported failure of memory was a common effect of trauma.

Standard of Review/Preservation: *See supra* Issue IV.

Issue VI: Whether the cumulative effect of multiple errors was prejudicial.

Standard of Review/Preservation: Issues raised under the cumulative error doctrine need not be preserved. This Court will "apply the 'standard of review applicable to each underlying claim or error.'" *State v. Davis*, 2013 UT App 228, ¶16, 311 P.3d 538.

RELEVANT STATUTES AND RULES

The following provisions are relevant to this case. Their text is provided in Addendum B. Utah Code § 76-5-403(2); Utah R. Evid. 412, 608, 401, 402, 403.

STATEMENT OF THE CASE

Nunez-Vasquez was charged with forcible sodomy and possession of a controlled substance. R:1-2. He was convicted as charged following a jury trial. R:348. He filed a timely notice of appeal. R:354.

STATEMENT OF FACTS

Nunez-Vasquez and CC spent an evening drinking at a party and then at a gay bar and then at a club. R:755; 757; 758; 996. CC claimed that he had not met Nunez-Vasquez before that night. R:756. Nunez-Vasquez testified that the two

were acquaintances who had met before. R:1009. CC testified that he drank alcohol "in excess" that night, consuming "anything that was there that [he] could get ahold of." R:756. Nunez-Vasquez was also drinking. R:999. Nunez-Vasquez testified that he was "really intoxicated" and CC was "really drunk." R:999.

The two ended up at the home of a third companion, DR, who had been drinking with them that night. R:875; 879. They arrived back late — probably at around 5am. R:890; 842. DR wrote in a witness statement that when the three arrived at his apartment, CC took off his shirt and he and Nunez-Vasquez were on the couch when DR went to bed in his room. R:890. Nunez-Vasquez told the police that he and CC cuddled on the couch before falling asleep. State's Ex.9. During the night, CC would cuddle into Nunez-Vasquez and the two "kept falling off the couch." State's Ex.9.

Nunez-Vasquez testified that he woke up with CC behind him. R:999-1000. It was light outside. R:1000. The two were on the floor and Nunez-Vasquez testified that he could feel CC's erect penis "grinding into" him. R:1001. Nunez-Vasquez believed this was a signal that CC wanted to have sex. R:1001. Nunez-Vasquez had anal sex with CC and ejaculated. State's Ex.9; R:1001; 1022. Nunez-Vasquez testified that while he was having sex with CC, CC's penis was erect and he was "pressing into" Nunez-Vasquez and "doing all the work." R:1002. The two did not speak or kiss, but CC "was moaning a little bit." R:1001-02. Nunez-Vasquez said at his police interview, which occurred later that day, that he gave CC oral sex, but he did not remember that happening or saying that

it did at the time he testified at trial. State's Ex.9 p.24; R:1003. He said in the interview that he pulled CC's pants down, but he testified at trial that he did not remember that. R:1016. He also said at the interview that he fondled CC's penis after the two had sex, but he did not remember doing that at the time of trial. R:1016. Nunez-Vasquez consistently maintained that he had reason to believe CC was awake and that CC consented to the sexual contact. R:1003 ("he was all over me ... I think it's pretty clear"); 1031-32 ("He was thrusting into me," and never expressed any objection); State's Ex.9 p.18 (responding affirmatively to the question of whether CC was awake, indicating that "his body is saying yeah," and explaining "I wouldn't do that if I thought that he didn't want it.").

CC testified that he woke up next to Nunez-Vasquez, felt lubricant and discomfort in his rectum, and called 911. R:762; Def. Ex.3. The call was made around 11:43am. R:567. CC told dispatch that he was raped, that he was wearing a $1,500 suit, and that he woke up with "this gay guy right next to" him, touching him, and that he did not know Nunez-Vasquez's name. Def. Ex.3.

CC testified at trial that after sitting on the couch in DR's apartment, he "was passed out, blacked out, passed out" and the next thing he remembered was waking up, seeing Nunez-Vasquez, seeing personal lubricant nearby, and calling 911. R:760-63. When defense counsel pressed CC on his lack of memory from that evening, he replied, "I would know if I would have given consent." R:774. CC claimed that in addition to alcohol consumption, he had memory problems

caused by a motorcycle accident that happened after the night in question. R:754.

A nurse examined CC. R:814. He complained of rectal pain, although the nurse [redacted] R:824; 817. The nurse was not able to say based on the exam whether the sex was consensual. R:827. She did testify that "[i]t is very common that either due to alcohol, drugs, or just the traumatic experience, a lot of people will not have any real recollection or they don't know a lot of detail about what happened. It's just part of trauma." R:819.

Nunez-Vasquez's DNA appeared on swabs from CC's penis, rectum, and perianal area. R:417. There was a one in two probability that CC's DNA appeared on Nunez-Vasquez's penile and perianal swabs and there was no foreign DNA on Nunez-Vasquez's rectal swab. R:413.

The police handcuffed Nunez-Vasquez when they responded to CC's 911 call but told him he was not under arrest. R:549. The officer recited the *Miranda* rights from memory and believed he "got it pretty close to right." R:549; 566. Nunez-Vasquez admitted that a bottle with marijuana in the apartment was his. R:805. A separate officer interviewed Nunez-Vasquez in the holding cell at about 4pm. R:586. He did not repeat *Miranda*, but asked if Nunez-Vasquez understood the rights he waived when he spoke to the first officer. State's Ex.9. p.1. Nunez-Vasquez replied, "I do, um, I'm going to be up front, I'm not sober." State's Ex.9. p.1. The officer said he could smell the alcohol just sitting next to Nunez-Vasquez. State's Ex.9. p.15. Later, Nunez-Vasquez told the officer he was

"exhausted." State's Ex.9. p.15. Asked again if he understood his rights, he replied, "Do I need an attorney at this point?" and expressed concern that he did not "feel comfortable answering questions...." State's Ex.9. p.1-2. The officer explained that he did not have to answer them. State's Ex.9. p.2. Nunez-Vasquez said he understood his rights and then answered the officer's questions. State's Ex.9. p.2. Nunez-Vasquez said in the interview that he had sex with CC believing that CC was awake and consenting. State's Ex.9. p.12.

During the interview, which was provided to the jury as an exhibit, the officer asked Nunez-Vasquez if CC was gay. State's Ex.9 p.4-5. Nunez-Vasquez replied, "I don't think so, I don't know. I don't really ask questions.... I didn't ask him, not something I really ask people." State's Ex.9 p.5. Nunez-Vasquez thought that CC did not identify as gay because "he might have said something at some point." State's Ex.9 p.5. The officer asked what would lead Nunez-Vasquez to believe that a man who identified as straight "wanted to have sex" with him. State's Ex.9 p.21. Nunez-Vasquez replied, "With me is not like really about, this might sound weird but I have a thing for straight guys.... It's just a thing, it's attractive to me. It's like a challenge, getting a straight guy.... Just because a guy tells me that [he's] straight doesn't mean that, I mean I've had sex with plenty of straight men, they tell me that they are, I still have sex with them. Just because they say that they are straight, doesn't mean that they don't want to. Does that make sense?" State's Ex.9. p.21.

At trial, Nunez-Vasquez attempted to explain that statement. The State asked, "you knew [CC] was not gay, right?" and Nunez-Vasquez replied, "That's kind of a loaded question, I think." R:1009. The State asked if Nunez-Vasquez had told the officer that CC said that night he was not gay; Nunez-Vasquez responded, "I knew that he identified as straight." R:1009. The State asked if CC "was the perfect candidate for your challenge?" and Nunez-Vasquez replied, "I think there's a lot of straight guys out there that have sex with gay men that identify as straight.... I was trying to explain to [the detective] how it could be possible for a man who identified as straight to have sex with a gay man. And that was the best possible way that I could do that at that point, in the state that I was." R:1030.

Nunez-Vasquez had moved to exclude the police interview because questioning continued after he indicated he was uncomfortable and asked about a lawyer. R:76-77. The court denied the motion. R:626. At trial, Nunez-Vasquez explained that when the officer first asked if he had sex with CC, he said, "I don't know." R:1007. He said he replied that way because he did not want to talk to the officer and did not know what was going on. R:1007. He testified that he was "a little bit confused" when speaking with the second officer. R:1006. The State objected and the court struck this response. R:1006. He testified that the police did not offer him "water until [the officer] was about to interview [him]." R:1007. The State objected again, arguing that the questions went "to whether his statement was involuntary" and that had "all been litigated and it's the judgment

of this Court, not the jury." R:1008. When the court asked for defense counsel's response, counsel said, "he might have a point there," and questioning on that issue stopped. R:1008.

CC had testified at the preliminary hearing that he was not gay, not bisexual, had never had sex with a man before the incident with Nunez-Vasquez, and that he had a girlfriend. R:485; 494. Defense counsel filed a motion to admit testimony from [redacted]" CC. R:1155. The witnesses would testify that CC "[redacted]" R:1156. The court denied the motion under Utah Rule of Evidence 412. R:1155-56; 639-42.

The defense requested an instruction that would have explained to the jury that, even if CC was blacked out or passed out or in hindsight did not want to have sex, Nunez-Vasquez was not guilty if he had a good faith and objectively reasonable belief that CC consented at the time. R:246-47; 259; 1042. The instruction is attached as Addendum C. The instruction explained, "A mistake of fact defense as to a person's lack of consent to the sexual activity charged has two components, one subjective, and one objective. The subjective component asks whether a defendant honestly and in good faith, albeit mistakenly, believed that the other person consented to the sexual intercourse or activity. The objective component asks whether the defendant's mistake regarding consent was reasonable under the circumstances.... Accordingly, the State has the burden to prove beyond a reasonable doubt, that the defendant did not hold a reasonable

and good faith belief that [CC] consented to the sexual activity." R:247. The trial court declined to give the instruction, providing instead an instruction on voluntary intoxication and an elements instruction that stated that the defendant must have "acted with intent, knowledge or recklessness that [CC] did not consent." R:320.

Nunez-Vasquez was convicted of both counts. R:530. The court sentenced him to prison for five years to life on the first degree felony and 102 days on the class B misdemeanor. R:344-45.

SUMMARY OF THE ARGUMENT

Point I. The court erred when it denied the defense's motion to introduce 412 evidence. Evidence of an alleged victim's sexual behavior is admissible if its exclusion would violate the defendant's constitutional rights. The determination involves balancing of the interests of the defendant — the importance of the evidence to an issue critical to the defense — and the interests of the State — the extent to which exclusion of the evidence will further the purposes of the rule.

Here, the evidence was critical.

[redacted] And the exclusion of the evidence did not protect the complaining witness from unnecessarily intrusive disclosures.

Point II. The court erred when it declined to instruct the jury on the mistake-of-fact defense. Counsel's proposed instruction explained that, even if CC ultimately did not consent, Nunez-Vasquez was not guilty if he reasonably and in good faith believed that CC consented. It was not enough to instruct jurors that the crime had a requisite mental component without making explicit that a reasonable and good faith mistake meant that Nunez-Vasquez was not guilty.

Point III. The court erred when it sustained an objection to contextualizing questions about the circumstances of Nunez-Vasquez's statements to police. That the evidence was relevant to another issue did not mean it was irrelevant to the jury's determination of the facts and Nunez-Vasquez's credibility.

Point IV. Counsel was ineffective when he did not move to exclude Nunez-Vasquez's statements regarding CC's sexuality under rule 403. Nunez-Vasquez's statements about CC's sexuality were confusing, misleading, and unfairly prejudicial for the reasons outlined in Points I and III. They had minimal probative value when understood in context and raised a serious danger of unfair prejudice.

Point V. Testimony that CC's claim that he had no memory of the incident was a "common" effect of "trauma" should have drawn an objection. It was ineffective assistance for counsel not to object to this anecdotal statistical

evidence. The nurse's testimony suggested that a weakness in the prosecution's case statistically supported the prosecution's case.

Point VI. This Court should consider the cumulative prejudice of these errors.

ARGUMENT

I. The court erred when it excluded evidence critical to Nunez-Vasquez's defense.

Utah Rule of Evidence 412 renders inadmissible "evidence offered to prove a victim's sexual predisposition" and "evidence offered to prove that a victim engaged in other sexual behavior" except where the evidence's "exclusion would violate the defendant's constitutional rights." Utah R. Evid. 412(a), (b)(3). "Subparagraph (b)(3) states a truism. A court may not exclude evidence of an alleged victim's sexual behavior or predisposition if to do so would deny the accused Constitutional protections. The United States Supreme Court has recognized that in various circumstances a defendant may have a right under the Confrontation Clause to introduce evidence otherwise precluded by an evidence rule.... The precise scope of the accused's constitutional right turns on the case's specific facts." Utah R. Evid. 412, 2011 advisory committee's note.

The Utah Supreme Court wrote that to be admissible under rule 412, the "evidence in question" must be "essential to the presentation of a defense." *State v. Thornton*, 2017 UT 9, ¶78, 391 P.3d 1016. This Court noted that the "interplay between rule 412 and the Confrontation Clause puts trial judges in the difficult

position of trying to strike the correct balance between two important interests: the accused's right to present a complete defense and the State's interest in protecting the complaining witnesses in sex crime prosecutions from unnecessarily intrusive invasions into private sexual matters." *State v. Marks*, 2011 UT App 262, ¶18, 262 P.3d 13. "The consideration of whether the exclusion of evidence is disproportionate to rule 412's purpose, thereby violating the defendant's constitutional right to confrontation, involves the balancing of the interests of the defendant against those of the State under the facts and circumstances of the particular case." *Id.* ¶22.

"A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *State v. Chavez*, 2002 UT App 9, ¶18, 41 P.3d 1137 (internal quotation marks omitted); *see State v. Williams*, 773 P.2d 1368, 1372 (Utah 1989) ("The Sixth Amendment right to confrontation requires only that the accused be permitted to introduce all relevant and admissible evidence."). "To determine if exclusion of evidence violates the Confrontation Clause, the court must assess both the importance of the evidence to an issue critical to the defense and the extent to which exclusion of the evidence will further the purposes of the rule under which it is excluded." *Marks*, 2011 UT App 262, ¶23.

Under this balancing analysis, the probative value of the evidence is "an important component." *Id.* Where "the excluded evidence is particularly

relevant, the Utah appellate courts ... require that the defendant be permitted to use it for cross-examination." *Id.* ¶30. In *Marks*, the defendant argued that evidence that the child victim was in trouble for possessing pornography was probative of the victim's motive to allege abuse and "redirect" his grandmother's anger towards the defendant. *Id.* ¶25. This Court noted that "there is little obvious connection, if any, between the excluded evidence and the theory advanced by the defense." *Id.* ¶26. This was in part because the defense in *Marks* could introduce evidence that the victim was in trouble before he made the accusation, excluding only the pornography detail. *Id.* ¶32.

The connection between the excluded evidence and the defense's theory is obvious in Nunez-Vasquez's case. *See, e.g.*, *Commonwealth v. McGregor*, 655 N.E.2d 1278, 1280 (Mass. App. 1995) ("The rape-shield statute does not preclude use of the victim's statements to show his motive to lie."); *People v. Hackett*, 365 N.W.2d 120, 124 (Mich. 1984) ("where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted"). Evidence of "[b]ias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence." Utah R. Evid. 608(c).[1] The defense's theory was that CC consented to

[1] In a footnote, the supreme "court rejected the defendant's alternative argument that evidence offered for impeachment purposes is similarly exempted from the scope of the rule, stating, 'There is no exception in rule 412 that allows for the admission of sexual conduct to impeach witnesses.'" *Marks*, 2011 UT App 262,

homosexual sex but accused Nunez-Vasquez of forcible sodomy because CC identified as straight and had a girlfriend. R:639-42. Evidence that CC [redacted] would demonstrate that motive to the jury.

Additionally, the evidence would have given the jury cause to question CC's credibility. CC testified at the preliminary hearing that he was straight and had never had sex with a man. R:485; 494. The defense [redacted] R:1155. Confronted with this evidence, CC might have altered his story or otherwise given the jury cause to question his credibility.

Finally, the evidence had particular importance in this case because CC testified that he did not remember most of the night in question or the crime itself. R:760. CC testified that his alcohol consumption erased his memory of most of the night, including everything that happened after he lay down on the couch, although he claimed he would not have given consent. R:766-67. According to Nunez-Vasquez, the two cuddled, had sex, and even fell off the couch together. R:1000-01; 1003; State's Ex.9 p.13. Utah "recognizes the

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¶45, (quoting *State v. Boyd*, 2001 UT 30, ¶38 n.4, 25 P.3d 985). This Court explained that "the footnote merely reflects the supreme court's agreement with the advisory committee notes that rule 412 presumptively excludes evidence of the complainant's prior sexual activity, even if such evidence is offered for impeachment purposes." *Id.* "There is nothing the supreme court's decision in *Boyd*, however, that suggests evidence offered for impeachment purposes must be categorically excluded if to do so would violate the defendant's constitutional rights." *Id.*

relevance of the complainant's past sexual conduct to rebut the sexual innocence inference in appropriate cases," usually those with young victims the jury would assume could only have learned about sex acts from abuse. *Marks*, 2011 UT App 262, ¶36. There is a similar concern for defendants in homosexual forcible sodomy cases — evidence is needed to "dispel the assumption that most jurors would believe such an act ... is not likely to occur voluntarily." *See Hackett*, 365 N.W.2d at 127. This is especially true in Utah, where sodomy, regardless of consent, appears in the criminal code as a class B misdemeanor. Utah Code § 76-5-403(1), (3).

The 412 evidence was critical in this case because the State relied on Nunez-Vasquez's statement to police that CC said he was straight as well as CC's testimony that he did not remember but was nevertheless confident that he would not have consented to sex with Nunez-Vasquez. R:1029; 1063; 766-67.

The evidence was also important because CC testified he "was passed out, blacked out," after drinking "anything that was there that [he] could get ahold of" and the jury was tasked with determining whether Nunez-Vasquez acted at least recklessly as to the alleged lack of consent. R:756; 760; 319. "Alcohol blackout," involves memory loss and is not the same thing as unconsciousness. *State v. Bryan*, 709 P.2d 257, 259-60 (Utah 1985) (defendant "remembered nothing about the accident" he caused after drinking and driving and "was suffering from 'alcohol blackout' at the time of the accident"); *see State v. Tennyson*, 850 P.2d 461, 465 (Utah Ct. App. 1993) ("a person with [a .37] blood alcohol level could

experience blackouts, i.e., loss of memory, for some period while intoxicated."); *see also State v. Bertul*, 664 P.2d 1181, 1182-83 (Utah 1983); *State v. Blubaugh*, 904 P.2d 688, 697 (Utah Ct. App. 1995).

The jury was instructed that sexual conduct was without consent if CC "was unconscious, unaware that the act was occurring, or was physically unable to resist." R:319. The jury was also instructed that Nunez-Vasquez was not guilty unless the jury found beyond a reasonable doubt that he "acted with intent, knowledge or recklessness that [CC] did not consent." R:320. This meant Nunez-Vasquez had to be "aware of a substantial and unjustifiable risk" that CC was unconscious or otherwise did not consent. R:314. It was possible on the evidence presented that the jury could have concluded that CC was blacked out from alcohol consumption and did not remember the events Nunez-Vasquez described; but the jury could have also concluded that CC acted in a way that gave Nunez-Vasquez no cause to question whether CC was awake and consenting. Under these facts, Nunez-Vasquez would not be guilty because he had no reason to be "aware of a substantial and unjustifiable risk" that CC was unconscious or otherwise nonconsenting. R:314.

But the jury heard evidence that CC said he was straight without hearing evidence [redacted] making it much less likely he would indicate consent to homosexual sex, even in a blackout state. *See Hackett*, 365 N.W.2d at 127. Evidence that [redacted] would have supported Nunez-Vasquez's version of events. It would have rebutted CC's

testimony that, although he did not remember what happened, he would not have consented. And it would have done so in a way that allowed the jury to reconcile both men's accounts. The jury could have believed that CC identified as straight and that he did not remember or even regretted having sex. But that did not prevent the jury from also believing Nunez-Vasquez's account of what appeared by all indications to be consensual sex.

In summary, evidence that [redacted] was critical to the defense. It changed the entire evidentiary picture and presented a path to innocence even if the jury believed CC's testimony.

In addition to assessing "the relevance of the challenged evidence to an issue critical to the defense," a 412 analysis must assess "the extent to which [the evidence's] exclusion furthers the purposes of rule 412." *State v. Ashby*, 2015 UT App 169, ¶22. "The rule has several goals, including protecting victims of sexual assault from humiliation, encouraging victims to report sexual crimes, and preventing the introduction of irrelevant and collateral issues that may confuse or distract the jury." *Id.* ¶27 (internal quotation marks omitted). These goals "are strongly implicated when the complainant is a child." *Id.* (internal quotation marks omitted). This Court's concern for embarrassment and humiliation also increased when the 412 evidence involved incest and the victim had mental disabilities. *Marks*, 2011 UT App 262, ¶51.

The evidence in this case is comparatively less concerning. CC was an adult. R:753. Counsel proffered [redacted] R:1155. While such information is personal, it is not objectively "humiliating," and in this case, as argued above, it was not "irrelevant." *Ashby*, 2015 UT App 169, ¶27; *cf. Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring) ("We now understand that homosexual men and women (and also bisexuals, defined as having both homosexual and heterosexual orientations) are normal in the ways that count, and beyond that have made many outstanding intellectual and cultural contributions to society").

Furthermore, the evidence's inclusion would not discourage the reporting of sex crimes. *See Ashby*, 2015 UT App 169, ¶27. Admitting the evidence in this case does not threaten the rule's prohibition against using evidence of unchastity to attack general credibility or prove propensity. *See United States v. Kasto*, 584 F.2d 268, 271 (8th Cir. 1978) (explaining that evidence admitted for such purposes is "insufficiently probative" to be admitted). Rather, similar to Utah's rule that allows some evidence of sexual experience "to rebut the sexual innocence inference in appropriate cases," *Marks*, 2011 UT App 262, ¶36, admitting this evidence would allow evidence [redacted] in limited circumstances to rebut the inference that the alleged victim was straight and, despite his inability to remember the incident, would therefore not have consented.

Counsel preserved the issue and, if not, was ineffective.

This issue is preserved because counsel's proffer and motion in this case were sufficient to allow the trial judge to weigh the respective interests and decide the issue. A proffer must "give the district court the information it needed to gauge the evidence's probative value." *State v. Bravo*, 2015 UT App 17, ¶30, 343 P.3d 306. In *Thornton*, the defense "failed to lay the foundation necessary to support" the argument that the defense needed evidence of the victim's sexual experience and could not rely on other evidence to show sexual knowledge. *Thornton*, 2017 UT 9, ¶¶81-82. Nunez-Vasquez's case is different.

First, the proffer in this case conveyed the necessary information without details that would cause unnecessary embarrassment or pry into private sexual matters. All that was necessary to convey the defense's theory of the case was evidence that [redacted]. The judge did not decide that other evidence was sufficient to make the defense's case, as in *Thornton*. The judge in Nunez-Vasquez's case ruled that the door would only be open to the evidence if CC testified that he was straight and "would never do that sort of thing." R:652. The prosecution announced that, although it had elicited testimony from CC that he was straight at the preliminary hearing, it would not ask that question at trial. R:646.[2]

[2] The Utah Supreme Court has stated that only the victim "could have waived" the "safeguards of rule 412." *Boyd*, 2001 UT 30, ¶46. However, this Court has clarified "that subsequent developments may affect the continuing wisdom of a pretrial rule 412 decision." *Marks*, 2011 UT App 262, ¶73 (citing R. Collin

Whether or not CC testified directly that he was straight, it was critical for the defense to present evidence that [redacted]. This was evidence of "prejudice or any motive to misrepresent," which can be shown "to impeach the witness either by examination of the witness or by other evidence." Utah R. Evid. 608(c). It was not reputation or opinion evidence. Utah R. Evid. 608(a). And the door was open regardless, because the court had already ruled that the prosecution could introduce Nunez-Vasquez's statement that CC said he was straight. R:626.

However, if this Court disagrees and considers the issue unpreserved, the Court may review the issue for ineffective assistance of counsel. To show ineffective assistance, an appellant must show "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense." *State v. Arriaga*, 2012 UT App 295, ¶12, 288 P.3d 588 (internal quotation marks omitted).

Counsel could have added detail to his 412 motion.[3] The motion did not name the men who would testify and did not provide the details of their

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Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 233 (2009–2010 ed.)). Although *Boyd* holds that another witness cannot waive the victim's protection under rule 412, the prosecution might create a situation where the exclusion of 412 evidence violates the constitutional rights of the defendant. *Id.* ¶73. "The rule cannot be used to exclude otherwise admissible evidence where the defendant has a constitutional right to use the evidence in the presentation of a complete defense." *Id.* ¶45 n.13.

[3] The record provides sufficient information on which to decide this issue. In the event that this Court concludes that additional findings are necessary, however, appellate counsel has filed a motion pursuant to Utah Rule of Appellate Procedure 23B arguing

testimony. As argued above, the motion presented the issue to the trial court in a way that it could — and did — rule on it without providing unnecessarily private and embarrassing detail. *See Kell v. State*, 2012 UT 25, ¶11, 285 P.3d 1133 ("The district court's decision to take up the question ... conclusively overcame any objection that the issue was not preserved for appeal."). The court did not deny the motion due to lack of detail. The court ruled that this kind of evidence was inadmissible under rule 412 unless CC testified on direct examination that he was straight. R:652.

But if additional detail were required to present the issue to the court, counsel's performance was deficient for failing to include it. *See State v. Snyder*, 860 P.2d 351, 359 (Utah Ct. App. 1993) ("Given that there is no legitimate trial tactic to be served by failing to comply with the filing requirement ... defense counsel's actions fell outside the wide range of professionally competent assistance." (internal quotation marks omitted)).

If a renewed motion was necessary to preserve the issue, counsel should have renewed the motion. CC made statements similar to those the judge suggested might make the 412 evidence admissible. The court and the prosecution agreed that if CC said, "I'm straight and would never do that sort of thing," the door would be open to cross examination on the 412 evidence. R:652. At trial, the prosecutor asked if CC remembered "flirting with Jamie that night"

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that trial counsel provided ineffective assistance when he failed to provide the court with a detailed proffer of the 412 evidence and failed to explain why it was critical to the defense.

and CC responded, "I definitely would have never done that." R:766. The prosecutor asked if he had any independent memory of *not* flirting and he responded, "I did not do such behavior." R:767. On cross-examination, when counsel asked if he remembered what he said or did with Nunez-Vasquez "at any location that you were at that evening," CC responded, "I would know if I would have given consent." R:772. The State also introduced in its case-in-chief, through Nunez-Vasquez's police interview, testimony that CC "said he was straight." R:734 (prosecution began opening statement with this quotation); 960 (police interview payed for the jury); State's Ex.9 p.5 (Nunez-Vasquez saying under interrogation that CC "said he's not" gay). Combined, this evidence amounted to evidence that the court indicated would render necessary and admissible the defense's evidence that [redacted] R:652.

At the time of the 412 ruling, the court had already ruled that Nunez-Vasquez's police interview was admissible. R:626. And that ruling came after CC's preliminary hearing testimony that he was straight and would not have consented. R:485; 490. Had counsel renewed his motion after this testimony, it is all but certain it would have been denied. Further pursuit of futile motions is not necessary to preserve an issue. *State v. Bird*, 2012 UT App 239, ¶12, 286 P.3d 11. However, if this Court disagrees and concludes that counsel needed to renew the motion to preserve it, counsel performed deficiently for failing to renew the

motion. The defense wanted to introduce the evidence and there was no reasonable strategic reason not to renew the motion.

The error was prejudicial.

The exclusion of this evidence was prejudicial. If this Court concludes that excluding the evidence violated Nunez-Vasquez's right to confrontation, a constitutional standard applies. "Where the error results in the deprivation of a constitutional right, [appellate courts] apply a higher standard of scrutiny, reversing the conviction unless [the courts] find the error harmless beyond a reasonable doubt." *State v. Calliham*, 2002 UT 86, ¶45, 55 P.3d 573. The error in this case was not harmless beyond a reasonable doubt.

In *State v. Lenkart*, trial counsel had failed to secure available expert testimony that the results of a Code R kit "were more consistent with consensual rather than nonconsensual intercourse" and the "test came back negative for the presence of salivary amylase, which directly supported the [defendant's] claim that no oral sex occurred." 2011 UT 27, ¶33, 262 P.3d 1. At trial, the jury had considered inculpatory and exculpatory evidence, including the alleged victim's testimony, the testimony of the Code R nurse who examined the alleged victim at the hospital, and the defendant's testimony that the sex was consensual. *Id*. ¶¶5, 6, 11. The Utah Supreme Court determined that, based on the prosecution's focus on the Code R kit at closing argument, testimony "of the Code R nurse was central to the State's theory of nonconsent. Without another opinion to counter these statements or any physical evidence to refute it, the jury was left with a

lopsided evidentiary picture in [the alleged victim's] favor." *Id*. ¶41. The missing expert testimony would have undermined the State's theory and bolstered the defense's, thus "changing the entire evidentiary picture at trial." *Id*.

The missing evidence in Nunez-Vasquez's case would have had an even more powerful effect. As argued above, the evidence showed CC's bias, provided a motive to lie, and revealed reasons to question his credibility. Furthermore, this was not a simple credibility contest because CC did not remember the incident. The missing evidence indicated that, even if CC believed he was testifying truthfully, Nunez-Vasquez could also be testifying truthfully about what happened when CC was in a blackout state. In *State v. Barela*, the court reversed where a "reasonable jury could have found the truth to lie somewhere between" the accounts of the defendant and the alleged victim. 2015 UT 22, ¶¶30, 32, 349 P.3d 676. In *Barela*, as in Nunez-Vasquez's case, "even in [the victim's] account, she never explicitly (in words) or openly (in physical resistance) rebuffed [the defendant's] advances." *Id.* ¶29. The court reversed because it had "no way of knowing how the jury processed these two stories." *Id.* ¶30.

In *Lenkart*, the court determined the missing evidence was prejudicial in part because of the prosecution's focus on it during closing argument. 2011 UT 27, ¶41. In Nunez-Vasquez's case, the prosecution relied on CC's testimony that, although he did not remember, he would not have consented: "He simply gave the same story that he had said, 'I did not consent to the defendant putting his mouth on my penis; I did not consent to the defendant penetrating my anus with

his penis.' ... But the important fact that he told the eight of you is, 'I did not consent to these acts.'" R:1064. The prosecution therefore relied in closing on the testimony that CC would not have consented although he did not remember, implying that he was not sexually attracted to men.

If the error was a violation of the evidentiary rules, or if it was unpreserved due to ineffective assistance, then a different prejudice analysis applies. "To demonstrate prejudice, a defendant must show that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Charles*, 2011 UT App 291, ¶28, 263 P.3d 469 (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Lenkart*, 2011 UT 27, ¶38 (internal quotation marks omitted). It is "substantially short of the 'more probable than not' portion of the spectrum." *State v. Knight*, 734 P.2d 913, 920 (Utah 1987).

Even under this standard, this Court should reverse. The prosecution's evidence was far from overwhelming. It was significantly weaker than most consent cases, which tend to be supported at a minimum by a victim's testimony of the event. "A rape case where the sole issue at trial is consent presents a unique circumstance not present in many other rape trials. In consent cases, physical evidence is often sparse, and few, if any witnesses are able to aid the jury in evaluating the subjective mindset of the parties to the encounter." *Lenkart*,

2011 UT 27, ¶42. Many consent "cases hinge on a he-said-she-said credibility contest between the alleged perpetrator and the victim." *Id.*

In this case, CC claimed to have no memory of the event, although it was uncontested that sexual conduct involved anal penetration and falling off the couch. R:760; 890; 794; 970; 1000; 999. Furthermore, Nunez-Vasquez testified credibly and consistently that CC indicated he was awake and consenting. R:1001; State's Ex.9 p.12. There was [redacted] R:824; 817. The prosecution's case was weak; it left room to doubt both that CC did not consent at the time and that Nunez-Vasquez would have any reason to believe that CC did not consent. As outlined above, the case left multiple avenues for reasonable doubt and the 412 evidence would have changed the entire evidentiary picture.

Under any standard of prejudice, the error in this case was prejudicial and this Court should reverse.

II. The court erred when it declined to give a jury instruction on mistake of fact as to consent.

The court lacked the discretion to leave out a jury instruction explaining the mistake-of-fact defense. The jury was instructed that Nunez-Vasquez had to "act[] with intent, knowledge or recklessness that [CC] did not consent." R:320. It was also instructed that a "person acts 'recklessly' when he/she is aware of a substantial and unjustifiable risk that certain circumstances exist relating to

his/her conduct, consciously disregards the risk, and acts anyway. The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation." R:314. The court declined to provide the instruction defense counsel proposed, which explained how these two instructions worked together to create a mistake-of-fact defense. R:1042-47; Addendum C. Counsel's proposed instruction explained that, even if the jury "ultimately [found] that [CC] did not actually consent, in order to convict ... Nunez-Vasquez of this crime, you must also find beyond a reasonable doubt that that ... Nunez-Vasquez did not hold a 'mistake of fact' as to consent." R:247. The proposed instruction explained that such a mistake would have a subjective and an objective component: "The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the other person consented to the sexual intercourse or activity. The objective component asks whether the defendant's mistake regarding consent was reasonable under the circumstances." R:247. "Accordingly, the State has the burden to prove beyond a reasonable doubt, that the defendant did not hold a reasonable and good faith belief that [CC] consented to the sexual activity. If the State has not met its burden of proof, you must find Jamie Nunez-Vasquez-Vazquez not guilty." R:247.

The Utah Supreme Court endorsed the "legal viability" of the mistake-of-fact defense in *State v. Barela*, 2015 UT 22, ¶23, 349 P.3d 676.[4] It explained that a defendant could be "not guilty of rape because he was reasonably mistaken — or in other words lacked mens rea — as to [the victim's] nonconsent," and added that it would be "easy to second-guess counsel's trial strategy" when counsel did not present this defense. *Id.* ¶¶20-22. The court explained that "counsel could legally have presented alternative theories to the jury," including one that the victim "was telling the truth, and invited the jury (through witness examination and in closing) to nonetheless acquit on the ground that [the defendant] might have been the instigator but mistaken as to whether she consented." *Id.* ¶23.

This Court noted that its holding in *State v. Marchet* was not meant to indicate that "an honest and reasonable mistake of fact instruction should not be given in the proper alleged rape case." 2012 UT App 197, ¶19 n.6, 284 P.3d 668 (internal quotation marks omitted). The instruction was not necessary in *Marchet*, however, because under the facts of that case, the defendant would have had "to demonstrate either that [the victim] actually consented or that there was a reasonable doubt as to whether [the victim] consented." *Id.* ¶19. The instruction was unhelpful because "the issue at trial essentially came down to whether [the victim] consented to having intercourse with [the defendant], not whether [the defendant] believed she consented." *Id.* ¶13. The victim testified

[4] The mistake-of-fact defense is also codified in the Utah Code: "Unless otherwise provided, ignorance or mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime." Utah Code § 76-2-304(1).

that she told the defendant numerous times that he had "'the wrong girl'" if he was "'looking for action'" and that she "repeatedly asked him to stop" when he tried to unbutton her pants. *Id.* ¶3. The defendant testified the encounter was "entirely consensual, that [the victim's] account was not accurate, that [the victim] participated in the intercourse, did not say no, and expressed hesitation only about having a 'one-night stand.'" *Id.* ¶6. Under those circumstances, the trial court ruled "that there was no basis" for a mistake-of fact jury instruction "in the evidence presented." *Id.* ¶7; *see also State v. Marchet*, 2009 UT App 262, ¶26, 219 P.3d 75 (no need for a mistake-of-fact instruction where only one theory was presented through evidence and it was that the victim "was not truthful at trial and that she enthusiastically consented to repeated incidents of sexual intercourse").

Nunez-Vasquez's case is different because the mistake-of-fact defense had a strong evidentiary basis. CC testified that he drank a lot on the night in question and that he had no memory of what happened after sitting on the couch. R:760-63. CC testified that he had blackouts in the past — he could not remember how many. R:778-79. Nunez-Vasquez testified that CC never expressed any objection to the sex, and that he was erect and participated by thrusting and "doing all the work," and that he was moaning. R:1031-32; 1001; 1003. However, Nunez-Vasquez also testified that CC had been drinking a lot. R:1010. Nunez-Vasquez acknowledged that the two did not kiss or speak during the sexual encounter. R:1002; 1017. And Nunez-Vasquez testified that he did not

remember seeing CC's eyes. R: 1026. The mistake-of-fact defense was much stronger in Nunez-Vasquez's case than it was in either *Marchet* case or in *Barela*, where the defendants relied on testimony that the victims consented enthusiastically at the time and lied about it later. *Barela*, 2015 UT 22, ¶¶23-24 (mistake-of-fact defense would do damage to "principal theory" by requiring counsel to "openly entertain the possibility that his client was lying"); *Marchet*, 2012 UT App 197, ¶7; *Marchet*, 2009 UT App 262, ¶26.

Additionally, the proposed instruction was clear and accurate, unlike the one defense counsel proposed in *Marchet*. 2012 UT App 197, ¶19 n.6 ("The trial court ... also noted that [the defendant's] proposed mistake-of-fact instruction was inadequate because the instruction should have contained a subjective component ... and an objective component."). In *Marchet*, the proposed instruction "stated, 'You shall find the defendant not guilty if you believe from the evidence that the defendant was ignorant or mistaken in his belief that [the victim] consented to sexual intercourse.'" *Id.* ¶18. In contrast, this Court expressed no misgivings with an instruction in *State v. Van Oostendorp* that read: "If you are convinced that the defendant honestly and reasonably believed that [Victim] consented to the sexual activity with the Defendant then you must find the defendant NOT GUILTY." 2017 UT App 85, ¶39. Counsel's proposed instruction in Nunez-Vasquez's case explained that, at least in a case involving an

intoxicated defendant,[5] there is both a subjective and an objective component: "The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the other person consented to the sexual intercourse or activity. The objective component asks whether the defendant's mistake regarding consent was reasonable under the circumstances." R:247.

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[5] It could be argued that, because the mental state of recklessness requires that the person be "aware of ... a substantial and unjustifiable risk that the circumstances exist," the objective component only becomes necessary after a conclusion that the defendant was in fact subjectively aware of such a risk. Utah Code § 76-2-103(3); R:314 (jury instruction defining recklessness).

The dissent in *Barela* explained that "the test for determining whether a criminal defendant acted recklessly involves both a subjective and an objective element. First, the defendant must subjectively be 'aware of but consciously disregard[ ] a substantial and unjustifiable risk' that a particular circumstance exists or that a particular result will occur. Second, in order to determine whether disregarding the risk was 'unjustifiable,' the fact-finder must measure the defendant's conduct against an objective, reasonable person standard. *State v. Barela*, 2015 UT 22, ¶60, 349 P.3d 676 (Durham, J., dissenting) (citation omitted). The difference is that, under defense counsel's proposed instruction in Nunez-Vasquez's case, even if he was subjectively unaware of the risk, he would still be guilty if a reasonable person would have been aware of it. R:247. But according to the *Barela* dissent, "the question presented to a correctly instructed jury would have been (1) whether Mr. Barela was 'aware of but consciously disregard[ed] a substantial and unjustifiable risk that' K.M. had not consented to sex *and, if so,* (2) whether Mr. Barela's assumption of the risk of being wrong about any conjecture that K.M. had consented to sex under these facts 'constitute[d] a gross deviation from the standard of care that an ordinary person would exercise.'" *Id.* ¶61 (footnote omitted) (emphasis added).

However, "if recklessness ... establishes an element of an offense and the actor is unaware of the risk because of voluntary intoxication, his unawareness is immaterial in a prosecution for that offense." Utah Code § 76-2-306; R:318 (jury instruction that if "the actor is unaware of the risk because of his voluntary intoxication, the actor's unawareness is not a defense"). Therefore, because Nunez-Vasquez was intoxicated, defense counsel's proposed instruction was correct that to negate the reckless mental state, the jury would have to consider the circumstances objectively as well as subjectively.

Therefore, *Marchet* held only that an instruction is not necessary where the mistake-of-fact defense is not supported by the evidence. 2012 UT App 197, ¶19. Nunez-Vasquez's case is distinguishable because the instruction was clear and correct and because the evidence strongly supported the mistake-of-fact defense. R:247.

"A party is entitled to have the jury instructed on its theory of the case if competent evidence is presented at trial to support its theory," but a party "is not entitled to have the jury instructed with any particular wording." *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, ¶16, 174 P.3d 1, *rev'd on other grounds*, 2009 UT 44, 215 P.3d 152. Even when instructions are correct "as a matter of law," it may be the case that "using them together with no explanation or clarification as to their applicability created the potential for confusion and could have misled the jury." *State v. Hutchings*, 2012 UT 50, ¶23, 285 P.3d 1183. The Utah Supreme Court has endorsed the philosophy that "jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might, but rather thrash them out during their deliberations, using their commonsense understanding of the instructions in the light of all that has taken place at the trial." *State v. Nelson*, 2015 UT 62, ¶42, 355 P.3d 1031 (alterations omitted) (internal quotation marks omitted).

The "subtle shades of meaning" in an elements instruction and a definitional instruction may be lost on a jury absent more direction. *Id.* "A party is clearly entitled to have the jury instructed on his theory of the case.... The exact

language need not be given but the basic theory espoused must be explained to the jury in ordinary, concise and understandable language." *Jorgensen v. Issa*, 739 P.2d 80, 82 (Utah Ct. App. 1987); *see also Laws v. Blanding City*, 893 P.2d 1083, 1086 (Utah Ct. App. 1995) ("Plaintiff has the right to have his theory of the case presented to the jury in a clear and understandable way, and the trial court has a duty to instruct the jury on the applicable law.") To understand the mistake-of-fact defense, the jury had to put together the instruction that Nunez-Vasquez had to act at least with recklessness "that [CC] did not consent" and the instruction that the legal meaning of recklessness is "when he/she is aware of a substantial and unjustifiable risk that certain circumstances exist relating to his/her conduct, consciously disregards the risk, and acts anyway. The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation." R:314; R:320. These were two difficult legal concepts: that a defendant must have a certain mental state as to someone else's nonconsent and that recklessness means not merely carelessness, as it is commonly understood, but awareness of a substantial and unjustifiable risk.

The proposed mistake-of-fact instruction would have made plain what was not clear even to the Court in *Marchet*. That case stated, "It is unclear whether Utah law recognizes a mistake-of-fact defense in such a context," and wrote that, "[i]n the proper case, it may be wise to consider the standards established by other jurisdictions, like California, when developing such a jury instruction."

Marchet, 2012 UT App 197, ¶19 n.6. This is exactly what defense counsel's instruction in Nunez-Vasquez's case would have done. The instruction pointed the trial court to both *Marchet*, 2012 UT App 197, and *People v. Williams*, 841 P.2d 961, 965 (Cal. 1992), the California case *Marchet* cited as a good guide for developing a mistake-of-fact jury instruction. R:248. The *Barela* decision settled any uncertainty about whether Utah recognizes the mistake-of-fact defense. *Barela*, 2015 UT 22, ¶¶23-24 (calling the defense "legally tenable" and endorsing its "legal viability"). Utah recognizes the mistake-of-fact defense because Utah law imposes a reckless mental state on the nonconsent element of forcible sodomy. Utah Code §§ 76-5-403 (2); 76-2-102 (imposing reckless mental state where not otherwise specified); 76-2-304(1)("mistake of fact which disproves the culpable mental state is a defense to any prosecution for that crime"); R:319 (instructing the jury that Nunez-Vasquez must have acted at least recklessly as to consent). But that was not clear in *Marchet*, which was issued before *Barela*, and it would not have been clear to a jury of lay witnesses. *See Marchet*, 2012 UT App 197, ¶19 n.6.

In summary, the trial court erred when it declined to provide a clear mistake-of-fact instruction. An instruction was necessary because the elements instruction and definition of recklessness did not explain the mistake-of-fact defense "to the jury in ordinary, concise and understandable language." *Jorgensen*, 739 P.2d at 82.

The error was prejudicial in this case because the evidence strongly supported the mistake-of-fact defense but the jury instructions insufficiently explained it. *See, e.g.*, *Miller v. Utah Dep't of Transp.*, 2012 UT 54, ¶20, 285 P.3d 1208 ("We conclude that the district court abused its discretion in refusing to issue the instruction, thereby prejudicing the Millers' ability to obtain a fair hearing of their claim. Accordingly, we reverse the judgment of the district court and remand for a new trial."). "To require a new trial, [the appellate court] must conclude ... that the error was prejudicial, that is, that it tended to mislead the jury to the prejudice of the complaining party or insufficiently or erroneously advised the jury on the law." *Laws*, 893 P.2d at 1086 (Utah (alterations omitted) (internal quotation marks omitted).

Unlike the situation in *Barela*, the mistake-of-fact defense would not have required defense counsel to argue that Nunez-Vasquez was lying. *Barela*, 2015 UT 22, ¶24. It would not even have required counsel to argue that CC was lying. As argued above, the mistake-of-fact defense reconciled all the evidence. CC, who had a history of blackouts, spent the night with Nunez-Vasquez at gay clubs, returned to the apartment, got on the couch, and did not remember the rest of the night. R:778; 757; 956; 760. During the portion of the night he did not remember, he indicated to Nunez-Vasquez that he was alert and that he consented to sexual contact. R:1001-02. CC never objected, and indicated consent when he moaned, thrusted his hips into Nunez-Vasquez, and cuddled

with him on the couch then, after the two fell off, on the floor. R:1032; 1001; 1031; State's Ex.9 p.11, 13.

However, without the mistake-of-fact defense instruction, the jury likely believed the focus should be on CC's mental state, not Nunez-Vasquez's. *See Marchet*, 2012 UT App 197, ¶19 n.6 (indicating that it is unclear whether Utah recognizes the mistake-of-fact defense). And CC testified that he would not have consented. R: R:766-77; 772. CC told the police the next morning he was raped. R:954. CC testified that he did not want to engage in the sexual activity. Without the mistake-of-fact instruction, the jury would have focused on CC's declarations of nonconsent after the fact instead of whether Nunez-Vasquez reasonably and in good faith believed that CC was consenting at the time.

Furthermore, without the mistake-of-fact instruction, defense counsel's arguments sounded inflammatory. Counsel told the jury in opening, before the court declined to give the mistake-of-fact instruction, "When you play with fire, you get burned. Well, that's what happened in this case. [CC] decided to play with fire and he got burned." R:267. As the prosecution pointed out in closing, "Just because you go to a bar with some people does not mean you are consenting to oral sex and anal sex.... That's not what the standard is." R:1085. But with the mistake-of-fact instruction, defense counsel's statement would have made sense: if someone gives another person reason to believe — both objectively and subjectively — that he is consenting, that person does not later become a victim of forcible sodomy because he regrets the encounter.

Nunez-Vasquez's testimony was credible and consistent: he and CC went out drinking, then they cuddled and eventually had what Nunez-Vasquez believed, reasonably and in good faith, was consensual sex. R:994; 999-1002. His testimony was supported by DR's witness statement that when the three arrived at his apartment, CC took off his shirt and he and Nunez-Vasquez were on the couch when DR went to bed in his room. R:890. And it was supported by the code R kit, [redacted]. R:824; 817.

The court did not have discretion to deny the instruction on the mistake-of-fact defense, which was necessary to explain an unintuitive concept. The error was prejudicial because the evidence supported the defense and counsel wished to raise it. Without the instruction, the jury had to piece together a difficult concept from multiple multi-part instructions. It was unlikely a lay jury would distill from these instructions the validity of the mistake-of-fact defense. This Court should reverse.

III. The contextual details of Nunez-Vasquez's statements to police were relevant and admissible.

The court should not have sustained an objection to Nunez-Vasquez's testimony explaining the contextualizing details of his police interrogation. At one point, defense counsel asked Nunez-Vasquez if he spoke to the police voluntarily. R:1006. Nunez-Vasquez responded, "I think I was a little bit confused." R:1006. The prosecution objected and the court struck that response. R:1006. When Nunez-Vasquez later testified that the police "didn't give" him

"water until" the officer "was about to interview" him, the prosecution objected again. R:1007-08. The basis for the prosecution's objection was that testimony about the circumstances of Nunez-Vasquez's statements during custodial interrogation were only relevant to whether the statements were voluntary, a question of legal admissibility, not to their evidentiary weight. R:1008. But evidence can be relevant for two different issues.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Utah R. Evid. 401. Relevant evidence is presumptively admissible. Utah R. Evid. 402. "Together these rules establish a very low bar that deems even evidence with the slightest probative value relevant and presumptively admissible." *State v. Richardson*, 2013 UT 50, ¶24, 308 P.3d 526 (internal quotation marks omitted). If evidence is relevant, "contextualizing detail can hardly undermine the relevance." *See id.* ¶26.

In Nunez-Vasquez's case, the *Miranda* issue was handled before trial and the court ruled that Nunez-Vasquez's in-custody statements during police interrogation were admissible. R:626. But that the statements were admitted did not mean that the defense could not explain and contextualize them. In fact, one of the reasons that statements by the opposing party are admissible hearsay in the first place "is a party's ability to rebut the out-of-court statement by putting himself on the stand and explaining his former assertion." *Harris v. United*

States, 834 A.2d 106, 116 (D.C. Cir. 2003) (alterations omitted) (internal quotation marks omitted).

The Utah Supreme Court has held that evidence addressing the circumstances of police interrogation and the potential for false confessions generally is admissible, even when a defendant's statements are voluntary and legally admissible. *State v. Perea*, 2013 UT 68, ¶¶90, 54. In *Perea*, the court held that the defendant "was advised of and subsequently waived his *Miranda* rights," and thus his statements were admissible. *Id.* ¶96. But it also held that the trial court abused its discretion when it refused to admit expert testimony on false confessions generally. *Id.* ¶85. The court held that, even when the defendant chooses not to testify "regarding the factors that contributed to his alleged false confession," an expert witness should be allowed to explain how "sleep deprivation, the presentation of false evidence and use of minimization techniques by questioners," among other considerations can lead to false confessions. *Id.* ¶¶70-71.

In Nunez-Vasquez's case, the line of questioning that the State's objection cut off would have explained how exhaustion, alcohol, nerves, and minimization techniques affected Nunez-Vasquez's responses. During interrogation, Nunez-Vasquez told the detective that he was "not sober" and "exhausted." State's Ex.9 p.1, 16. The detective told him he was giving Nunez-Vasquez "an opportunity to talk with [him] so [he] can get both sides of the story." State's Ex.9 p.2. When Nunez-Vasquez said that he and CC were cuddling, the detective told him, "You

can tell me, I'm not gonna like, this doesn't embarrass me." State's Ex.9 p.12. When Nunez-Vasquez said that just because people, "say that they are straight, doesn't mean that they don't want to" engage in homosexual activity, the detective responded, "Well, I can follow along with that.... It's not like they are trying to have sex with a guy, sometimes you just get into a situation and have a little bit of fun." State's Ex.9 p.21-22. Nunez-Vasquez should have been allowed to explain how the conditions of his police interrogation affected his responses, including the circumstances that led to his incomplete answers, to his providing details he did not remember by the time of trial, and to his statement that straight men are "a challenge." State's Ex.9 p.21. That evidence was relevant and admissible and the court lacked discretion to exclude it.

Counsel preserved the issue and, if not, was ineffective.

This issue was preserved. "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." *Patterson v. Patterson*, 2011 UT 68, ¶12, 266 P.3d 828 (alterations omitted). The first time the State objected to Nunez-Vasquez's testimony that he was "a little bit confused" when talking with the officers, the court sustained the objection and struck the response. R:1006. The second time, defense counsel said that the prosecution "may have a point there." R:1008. But by this time, the court had already ruled on the issue after the first objection and "futile objections are not required to preserve issues for appeal." *State v. Bird*, 2012 UT App 239, ¶12, 286 P.3d 11. Counsel preserved the issue when he asked

the question and the court sustained the State's objection. *Gressman v. State*, 2013 UT 63, ¶45, 323 P.3d 998 ("party may not raise an issue and induce the district court to rule upon it, and then argue the issue is not preserved"). When the district court "take[s] up a question," the court's ruling "conclusively over[comes] any objection that the issue was not preserved for appeal." *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶13, 379 P.3d 1218.

However, if counsel failed to preserve the issue, counsel was ineffective. To show ineffective assistance, an appellant must show "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense." *Arriaga*, 2012 UT App 295, ¶12 (internal quotation marks omitted). Counsel wanted to introduce this evidence. R:1006-8. As argued above, it was admissible. Conceding, waiving, or otherwise failing "to correctly argue the rules of evidence fell below an objective standard of reasonableness" because the rules of evidence would have supported the defense. *State v. Scott*, 2017 UT App 74, ¶¶23-28.

The error was prejudicial.

The exclusion of Nunez-Vasquez's testimony explaining the circumstances under which he gave statements to the police was prejudicial. This Court will reverse where "absent the erroneous exclusion, there is a reasonable likelihood of an outcome more favorable to" the defendant. *Woods v. Zeluff*, 2007 UT App 84, ¶10, 158 P.3d 552 (internal quotation marks omitted). The same standard for

prejudice applies under ineffective assistance of counsel. *Arriaga*, 2012 UT App 295, ¶12.

The prosecution relied heavily on the police interview. The prosecution cross-examined Nunez-Vasquez with contentious questions designed to show the differences between his testimony at trial and his statements to police. The prosecution elicited testimony that Nunez-Vasquez did not remember pulling CC's pants down, but he told the detective that he did. R:1015-16. He testified that he did not remember pulling his own pants off, but, confronted with the interview transcript "obviously [Nunez-Vasquez] said it to him." R:1016.

The prosecution also cross-examined Nunez-Vasquez on things that he testified about at trial but had not mentioned in the interview. The prosecution pointed out that Nunez-Vasquez never told the police "at any time" that he was "in front" of CC. R:1019. He did not mention "any moaning" to the officers and, as the prosecutor put it, "at every single time that [he was] asked [about] verbal interaction, [he] stated there was no verbal interaction." R:1022. He did not tell the police "when asked ... about whether this was consensual" that CC "was pressing his penis into [Nunez-Vasquez's] anus." R:1019. When Nunez-Vasquez tried to explain that he "wasn't comfortable talking to these officers," the court intervened: "Okay. Mr. Nunez-Vasquez, please listen very closely to the question. You can answer that question he's asking you with a yes or a no." R:1020. The court had to intervene again when the prosecution asked whether Nunez-Vasquez

mentioned to the police that CC "was jamming his buttocks into [Nunez-Vasquez's] penis." R:1021.

The prosecution also relied on Nunez-Vasquez's statement about CC identifying as straight and finding that "attractive" and a "challenge." The prosecution prompted that Nunez-Vasquez "knew [CC] was not gay, right?" R:1009. Nunez-Vasquez replied, "That's kind of a loaded question, I think." R:1009. The prosecution followed up: "Well, in your statement, did you tell the officer that he said some time during the night he was not gay?" R:1009. When the State asked if CC "fit all the components for your challenge that you mentioned to" the detective, after Nunez-Vasquez testified that the prosecutor was "making it sound like it's some sort of a game, and it's not," Nunez-Vasquez responded, "I was trying to explain to [the detective] how it could be possible for a man who identified as straight to have sex with a gay man. And that was the best possible way that I could do that at that point, in the state that I was." R:1030. The prosecution then made Nunez-Vasquez read the statements, which had already been introduced through exhibit, to the jury, and the jury took the exhibits with it during deliberation. R:931 (introducing State's Exhibits with the transcript and recording of Nunez-Vasquez's interview); 1031; 614.

The prosecution brought up this statement in opening and closing. R:734; 1068. It argued that the jury should disbelieve any testimony that Nunez-Vasquez did not provide to the police. R:1065. Regarding Nunez-Vasquez's testimony that CC was moaning and pressing against him, the prosecution argued

that the detective "was just trying to understand," how Nunez-Vasquez believed he had consent if he "knew [CC] wasn't gay." R:1065. "He asked him over and over.... 'Help me understand what made you think that he wanted to have sex with you.' He kept asking it over and over again in different ways, trying to get some answer for how did you know? He was never able to tell him." R:1064-65.

If Nunez-Vasquez had been allowed to testify about the influence of exhaustion, dehydration, alcohol, nerves, and minimization techniques on his responses during custodial interrogation, he could have rehabilitated his credibility for the jury. The State argued that Nunez-Vasquez's interview was more reliable than his in-court testimony. It argued that anything he testified about at trial but did not tell the police — for example, that CC was moaning and "doing all the work" — was not credible. R:1022; 1065. Contextualizing detail would have rehabilitated Nunez-Vasquez's credibility. It would have suggested that Nunez-Vasquez's testimony, which he provided under oath and under penalty of perjury, was as reliable as or more reliable than an interrogation that occurred when he was exhausted, dehydrated, not sober, nervous, and responding to questions from someone who was looking for a confession, not an explanation.

In addition to adding weight to Nunez-Vasquez's trial testimony and rehabilitating his general credibility, the contextualizing detail would have mitigated the statement the prosecution relied on most heavily at trial. R:734;

742; 1029; 1030; 1031; 1063; 1068; 1097. The following exchange occurred during the interrogation:

> Officer: Oh I see, okay. I have a question ... You told me you understand this guy is not gay right? What would lead you to believe he wanted to have sex with you other than the fact that you felt he was pushing back onto you because you were behind him?
> Nunez-Vasquez: With me is not like really about, this might sound weird but I have a thing for straight guys
> Officer: You have a thing for straight guys? Why is that?
> Nunez-Vasquez: It's just a thing, it's attractive to me. It's like a challenge, getting a straight guy.
> Officer: Getting a straight guy to have sex with you right?
> Nunez-Vasquez: Just because a guy tells me that [he's] straight doesn't mean that, I mean I've had sex with plenty of straight men, they tell me that they are, I still had sex with them. Just because they say that they are straight, doesn't mean that they don't want to. Does that make sense?

State's Ex.9 p.21-22.

The prosecution relied on this statement during the trial, arguing that the sex was not consensual because it was "a challenge." R:734 (opening statement); 742 (repeating at opening statement); 1029 (asking about it on cross); 1030; 1031; 1063 (stating in closing, "It was a challenge. That's why we're here and that's what this case is about."); 1068 ("We're not here because this was a consensual act. We're here because this was a challenge."); 1097 (closing rebuttal: "And why did he do it? Because it was a challenge.").

If Nunez-Vasquez had been able to explain the circumstances of the statement, the jury would have understood that he was not explaining his motive for having sex with someone who was not interested in sex with men. Rather, he "was trying to explain to [the detective] how it could be possible for a man who

identified as straight to have sex with a gay man. And that was the best possible way that I could do that at that point, in the state that I was." R:1030. Nunez-Vasquez was not explaining his own motivations, he was explaining CC's. He was responding to the first portion of the officer's question, "You understand that this guy is not gay, right?" not the portion asking for a complete description of everything that led Nunez-Vasquez "to believe [CC] wanted to have sex." State's Ex.9 p.21. But without contextualizing detail, Nunez-Vasquez could only tell the jury that his statement about a "challenge" was the result of "the state" that he was in, without describing that state. R:1030. The prosecution used this deficiency in closing, arguing that the officer "asked him over and over....'Help me understand what made you think that he wanted to have sex with you.' He kept asking it over and over again in different ways, trying to get some answer for how did you know? He was never able to tell him." R:1064-65.

Nunez-Vasquez's credibility was vital to the jury's determination of guilt. Many consent "cases hinge on a he-said-she-said credibility contest between the alleged perpetrator and the victim," and the credibility contest in this case relied even more on Nunez-Vasquez's testimony than most cases because of CC's memory lapses. *Lenkart*, 2011 UT 27, ¶42. Nunez-Vasquez needed to explain why his interrogation transcript did not include all the details he testified about at trial. And he needed to explain why the officer's compound question about consent yielded an answer that could be misinterpreted to suggest that Nunez-Vasquez liked having sex with nonconsenting partners.

Nunez-Vasquez's trial testimony strongly indicated that CC consented: Nunez-Vasquez testified that he was "grinding into" Nunez-Vasquez, that CC was erect and "pressing ... onto [Nunez-Vasquez's] penis with his ass," that CC was "doing all the work" when the two had sex, that CC "was cuddling" with Nunez-Vasquez, and "moaning a little bit." R:999-1003. But the State was able to argue that the jury should disbelieve testimony that Nunez-Vasquez heard CC moaning or felt him pressing "his anus on top of [Nunez-Vasquez's] erect penis," because Nunez-Vasquez did not say that during police interrogation. R:1065. The State argued that instead of relying on all the indications that CC was awake and consenting that Nunez-Vasquez testified about a trial, the jury should rely only on his statement during interrogation that Nunez-Vasquez had sex with CC because CC was straight and that made it a "challenge." R:734; 742; 1029; 1030; 1031; 1063; 1068; 1097.

As in *Lenkart*, without relevant evidence that was never introduced at trial, "the jury was left with a lopsided evidentiary picture" in the prosecution's favor. *Id.* ¶41. The missing contextualization would have undermined the State's theory and bolstered the defense's, thus "changing the entire evidentiary picture at trial." *Id.* This Court should reverse because the trial court erred by preventing defense counsel from eliciting evidence that would have contextualized Nunez-Vasquez's statements to police.

IV. Counsel should have moved to exclude Nunez-Vasquez's statements about CC's sexuality.

Counsel should have moved to exclude Nunez-Vasquez's statement to the police that CC was straight and that Nunez-Vasquez had "a thing for straight guys." State's Ex. p.21-22. To show ineffective assistance, an appellant must show "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense." *State v. Arriaga*, 2012 UT App 295, ¶12, 288 P.3d 588 (internal quotation marks omitted).

Evidence should be excluded if "its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues," or "misleading the jury." Utah R. Evid. 403. Counsel should have moved to exclude Nunez-Vasquez's misleading and unfairly prejudicial statements under rule 403, especially in light of the trial court's ruling that the statements were admissible under *Miranda* but the circumstances of the police interview were not and the court's ruling the contextualizing details regarding CC's sexuality were inadmissible under rule 412. *See supra* Parts I & III.

Counsel had no reason not to object under rule 403 — counsel had already moved to exclude the statements in an unsuccessful *Miranda* motion. R:76-77. As argued above, the statements were misleading and unfairly prejudicial. *See supra* Parts I & III. The statements were misleading considering the excluded testimony that [redacted]. R:1155-56. The statements were

confusing because Nunez-Vasquez was unable to explain their context. R:1008. And the statements carried a serious danger of unfair prejudice because, absent that context, they implied both that CC would not have consented because he was straight and that Nunez-Vasquez considered sex with a non-consenting partner a challenge. R:1063; 1068. In context, however, the statements had low probative value. They showed only Nunez-Vasquez's nervous attempt to explain the flexibility of sexuality to a police officer. *See supra* Parts I & III. The comments were inadmissible under rule 403 and counsel should have excluded them.

Counsel's error was prejudicial. As explained above, the State's case was weak and the State relied on Nunez-Vasquez's comments to show that CC did not consent and that Nunez-Vasquez had the required mental state. *See supra* Parts I & III. In light of the court's rulings on the 412 motion and the *Miranda* motion, as well as the trial ruling excluding Nunez-Vasquez's explanation of the conditions of his statements to police, counsel was ineffective for failing to move to exclude these statements under rule 403.

V. Counsel should have objected to testimony that CC's lack of memory was likely the result of trauma.

Testimony from the nurse practitioner that a complete failure of memory did not "concern" her and was "very common" as "just part of trauma" should have drawn objection. R:819. Utah courts have "condemned anecdotal statistical evidence when it concerns matters 'not susceptible to quantitative analysis.'" *State v. Jones*, 2015 UT 19, ¶50, 345 P.3d 1195. This exclusion falls under Utah

Rule of Evidence 403's bar on evidence when its potential for prejudice substantially outweighs its probative value. *State v. Rammel*, 721 P.2d 498, 501 (Utah 1986). "Probabilities cannot conclusively establish that a single event did or did not occur and are particularly inappropriate when used to establish facts 'not susceptible to quantitative analysis,' such as whether a particular individual is telling the truth at any given time." *Id.* For this reason, the *Rammel* court deemed inadmissible a detective's testimony that "he did not consider it unusual for [a witness who was later granted immunity] to lie to him when [he] was first interrogated" because based on "his experience interviewing several hundred criminal suspects," none immediately admitted committing a crime. *Id.* at 500.

Similarly, in a case where a detective "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," that testimony should have been excluded because of its "potential for prejudice" under rule 403. *State v. Iorg*, 801 P.2d 938, 941 (Utah Ct. App. 1990).

The nurse's testimony was similar: in her experience, CC's purported lack of memory was "very common" in victims truthfully recounting sex crimes. R:819. Counsel should have objected to the nurse's testimony because it was at least as unfairly prejudicial as the testimony in *Rammel* and *Iorg*. To show ineffective assistance, an appellant must show "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense." *State v. Arriaga*, 2012 UT App

295, ¶12, 288 P.3d 588 (internal quotation marks omitted). There was no strategic or tactical reason not to object to inadmissible expert testimony that CC's purported memory loss — a weakness in the State's case — actually made him statistically more likely to be a victim of the charged crime. R:819.

Counsel's error was prejudicial. This Court will reverse where "absent the erroneous exclusion, there is a reasonable likelihood of an outcome more favorable to" the defendant. *Woods v. Zeluff*, 2007 UT App 84, ¶10, 158 P.3d 552 (internal quotation marks omitted). As the Utah Supreme Court noted, the rules governing expert testimony guard against "the tendency of the finder of fact to abandon its responsibility to decide the critical issues and simply adopt the judgment of the expert despite an inability to accurately appraise the validity of the underlying science." *State v. Rimmasch*, 775 P.2d 388, 398 (Utah 1989), *superseded by statute on other grounds as stated in State v. Maestas*, 2012 UT 46, 299 P.3d 892. Although the expert in this case conceded that alcohol could explain why CC was not able to remember the incident, R:820, her testimony about trauma was still prejudicial. Undisputed evidence indicated that CC fell off the couch and was penetrated anally. State's Ex.9 p.13; 818-19; 738; 760; 417. A reasonable juror would conclude that even if CC fell asleep on the couch, this activity would have awakened him. The nurse's testimony provided a speculative explanation based on anecdotal statistics: CC did wake up but he did not remember the event due to trauma. R:819. The jury could have adopted the judgement of the expert, necessarily requiring it to reject the evidence that CC

was testifying untruthfully. R:778. Absent the nurse's testimony about trauma, CC's inability to remember the incident was questionable and, even if true, did not contradict Nunez-Vasquez's testimony. There is a reasonable probability that, without this testimony, the jury would have acquitted. *See Lenkart*, 2011 UT 27, ¶42.

VI. The cumulative effect of any combination of errors establishes prejudice.

The cumulative prejudice of any combination of the errors requires reversal. Under the doctrine of cumulative error, this Court will reverse if the cumulative effect of multiple errors undermines the Court's confidence in the verdict. *State v. Campos*, 2013 UT App 213, ¶61, 309 P.3d 1160. That was the case here, where multiple errors compromised the fairness of the trial. *See supra* Parts I-V.

CONCLUSION

For these reasons, this Court should reverse.

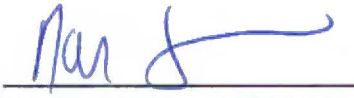
SUBMITTED this 22nd day of June, 2017.

NATHALIE S. SKIBINE
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 13,939 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.



NATHALIE S. SKIBINE

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies 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 to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 22nd day of June, 2017.

NATHALIE S. SKIBINE

DELIVERED this _____ day of June, 2017.

ADDENDUM A

The Order of the Court is stated below:
Dated: August 24, 2016
01:30:52 PM

At the direction of:
/s/ MARK KOURIS
District Court Judge

by
/s/ Mary Mittler
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141900845 FS
JAMIE ERNESTO NUNEZ-VASQUEZ,	:	Judge: MARK KOURIS
Defendant.	:	Date: August 22, 2016

PRESENT
Clerk: marycm
Prosecutor: JOHNSON, SANDI
Defendant
Defendant's Attorney(s): ORIFICI, JOSEPH F

DEFENDANT INFORMATION
Date of birth: October 26, 1976
Sheriff Office#: 267186
Audio
Tape Number: W48 Tape Count: 2.34

CHARGES
1. FORCIBLE SODOMY - 1st Degree Felony
Plea: Not Guilty - Disposition: 05/12/2016 Guilty
2. POSSESSION OR USE OF A CONTROLLED SUBSTANCE - Class B Misdemeanor
Plea: Not Guilty - Disposition: 05/12/2016 Guilty

HEARING

This case comes before the court for sentencing. The victim addresses the court.

Restitution ordered in the amount of $8309.00.

No further commitment for the class b misdemeanor charge.

SENTENCE PRISON
Based on the defendant's conviction of FORCIBLE SODOMY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

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

ALSO KNOWN AS (AKA) NOTE
JAMIE E VASQUEZ-NUNEZ
JAIME ERNESTO NUNEZ
JAIME E VASQUEZ-NUNEZ

SENTENCE JAIL

Based on the defendant's conviction of POSSESSION OR USE OF A CONTROLLED SUBSTANCE a Class B Misdemeanor, the defendant is sentenced to a term of 102 day(s)
Credit is granted for time served.
Credit is granted for 102 day(s) previously served.

CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

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

ADDENDUM B

Utah Code § 76-5-403

§ 76-5-403. Sodomy--Forcible sodomy

(1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.

(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

(3) Sodomy is a class B misdemeanor.

(4) Forcible sodomy is a first degree felony, punishable by a term of imprisonment of:
(a) except as provided in Subsection (4)(b) or (c), not less than five years and which may be for life;
(b) except as provided in Subsection (4)(c) or (5), 15 years and which may be for life, if the trier of fact finds that:
(i) during the course of the commission of the forcible sodomy the defendant caused serious bodily injury to another; or
(ii) at the time of the commission of the rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or
(c) life without parole, if the trier of fact finds that at the time of the commission of the forcible sodomy the defendant was previously convicted of a grievous sexual offense.

(5) If, when imposing a sentence under Subsection (4)(b), a court finds that a lesser term than the term described in Subsection (4)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(a) 10 years and which may be for life; or
(b) six years and which may be for life.

(6) The provisions of Subsection (5) do not apply when a person is sentenced under Subsection (4)(a) or (c).

(7) Imprisonment under Subsection (4)(b), (4)(c), or (5) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-403; Laws 1977, c. 86, § 2; Laws 1979, c. 73, § 3; Laws 1983, c. 88, § 21; Laws 2007, c. 339, § 16, eff. April 30, 2007; Laws 2013, c. 81, § 8, eff. May 14, 2013.

Utah Rules of Evidence, Rule 412

RULE 412. ADMISSIBILITY OF VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:
(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:
(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or
(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.
(1) *Motion*. If a party intends to offer evidence under Rule 412(b), the party must:
(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and
(C) serve the motion on all parties.

(2) *Notice to the Victim*. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.

(3) *Hearing*. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Credits

[Adopted effective July 1, 1994. Amended effective December 1, 2011; May 1, 2017.]

Utah R. Evid. 608

RULE 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

Credits

[Amended effective October 1, 1992; November 1, 2004; December 1, 2011.]

Utah R. Evid. 401

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

Utah R. Evid. 402

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Utah Constitution;
- a statute; or
- rules applicable in courts of this state.

Irrelevant evidence is not admissible.

Utah R. Evid. 403

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

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.

2011 Advisory Committee Note. – The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE

This rule is the federal rule, verbatim, and is substantively comparable to Rule 45, Utah Rules of Evidence (1971) except that "surprise" is not included as a basis for exclusion of relevant evidence. The change in language is not one of substance, since "surprise" would be within the concept of "unfair prejudice" as contained in Rule 403. See also Advisory Committee Note to Federal Rule 403 indicating that a continuance in most instances would be a more appropriate method of dealing with "surprise." See also Smith v. Estelle, 445 F. Supp. 647 (N.D. Tex. 1977)(surprise use of psychiatric testimony in capital case ruled prejudicial and violation of due process). See the following Utah cases to the same effect. Terry v. Zions Coop. Mercantile Inst., 605 P.2d 314 (Utah 1979); State v. Johns, 615 P.2d 1260 (Utah 1980); Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

ADDENDUM C

INSTRUCTION NO. ____

Mistake of Fact As to Consent)

You have been instructed previously that for any crime, the required criminal intent must exist at the time of the commission of the act. You have also been instructed that under Utah Law, it is an affirmative defense to a crime when a person acts under ignorance or a mistake of fact-here, a mistake of fact as to the existence of consent.

Evidence has been presented that Mr. Jaime Nuñez-Vazquez believed Mr. Christopher Cummings consented to the sexual activity for which he is charged with a crime. Therefore, if you ultimately find that Christopher Cummings did not actually consent, in order to convict Jaime Nuñez-Vazquez of this crime, you must also find beyond a reasonable doubt that Jaime Nuñez-Vazquez did not hold a "mistake of fact" as to consent-here, a reasonable belief that consent existed.

A mistake of fact defense as to a person's lack of consent to the sexual activity charged has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the other person consented to the sexual intercourse or activity. The objective component asks whether the defendant's mistake regarding consent was reasonable under the circumstances.

Here, evidence has been presented that Jaime Nuñez-Vazquez believed Christopher Cummings consented to the sexual activity for which he is charged. Accordingly, the State has the burden to prove beyond a reasonable doubt, that the defendant did not hold a reasonable and good faith belief that Christopher Cummings consented to the sexual activity. If the State has not met its burden of proof, you must find Jaime Nuñez-Vazquez not guilty.

State v. Low, 2008 UT 58, 192 P.3d 867, 876 (When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented---either by the prosecution or by the defendant—that provides any reasonable basis upon which a jury could concluded that the affirmative defense applies to the defendant); *State v. Sellers*, 2011 UT App 38 ¶ 15, 248 P.3d 70, 76 (a defendant is entitled to an affirmative defense instruction so long as there is a reasonable basis in the evidence for such a defense and "[t]rial courts should separately instruct each jury clearly that the State must disprove…[an] affirmative defense [ ] beyond a reasonable doubt"); State b. Burke, 2011 UT App 168 256 P.3d 1102, 1129 (When a criminal defendant requests a jury instruction regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented…that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies to the defendant); *State v. Hall*, 2013, 2013 UT App 4, 294 P. 3d 632, 637 *cert. denied,* 308 P. 3d 536 (Utah 2013) *cert. denied,* 134 S. Ct. 1299, 188 L. Ed. 2d 323 (U.S. 2014) (When a criminal defendant requests a jury instructions regarding a particular affirmative defense, the court is obligated to give the instruction if evidence has been presented…that provides any reasonable basis upon which a jury could conclude that the affirmative defense applies); *State v. Torres*, 619 P.2d 694, 695 (Utah 1980) (stating that a defendant is "*entitled to* have the jury instructed on the law applicable to [her] theory of the case if there is *any reasonable basis* in the evidence to justify it" (emphasis added).

Utah Code Ann. § 76-2-304;

Cf. *State v. Dalton,* 2014 UT App 68, ¶ 39, 331 P.3d 1110, 1122 ("if the jury was convinced that Defendant honestly believed that Victim purported to consent to sex with Harman, the jury could find that the State did not meet its burden…"); *State v. Marchet*, 2012 UT App 197, n.6., 284 P.3d 668, 674, cert. denied (Oct. 23, 2012), cert. denied, 288 P.3d 1045 (Utah 2012 (citing People v. Williams, 841 P.2d 961, 965 (1992) for jury instruction as to mistake of fact as to consent); State v. Houston, 2000 UT App 242, ¶ 6,9 P.3d 188 (nothing that defendant was acquitted of rape (and other charges) and his primary defense at trial was that "he had a reasonable and good faith belief that [the complainant] voluntarily consented to engage in sexual intercourse," but not analyzing issue);