

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

JAMIE ERNESTO NUNEZ-VASQUEZ,
Defendant/Appellant.

SUPPLEMENTAL 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.

Appellant is incarcerated

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INTRODUCTION

Nunez-Vasquez submits this memorandum and welcomes any additional briefing.

STATEMENT OF FACTS

Because this memorandum is limited to five pages, Nunez-Vasquez assumes familiarity with the supplemental record, original briefs, and 23B memoranda.

Justin Baines testified consistently with his affidavit that led to the remand.

R:1589. He would attend parties with CC along with “most of the gay friends that [Baines] knew from the club scene.” R:1589. They considered CC “bi” or “possibly gay and not fully out.” R:1590. CC was flirtatious with the other men — “there would be the occasional butt squeeze” and CC “would take his shirt off all the time.” R:1590.

CC would sleep on Baines’s couch after going out. R:1592. Once, CC was drunk, came into Baines’s bedroom, straddled Baines, and kissed Baines. R:1592-93. Baines rejected CC, and he CC became upset. R:1594.

Bryson Moore testified about a similar experience with CC. R:1566-1572.

Trial counsel was aware “witnesses came forward that [counsel] interviewed about [CC’s] sexual predisposition.” R:1551. Counsel filed a 412 motion because he felt that CC “opened the door” to his sexuality at the preliminary hearing and “there was the constitutional right of due process.” R:1558. He believed that calling the witnesses would have showed that CC “was not who he appeared to be” and that he was sexually interested in men. R:1557. Given the court’s denial of the 412 motion, counsel testified,

I did the best I could with what I had to work with and I believe I — you know, the jury might have not seen the entire picture and — and I felt like that was not fair, as far as my client’s right were concerned, but I certainly

tried to paint the picture for them that they needed to look beyond the picture that they were getting. R:1561

Asked if he thought “it would have made any difference to admit the” 412 evidence, counsel responded, “Yes. Absolutely I believe it would have made a difference.” R:1561-62. He testified, “I don’t know what the jury would have decided if they had . . . gotten the entire picture, but I felt like, you know, my client should have had the opportunity to present that picture.” R:1563.

Asked if he would have renewed his 412 motion if the door was open; he said:

I don’t know if that question actually opens the door, but I understand their ruling and I understand the implications are by that question. So maybe it just didn’t strike me. Maybe I was distracted.

I know [CC] was the first witness during the trial. I know that there were issues with him getting through security. I had concerns that he — I knew he didn’t like me and I had concerns that he was going to try to kill me during that trial. So — and I raised those concerns to [the State] on a break during the first day of trial, but — I mean, I don’t recall what I was thinking. I don’t recall the question, and that’s just the way it is. R:1556.

ARGUMENT

“[T]he ultimate resolution of the matter of counsel’s ineffectiveness, which originated on appeal, must be accomplished by the appellate court that ordered the remand in the first place.” *State v. Tirado*, 2019 UT App 115, ¶ 11 n.2. This Court owes no deference to the trial court’s legal conclusions. *Menzies v. Galetka*, 2006 UT 81, ¶ 58.

I. Trial Counsel Was Ineffective for Failing to File a Detailed 412 Motion.

Nunez-Vasquez incorporates the arguments in the opening brief and 23B motion addressing this issue. The remand evidence was consistent with the affidavit and arguments in the 23B motion. The two men who testified at the hearing were in contact

with trial counsel before the trial. R:1685; 1682-83. Trial counsel understood that the 412 evidence showed that CC “was not who he appeared to be” because he was sexually interested in men. R:1557. Trial counsel was concerned that, absent the 412 evidence, “the jury might not have seen the entire picture,” that it “wasn’t fair as far as [Nunez-Vasquez’s] rights were concerned,” and that he “absolutely . . . believe[d] it would have made a difference.” R:1561-62. Therefore, if counsel’s initial 412 motion and proffer was insufficient, that insufficiency constituted ineffective assistance of counsel.

II. Trial Counsel Was Ineffective for Failing to Renew the 412 Motion.

Nunez-Vasquez incorporates the arguments in the opening brief and 23B motion on this issue. At the 23B evidentiary hearing, trial counsel explained that he was unsure whether CC’s testimony that he “definitely would never have done that” because he “did not do such behavior” and “would know if [he] would have given consent” opened the door to renewing the 412 motion. R:1556. He also stated he was distracted during his cross examination of CC because he felt threatened by CC and did not “recall [the] question” about whether CC flirted with Nunez-Vasquez. R:1556.

The jury would have understood CC’s testimony, in context, as evidence that he was not interested in men. Any ambiguity would have been erased when the State introduced evidence that CC said he was straight. Although the State introduced evidence that Nunez-Vasquez told detectives that CC said he was straight, the trial court felt that this did not open the door because, “the defendant is [not] allowed to open the door.” R:1711. But it was the State that introduced CC’s hearsay statements; counsel filed a

motion to exclude Nunez-Vasquez's police interview. R:626.¹ The State then asked Nunez-Vasquez, "You knew [CC] was not gay, right?" R:1009. The State elected to use evidence that CC said he was straight along with CC's testimony that he could be confident he did not flirt or consent. This opened the door to evidence that CC, when drunk, expressed sexual interest in gay men who were sleeping over. *State v. Saunders*, 1999 UT 59, ¶ 21("it was not defendant who 'opened the door' to that evidence but that the State did so by adducing such evidence through several witnesses"); *State v. Mahi*, 2005 UT App 494, ¶ 17 (explaining door opening occurs when party "introduce[s] . . . evidence and then later complain[s] when the opposing party attempts to rebut it").

III. Additional Detail or Argument on the 412 Issue Would Have Been Futile.

Nunez-Vasquez argued in the opening brief that the "court did not deny the [412] motion due to lack of detail" and "[h]ad counsel renewed his motion after [CC's] testimony, it is all but certain it would have been denied." OB 23-24 (citing *State v. Bird*, 2012 UT App 239, ¶ 12). The State argued that any error was invited. SB 22 & n.6. The remand hearing makes clear that further argument would have been futile.

The district court stated at the remand hearing that "quite frankly, this Court finds no[]" probative value to the 412 evidence and "a 412 hearing . . . would not have made a difference." R:1711-12. This Court should therefore treat the 412 issue as preserved.

The court also stated, "I think the victim was unconscious or blacked out during the time this happened. So I don't think they had the ability to consent." R:1712. The

¹ Nunez-Vasquez argued in the opening brief that counsel should also have raised additional objections to this misleading evidence of CC's sexuality. OB 50.

conflation of alcohol blackout with unconsciousness was addressed in the reply brief 12-13; Addendum A provides a list of additional resources indicating that alcohol blackout is commonly understood as temporary memory loss due to drinking, not unconsciousness.

IV. The Cumulative Effect of Multiple Errors was Prejudicial

The opening brief raised six issues, including cumulative prejudice. Regarding the claim that it was ineffective assistance not to allow Nunez-Vasquez to explain the conditions leading to the statements he made in his police interrogation, the State conceded that counsel “clearly wanted to introduce evidence about the interview circumstances, and such evidence is admissible.” SB 52. At the remand hearing, counsel stated that he thought “the most damaging evidence . . . in the case was [Nunez-Vasquez’s] statements to the police officer that the reason he thought that he could have sex with [CC] was because of his body language.” R:1562. At the police interview, Nunez-Vasquez said CC’s “body was saying yeah.” State’s Ex.9 p.18. Nunez-Vasquez testified at trial that he had additional indications of consent. R:1002. Nunez-Vasquez was unable to explain the circumstances of the police interview, which the State used against him. OB 39-49. The prejudice from the exclusion of the 412 evidence compounds the prejudice from the exclusion of Nunez-Vasquez’s explanation of the circumstances of his police interrogation. Where the prosecution’s theory was bolstered by the implication that CC was not sexually interested in men, Nunez-Vasquez was prevented from explaining his own statements during police interrogation. R:1008-09.

CONCLUSION

For the reasons above, and those argued previously, this Court should reverse.

SUBMITTED this 11 day of December 2019.

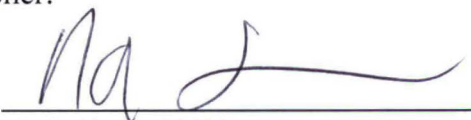


NATHALIE S. SKIBINE
Attorney for defendant/Appellant

CERTIFICATE OF COMPLIANCE

In compliance with the page limitation of Utah R. App. P. 49(d), I certify that this petition does not exceed 5 pages, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. I certify that this petition has been prepared in a proportionally spaced font using Microsoft Word 2016 in Times New Roman 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(10)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted or redacted from the foregoing petition for writ of certiorari of defendant/petitioner.



Nathalie S. Skibine

CERTIFICATE OF DELIVERY

I, NATHALIE S. SKIBINE, hereby certify that I have caused the foregoing to be delivered/filed by email as a searchable PDF to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies hand-delivered 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 Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 11 day of December 2019.


NATHALIE S. SKIBINE

DELIVERED this 11 day of December 2019.



ADDENDUM A

Resources addressing alcohol blackout

Evidence in the record

R:819 (nurse testifying that it is common that due to alcohol, people might not have any recollection about what happened)

R:760-63 (CC's testimony)

Dictionary definitions

<https://www.dictionary.com/browse/blackout?s=t> ("a period of total memory loss, as one induced by an accident or prolonged alcoholic drinking:
The patient cannot account for the bizarre things he did during his blackout.")

<https://www.merriam-webster.com/dictionary/blackout> ("transient dulling or loss of vision, consciousness, or memory // an alcoholic blackout")

<https://www.thefreedictionary.com/blackout> ("A temporary loss of memory or consciousness")

[https://en.wikipedia.org/wiki/Blackout_\(drug-related_amnesia\)](https://en.wikipedia.org/wiki/Blackout_(drug-related_amnesia)) ("A drug-related blackout is a phenomenon caused by the intake of any substance or medication in which short-term and long-term memory creation is impaired, therefore causing a complete inability to recall the past. Blackouts are frequently described as having effects similar to that of anterograde amnesia, in which the subject cannot recall any events after the event that caused amnesia.")

<https://www.urbandictionary.com/define.php?term=black%20out> ("Blackout is the term used to describe when a person is so drunk that they wake up the next morning with temporary amnesia, no recollection of what they did the night before. It can be used as a verb or as an adjective.")

Secondary Sources

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") (cited in reply brief)

Sarah Hepola, *My drinking years: 'Everyone has blackouts, don't they?'*, The Guardian (June 13, 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.”) (cited in reply brief)

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”) (cited in reply brief)

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”) (cited in reply brief).

Jackson McHenry, *Corrine Olympios Says Medication Mixed With Alcohol Caused Her to Blackout on Bachelor in Paradise*, Vulture (August 29, 2017), <https://www.vulture.com/2017/08/corinne-olympios-bachelor-in-paradise-medication-blackout.html> (Olympios reported that a man “sexually assaulted her on the show.” But she “explained that she has no memory of the incident in question” due to an alcohol and drug blackout. “Olympios also confirmed that she had ‘seen some of the footage’ of herself . . . that was central to the investigation. . . ‘I never meant that I was a victim of [the man]. I strongly believe he had no bad intentions at all. . . . It was unfortunate that no one really knew how intoxicated I actually was at the time. . . . It was nobody’s fault. I was a victim of not really knowing what happened at the time.’”)

Ruben Castenada, *What Happens During an Alcohol Blackout?*, U.S. News (October 8, 2018), <https://health.usnews.com/wellness/articles/2018-10-08/what-happens-during-an-alcoholic-blackout> (“Blackouts are periods of amnesia during which a person engages in activities like walking, talking or dumping beer on a friend’s head ‘but doesn’t create memories for these events as they transpire,’ according to the National Institute on Alcohol Abuse and Alcoholism.” “During a blackout, a person is able to actively engage and respond to [the] environment,’ Wetherill says. ‘However, the brain is not creating memories for the events. Essentially, alcohol . . . impairs memory formation by suppressing activity within the hippocampus and other regions of the brain involved in the transfer of information from short-term to long-term memory.’”)

Sarah Hepola, *Kavanaugh and the Blackout Theory*, N.Y. Times (Sept 29, 2018), <https://www.nytimes.com/2018/09/29/opinion/sunday/brett-kavanaugh-drinking-blackouts.html> (“In the days leading up to the Senate Judiciary Committee hearing on the Supreme Court nomination of Brett Kavanaugh, a theory arose that he might have drunk so much as a teenager that he did not remember his alleged misdeeds. The blackout theory was a way to reconcile two competing narratives. It meant that Christine Blasey Ford was telling the truth but so was Brett Kavanaugh. He simply did not remember what happened that night and therefore believed himself falsely accused.”)

Claire Gillespie, *5 Myths We Need to Stop Believing About Alcohol Blackouts*, Self (October 27, 2017), <https://www.self.com/story/5-myths-we-need-to-stop-believing-about-alcohol-blackouts> (“‘People appear able to keep information active in short-term memory for at least a few seconds,’ Dr. White says. ‘As a result, they can often carry on conversations, drive automobiles, and engage in other complicated behaviors. However, the process of transferring information from short-term to long-term storage in the brain has been completely blocked.’”)

Corpus linguistics

In the seven results for searching the Corpus of Contemporary American English for “blackout” within nine words of “drinking,” the results are predominantly about memory loss. Davies, Mark. (2008-) The Corpus of Contemporary American English (COCA): 560 million words, 1990-present. A link to the search is <https://www.english-corpora.org/coca/?c=coca&q=82510176>

The TV Corpus results for “blackout” show that memory loss due to alcohol is a frequent cultural reference in American television. All the results are available at <https://www.english-corpora.org/tv/?c=tv&q=82511571>

Examples:

“Obviously, I came here last night during a blackout.”

“ ‘Obviously?’ You came here and defeated our arch nemesis while so drunk you don’t remember doing it? That’s something ‘obvious’ to you?”

Rick and Morty (Cartoon Network 2017)

“Then, you took it all off because you decided Egypt was stupid, especially pyramids, because you think triangle buildings are, and I quote, ‘gauche as shit.’”

“That does sound like me, but I don’t remember any of that. I must have blacked out. Maybe I should lay off the alcohol.”

BoJack Horseman (Netflix 2016)

“Got her pregnant at the Halloween party? What does that mean?”
“I don't even remember that party; I was wasted.”
“Yeah, me, too. I-I browned out that evening.”
“Browned out? What’s browned out?”
“Oh, it’s when you drink so much that everything goes brown. It’s not as severe as a blackout, cause I remember bits and pieces.”

It’s Always Sunny in Philadelphia (FX 2010)

“More wine, please.”
“Oh, are you sure that’s wise, dear? Remember that blackout you had last month? What am I saying? Of course you don’t.”

Frasier (NBC 1996)

“Yeah, I hit rock bottom. Sure-fire way to snap out of something is to wake up from a blackout realizing you’re the guy at the party who told everybody what they didn’t wanna hear. And then alienating the one person that you cared about.”

Dawson’s Creek (WB 2002)

“And whatever malt liquor was on sale. Next thing we knew, it was morning. . . . We’re on a school bus. What? How’d we get here? I don’t remember anything from last night. . . . Now you just got to return that motorcycle. But I have no idea what we did with it. I was blackout drunk that night. Too bad Earl’s in a coma, cause he was just plain ol’ drunk. He'd remember.”

My Name is Earl (NBC 2008)

“I’m asking, back when you had a best friend named tequila, did you actually ever blackout?”
“Once. No, twice. But the stuff you don’t remember is usually the stuff you don’t wanna remember.”

Grey’s Anatomy (ABC 2007)

“Hey, Cal. I’m what you call a blackout drunk, so sometimes I’d wake up five states away from where I started drinking. And I’d be married, often while I was already married.”

Lucky Louie (HBO 2006)