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IN THE

UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. JAIME NUNEZ-VASQUEZ, Defendant/Appellant.	State's Supplemental Memorandum Following Remand Under Rule 23B, Utah Rules of Appellate Procedure Case No. 20160794-CA

This Court granted Nunez-Vasquez's request for a remand under rule 23B, Utah Rules of Appellate Procedure, to address trial counsel's not giving "a more detailed proffer of his 412 evidence" or renewing that motion when C.C. testified that he "definitely would never have" consented to sex with Nunez-Vasquez, and that he would have known if he would have consented. July 18, 2018 Order.

The district court heard testimony from Joseph Orifici (trial counsel), as well as Bryson Moore and Justin Baines. Moore and Baines discussed what they told Mr. Orifici. Moore recounted a time when C.C. slept over at his apartment after a night of drinking.

R1568-69. This occurred about three months before the crime in this case. R1573. C.C. allegedly kissed Moore on the neck, grabbed Moore's genitals, and tried to remove Moore's clothing. R1568-69. Though Moore had flirted with C.C. before, he did not want to have sex that night. R1575-76. C.C. allegedly flirted with gay guys at gay bars, and did not give the impression that he was straight. R1572. Neither Moore nor C.C. ever called the police. R1578-79.

Baines testified that C.C. was really flirtatious with gay men, and that Baines had both flirted with and sexted C.C. in the past. R1590, 1594, 1597; see also DE1. One night, C.C. allegedly came into Baines's bedroom, straddled him, and started kissing his neck. R1592-93. Baines refused. EH at 68. C.C. never called the police or accused Baines of rape. R1608-09.

Before trial, Orifici interviewed three witnesses regarding C.C.'s alleged prior homosexual experiences: Chammy Roses (Moore's roommate); Moore; and Baines. R1551-52, 1568-69, 1582-84. He did not investigate any others because he was on a "shoestring" budget, and Nunez-Vasquez could not even pay Orifici all he was owed, let alone hire an investigator. R1563-64. After the preliminary hearing, he filed a rule 412 motion to impeach C.C.'s preliminary hearing testimony that he was not gay. R1557. The Court denied the motion but said that it would revisit the issue if C.C. were to open the door during his testimony. R652.

During C.C.'s trial testimony, he gave two several responses that this Court highlighted in its order as potentially opening the door: Fist, the prosecutor asked during direct: "Do you remember flirting with Jaime that night?" R766. C.C. answered, "I definitely would never have done that." R766; see also Remand Order at 2. On cross-examination, defense counsel asked, "Isn't it true that you don't remember what you said or did with my client at any location that you were at that evening?" R772. C.C. answered, "I would know if I would have given consent." R772; see also Remand Order at 2.

At the hearing, Mr. Orifici reviewed those questions, and said that even with the benefit of hindsight, he did not know if those responses "actually open[ed] the door." R1556, 1560. In his estimation, the most damaging evidence against Nunez-Vasquez were his own statements to police. R1562.

The trial court ruled that a more detailed proffer would not have affected its pretrial decision not to admit the 412 evidence, because C.C.'s alleged sexuality would not be "fair game" at trial unless C.C. "opened the door." R1686. The court explained that the evidence was inadmissible under rules 403 and 412. *Id.* The trial court further ruled that counsel "could have reasonably decided that C.C.'s trial testimony did not open the door" because "the answer could reasonably be understood to refer to C.C.'s not flirting with Nunez-Vasquez particularly." *Id.* "And his answer to trial counsel's question could likely be reasonably understood to be confined to Nunez-Vasquez in particular, not men generally." *Id.* Further, "[a]s counsel admitted, even with the benefit of hindsight, it is questionable

whether this testimony opened the door to impeachment on sexuality. [] Eliminating the distorting effects of hindsight, counsel did not perform deficiently." R1686-87. The court also found no prejudice. R1687.

The trial court's analysis was correct. To prove the deficient performance element of the claim, *Strickland*'s guiding principle is reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687 ("[T]he proper standard for attorney performance is that of reasonably effective assistance."); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000) (explaining that the question under *Strickland's* deficient performance element "is not whether counsel's choices were strategic, but whether they were reasonable."). A defendant cannot prove deficient performance unless he proves that "no competent attorney" would have proceeded as her counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011).

Defense counsel could reasonably understand C.C.'s statements as denying any feelings for or attraction to Nunez-Vasquez in particular, rather than as denying homosexual feelings or attraction for anyone. Even though those statements might be read, years later, as having a different import, that is not the question; the question is whether they could have been reasonably understood as the trial court found. The answer to that question is yes, which ends the analysis.

Further, Nunez-Vasquez could not show prejudice because both of the alleged encounters with other men involved mutual flirting and attraction. *See* R1573-74, 1576-77;

DE1-13. By contrast, all the evidence at trial—from C.C., from the apartment owner, and from Nunez-Vasquez himself—was that C.C. did not flirt at all with Nunez-Vasquez that night. R766, 883, 957. Thus, even if counsel could have shown that C.C.'s flirting generally indicated attraction to other men, that evidence would not have shown that he was willing to have it with Nunez-Vasquez (with whom he did not flirt). And it may have provided an avenue to bolster the State's case—if C.C. did not first flirt with Nunez-Vasquez as he had with other men, then it was less likely that he consented to have sex with Nunez-Vasquez.

Respectfully submitted on December 11, 2019.

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CERTIFICATE OF SERVICE

I certify that on December 11, 2019, a copy of the State's Supplemental Memorandum Following Remand Under Rule 23B, Utah Rules of Appellate Procedure was emailed to the defendant's counsel of record as follows:

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