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

REPLY 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

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

ARGUMENT

I. The issue on appeal is preserved, and counsel did not invite error by accepting the court's ruling.

As an initial matter, the State writes that "the trial court's action was not based on a lack of detail" in counsel's 412 motion. State's Brief (SB) 22 n.6. The opening brief agreed, arguing that the "court did not deny the motion due to lack of detail." Opening Brief (OB) 23.

The State relies on the court of appeals' opinion *State v. McNeil*, 2013 UT App 134, to argue that counsel invited the errors in this case. SB 21-22, 50-51.

The Utah Supreme Court granted certiorari in the *McNeil* case and reversed the court of appeals' holding on invited error. *State v. McNeil*, 2016 UT 3, ¶¶16. In the Utah Supreme Court opinion, the court acknowledged that there was some inconsistent case law on invited error, and "[t]o the extent" those cases were inconsistent with its holding that the error was not invited or suggested "that acquiescence to an alleged error initiated by the trial court bars appellate review," *McNeil* "overrule[d]" and "repudiate[d]" them. *Id.* ¶¶19 n.1, 21 n.2.

In *McNeil*, counsel eventually said of the records he had initially objected to on hearsay grounds, "'Okay, it's not hearsay.'" *Id.* ¶22. But counsel "did not state that the records were not hearsay until the trial court insisted that the detective's testimony was not hearsay. Until the trial court's statement, counsel argued exactly the opposite." *Id.* ¶22. The Utah Supreme Court "reject[ed] the State's arguments" that counsel invited the error in *McNeil* and held that the defendant "did not invite the alleged error in this case because his counsel withdrew the hearsay argument due to actions of the trial court, and because counsel's failure to object to a trial court's actions is not invited error in this context." *Id.* ¶23. The court explained that the invited error doctrine exists to "discourage[] parties from intentionally misleading the trial court so as to preserve a hidden ground for reversal on appeal and give[] the trial court the first opportunity to address the claim of error." *Id.* ¶17 (internal quotation marks omitted).

"[A]n error is invited when counsel encourages the trial court to make an erroneous ruling." *Id.* To invite error, counsel must "independently ma[k]e a clear affirmative representation of the erroneous principle." *Id.* ¶18. When "the trial court — not counsel — is responsible for leading a courtroom discussion into error, any resulting error is not invited." *Id.* ¶19.

In Nunez-Vasquez's case, the error was not invited. Counsel filed a motion to admit evidence under rule 412 and argued in favor of the motion. R:1155-56; 639-42. He argued that the evidence was admissible for bias, motive, and impeachment under Utah Rule of Evidence 608(c). R:641. He argued that Utah Rule of Evidence 412 did not exclude the evidence because rule 412 included an exception for a violation of the defendant's constitutional rights, including the "right to confront and cross-examine." R:642. These are the same arguments the opening brief raised on this issue. OB 13-20 (arguing that the evidence was admissible under rule 412's exception for evidence that would violate the defendant's constitutional rights and that the evidence was admissible under rule 608(c)).

The trial court responded to counsel's argument with, "Okay," and asked for argument from the prosecution. R:643. The prosecution argued that the evidence was inadmissible under rule 608. R:651. And it argued that the evidence was inadmissible unless "the victim opens the door," but opening the door would be impermissible under rule 412. R:646, 652. The court responded to the prosecutor's arguments with, "Correct," and, "Agreed." R:652. It was at

this point that defense counsel said he "understood the ground rules" and had "no response." R:652. These statements are less affirmative than, "'Okay, it's not hearsay,'" which *McNeil* held did not invite error. *McNeil*, 2016 UT 3, ¶22. They are not an affirmative representation of an erroneous principle, but rather an acknowledgement of the court's decision. R:652 (court responded to counsel with, "the ruling obviously is that that wouldn't come in unless and until that door's opened either by [the prosecution] or the victim himself"). Counsel should not be faulted for accepting the trial court's decision on this issue after the court heard his argument, heard the State's argument, and agreed with the State.

"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." *Gressman v. State*, 2013 UT 63, ¶45 (alterations omitted) (internal quotation marks omitted); *see also State v. Crowley*, 2014 UT App 33, ¶6 (An issue is preserved where it is "evident from the record that defense counsel sufficiently raised [the] issue to a level of consciousness that allowed the trial court to consider it."). When the district court "take[s] up a question," the court's ruling "conclusively over[comes] any objection that the issue was not preserved on appeal." *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28, ¶13. Additionally, "further pursuit" of "futile objections" is "not required to preserve issues for appeal" and it would be futile, or even hostile, to insist on an objection after the court has made its decision. *See State v. Bird*, 2012 UT App 239, ¶12.

Counsel filed a motion, argued in favor of the motion, and received a ruling on the motion. R:652-53; 1155-56. The issue is therefore preserved for appeal.

II. Counsel's decisions must be considered in context.

The State notes that counsel wanted to admit evidence of CC's prior sexual conduct and Nunez-Vasquez's explanation of his interrogation. SB 17, 52. The State suggests that counsel's actions invited the rulings that caused counsel's attempts to fail. SB 50, 20-21. The State concedes that, if counsel had not waived the issue or invited the error, the evidence counsel wanted to admit concerning the circumstances of Nunez-Vasquez's interrogation would be admissible. SB 52. But the State argues that, even though counsel wanted to admit the evidence and created the circumstances that led to its exclusion, counsel did not perform deficiently. SB 23-24, 25, 30, 53. The State reasons that another attorney might have reasonably made the decision not to admit the evidence in question. SB 53.[1]

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[1] The State cites *Premo v. Moore*, 562 U.S. 115, 124 (2011), for its assertion that "[c]ounsel performs deficiently under *Strickland* only when 'no competent attorney' would have acted similarly." SB 23-24. It elsewhere cites *Burt v. Titlow*, 134 S. Ct. 10 (2013), and *Harrington v. Richter*, 562 U.S. 86 (2011). SB 37, 23-24.

It is worth noting that all three cases involved appeals from "federal habeas corpus" petitions controlled by the "Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)" after the ineffective assistance claims had already been "'adjudicated on the merits in State court proceedings.'" *Premo*, 562 U.S. at 118-21; *Titlow*, 134 S. Ct. at 13; *Richter*, 562 U.S. at 101.

Compared to the *Strickland* standard, the AEDPA standard in federal habeas is "'doubly'" deferential. *Premo*, 562 U.S. at 122. Under the federal habeas standard, "'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied

As this Court has explained, counsel's performance on a specific issue should be considered "in light of [the defense's] trial strategy." *State v. Scott*, 2017 UT App 74, ¶25, *cert. granted* 397 P.3d 837. The Utah Supreme Court has likewise explained that appellate courts analyze whether an attorney's performance was "*unreasonable*" "[w]ithin the context of" the "case." *State v. Larrabee*, 2013 UT 70, ¶28. A claim of ineffective assistance does not fail because another attorney could have selected a different strategy, changing the context of any one decision. When "[t]here is only upside" in presenting evidence that weakens the State's case, "no reasonable lawyer would have found an advantage" in proceeding without it. *See State v. Barela*, 2015 UT 22, ¶27. In

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Strickland's deferential standard.'" *Id.* at 123. "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102. "[H]abeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* In fact, "a *de novo* review of *Strickland*" "is an unnecessary step" where AEDPA is involved. *Id.* at 109. On AEDPA review, the court must determine which "arguments or theories...could have supported[] the state court's decision," then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the U.S. Supreme Court. *Id.* at 102. That question, not the standard *Strickland* analysis, is "the only question that matters" under AEDPA. *Id.*

And on top of that, *Premo* and *Titlow* presented challenges to representation at the plea bargain stage, which "presents questions farther removed from immediate judicial supervision." *Premo*, 562 U.S. at 125; *Titlow*, 134 S.Ct. at 13.

The federal AEDPA cases the State cites are not controlling and they are more misleading than helpful in the application of *Strickland* on direct appeal. *See Richter*, 562 U.S. at 109; *see also Cullen v. Pinholster*, 563 U.S. 170, 202 (2011) (holdings from cases applying *Strickland* in the first instance "therefore offer no guidance with respect to whether a state court has *unreasonably* determined that prejudice is lacking" under AEDPA).

light of the defense's strategy to discredit CC's statements that he would not have consented and to bolster Nunez-Vasquez's statements that CC consented, counsel's performance was deficient.

The State argues that counsel did not perform deficiently regarding the 412 evidence because a reasonable attorney could have concluded that the evidence was inadmissible. SB 30. As argued in the opening brief, the evidence was admissible. OB 13-20. But even if it were an open question, Utah law holds that counsel cannot "be excused for not seeking to introduce [helpful evidence] because the issue of whether the [evidence] came within [the hearsay rules] was an open question in our courts." *State v. Ison*, 2006 UT 26, ¶32. "Surely, competent counsel would scour the exceptions to the hearsay rule in search of a means" to introduce the evidence the court deemed admissible in that case. *Id.*; *see State v. Eyre*, 2008 UT 16, ¶15 (holding for the first time that the charged crime had an element not included in the jury instructions, then holding that counsel was ineffective "for failing to object to the absence of a jury instruction identifying" that element).

The State does not suggest a reason for counsel's abandonment of the interrogation evidence, which it concedes was admissible. SB 52-53. In both instances, within the context of the case, no reasonable attorney would have found an advantage in proceeding without this critical evidence. *See Barela*, 2015 UT 22, ¶27. And in fact, the record is clear that defense counsel in this case found no advantage in proceeding without it. R:1155-56; 639-42; 978-79; 1006-

08. Counsel attempted to admit it. R:1155-56; 639-42; 978-79; 1006-08. Therefore, conceding, waiving, or otherwise failing "to correctly argue the rules of evidence fell below an objective standard of reasonableness." *Scott*, 2017 UT App 74, ¶¶23-28.

III. The evidence

The State argues that the "unstated premise behind [Nunez-Vasquez's] justifications is SB 35. The opening brief did not argue that the evidence was admissible for this purpose. Rather, the evidence at issue showed "motive to lie," challenged CC's credibility in light of his testimony , rebutted CC's testimony that he could be confident that he would not have consented to sex he did not remember, and contextualized Nunez-Vasquez's statement that CC said he was straight. OB 15-19 (citing *State v. Marks*, 2011 UT App 262). The evidence of prior sexual conduct was not evidence of predisposition and the defense could not have used it to make the argument the State suggests.

The State argues that because Nunez-Vasquez testified, the 412 evidence was not essential to his defense. SB 34. A defendant has the right to testify, and he also has the right to confront and cross-examine his accuser. SB 27. The missing 412 evidence infringed on both interests and left the defense at an unfair disadvantage. *See* SB 33 ("contesting an element is a weighty interest"). As

argued in the opening brief, the evidence was critical to understanding CC's testimony and weighing his credibility. OB 15-19. It was also important for understanding Nunez-Vasquez's statement about CC being straight. OB 50-51. It was essential to the defense in a consent case that "hinge[d] on a he-said-she-said credibility contest between the alleged perpetrator and the victim." *State v. J.A.L.*, 2011 UT 27, ¶42.

Finally, the State argues that any error was harmless because CC did not accuse the other men of rape and did not "wait[] to accuse Nunez-Vasquez until someone else found out." SB 37-38. CC woke up with Nunez-Vasquez in another man's apartment — the man was in the next room. R:881; 890. It is all but certain "someone else" would "f[ind] out." SB 38. The evidence was admissible for the proper purpose of showing motive to lie [redacted] weighing credibility, and rebutting evidence [redacted] OB 13-20.

IV. The legal definition of "reckless" as it applies to consent in a rape case is not common sense.

The State argues that jurors "with commonsense understanding" would understand the mistake-of-fact defense without an instruction directly explaining it. SB 41 (internal quotation marks omitted), 43-44. As argued in the opening brief, mistake of fact as to consent is a "difficult legal concept" even for the legal profession. OB 35.

For example, defense counsel in Nunez-Vasquez's case did not realize that the reckless standard applied to the charges until around the time of trial. R:244; 284 (defense counsel objected to the proposed jury instructions arguing that recklessness did not apply); 727.

And as argued in the opening brief, before the *Barela* opinion, this Court noted that it was "unclear whether Utah law recognizes a mistake-of-fact defense" and pointed to other jurisdictions that counsel might use when "developing" a jury instruction on mistake of fact. *State v. Marchet*, 2012 UT App 197, ¶19 n.6.

The State's brief contains a further example of how confusing the concept can be. The State argues that Nunez-Vasquez "admitted at sentencing that he was reckless as to whether the victim consented." SB 20 (citing R:1141).[2] At sentencing, Nunez-Vasquez apologized to CC "for any pain that I've caused him," and said, "I understand my behavior was reckless, that my use of alcohol is not an excuse, and that I should have known better. I made a mistake and I'm very sorry." R:1141. The "behavior" Nunez-Vasquez referred to included behavior commonly understood as "reckless" —drinking alcohol to excess and having sex with a person he did not know well. R:990; 999; 1002. Nunez-Vasquez never said "that he was reckless as to whether the victim consented." SB 20. He

[2] Statements made at sentencing are not relevant to determining error or prejudice at trial, the only issues on appeal. *See State v. Marks*, 2011 UT App 262, ¶74 (limiting consideration to evidence known to the court "at the time of its ruling").

consistently maintained that he reasonably believed he had consent. R:999-1002.

CC explained before Nunez-Vasquez's statement that the sexual encounter caused him to suffer severe mental health conditions. R:1134-35. In context, Nunez-Vasquez was not "admitting . . . that he was reckless as to whether the victim consented." SB 20. He was taking responsibility for behavior that was reckless as that word is commonly understood — generally "careless" or "irresponsible"[3] — and he was apologizing for a "mistake" that caused CC harm. R:1141. Nunez-Vasquez's use of the word "reckless" and the State's characterization of it underscore that both the legal definition of reckless and the application of the reckless mental state to another person's non-consent are difficult to grasp, unintuitive, and require unambiguous explanations.

The State points to *Marchet*, which it concludes "resolves [the] issue" of whether the failure to instruct specifically on a mistake-of-fact defense is reversible error. SB 42. As argued in the opening brief, *Marchet* held that the trial court did not err in that case where the proposed instruction on mistake of fact was faulty and the facts did not support it. OB 30-34. *Marchet* specifically left room for a mistake-of-fact instruction "[i]n the proper case." 2012 UT App 197, ¶19 n.6. *State v. Van Oostendorp* demonstrates that at least one case since has included a mistake-of-fact instruction. 2017 UT App 85, ¶39. And *Barela*

[3] *Merriam-Webster*, "reckless," https://www.merriam-webster.com/dictionary/reckless

noted that, when counsel employed a strategy that did not include asking for an instruction on mistake of fact or pursuing that theory, it was easy to "second-guess" that strategy. 2015 UT 22, ¶22.

The State argues that Nunez-Vasquez "presented no evidence below on the effects of alcoholic blackout." SB 45. Elsewhere in its brief, the State argues that a reasonable interpretation of the nurse's testimony was "that the victim's memory loss was entirely attributable to alcohol and/or drugs." SB 60. Furthermore, CC testified about alcohol blackouts — he testified that they are "involuntary," that he had had them before but did not remember how many times, and that he did not remember anything that happened after he drank to excess on the night in question. R:776-79; 760.[4]

Furthermore, alcohol blackout is not a foreign concept to lay jurors. It is not uncommon among drinkers and appears frequently in the media. *E.g.*, Alexandra Sifferlin, *Here's Who's Most Likely To Black Out While Drinking*, Time (Dec. 16, 2014), http://time.com/3635960/drinking-blackout/ ("Blacking out, or getting so drunk that you can't remember anything that happened the night before, is all too common among underage drinkers"); Sarah Hepola, *My drinking years: 'Everyone has blackouts, don't they?'*, The Guardian (June 13,

[4] The State argues that CC "was clear that he was not just 'blacked out,' but 'passed out.'" SB 46 n.10 (citing R:759-60; 956). CC testified, "I remember sitting on the couch for maybe 30 minutes to a minute and then I was out." R:759. He was "passed out, blacked out, passed out." R:760. Additionally, it is unclear how CC, who testified he did not remember anything after sitting on the couch, could tell the difference between being blacked out and being passed out.

2015), https://www.theguardian.com/society/2015/jun/13/my-drinking-years-everyone-has-blackouts-dont-they (blackouts "are not rare in drinking circles. In fact, they're common."); Gabrielle Glaser, *'The Girl on the Train' and Why Women Drink Until They Blackout*, The Daily Beast (Oct. 16, 2016), https://www.thedailybeast.com/the-girl-on-the-train-and-why-women-drink-until-they-blackout ("Blackouts are clearly a thing: in 2015, there was a serious examination of the topic in popular culture" including a novel, a memoir, and the movie *Trainwreck*, which "opened with [a character] waking up in Staten Island next to a guy she doesn't remember meeting"); Christopher Smart, *Rescued: One man's story of salvation at the Rescue Mission of Salt Lake*, S.L. Trib. (Sept. 17, 2015), http://www.sltrib.com/news/politics/2015/09/17/rescued-one-mans-story-of-salvation-at-the-rescue-mission-of-salt-lake/ ("he found himself in a jail cell in Vernal for an assault he had committed during an alcohol-fueled blackout").

The State also argues that counsel "made no argument that the victim could have consented, but not remembered due to alcohol consumption." SB 45. The State acknowledges that counsel did argue that the State had not met its burden to show that Nunez-Vasquez was aware that CC was unconscious. SB 46. Counsel's closing arguments came after the court's ruling on the mistake-of-fact instruction. R:1037-47 (ruling on instruction), 1069 (closing argument). This Court has explained that it "understand[s] that once a court has ruled counsel must make the best of the situation." *State v. Cruz*, 2016 UT App 234, ¶44.

Without the instruction, counsel focused on a defense that CC was lying. R:1070. Before, counsel prepared the mistake-of-fact instruction and argued for its inclusion. R:246; 247; 259; 1047. And, regardless of counsel's argument, the jury was instructed to base its verdict on the evidence, and the evidence supported a mistake-of-fact defense. R:302 ("You must base your decision only on the evidence. . . . What the lawyers say is not evidence. For example, their opening statements and closing arguments are not evidence."); *Barela*, 2015 UT 22, ¶¶24, 28-30 (even where counsel reasonably elected not to pursue a mistake-of-fact defense, the jury could still acquit based on mistake of fact).

The State argues that "counsel sought to blame [CC]" and that his arguments were "geared to convince the jury that [CC] deserved what he got." SB 47 & n.11. Nunez-Vasquez is no longer represented by the attorney who represented him at trial, and has argued that attorney was ineffective. OB 21, 42, 50, 51. As the State notes, counsel's closing argument included a religious entreaty that the jury should "say a prayer to your maker," which drew an objection from the prosecution and ended counsel's closing argument. R:1082; SB 47 n.11. The jury did not find this entreaty persuasive and this Court should not hold any of trial counsel's improper remarks against Nunez-Vasquez. *See Kornegay v. State*, 329 S.E.2d 601, 604-05 (Ga. Ct. App. 1985) (holding that counsel was ineffective for making inflammatory remarks in closing argument and the "record does not indicate that defendants acquiesced in it in any way" "just because they did not jump up and object" to counsel's argument).

However, argument concerning evidence supporting a mistake-of-fact defense could sound inappropriate without an instruction explaining the defense. The State points to counsel's argument that CC "wore an expensive purple suit, went out with a 'gay friend' to a party and 'a gay bar,' 'hung out with gay guys all night,' and 'stayed with two gay men in an apartment where the resident is gay.'" SB 47 (quoting R:1079). This argument, tied to a proper mistake-of-fact instruction, could help to explain why Nunez-Vasquez was mistaken as to consent.

Finally, the State argues that "[t]he encounter Nunez-Vasquez described would have left no room for a mistake as to consent." SB 48. The State cites *Barela* in this section of the argument — a case that held there was room for an acquittal based on mistake as to consent despite the defendant's testimony and counsel's sole argument that the defendant had active consent from the alleged victim. 2015 UT 22, ¶¶22, 28-32. The facts of *Barela* leave less room for mistake of fact than Nunez-Vasquez's case. In *Barela*, the alleged victim was a client at a professional massage studio who testified that she did not flirt with the defendant — her massage therapist — but did not physically resist or say no because she "'just froze'" when the defendant made sexual advances on her. *Id.* ¶¶4, 7.

In Nunez-Vasquez's case, he and CC spent the night drinking and clubbing together before sleeping together on the same couch. R:990-1002. Nunez-Vasquez knew CC had been drinking, and while he was always consistent that CC indicated his consent, Nunez-Vasquez conceded that the two did not talk or kiss

during the encounter. R:1010; 1002; 1017; 1026. The evidence in this case strongly supported a mistake-of-fact defense; *Barela* reversed where the evidence in support of mistake as to consent was much weaker. *Id*. ¶61 (Durham, J., dissenting) (The defendant, a massage therapist, "inserted his penis into the vagina of a client who was a near-stranger to him within a matter of seconds of massaging her inner thigh.").

V. Preventing Nunez-Vasquez from explaining the circumstances of his police interrogation was prejudicial.

The State argues that because defense counsel "ultimately agreed" with the trial court that Nunez-Vasquez could not testify about the circumstances of his interrogation and provide contextualizing detail to explain his statements, "[i]f the trial court erred, defense counsel invited the error." SB 50. Again, the State relies only on the court of appeals' *McNeil* opinion for this assertion, but the Utah Supreme Court reversed the invited error section of the opinion on certiorari review. SB 50-52 (citing *State v. McNeil*, 2013 UT App 134, *disagreed with in part in State v. McNeil*, 2016 UT 3); *see supra* Part I. As argued in the opening brief, defense counsel did not give up on this issue until after the court had already ruled on the State's first objection. OB 42-43 (citing *Patterson v. Patterson*, 2011 UT 68; *State v. Bird*, 2012 UT App 239, *Gressman v. State*, 2013 UT 63, *Fort Pierce Indus. Park Phases II, III & IV Owners Ass'n v. Shakespeare*, 2016 UT 28). The error is not invited in this case and the issue was preserved.

The State agrees that counsel "clearly wanted to introduce evidence about the interview circumstances and such evidence is admissible." SB 52. Although the State argues that the question is "whether all reasonable counsel would have sought to introduce this evidence," the State suggests no reason why a defense attorney would not want Nunez-Vasquez to explain the context of his statements. SB 53. Counsel wanted to admit that explanation in this case and Nunez-Vasquez repeatedly attempted to explain the circumstances of his statements. *See* SB 52. As argued above, whether counsel performed deficiently on any one issue must be considered in context. *Supra* Part II (citing *State v. Larrabee,* 2013 UT 70, ¶28; *State v. Scott*, 2017 UT App 74, ¶25). Counsel wanted to introduce the context of the interrogation, the rules of evidence allowed for its admission, and the context strengthened the defense; conceding, waiving, or otherwise failing "to correctly argue the rules of evidence fell below an objective standard of reasonableness." *Scott*, 2017 UT App 74, ¶¶23-28.

Ultimately, the State argues that regardless of preservation or deficient performance, the absence of the contextualizing detail was not prejudicial. SB 53-56. The State notes that the jury heard some evidence providing context to Nunez-Vasquez's statements to the police. SB 53-54. The State points to testimony that Nunez-Vasquez had been drinking and was still feeling the effects of alcohol, that he initially "'didn't know what was going on,'" that he was handcuffed, and that he did not get food and water until the officers were about to conduct the interview. SB 53-54. But, as explained in the opening brief,

describing those conditions did not explain how those conditions affected Nunez-Vasquez's statements. OB 44-49. The two times Nunez-Vasquez attempted to explain the effect — his statements were incomplete and unclear because he was confused and he was not comfortable talking to the officers — the court prevented the testimony. R:1020; 1021; 1006. The State argues that Nunez-Vasquez "was able to explain his most damaging statement," SB 54, but Nunez-Vasquez explained it by saying the statement was the result of "the state [he] was" in. R:1030. Absent evidence and an explanation of that state, this testimony lost its explanatory power.

The State argues that evidence of minimization techniques "is not in the record" and this Court "cannot consider it." SB 55. There is a "general rule that record inadequacies result in an assumption of regularity on appeal." *State v. Litherland*, 2000 UT 76, ¶17. A record must be "adequate to allow" the reviewing court "to meaningfully consider the merit of the issues raised." *Call v. City of W. Jordan*, 788 P.2d 1049, 1057 (Utah Ct. App. 1990) (Orme, J., concurring). As argued in the opening brief, minimization techniques were apparent in the interview, which was introduced at trial and is a part of the record. OB 41-42. Nunez-Vasquez did not need to use the term "minimization techniques" at trial in order to explain how the form of the officer's questions led to inaccurate and incomplete responses. *See In re Baby Girl T.*, 2012 UT 78, ¶38 ("Whether a party has properly preserved an argument, however, cannot turn on the use of magic words or phrases").

The State notes that defense counsel relied on the police interview. SB 54-55. Again, counsel did so after the court ruled against the defense's motion to exclude the interview as a violation of Nunez-Vasquez's Fifth Amendment rights, R:124-27; 540; 626, and "once a court has ruled counsel must make the best of the situation." *State v. Cruz*, 2016 UT App 234, ¶44. Indeed, the interview contained consistencies with Nunez-Vasquez's testimony at trial — he was always consistent that he believed CC was awake and consenting. State's Ex. 9 p.11-19.

But, as argued in the opening brief, the prosecution relied heavily on the interview to encourage the jury to disbelieve Nunez-Vasquez's testimony. OB 44-46 (citing R:1065; 1068); *see State v. Ojeda*, 2015 UT App 124, ¶16 (mem.) (error not prejudicial where it "was not mentioned during closing argument"). The prosecution focused specifically on any testimony Nunez-Vasquez provided at trial that he had not told the police during the interrogation and argued the omissions made the trial testimony less credible. R:1064-65. The excluded testimony would have explained to the jury that any inconsistencies or added details did not indicate recent fabrication. OB 46. The missing contextualization would have "chang[ed] the entire evidentiary picture at trial" in this consent case that rested on credibility. *State v. J.A.L.*, 2011 UT 27, ¶41. The error was prejudicial and this Court should reverse.

VI. In light of the trial court's rulings, any probative value in Nunez-Vasquez's statement about CC's sexuality was substantially outweighed by the danger of unfair prejudice.

The State argues that the claim that counsel should have moved to exclude Nunez-Vasquez's custodial statement about CC's sexuality under Utah Rule of Evidence 403 "is frivolous." SB 56. "A frivolous appeal is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." *N.F. v. G.F.*, 2013 UT App 281, ¶16 (internal quotation marks omitted). Even if an "issue would be unsuccessful on the merits, that does not mean that it is necessarily frivolous." *Id.* ¶17.

The argument is not frivolous. The opening brief argues that, after counsel lost multiple motions geared at explaining Nunez-Vasquez's statements during interrogation, counsel should have moved to exclude it as unfairly prejudicial under rule 403. OB 50-51. Counsel lost a 412 motion to include contextualizing detail that explained Nunez-Vasquez's statement about CC's sexuality. R:652. The State pointed out that asking CC if he was gay or if he had had homosexual experiences would violate rule 412. R:646. Counsel lost a motion to exclude Nunez-Vasquez's custodial statements addressing CC's sexuality as a violation of *Miranda*. R:626. And the court ruled that counsel could not even ask Nunez-Vasquez questions that would explain those custodial statements. R:1006; 1007-08; 1020.

Counsel had informed the court of evidence in support of each motion. The court was aware that there was excluded evidence that [redacted] R:626. The court was also aware that Nunez-Vasquez asked about a lawyer and explained he was "not sober" in his police interview. R:576; 588. But all the jury would hear was that Nunez-Vasquez said CC told him he was straight and straight men were a challenge. R:734. If the court was correct that contextualizing details were inadmissible, then the statement itself became inadmissible: without necessary context, it was unfairly prejudicial and of little probative value to the State's case. Utah R. Evid. 403; s*ee State v. Maurer*, 770 P.2d 981, 983 (excluding portions of a letter under 403 because those portions were inflammatory and ultimately had no bearing on the legal issue); *State v. Brooks*, 264 P.3d 40, 49 (Haw. Ct. App. 2011) (court "determined that portions of [a witness's] statement that [the defendant] seeks to introduce would so distort the accuracy and integrity of the factfinding process if offered in isolation that [Hawaii Rule of Evidence] 403 would bar their admission if the State were not allowed to introduce clarifying and contextualizing portions of the statement" (internal quotation marks omitted)); *see also United States v. James*, 172 Fed App'x 144, 146 (9th Cir. 2006) (mem.) ("the limited probative value of the excluded portion of the videotape was outweighed by the danger of misleading or confusing the jury in viewing the portion out of context").

No reasonable defense attorney would have allowed Nunez-Vasquez's statements to be admitted where counsel could have excluded them under rule 403. *See State v. Scott*, 2017 UT App 74, ¶¶23-28. And counsel in this case moved unsuccessfully to exclude the statements for other reasons. R:76-77.

As argued in the opening brief, if it is true that the context of the statement could not be admitted under the rules of evidence, then counsel was ineffective for not arguing that rule 403 prohibited the admission of the statements altogether. OB 50-51.

VII. Counsel should have moved to exclude the anecdotal statistical evidence about memory loss and trauma.

The State argues that the rule prohibiting anecdotal statistical evidence "does not apply where a witness does not 'directly comment' or 'otherwise directly opine' on witness veracity." SB 59 (quoting *State v. Bair*, 2012 UT App 106, ¶47 & n.10). The footnote the State cites holds only that the witness in that case did not "use his 'anecdotal statistical' experience with delayed reporting and what constitutes a typical response from an accused to otherwise directly opine on either person's veracity." *Bair*, 2012 UT App 106, ¶47 n.10. The witness in *Bair* did not rely on anecdotal statistics at all. *See id.* ¶47. The defendant challenged the witness's testimony under Utah Rule of Evidence 608, *id.* ¶44, not under rule 403, the basis for Nunez-Vasquez's anecdotal statistics challenge. OB 52 (citing *State v. Rammel*, 721 P.2d 498 (Utah 1986) and *State v. Iorg*, 801 P.2d

938 (Utah Ct. App. 1990), which held anecdotal statics inadmissible under rule 403).

Furthermore, the testimony at issue in *Bair* was that "abuse victims often delay reporting," which is "a fact already recognized by Utah courts." *Bair*, 2012 UT App 106, ¶47. In contrast, the nurse's testimony was directly tied to CC — the prosecutor asked if CC's lack of memory "concern[ed]" her and she responded that it was a "very common" and "just part of trauma." R:819. The nurse's testimony relied on anecdotal statistics to address a phenomenon — the complete loss of memory the day after an alleged assault due to trauma — that is not recognized in Utah caw law the way delayed reporting is. *Id.* ¶47.

Finally, the State notes that the nurse acknowledged that other factors could have caused or contributed to memory loss, including alcohol and a "'red flag for maybe possibly that someone put drugs in his drink, which can happen.'" SB 58-60 (quoting R:819-20). That the nurse acknowledged that alcohol could cause memory loss did not mitigate her statements indicating that she would expect memory loss as "just part of trauma." R:819. That she speculated that someone put drugs in CC's drink did not mitigate the unfair prejudice, it aggravated it. R:820. Counsel's failure to object to this prejudicial testimony constituted ineffective assistance. OB 50-54.

CONCLUSION

For the reasons above and in the opening brief, this Court should reverse.

SUBMITTED this 24th day of November 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 5,902 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 private brief and one copy of the public brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies of the private brief and one copy of the public brief to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf of the private and public briefs to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 24th day of November 2017.

NATHALIE S. SKIBINE

DELIVERED this _____ day of November 2017.