Public

Case No. 20161070-CA October 23 at 1 pm

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ASHTEN NUNES,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions on one count of rape, a first degree felony, and ten counts of violating a protective order, a Class A midsdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Vernice Trease presiding

TROY L. BOOHER
FREYJA R. JOHNSON
Zimmerman Booher
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, UT 84111
tbooher@zbappeals.com
fjohnson@zbappeals.com

Counsel for Appellant

KAREN A. KLUCZNIK (7912)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: kklucznik@agutah.gov

SANDY JOHNSON
Salt Lake County D.A.'s Office

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

Case No. 20161070-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ASHTEN NUNES,
Defendant/Appellant.

Brief of Appellee

INTRODUCTION

Victim met Defendant, then 17 years old, when Victim was 14. At the time, Victim and her father were fighting all the time. Victim was in therapy for that and for depression.

Victim and Defendant soon started texting. Before long, Defendant was texting Victim about sexual things and how Defendant would take care of her. Victim liked Defendant. She had never really had a boyfriend before, and nobody else had ever made her feel she was actually loved.

Victim's parents, however, wanted Defendant to stay away from Victim. When talking to Defendant did not work, they got a protective order prohibiting him from contacting Victim. Defendant ignored the order.

One night, Defendant asked Victim if she wanted to have sex, and she said yes. But when Defendant started to penetrate Victim, Victim asked him to stop. Instead, as Victim screamed and cried, Defendant put his penis in Victim's anus and vagina.

About a month later, Victim told her counselor what Defendant had done. Victim begged Counselor not to tell anyone. But Counselor convinced Victim to tell her parents. Victim then told the police.

Defendant was charged with one count each of rape and forcible sodomy and ten counts of violating a protective order. At his four-day trial, Defendant conceded the protective-order violations and that he and Victim had had sex. The only issue was whether Victim consented to the sex. One of the State's theories of non-consent was that Victim had expressed her non-consent through words and conduct. A second theory was that Defendant was at least three years older than Victim and he enticed or coerced her to have sex. The jury found Defendant guilty of rape and the protective-order violations. It acquitted him of forcible sodomy.

Defendant raises three ineffective assistance claims on appeal. First, he asserts counsel was ineffective for withdrawing hearsay objections to evidence of Victim's prior consistent statements presented through Victim's

mother, the investigating officer, and Counselor. Mother testified that she learned of Defendant's assault of Victim at a meeting with Victim and Counselor. The prosecutor asked, "what did [Victim] tell you?" Defense counsel objected on hearsay grounds. When the court agreed with the prosecutor that the defense had asked Victim about prior inconsistent statements and that Victim's prior consistent statements were admissible to rebut that impeachment, the defense said, "Okay." The lead investigator testified that he conducted Victim's CJC interview. When the prosecutor asked whether Victim told him what had happened, the officer responded, "That she had been raped." The defense did not object. Later, when the prosecutor asked Counselor what Victim told her about Defendant's assault, the defense objected on hearsay grounds. When the court ruled that Victim's statements were prior consistent statements admissible to rebut Defendant's prior impeachment of Victim, the defense withdrew its objection.

Defendant's ineffectiveness, that counsel should have objected to the evidence as inadmissible hearsay under Utah R. Evid. 801 fails. First, Defendant has not shown that the evidence was so clearly inadmissible that all competent counsel would decide to continue to object, especially once the trial court had ruled that the evidence was admissible. Thus, Defendant has

not shown deficient performance. But Defendant also has not shown prejudice—a reasonable likelihood of a different result had counsel continued to object. Defendant's prejudice argument is that absent counsel's alleged errors, there is a reasonable likelihood the jury would have found that Victim willingly participated in the sex with him. But the prosecution also argued non-consent on the theory that Defendant enticed and coerced Victim to engage in the sex. Defendant does not address that theory and, thus, does not show any reasonable likelihood that absent counsel's alleged errors, the jury would have rejected it.

Defendant's second ineffectiveness claim faults defense counsel for not objecting when Mother testified she did not believe Victim was faking her emotional state during the meeting with Counselor. But competent counsel could reasonably conclude that the jury would not be particularly surprised to hear that a mother believed her child. Competent counsel could thus reasonably conclude that objecting to Mother's isolated statement could hurt Defendant by encouraging the jury to give the statement more weight than it otherwise would. Moreover, Defendant again has not proved prejudice because his argument addresses only one of the State's theories of non-consent.

Finally, Defendant argues that counsel was ineffective for not objecting to Victim's references to Defendant being in jail. Victim was the State's first witness in a four-day trial in which 13 witnesses were called. Early in her testimony, Victim twice referred to Defendant having been in jail during their relationship. Defense counsel did not object, later explaining that they had heard Victim's references, "but didn't want to draw attention" to them. Defendant's claim fails because counsel strategically chose not object to Victim's isolated jail references to avoid drawing attention to them, and Defendant has not shown that no competent counsel would have made the same decision. Further, his prejudice argument again addresses only one of the State's theories of non-consent.

STATEMENT OF THE ISSUES

Issue I. Has Defendant proved ineffective assistance of counsel?

--- Has Defendant proved that Victim's prior consistent statements were so clearly inadmissible that all competent counsel would have concluded it would not be futile to continue objecting to them, even after the trial court had ruled they were admissible? Has Defendant proved prejudice where he has not shown that the evidence was inadmissible and where his

argument does not prove a reasonable likelihood of a different result under the State's enticement theory of non-consent?

--- Has Defendant proved that all competent counsel would have objected to Mother's isolated statement that Victim did not seem to be faking when she confirmed what Counselor told Mother about Defendant's assault? Has Defendant proved prejudice, where the only issue at trial was consent and Defendant's prejudice argument addresses only one of the two major non-consent theories argued by the State?

--- Has Defendant proved that all competent counsel would have drawn attention to Victim's passing references to Defendant being in jail by objecting to them rather that avoiding that attention by choosing not to object? Has Defendant proved prejudice, where the only issue at trial was consent and Defendant addresses only one of the two major non-consent theories argued by the State?

Standard of Review. "When an ineffective assistance of counsel claim is raised for the first time on appeal, there is no lower court ruling to review"; thus, this Court decides the issue as a question of law. *Layton City v. Carr*, 2014 UT App 227, ¶6, 336 P.3d 587.

Issue II. Does Defendant's cumulative error argument fail?

Standard of Review. An appellate court reverses under the cumulative error doctrine only if the errors "are 'substantial' enough to accumulate" and the cumulative effect of the errors undermines its confidence in a fair trial. *State v. Martinez-Castellanos*, 2018 UT 46, ¶¶39,40, 872 Utah Adv. Rep. 51.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Victim met Defendant, who was more than three years older than her, at a concert when Victim was a 14-year-old ninth grader. R1060-61;St. Exh. 9. Before meeting Defendant, Victim was "involved in everything"—music, art, drama, sports. In addition, she was "very popular, very happy," and a "straight A student." R1279. Victim and her father did start having difficulties when her parents started having marital problems. R1066. But Victim was in therapy for that and for depression. R1516.

Defendant and Victim soon started texting. R1061. Before long, Defendant texted Victim about sexual things, like that Victim should "finger" herself in a bathroom stall during school. R1063;Def.Exh. 1. And he sent her messages about sexual things he wanted to do to her. R1147;Def,Exh, 1. They

also talked about Victim's father, and Defendant would tell her that Defendant would take care of her. R1066.

Soon, Defendant encouraged Victim to sneak out to see him. *Id.* Defendant or his mother would then pick Victim up and bring her to their house. R1063,1078. Victim liked going over to Defendant's house because she and Defendant could do drugs and Defendant's mother didn't care. R1066. Defendant's mother also never told her to go home. *Id.*

Meanwhile, Victim's parents noticed dramatic changes in Victim after she started interacting with Defendant. R1279,1281. Victim started to lose her friends. R1281. Her depression became more severe. *Id.* And she started missing school and lying about her whereabouts. R1282-96.

One of the times Victim snuck out to see Defendant on a weekday, she and Defendant smoked marijuana and then fell asleep. R1064. The next morning, when Victim's parents could not find or get in touch with Victim, they called the police. R1064. After Defendant dropped Victim off a short distance from her house, Victim walked home and lied that she had a nightmare and, feeling suicidal, decided to go for a walk. *Id.* Victim's father did not believe her. *Id.*

Another time, Victim skipped school to go to a party at Defendant's house. R1068-69. Everyone there was at least five years older than Victim *Id.* And all of them were snorting drugs and smoking. *Id.*

When Victim's parents found out Victim had skipped school, they took her phone and went through the messages. *Id.* Victim had "millions of text messages" from Defendant. *Id.* After reaching out unsuccessfully to Defendant and his mother to have Defendant stop contacting Victim, Victim's father got a protective order prohibiting Defendant from contacting Victim R1069-70.

But Defendant and Victim still messaged each other, using all different types of media to keep their contact secret. R1073. And every time they got together, Defendant would grope Victim and try to have sex with her, but Victim would say no. R1070.

Victim did not realize that Defendant's conduct was abnormal. *Id.* She had never really had a boyfriend before. R1062. She also cared for Defendant. R1071,1074. Nobody had ever made her feel like she was actually loved. R1062. And Victim wanted that. *Id.* Defendant also intrigued her because he was interested in magic and crystals. *Id.* And he intimidated her because he

was older. *Id.* At the same time, Victim knew that Defendant was seeing other people, and she was jealous. R1081.

Sometimes, though, Victim would try to end the relationship. When she did, Defendant would threaten to commit suicide or threaten to hurt Victim or her father. R1071,1338. One time, after Victim went to a school dance with another boy, the boy committed suicide a few weeks later, and Defendant claimed he had a hand in it because she was not supposed to see other people. R1075-78. So Victim was also scared of Defendant. R1071.

Victim's father later concluded, in retrospect, that Victim "was kind of being brainwashed by" Defendant "and just coerced and manipulated." R1338.

On December 5, 2014, Defendant's mother picked Victim up after school and took her to a new home Defendant was moving into. R1078. Defendant seemed crazier than usual, talking about God, devils, and demons. R1079. He tried to have sex with Victim, but she said no. *Id.* Defendant's mother later brought Victim home. R1080.

The next day, Defendant told Victim that he needed to see her. R1080. Defendant asked Victim if she wanted to have sex, and she said yes. R1244. But when Defendant propped Victim up on her knees and held the back of

her head down on the bed, Victim asked him to stop. R1084-87. Instead, as Victim screamed, cried, and continued to ask him to stop, Defendant put his penis in Victim's anus and vagina. R1085-87. Victim had never experienced anything so painful. R1087,1090. After Defendant ejaculated on Victim's back, Victim got up and had blood all over her. R1085-87.

Almost immediately, Defendant and his mother took Victim home. R1088. Victim did not say anything to Defendant's mother on the way home; Victim knew she wouldn't care. *Id.* Although Victim hugged Defendant when she left the car, she cried for a long time once she was home. R1087,1089.

Two days later, Victim was hospitalized after reporting to a school counselor that she felt suicidal. R1098. Still, for about a month, Victim and Defendant continued to text. *See, e.g.*, St.Exh. 16-19;Def. Exh. 3. In some texts, Victim was affectionate. *See id.* In others, when she said she didn't want to see Defendant anymore, Defendant threatened to commit suicide or hurt her. *Id.*

About a month after the rape, Victim went to see her counselor. R1521. Counselor knew that Victim had been seeing Defendant. R1520. Counselor also knew that Victim could get drugs from Defendant and that his house was a place she could go to that had no rules. R1517. And Counselor knew from Victim that Victim was a virgin. R1520-21.

During the session, though, Victim disclosed that she had lost her virginity, and Counselor recalled that "what happened [next] was extremely alarming." R1526-27. Victim "went into a full-blown panic attack"—breathing abnormally and "sobbing." R1627. Victim's distress continued for about 20 minutes. *Id.* Counselor had "never seen anything like it." *Id.*

When Victim finally calmed down, she told Counselor that Defendant had held her down, hit and scratched her; that Defendant had penetrated her vaginally and anally; that when Victim "begged him to stop," Defendant "would do it harder"; and that "there was blood everywhere." R1530.

When Counselor informed Victim that what Defendant had done was rape, Victim begged her not to tell anyone. R1533. But Counselor convinced Victim to tell Victim's parents. R1534-35. After Victim's parents were told, Victim was interviewed by the police. R118. A subsequent genital exam revealed that Victim had a healed cut in her hymen. R1432.

Meanwhile, police searched Defendant's house and seized a blanket. R1346. Victim's DNA was found in a blood spot on the blanket. R1392,1394,1420-21,1428.

B. Summary of proceedings and disposition of the court.

Defendant was charged with one count each of rape and forcible sodomy, both first degree felonies, and ten counts of violating a protective order, all class A misdemeanors. R1-4,887-78. At trial, Defendant conceded his guilt on the protective-order counts. R1050-51,1810. He also admitted having sex with Victim. R1810,1823. The only contested issue, therefore, was whether Victim consented to the sex. R1803-24.

The State's theories of nonconsent included that (1) Victim expressed "lack of consent through words or conduct"; (2) Defendant coerced Victim "by threatening immediate or future retaliation" against Victim or another person and Victim thought at the time that Defendant "had the ability to carry out the threat"; and (3) Victim between 14 and 18 years old, Defendant was at least three years old than her, and Defendant "enticed or coerced" her "to submit or participate" in the sex.R1800-01 (Jury Instr. 35).

The defense. Defendant's defense at trial was that Victim consented to having sex. R1050-58. In support, Defendant presented evidence that Victim's hymenal cut was consistent with consensual sex. R1619. In addition, Defendant cited a message from Victim before the encounter, in which Victim arguably teased Defendant about having sex. R1135. Defendant also

presented evidence that Defendant had asked Victim if she wanted to have sex and she had said yes. R1244. Defendant cited messages from Victim after the encounter in which Victim said Defendant was "amazing" and expressed her love for him. Def.Exh. 7. And Defendant argued that Victim's motive for alleging rape was that she was jealous of other women Defendant was also having sex with. R1141.

The jury's verdict. The jury convicted Defendant on the rape and protective-order counts. R575-77. It acquitted him of forcible sodomy. *Id.* The trial court sentenced Defendant to zero-to-365 day jail terms on each of the protective-order convictions. R613-16. It sentenced him to five-years-to-life on the rape conviction, to run consecutively to his other sentences in this case and his sentences in another case. *Id.*

The appeal. Defendant timely appealed. R625-26.

SUMMARY OF ARGUMENT

Point I. Defendant argues that defense counsel was ineffective because they withdrew their objections to evidence of Victim's prior consistent statements admitted through Mother, Counselor, and the lead investigator. Defendant contends counsel should have insisted that the evidence was inadmissible hearsay.

Defense counsel withdrew their objections, however, after the trial court ruled that the evidence was admissible to rehabilitate Victim after the defense's cross-examination of her. Competent counsel could have reasonably concluded that the trial court's ruling was correct. Moreover, once the trial court ruled, competent counsel could have decided that any further objection would be futile. For both of these reasons, Defendant cannot prove deficient performance—that no competent counsel would have done as defense counsel did here.

Defendant also has not proved prejudice. First, Defendant has not shown that the trial court erred in ruling that the evidence was admissible. Thus, he has not proved that the evidence would have been excluded had counsel continued to object. Second, Defendant's prejudice argument addresses only one of the two major theories of non-consent in arguing a probability of a different result had counsel objected. Defendant's argument, therefore, does not address the arguably stronger theory, which would not have been weakened had the challenged evidence been excluded.

Defendant also argues that defense counsel was ineffective for not objecting when Mother testified that she did not believe Victim was faking her emotional response during the meeting with Counselor at which Mother

learned of Defendant's assault. Competent counsel, however, could have reasonably concluded that the jury would not be surprised—and thus Defendant would not be prejudiced—by Mother's comment. And competent counsel could have reasonably concluded that an attempt to silence Mother on the subject by objecting could offend the jury and thereby hurt Defendant. Thus, Defendant has not proved deficient performance.

Defendant also has not proved prejudice. First, as with his first ineffectiveness claim, Defendant's prejudice argument addresses only one of the two major theories of non-consent in arguing a probability of a different result had counsel objected. For this reason alone, his prejudice argument fails. But also, Mother's comment was an isolated comment made during the course of a four-day trial. Its prejudicial effect, if any, was likely minimal.

Finally, Defendant argues that defense counsel was ineffective for deciding not to object to two references by Victim, early in the trial, to Defendant having been in jail during their relationship.

Defense counsel, however, specifically put on the record that they strategically chose not to object so as not to draw attention to the references. Defendant has not shown that no other counsel would have made the same choice. Thus, Defendant has not proved deficient performance.

Moreover, as with his other two ineffectiveness claims, Defendant's prejudice argument addresses only one of the State's main theories of non-consent. Thus, Defendant does not explain why two isolated comments early during a four-day trial involving 13 witnesses were so prejudicial to that theory as to render a different result likely in their absence.

Point II. Defendant asks this Court to reverse his rape conviction under the cumulative error doctrine. Defendant, however, has not shown that his counsel performed deficiently at his trial. Thus, he has not shown any error that would trigger the cumulative error doctrine.

ARGUMENT

I.

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FAIL BECAUSE HE HAS NOT PROVED EITHER THAT NO COMPETENT ATTORNEY WOULD HAVE PROCEEDED AS HIS COUNSEL DID OR A REASONABLE PROBABILITY OF A MORE FAVORABLE OUTCOME

On appeal, Defendant does not challenge his protective-order convictions. Aplt.Br. 41. He only challenges his rape conviction. *Id.* As to that conviction, Defendant argues that his trial counsel was ineffective because they (1) did not persist in objecting to evidence of Victim's prior consistent statements as inadmissible hearsay; (2) did not object to Mother's single

statement that she did not believe Victim was "faking" when Victim confirmed Counselor's description of what had happened with Defendant; and (3) chose not to object when Victim mentioned in passing that Defendant had been in jail. *Id.* at 17.

Defendant has not proved deficient performance—that no competent attorney would have followed counsel's course. He also has not proved prejudice—the only issue at trial was consent and Defendant ignores one of the main theories by which the State proved non-consent. The failure to prove either independently defeats his claims.

A. To prove ineffective assistance of counsel, Defendant must prove both that no competent counsel would have represented him as his counsel did and that he was prejudiced by counsel's conduct.

To show that his counsel was constitutionally ineffective, Defendant must prove both that counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). The defendant's proof "cannot be a speculative matter but must be demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (quotations and citation omitted). Surmounting *Strickland*'s high bar is "never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To prove deficient performance, Defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. To meet that burden, Defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). There is "no expectation that competent counsel will be a flawless strategist or tactician." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Thus, the "relevant question" under *Strickland* is "not whether counsel's choices were strategic," *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000), or "deviated from best practices or most common custom," *Richter*, 562 U.S. at 105. Rather, the relevant question is whether counsel's choices "were reasonable" or "amounted to incompetence under prevailing professional norms." *Id*. at 105. And to prove that, Defendant must prove that "no competent attorney" would have done what his counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (counsel deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted

similarly"); *Chandler v. United States*, 218 F.3d 1305, 1315 & n.17 (11th Cir. 2000) (en banc) (counsel deficient only when defendant can show "that no competent counsel would have taken the action that his counsel did take").

When evaluating a claim that counsel should have made an objection, then, *Strickland*'s deficient performance prong does not turn on the objection's merits alone. The potential merits of the objection may factor into that analysis, but is dispositive only if the objecting would have been futile. Counsel cannot be ineffective for not raising a futile objection. *See State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance.").

An objection's potential merit, although relevant, is not otherwise dispositive. The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 Fed.Appx. 177, 181 (3rd Cir. 2010); *accord Thomas v. Thaler*, 520 Fed.Appx. 276, 281 (5th Cir. 2013).

Competent counsel may decide to forego an objection—or, as here, withdraw it—because he reasonably concludes that it is unlikely to succeed. This decision may be reasonable even though a later reviewing court might

ultimately hold that the objection would have succeeded. As stated, the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Gentry*, 540 U.S. at 8.

Competent counsel may also reasonably conclude that foregoing an objection better serves his client than would an objection. *See State v. Bedell*, 2014 UT 1, ¶¶21-25, 322 P.3d 697 (counsel strategized to admit evidence of defendant's prior acts to attack victim's credibility); *State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162 (although counsel could have objected to witnesses' testimony, counsel "may well have made a reasonable tactical choice when he did not object"); *State v. Pecht*, 2002 UT 41, ¶¶ 40–44, 48 P.3d 931 (counsel's not objecting to evidence of defendant's incarceration was sound trial strategy); *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989) (counsel reasonably decided to allow child victims' out-of-court statements rather than insist that they testify).

And competent counsel may simply overlook a possible objection. *See Richter*, 562 U.S. at 111 (although "'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' … it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy") (citation omitted).

Thus, "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986).

"Judicial scrutiny of counsel's performance," therefore, "must be highly deferential." *Strickland*, 466 U.S. at 689. A "court considering an ineffectiveness claim must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). While it "is all too tempting" and "easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," courts must resist that temptation. *Strickland*, 466 U.S. at 689. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Again, the determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. The rule distills to this: counsel's representation is objectively reasonable, and therefore constitutionally compliant, unless "no competent attorney" would have proceeded as he did. *Moore*, 562 U.S. at 124.

Importantly, Defendant's strict reliance on the American Bar Association standards for defense counsel to prove deficient performance, *see* Aplt.Br. 26,33,40, conflicts with the law. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89. In fact, "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id*. at 689.

Thus, "[p]revailing norms of practice as reflected in American Bar Association standards and the like" are only "guides to determining what is reasonable." *Id*. at 688. They are "not 'inexorable commands.'" *Bobby v. Van Hook*, 558 U.S. 4, 8- 9 (2009). While "private organizations … 'are free to impose whatever specific rules they see fit to ensure that criminal defendants

are well represented, … the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Id*. at 9 (citation omitted).

To prove *Strickland* prejudice, the defendant must prove "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different"–"the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 688, 694-95. A reasonable probability is one "sufficient to undermine confidence in the outcome.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 694). Thus, it "is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693). Defendant must prove that the "likelihood of a different result" is "substantial, not just conceivable." *Id.* at 112 (citation omitted).

B. Defendant has not proved that all competent counsel would have persisted in objecting to evidence of Victim's prior consistent statements once the trial court ruled that the statements were admissible to rehabilitate Victim after Defendant impeached her. Defendant also has not proved either that the statements were excludable or a reasonable probability of a more favorable outcome if they had been excluded.

At Defendant's trial, Mother, Counselor, and the officer who conducted Victim's CJC interview testified about prior statements Victim had

made to them that were consistent with Victim's trial testimony. Defendant asserts that those prior statements were made after Victim had a motive to fabricate and, thus, were inadmissible under Utah R. Evid. 801(d)(1)(B). Aplt.Br. 17-31. Accordingly, Defendant argues, defense counsel performed deficiently when they withdrew their objections after the trial court ruled the statements were admissible. *See id.* Defendant's argument fails because reasonable counsel could conclude that, as the trial court ruled, Victim's prior consistent statements were admissible despite rule 801(d)(1)(B).

1. Background.

Victim's testimony.[1] Victim testified that Defendant had vaginal and anal sex with her without her consent on December 6, 2014. R1084-87. On cross-examination, defense counsel asked Victim about statements she had made both before and after the sexual assault that, according to the defense, suggested the sex was not unwelcomed and thus were inconsistent with Victim's testimony that she did not consent. For example, the defense referred to a message from Victim to Defendant the day before the assault stating that she had a present for him—mushrooms and birth control. F1135. The defense asked if Victim remembered telling Defendant after the sexual

[1] A transcript of Victim's testimony is attached at Addendum B.

encounter that "I gave everything away to you and you don't even fucking care. That kills me." R1140. The defense asked if Victim remembered tweeting him the day after the assault that she had lost her virginity to him the night before and that he meant "everything" to her. R1141. And the defense asked if Victim remembered telling Defendant after the assault that she loved him. R1163.

Mother's testimony.[2] Mother testified next. R1278. Mother testified about the changes she observed in Victim after she started high school and started interacting with Defendant. R1279.1281. And she testified about being called to Victim's school on December 8, 2014—two days after Defendant's sexual assault of Victim—and taking Victim to the hospital that day because Victim was suicidal. R1294-96.

Mother then testified about when, the following January, Counselor called Mother to come in for a session. R1297,1304. When the prosecutor asked what Victim told Mother during the session, defense counsel objected. R1298. The prosecutor argued that the defense had brought out inconsistent statements by Victim during its cross-examination of Victim and that Victim's

[2] A transcript of Mother's testimony is attached at Addendum C.

prior consistent statements were now admissible to rebut that impeachment evidence. R1298-99. The court ruled that prior consistent statements are admissible "to rebut an impeachment about a prior inconsistent statement." *Id.*[3] Defense counsel said, "Okay." R1299.

Officer's testimony.[4] Officer Bruce Huntington was the lead investigator in the case. R1368. As part of his testimony, Huntington testified that he interviewed Victim at the Children's Justice Center. R1368-69. When asked whether Victim told him what had occurred on December 6, 2014, the officer responded, "That she had been raped." R1369. The prosecutor did not ask the officer any further questions about what Victim said. R1369-80. Defense counsel did not object.

C***ounselor's testimony.***[5] When Counselor testified, the prosecutor asked what Victim had told Counselor about Defendant when the two met a month after the rape. R1517. When the defense objected on hearsay grounds, the prosecutor withdrew the question. *Id.* Instead, the prosecutor asked

---

[3] The trial transcript identifies the court's statement as a question. R1298. But defense counsel's response indicates that the court's statement was a ruling. R1299.

[4] A transcript of the officer's testimony is attached at Addendum D.

[5] A transcript of Counselor's testimony is attached at Addendum E.

Counselor what her understanding of Victim and Defendant's relationship was, based on what Victim had told her. *Id.* Counselor testified that Victim could get drugs from Defendant and that his house was a place where she could go that had no rules. *Id.* When Counselor said she "could keep going," the defense objected that Counselor's testimony was cumulative and based on hearsay. R1518. The court ruled that Counselor's testimony was corroborating, not cumulative. R1519. The court did not specifically address defense counsel's hearsay objection, but did admonish the prosecutor to make sure that Counselor's testimony on Victim's prior statements did not go beyond Victim's testimony. *Id.*

Counselor then testified that she knew that Defendant was older than Victim, and that Victim had been seeing Defendant. R1520. Counselor also knew from Victim that Victim was a virgin. *Id.* And Counselor learned from Victim on January 6, 2015, that Victim had lost her virginity. R1521.

When the prosecutor asked what Victim told Counselor about her lost virginity, the defense objected on hearsay grounds. R1528. The prosecutor seemed to argue that Victim's statements to Counselor were made before Victim had a reason to fabricate. R1528. But the trial court admitted the evidence on a different basis—that Victim's prior consistent statements were

admissible once the defense impeached Victim "on different statements she's made." *Id.* Defense counsel said, "I'll withdraw." *Id.* Counselor then paraphrased what Victim had told her—that Defendant held her down, hit, and scratched her; that Defendant penetrated her vaginally and anally; that when Victim "begged him to stop," Defendant "would do it harder"; that he "was chanting some sort of bizarre chant" during the rape; and that "there was blood everywhere." R1530.

2. Defendant has not proved deficient performance.

Defendant has not proved that all competent counsel would have insisted that evidence of Victim's prior consistent statements was inadmissible hearsay. Competent counsel could have reasonably concluded, as the trial court did, that the statements were admissible to rehabilitate Victim even if they were not admissible under rule 801 for the truth of the matter asserted.

Hearsay "is not admissible except as provided by law or by these rules." Utah R. Evid. 802. "Hearsay" is any out-of-court statement offered "to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c).

Notwithstanding these general rules, any out-of-court statement that is "consistent with the declarant's testimony" is admissible for the truth of

the matter asserted if "offered to rebut an express or implied charge that the declarant recently fabricated it …." Utah R. Evid. 801(d)(1)(B). But prior consistent statements are admissible to rebut that charge "only" if they "were made prior to the time a motive to fabricate arose." *State v. Bujan*, 2008 UT 47, ¶1, 190 P.3d 1255; *accord Tome v. United States*, 513 U.S. 150, 165 (1995) (interpreting federal rule). The recent-fabrication rule, then, "creates a narrow avenue by which premotive statements are considered nonhearsay" and can be admitted "both for rehabilitative purposes *and, more importantly to the purpose of the rule, for their substance*." *Bujan*, 2008 UT 47, ¶¶11-12 (emphasis added).

But rule 801(d)(1)(B) applies only to statements that are admitted substantively—for the truth of the matters asserted—for the specific purpose of rebutting "a charge of recent fabrication, improper influence, or motive." *Bujan*, 2008 UT 47, ¶1. Rule 801(d)(1)(B), therefore, does not exclude all post-motive prior consistent statements. *Id.* at ¶9.

For example, rule 801(d)(1)(B) does not bar prior consistent statements that are not offered for the truth of the matter asserted but, rather, are offered to rehabilitate a witness whose credibility has been challenged on cross-examination. *Id.* at ¶12; *see also United States v. Ellis*, 121 F.3d 908, 919 (4th Cir.

1997) ("where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, … Rule 801(d)(1)(b) and its concomitant restrictions do not apply.") *accord United States v. Simonelli*, 237 F.3d 19, 26 (1st Cir. 2001); *People v. Eppens*, 979 P.2d 14, 22 (Colo. En Banc. 1999).

To prove deficient performance, then, Defendant must do more than show that Victim's prior consistent statements were inadmissible as substantive evidence under rule 801(d)(1)(B). He had to show that no competent counsel would have concluded that the statements might nonetheless be admissible, for example, for rehabilitation.

Defendant has not even tried to make that additional showing here. *See* Aplt.Br. 17-31. Instead, Defendant asserts that defense counsel should have continued to object under rule 801(d)(1)(B) because in connection with Counselor's testimony, the prosecutor inaccurately argued that Victim's statements predated her motive to lie. Aplt.Br. 24.

Defendant's assertion is unavailing. Regardless of what the prosecutor argued, the court ruled during Mother's testimony that Victim's prior consistent statements were admissible "to rebut an impeachment about a prior inconsistent statement." R1298. And during Counselor's testimony, the

court reached the same conclusion—that Victim's prior consistent statements were admissible because the defense impeached Victim "on different statements she's made." R1528. As shown, the law supports the trial court's ruling. *Bujan*, 2008 UT 47, ¶12. And Defendant has not proved that no competent counsel could conclude, based on the law, that the evidence offered through Mother and Counselor was admissible as non-substantive rehabilitation. *See Kelley*, 2000 UT 41, ¶26 (counsel is not ineffective assistance for not making futile objections).

Defendant's contention about the officer's testimony fails for the same reason, as well as an additional one. The prosecutor's questions to Mother and Counselor specifically asked the witnesses to testify about what Victim had told them. R1298 (prosecutor asking Mother, "what did she tell you?"); R1527 (prosecutor asking Counselor, "what words was she able to tell you?"). In both instances, then, the prosecutor's question warned defense counsel what was coming, and counsel could make a pre-emptive objection before the challenged evidence was put before the jury.

The prosecutor's question to the officer, however, asked whether Victim said anything, not what Victim said. R1369 (prosecutor asking officer, "And did she say what occurred?"). Arguably, then, the prosecutor's

question to the officer did not give defense counsel the same notice. The officer's statement—"That she had been raped," R1369—was thus before the jury before the defense could object to it. In the split second that followed, defense counsel could have reasonably concluded that no juror would be surprised by the officer's recap of what Victim told him. And defense counsel could have reasonably decided that it would therefore be "ill-advised to call undue attention to the unanticipated testimony.'" *State v. Reid*, 2018 UT App 146, ¶47, 870 Utah Adv. Rep. 24 (quoting *State v. Harper*, 2006 UT App 178, ¶25, 136 P.3d 1261). In other words, "'counsel's actions in ignoring the testimony may be considered sound trial strategy.'" *Id.* (quoting *Harper*, 2006 UT App 178, ¶25); *see also State v. Colonna*, 766 P.2d 1062, 1067 (Utah 1988) (defense counsel not deficient in not objecting to inadmissible evidence of past offenses because "it is conceivable that counsel made a deliberate and wise tactical choice in not focusing jury attention on [the statements] by objecting"). *Cf. State v. Houston,* 2015 UT 40, ¶76, 353 P.3d 55 ("When we review an attorney's failure to object to a prosecutor's statements during closing argument, the question is "not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only

defensible choice was to interrupt those comments with an objection.") (citation omitted).

In sum, Defendant has not proved that all competent counsel would persist in objecting to the admission of Victim's statements to Mother and Counselor—rather than withdrawing the objections, as counsel did here—or would have objected to the officer's single statement summarizing what Victim told him. Defendant thus has not shown that counsel performed deficiently.

3. Defendant has not proved prejudice.

Defendant's argument also fails because he has not proved prejudice. Defendant asserts that the evidence in this case was thin because the prosecution presented no witnesses who could corroborate that Defendant raped Victim and "no physical or forensic evidence to establish lack of consent." Aplt.Br. 28-29. Consequently, Defendant argues, the "pivotal issue for the jury" was Victim's credibility as to non-consent. Aplt.Br. 27. And, Defendant concludes, because Victim's prior consistent statements bolstered her credibility on "that central issue,", there is a reasonable likelihood of a different result had defense counsel objected to it. *Id.*

Defendant's argument, however, rests on his assumption that Victim's statements would have been excluded had defense counsel persisted in objecting to them under rule 801(d)(3)(B). *Id.* at 27-31. But, as shown, there was at least one other basis for admitting the evidence. *See* Point I.A.2 *supra*. Consequently, Defendant cannot show any reasonable likelihood of a different result had defense counsel persisted in objecting the evidence.

Moreover, Defendant's argument asserts only that, absent the evidence, the jury may have doubted whether Victim was an unwilling participant in the sexual encounter. *Id.* at 27-31. In support, Defendant notes that Victim texted him about birth control the day before their sexual encounter; that Victim "went freely" with him into the bedroom; that when Defendant asked if she wanted to have sex, she said yes; that she then sat next to and hugged Defendant when he dropped her off after the sex; that she then texted, "thank you lovely" and "you're amazing"; and that she talked about getting together with him the next day. *Id.* at 29. Defendant also notes that the examination of Victim a month after the assault found no evidence of anal injury and that the hymenal cut was consistent with both consensual and nonconsensual sex. *Id.* at 30. And Defendant notes that Victim's jealousy over

Defendant's relationship with other girls gave her a motive to fabricate her lack of consent. *Id.*at 30-31.

Defendant's prejudice argument fails because it goes to only one theory supporting the rape—that Victim expressed her lack of consent through words or conduct. R1800-01 (Jury Instr. 35, attached at Addendum F). But the prosecution also alleged non-consent based on evidence that Victim "was 14 years old or older, but younger than 18 years old," and Defendant "was more than three years older than" Victim and "enticed or coerced" her "to submit or participate under circumstances not amounting to physical force or violence or the threat of retaliation." *Id.*;R1808 (prosecution's closing argument, attached at Addendum G); *see also* Utah Code Ann. § 76-5-406(11) (defining such enticement as non-consent).

Further, the evidence on the enticement theory of non-consent was *not* thin and did not depend on Victim's credibility alone. Indeed, it included evidence that Defendant sent thousands of messages to Victim, including sexual messages; that Defendant provided Victim with drugs and a place without rules; that Defendant knew about Victim's problems with her father and said he would take care of Victim; that he persisted in contacting her even after her father got a protective order; and that when Victim voiced wanting

to break up, Defendant threatened to commit suicide or to hurt either her or her father. *see, e.g.*, R1059-1173,1239-77; Def.Exh. 1; St.Exh. 20. Much of this was proved by the actual text messages between Defendant and Victim.

Fatally, Defendant's prejudice argument does not address this overwhelmingly evidence that Defendant "enticed or coerced" Victim "to submit or participate" in his raping her. For this reason also, Defendant's prejudice argument fails.

C. Defendant has not proved that all competent counsel would have objected to Mother's isolated statement that Victim did not seem to be faking when she confirmed what Counselor told Mother about Defendant's assault. Defendant also has not proved prejudice.

As stated, Mother testified that she learned of Defendant's assault at a meeting with Victim and Counselor. When the prosecutor asked, "what did [Victim] tell you?," the defense objected on hearsay grounds. After the court overruled the objection, Mother testified that, in fact, Counselor provided most of the details of the assault and that Victim only apologized and, while crying, said it was true. The prosecutor asked if it appeared that Victim "was faking?" Mother said, "Not at all, no." The defense did not object.

Defendant argues that defense counsel was ineffective for not objecting when the prosecutor asked Mother if she believed Victim was faking. Aplt.Br.

32-34. Defendant's contention appears to be that counsel had an obligation to object because counsel had a basis to do so. *Id.* Again, Defendant has not shown deficient performance or prejudice.

1. Defendant has not proved deficient performance.

Relying on *State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989), Defendant argues that counsel should have objected that Mother could not testify to whether Victim was telling the truth during Mother's meeting with Victim and Counselor. Aplt.Br. 32-34. But as stated, an objection's potential merit is not dispositive on whether defense counsel performed deficiently in not raising it. *See Bedell*, 2014 UT 1, ¶¶21-25; *Clark*, 2004 UT 25, ¶7; *Pecht*, 2002 UT 41, ¶¶40-44; *Bullock*, 791 P.2d at 159. In fact, the "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *Nguyen*, 379 Fed.Appx. at 181; *accord Thomas*, 520 Fed.Appx. at 281. In other words, "the defense may be aware of a prosecutor's misstep but choose not to highlight it through an objection." *State v. Hummel*, 2017 UT 19, ¶109, 393 P.3d 314.

Here, competent defense counsel could reasonably conclude that the jury would be neither surprised nor swayed by Mother's testimony that she

did not believe her daughter was "faking" an emotional response to disclosing Defendant's assault. Competent counsel could also reasonably conclude that the jury might be offended by any attempt by the defense to silence a mother's testimony about her own child's demeanor. Competent counsel could reasonably conclude that an objection would be futile, given that the question arguably went to Mother's perception of Victim's demeanor, not to whether Victim was being truthful. And, finally, competent counsel could reasonably conclude that objecting to Mother's isolated comment would encourage the jury to give her comment more attention than the jury might otherwise.

In sum, Defendant only points to an objection that counsel could have made. But he has not proved that all competent counsel would have made it.

2. Defendant has not proved prejudice.

Defendant's argument also fails to prove prejudice. As with his previous prejudice argument, Defendant's argument here focuses on only one of the State's theories of non-consent—that Victim expressed non-consent through words and conduct. *See* Aplt.Br. 33-34. Defendant's argument nowhere addresses the prosecution's arguably stronger enticement theory. *See id.* Even if Defendant could establish that Mother's isolated comment

could have had some effect on the prosecution's evidence supporting the first theory, then, Defendant still has not shown prejudice, because he has not shown any reasonable likelihood that it would have had any effect on the prosecution's enticement theory. *See id.*

Furthermore, Mother's isolated comment came on the second day of a four-day trial involving 13 witnesses. R867-69. In addition, it was unlikely that the jury would be surprised that a mother would voice faith in what her daughter had told her. *Cf. State v. Houskeeper*, 2002 UT 118, ¶26, 62 P.3d 444 (improperly admitted evidence of defendant's attempt to obtain drugs was harmless because, in light of other evidence, defendant's solicitation "would come as little surprise to the jury"). For these reasons also, Defendant cannot prove prejudice.

D. Defendant has not proved that all competent counsel would have objected to Victim's two passing references to Defendant having been in jail instead of forgoing an objection so as not to emphasize the references, as defense counsel did here.

Defendant argues that defense counsel should have objected to Victim's two fleeting references to Defendant having been in jail at one point in their relationship, equating the references to "requiring a defendant to appear in prison clothes or informing the jury about prior unrelated

convictions." Aplt.Br. 34. Defendant has not proved deficient performance or prejudice.

1. Defendant has not proved deficient performance.

Defendant's contention appears to be that counsel should have objected because counsel had a basis to do so. *Id.* But counsel's later explanation makes clear that counsel knew they could object and strategically chose not to. And Defendant has not shown that no other counsel would have made that decision. Again, then, Defendant has not shown deficient performance.

On direct examination, Victim testified about how she met Defendant, how they started talking with each other over social media, and how, eventually, she started sneaking out of her home and skipping school to visit Defendant. R1061-69. Victim also testified that after her father got a protective order to keep Defendant and Victim apart, Defendant and Victim found new, more secretive ways to stay in contact. R1073.

Victim then testified that after her friend committed suicide, she felt overwhelmed and sent Defendant a message. R1077. Victim testified that the two started talking more and "finally hung out" after Defendant "got out of jail." *Id.* She continued that it was on their first visit after Defendant "got out

of jail" that Defendant told Victim that she could not see other people. R1078. And it was during that same visit that Defendant referenced Victim's friend who had committed suicide and "almost apologized to me for killing" the friend. R1078.

Victim then testified about what else happened on that first day she and Defendant saw each other again. R1078-79. And she testified how, the next day, Defendant had vaginal and anal sex with her as she screamed and cried for him to stop. R1083-87.

After the jury was excused during a break in Victim's testimony, the court asked whether either party wanted to put anything on the record. R1090-91. Defense counsel said: "No. I mean, I caught her saying about him getting out of jail a couple times, but didn't want to draw attention to it." R1091. Counsel then asked the prosecution to "instruct its remaining witnesses and remind [Victim] not to mention anything about jail." R1092. And the court instructed the prosecution to talk with its witnesses on the matter. R1093-94.

Thus, Defendant's counsel made a conscious choice not to object. And to prove that that choice was constitutionally unacceptable, Defendant must

overcome the strong presumption otherwise. *See Strickland*, 466 U.S. at 689. Defendant has not undertaken that burden.

As an initial matter, two brief references to Defendant having been in jail are not the same as references to prior convictions or being tried in prison garb. First, evidence that a defendant has a prior conviction is evidence that the defendant has actually previously been found guilty of committing a crime. But a person's being in jail may simply indicate an arrest. And here, where there was evidence that Defendant used drugs, a jury would likely believe he was arrested for that, not for any more nefarious reason. Second, the Utah Supreme Court has expressly rejected as "meritless" a defendant's attempt to equate a reference to his having been in jail "clearly elicited inadvertently, made during a three-day trial to the prejudice inherent in requiring a defendant to stand trial while wearing prison garb." *State v. Velarde*, 734 P.2d 440, 448 (Utah 1986).

Defendant's argument, then, is simply that counsel was deficient because he could have objected, but did not. Aplt.Br. 34. As shown, that alone is insufficient. *See Bedell*, 2014 UT 1, ¶¶21-25; *Clark*, 2004 UT 25, ¶7; *Pecht*, 2002 UT 41, ¶¶40-44; *Bullock*, 791 P.2d at 159.

And on this record, Defendant cannot overcome the strong presumption that counsel's decision was reasonable. Victim's references were "vague," "fleeting," and "not elicited by the prosecutor." *State v. Butterfield*, 2001 UT 59, ¶47, 27 P.3d 1133 (trial court did not abuse discretion in denying mistrial motion where officer's improper reference to defendant's being in jail was "a 'vague,' 'fleeting' remark that was not elicited by the prosecutor"); *see also State v. Velarde*, 734 P.2d at 448 (rejecting defendant's attempt to "equate[] a single phrase" about his having been in jail, "clearly elicited inadvertently, made during a three-day trial to the prejudice inherent in requiring a defendant to stand trial while wearing prison garb").

Further, as stated, whether to object "is a quintessential matter of strategy and discretion on the part of the trial attorney." *Nguyen*, 379 Fed.Appx. at 181. In other words, "strategically refusing to object" can be "an acceptable trial strategy." *State v. Larrabee*, 2013 UT 70, ¶27, 321 P.3d 1136.

A different attorney may have exercised his discretion differently. But Defendant's attorney could and did reasonably conclude that the better course was to avoid drawing attention to the two isolated jail references made by the first witness in a four-day trial, thereby avoiding emphasizing that fact for the jury. *Cf. Houston*, 2015 UT 40, ¶76 ("When we review an attorney's

failure to object to a prosecutor's statements during closing argument, the question is "not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection.") (citation omitted); *see also Barela*, 2015 UT 22, ¶21 (question in determining *Strickland* deficient performance is "whether a reasonable, competent lawyer could have chosen the strategy that was employed in the real-time context of trial").

Defendant, therefore, has not proved deficient performance.

2. Defendant has not proved prejudice.

Defendant also has not proved that objecting to the two isolated and fleeting jail references would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely.

First, as with his previous prejudice arguments, Defendant focuses on only one of the State's theories of non-consent—that Victim expressed non-consent through words and conduct. *See* Aplt.Br. 34-40. Again, therefore, Defendant nowhere addresses the prosecution's arguably stronger enticement theory. *See id.* Even if Defendant could establish that Victim's isolated references could have had some effect on the prosecution's evidence supporting the first theory, then, Defendant still has not shown prejudice,

because he has not shown any reasonable likelihood that they would have had any effect on the prosecution's enticement theory. *See id.*

Second, Victim's isolated references came in the first 20 pages of the first witness's testimony on the first day of a four-day trial where 13 witnesses testified. *Cf. Butterfield*, 2001 UT 59, ¶47 (trial court did not abuse discretion in denying mistrial motion where officer's improper reference to defendant's being in jail was "a 'vague,' 'fleeting' remark that was not elicited by the prosecutor"); *Velarde*, 734 P.2d at 448; *State v. Yalowski*, 2017 UT App 177, ¶18, 404 P.3d 53 ("because Victim's statement [that defendant had previously been violent] lacked detail, was not elicited by the prosecutor, and was not emphasized or dwelt on during trial, we conclude that Defendant was not prejudiced by the statement").

Defendant's claim thus also fails for lack of prejudice.

II

WHERE THERE WAS NO ERROR, THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

Defendant finally argues that even if this Court concludes that no individual error warrants a new trial, this Court should reverse Defendant's rape conviction under the cumulative error doctrine. Aplt.Br. 40-42.

The cumulative error doctrine applies "'when a single error may not constitute grounds for reversal, but many errors, when taken collectively,' do." *State v. Martinez-Castellanos*, 2018 UT 46, ¶39, 872 Utah Adv. Rep. 51 (quoting *State v. Perea*, 2013 UT 68, ¶97, 322 P.3d 624). Thus, the doctrine does not apply "when 'claims are found on appeal to not constitute error, or the errors are found to be so minor as to result in no harm.'" *Id.* at ¶40 (quoting *State v. Maestas*, 2012 UT 46, ¶363, 299 P.3d 892). "In other words, the doctrine will only be applied to errors that are 'substantial' enough to accumulate." *Id.*

Here, Defendant has not established any error, let alone any substantial prejudice therefrom. Thus, his cumulative error claim fails.

CONCLUSION

On appeal, Defendant does not challenge his protective-order convictions. Thus, this Court should affirm them outright.

Although Defendant does challenge his rape conviction on the ground that his defense counsel was constitutionally ineffective, Defendant has not proved either that defense counsel performed deficiently or that he was prejudiced by counsel's deficient performance. This Court should therefore also affirm Defendant's rape conviction.

Respectfully submitted on October 29, 2018.

SEAN D. REYES
Utah Attorney General

/s/ Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 9, 335 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☐ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☑ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 29, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Troy L. Booher
Zimmerman Booher
Felt Building, Fourth Floor
Salt Lake City, UT 84111
tbooher@zbappeals.com

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Public

Case No. 20161070-CA October 23 at 1 pm

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ASHTEN NUNES,
Defendant/Appellant.

Brief of Appellee

Appeal from convictions on one count of rape, a first degree felony, and ten counts of violating a protective order, a Class A midsdemeanor, in the Third Judicial District, Salt Lake County, the Honorable Vernice Trease presiding

TROY L. BOOHER
FREYJA R. JOHNSON
Zimmerman Booher
Felt Building, Fourth Floor
341 South Main Street
Salt Lake City, UT 84111
tbooher@zbappeals.com
fjohnson@zbappeals.com

Counsel for Appellant

KAREN A. KLUCZNIK (7912)
Assistant Solicitor General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180
Email: kklucznik@agutah.gov

SANDY JOHNSON
Salt Lake County D.A.'s Office

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

Case No. 20161070-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

ASHTEN NUNES,
Defendant/Appellant.

Brief of Appellee

INTRODUCTION

Victim met Defendant, then 17 years old, when Victim was 14. At the time, Victim and her father were fighting all the time. Victim was in therapy for that and for depression.

Victim and Defendant soon started texting. Before long, Defendant was texting Victim about sexual things and how Defendant would take care of her. Victim liked Defendant. She had never really had a boyfriend before, and nobody else had ever made her feel she was actually loved.

Victim's parents, however, wanted Defendant to stay away from Victim. When talking to Defendant did not work, they got a protective order prohibiting him from contacting Victim. Defendant ignored the order.

One night, Defendant asked Victim if she wanted to have sex, and she said yes. But when Defendant started to penetrate Victim, Victim asked him to stop. Instead, as Victim screamed and cried, Defendant put his penis in Victim's anus and vagina.

About a month later, Victim told her counselor what Defendant had done. Victim begged Counselor not to tell anyone. But Counselor convinced Victim to tell her parents. Victim then told the police.

Defendant was charged with one count each of rape and forcible sodomy and ten counts of violating a protective order. At his four-day trial, Defendant conceded the protective-order violations and that he and Victim had had sex. The only issue was whether Victim consented to the sex. One of the State's theories of non-consent was that Victim had expressed her non-consent through words and conduct. A second theory was that Defendant was at least three years older than Victim and he enticed or coerced her to have sex. The jury found Defendant guilty of rape and the protective-order violations. It acquitted him of forcible sodomy.

Defendant raises three ineffective assistance claims on appeal. First, he asserts counsel was ineffective for withdrawing hearsay objections to evidence of Victim's prior consistent statements presented through Victim's

mother, the investigating officer, and Counselor. Mother testified that she learned of Defendant's assault of Victim at a meeting with Victim and Counselor. The prosecutor asked, "what did [Victim] tell you?" Defense counsel objected on hearsay grounds. When the court agreed with the prosecutor that the defense had asked Victim about prior inconsistent statements and that Victim's prior consistent statements were admissible to rebut that impeachment, the defense said, "Okay." The lead investigator testified that he conducted Victim's CJC interview. When the prosecutor asked whether Victim told him what had happened, the officer responded, "That she had been raped." The defense did not object. Later, when the prosecutor asked Counselor what Victim told her about Defendant's assault, the defense objected on hearsay grounds. When the court ruled that Victim's statements were prior consistent statements admissible to rebut Defendant's prior impeachment of Victim, the defense withdrew its objection.

Defendant's ineffectiveness, that counsel should have objected to the evidence as inadmissible hearsay under Utah R. Evid. 801 fails. First, Defendant has not shown that the evidence was so clearly inadmissible that all competent counsel would decide to continue to object, especially once the trial court had ruled that the evidence was admissible. Thus, Defendant has

not shown deficient performance. But Defendant also has not shown prejudice—a reasonable likelihood of a different result had counsel continued to object. Defendant's prejudice argument is that absent counsel's alleged errors, there is a reasonable likelihood the jury would have found that Victim willingly participated in the sex with him. But the prosecution also argued non-consent on the theory that Defendant enticed and coerced Victim to engage in the sex. Defendant does not address that theory and, thus, does not show any reasonable likelihood that absent counsel's alleged errors, the jury would have rejected it.

Defendant's second ineffectiveness claim faults defense counsel for not objecting when Mother testified she did not believe Victim was faking her emotional state during the meeting with Counselor. But competent counsel could reasonably conclude that the jury would not be particularly surprised to hear that a mother believed her child. Competent counsel could thus reasonably conclude that objecting to Mother's isolated statement could hurt Defendant by encouraging the jury to give the statement more weight than it otherwise would. Moreover, Defendant again has not proved prejudice because his argument addresses only one of the State's theories of non-consent.

Finally, Defendant argues that counsel was ineffective for not objecting to Victim's references to Defendant being in jail. Victim was the State's first witness in a four-day trial in which 13 witnesses were called. Early in her testimony, Victim twice referred to Defendant having been in jail during their relationship. Defense counsel did not object, later explaining that they had heard Victim's references, "but didn't want to draw attention" to them. Defendant's claim fails because counsel strategically chose not object to Victim's isolated jail references to avoid drawing attention to them, and Defendant has not shown that no competent counsel would have made the same decision. Further, his prejudice argument again addresses only one of the State's theories of non-consent.

STATEMENT OF THE ISSUES

Issue I. Has Defendant proved ineffective assistance of counsel?

--- Has Defendant proved that Victim's prior consistent statements were so clearly inadmissible that all competent counsel would have concluded it would not be futile to continue objecting to them, even after the trial court had ruled they were admissible? Has Defendant proved prejudice where he has not shown that the evidence was inadmissible and where his

argument does not prove a reasonable likelihood of a different result under the State's enticement theory of non-consent?

--- Has Defendant proved that all competent counsel would have objected to Mother's isolated statement that Victim did not seem to be faking when she confirmed what Counselor told Mother about Defendant's assault? Has Defendant proved prejudice, where the only issue at trial was consent and Defendant's prejudice argument addresses only one of the two major non-consent theories argued by the State?

--- Has Defendant proved that all competent counsel would have drawn attention to Victim's passing references to Defendant being in jail by objecting to them rather that avoiding that attention by choosing not to object? Has Defendant proved prejudice, where the only issue at trial was consent and Defendant addresses only one of the two major non-consent theories argued by the State?

Standard of Review. "When an ineffective assistance of counsel claim is raised for the first time on appeal, there is no lower court ruling to review"; thus, this Court decides the issue as a question of law. *Layton City v. Carr*, 2014 UT App 227, ¶6, 336 P.3d 587.

Issue II. Does Defendant's cumulative error argument fail?

Standard of Review. An appellate court reverses under the cumulative error doctrine only if the errors "are 'substantial' enough to accumulate" and the cumulative effect of the errors undermines its confidence in a fair trial. *State v. Martinez-Castellanos*, 2018 UT 46, ¶¶39,40, 872 Utah Adv. Rep. 51.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Victim met Defendant, who was more than three years older than her, at a concert when Victim was a 14-year-old ninth grader. R1060-61;St. Exh. 9. Before meeting Defendant, Victim was "involved in everything"—music, art, drama, sports. In addition, she was "very popular, very happy," and a "straight A student." R1279. Victim and her father did start having difficulties when her parents started having marital problems. R1066. But Victim was in therapy for that and for depression. R1516.

Defendant and Victim soon started texting. R1061. Before long, Defendant texted Victim about sexual things, like that Victim should "finger" herself in a bathroom stall during school. R1063;Def.Exh. 1. And he sent her messages about sexual things he wanted to do to her. R1147;Def,Exh, 1. They

also talked about Victim's father, and Defendant would tell her that Defendant would take care of her. R1066.

Soon, Defendant encouraged Victim to sneak out to see him. *Id.* Defendant or his mother would then pick Victim up and bring her to their house. R1063,1078. Victim liked going over to Defendant's house because she and Defendant could do drugs and Defendant's mother didn't care. R1066. Defendant's mother also never told her to go home. *Id.*

Meanwhile, Victim's parents noticed dramatic changes in Victim after she started interacting with Defendant. R1279,1281. Victim started to lose her friends. R1281. Her depression became more severe. *Id.* And she started missing school and lying about her whereabouts. R1282-96.

One of the times Victim snuck out to see Defendant on a weekday, she and Defendant smoked marijuana and then fell asleep. R1064. The next morning, when Victim's parents could not find or get in touch with Victim, they called the police. R1064. After Defendant dropped Victim off a short distance from her house, Victim walked home and lied that she had a nightmare and, feeling suicidal, decided to go for a walk. *Id.* Victim's father did not believe her. *Id.*

Another time, Victim skipped school to go to a party at Defendant's house. R1068-69. Everyone there was at least five years older than Victim *Id.* And all of them were snorting drugs and smoking. *Id.*

When Victim's parents found out Victim had skipped school, they took her phone and went through the messages. *Id.* Victim had "millions of text messages" from Defendant. *Id.* After reaching out unsuccessfully to Defendant and his mother to have Defendant stop contacting Victim, Victim's father got a protective order prohibiting Defendant from contacting Victim R1069-70.

But Defendant and Victim still messaged each other, using all different types of media to keep their contact secret. R1073. And every time they got together, Defendant would grope Victim and try to have sex with her, but Victim would say no. R1070.

Victim did not realize that Defendant's conduct was abnormal. *Id.* She had never really had a boyfriend before. R1062. She also cared for Defendant. R1071,1074. Nobody had ever made her feel like she was actually loved. R1062. And Victim wanted that. *Id.* Defendant also intrigued her because he was interested in magic and crystals. *Id.* And he intimidated her because he

was older. *Id.* At the same time, Victim knew that Defendant was seeing other people, and she was jealous. R1081.

Sometimes, though, Victim would try to end the relationship. When she did, Defendant would threaten to commit suicide or threaten to hurt Victim or her father. R1071,1338. One time, after Victim went to a school dance with another boy, the boy committed suicide a few weeks later, and Defendant claimed he had a hand in it because she was not supposed to see other people. R1075-78. So Victim was also scared of Defendant. R1071.

Victim's father later concluded, in retrospect, that Victim "was kind of being brainwashed by" Defendant "and just coerced and manipulated." R1338.

On December 5, 2014, Defendant's mother picked Victim up after school and took her to a new home Defendant was moving into. R1078. Defendant seemed crazier than usual, talking about God, devils, and demons. R1079. He tried to have sex with Victim, but she said no. *Id.* Defendant's mother later brought Victim home. R1080.

The next day, Defendant told Victim that he needed to see her. R1080. Defendant asked Victim if she wanted to have sex, and she said yes. R1244. But when Defendant propped Victim up on her knees and held the back of

her head down on the bed, Victim asked him to stop. R1084-87. Instead, as Victim screamed, cried, and continued to ask him to stop, Defendant put his penis in Victim's anus and vagina. R1085-87. Victim had never experienced anything so painful. R1087,1090. After Defendant ejaculated on Victim's back, Victim got up and had blood all over her. R1085-87.

Almost immediately, Defendant and his mother took Victim home. R1088. Victim did not say anything to Defendant's mother on the way home; Victim knew she wouldn't care. *Id.* Although Victim hugged Defendant when she left the car, she cried for a long time once she was home. R1087,1089.

Two days later, Victim was hospitalized after reporting to a school counselor that she felt suicidal. R1098. Still, for about a month, Victim and Defendant continued to text. *See, e.g.*, St.Exh. 16-19;Def. Exh. 3. In some texts, Victim was affectionate. *See id.* In others, when she said she didn't want to see Defendant anymore, Defendant threatened to commit suicide or hurt her. *Id.*

About a month after the rape, Victim went to see her counselor. R1521. Counselor knew that Victim had been seeing Defendant. R1520. Counselor also knew that Victim could get drugs from Defendant and that his house was a place she could go to that had no rules. R1517. And Counselor knew from Victim that Victim was a virgin. R1520-21.

During the session, though, Victim disclosed that she had lost her virginity, and Counselor recalled that "what happened [next] was extremely alarming." R1526-27. Victim "went into a full-blown panic attack"—breathing abnormally and "sobbing." R1627. Victim's distress continued for about 20 minutes. *Id.* Counselor had "never seen anything like it." *Id.*

When Victim finally calmed down, she told Counselor that Defendant had held her down, hit and scratched her; that Defendant had penetrated her vaginally and anally; that when Victim "begged him to stop," Defendant "would do it harder"; and that "there was blood everywhere." R1530.

When Counselor informed Victim that what Defendant had done was rape, Victim begged her not to tell anyone. R1533. But Counselor convinced Victim to tell Victim's parents. R1534-35. After Victim's parents were told, Victim was interviewed by the police. R118. A subsequent genital exam revealed that Victim had a healed cut in her hymen. R1432.

Meanwhile, police searched Defendant's house and seized a blanket. R1346. Victim's DNA was found in a blood spot on the blanket. R1392,1394,1420-21,1428.

B. Summary of proceedings and disposition of the court.

Defendant was charged with one count each of rape and forcible sodomy, both first degree felonies, and ten counts of violating a protective order, all class A misdemeanors. R1-4,887-78. At trial, Defendant conceded his guilt on the protective-order counts. R1050-51,1810. He also admitted having sex with Victim. R1810,1823. The only contested issue, therefore, was whether Victim consented to the sex. R1803-24.

The State's theories of nonconsent included that (1) Victim expressed "lack of consent through words or conduct"; (2) Defendant coerced Victim "by threatening immediate or future retaliation" against Victim or another person and Victim thought at the time that Defendant "had the ability to carry out the threat"; and (3) Victim between 14 and 18 years old, Defendant was at least three years old than her, and Defendant "enticed or coerced" her "to submit or participate" in the sex.R1800-01 (Jury Instr. 35).

The defense. Defendant's defense at trial was that Victim consented to having sex. R1050-58. In support, Defendant presented evidence that Victim's hymenal cut was consistent with consensual sex. R1619. In addition, Defendant cited a message from Victim before the encounter, in which Victim arguably teased Defendant about having sex. R1135. Defendant also

presented evidence that Defendant had asked Victim if she wanted to have sex and she had said yes. R1244. Defendant cited messages from Victim after the encounter in which Victim said Defendant was "amazing" and expressed her love for him. Def.Exh. 7. And Defendant argued that Victim's motive for alleging rape was that she was jealous of other women Defendant was also having sex with. R1141.

The jury's verdict. The jury convicted Defendant on the rape and protective-order counts. R575-77. It acquitted him of forcible sodomy. *Id.* The trial court sentenced Defendant to zero-to-365 day jail terms on each of the protective-order convictions. R613-16. It sentenced him to five-years-to-life on the rape conviction, to run consecutively to his other sentences in this case and his sentences in another case. *Id.*

The appeal. Defendant timely appealed. R625-26.

SUMMARY OF ARGUMENT

Point I. Defendant argues that defense counsel was ineffective because they withdrew their objections to evidence of Victim's prior consistent statements admitted through Mother, Counselor, and the lead investigator. Defendant contends counsel should have insisted that the evidence was inadmissible hearsay.

Defense counsel withdrew their objections, however, after the trial court ruled that the evidence was admissible to rehabilitate Victim after the defense's cross-examination of her. Competent counsel could have reasonably concluded that the trial court's ruling was correct. Moreover, once the trial court ruled, competent counsel could have decided that any further objection would be futile. For both of these reasons, Defendant cannot prove deficient performance—that no competent counsel would have done as defense counsel did here.

Defendant also has not proved prejudice. First, Defendant has not shown that the trial court erred in ruling that the evidence was admissible. Thus, he has not proved that the evidence would have been excluded had counsel continued to object. Second, Defendant's prejudice argument addresses only one of the two major theories of non-consent in arguing a probability of a different result had counsel objected. Defendant's argument, therefore, does not address the arguably stronger theory, which would not have been weakened had the challenged evidence been excluded.

Defendant also argues that defense counsel was ineffective for not objecting when Mother testified that she did not believe Victim was faking her emotional response during the meeting with Counselor at which Mother

learned of Defendant's assault. Competent counsel, however, could have reasonably concluded that the jury would not be surprised—and thus Defendant would not be prejudiced—by Mother's comment. And competent counsel could have reasonably concluded that an attempt to silence Mother on the subject by objecting could offend the jury and thereby hurt Defendant. Thus, Defendant has not proved deficient performance.

Defendant also has not proved prejudice. First, as with his first ineffectiveness claim, Defendant's prejudice argument addresses only one of the two major theories of non-consent in arguing a probability of a different result had counsel objected. For this reason alone, his prejudice argument fails. But also, Mother's comment was an isolated comment made during the course of a four-day trial. Its prejudicial effect, if any, was likely minimal.

Finally, Defendant argues that defense counsel was ineffective for deciding not to object to two references by Victim, early in the trial, to Defendant having been in jail during their relationship.

Defense counsel, however, specifically put on the record that they strategically chose not to object so as not to draw attention to the references. Defendant has not shown that no other counsel would have made the same choice. Thus, Defendant has not proved deficient performance.

Moreover, as with his other two ineffectiveness claims, Defendant's prejudice argument addresses only one of the State's main theories of non-consent. Thus, Defendant does not explain why two isolated comments early during a four-day trial involving 13 witnesses were so prejudicial to that theory as to render a different result likely in their absence.

Point II. Defendant asks this Court to reverse his rape conviction under the cumulative error doctrine. Defendant, however, has not shown that his counsel performed deficiently at his trial. Thus, he has not shown any error that would trigger the cumulative error doctrine.

ARGUMENT

I.

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FAIL BECAUSE HE HAS NOT PROVED EITHER THAT NO COMPETENT ATTORNEY WOULD HAVE PROCEEDED AS HIS COUNSEL DID OR A REASONABLE PROBABILITY OF A MORE FAVORABLE OUTCOME

On appeal, Defendant does not challenge his protective-order convictions. Aplt.Br. 41. He only challenges his rape conviction. *Id.* As to that conviction, Defendant argues that his trial counsel was ineffective because they (1) did not persist in objecting to evidence of Victim's prior consistent statements as inadmissible hearsay; (2) did not object to Mother's single

statement that she did not believe Victim was "faking" when Victim confirmed Counselor's description of what had happened with Defendant; and (3) chose not to object when Victim mentioned in passing that Defendant had been in jail. *Id.* at 17.

Defendant has not proved deficient performance—that no competent attorney would have followed counsel's course. He also has not proved prejudice—the only issue at trial was consent and Defendant ignores one of the main theories by which the State proved non-consent. The failure to prove either independently defeats his claims.

A. To prove ineffective assistance of counsel, Defendant must prove both that no competent counsel would have represented him as his counsel did and that he was prejudiced by counsel's conduct.

To show that his counsel was constitutionally ineffective, Defendant must prove both that counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-89, 694 (1984). The defendant's proof "cannot be a speculative matter but must be demonstrable reality." *State v. Munguia*, 2011 UT 5, ¶30, 253 P.3d 1082 (quotations and citation omitted). Surmounting *Strickland*'s high bar is "never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To prove deficient performance, Defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. To meet that burden, Defendant must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. The "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam). There is "no expectation that competent counsel will be a flawless strategist or tactician." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Thus, the "relevant question" under *Strickland* is "not whether counsel's choices were strategic," *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000), or "deviated from best practices or most common custom," *Richter*, 562 U.S. at 105. Rather, the relevant question is whether counsel's choices "were reasonable" or "amounted to incompetence under prevailing professional norms." *Id*. at 105. And to prove that, Defendant must prove that "no competent attorney" would have done what his counsel did. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *see also Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (counsel deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted

similarly"); *Chandler v. United States*, 218 F.3d 1305, 1315 & n.17 (11th Cir. 2000) (en banc) (counsel deficient only when defendant can show "that no competent counsel would have taken the action that his counsel did take").

When evaluating a claim that counsel should have made an objection, then, *Strickland*'s deficient performance prong does not turn on the objection's merits alone. The potential merits of the objection may factor into that analysis, but is dispositive only if the objecting would have been futile. Counsel cannot be ineffective for not raising a futile objection. *See State v. Kelley*, 2000 UT 41, ¶26, 1 P.3d 546 ("Failure to raise futile objections does not constitute ineffective assistance.").

An objection's potential merit, although relevant, is not otherwise dispositive. The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 Fed.Appx. 177, 181 (3rd Cir. 2010); *accord Thomas v. Thaler*, 520 Fed.Appx. 276, 281 (5th Cir. 2013).

Competent counsel may decide to forego an objection—or, as here, withdraw it—because he reasonably concludes that it is unlikely to succeed. This decision may be reasonable even though a later reviewing court might

ultimately hold that the objection would have succeeded. As stated, the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Gentry*, 540 U.S. at 8.

Competent counsel may also reasonably conclude that foregoing an objection better serves his client than would an objection. *See State v. Bedell*, 2014 UT 1, ¶¶21-25, 322 P.3d 697 (counsel strategized to admit evidence of defendant's prior acts to attack victim's credibility); *State v. Clark*, 2004 UT 25, ¶7, 89 P.3d 162 (although counsel could have objected to witnesses' testimony, counsel "may well have made a reasonable tactical choice when he did not object"); *State v. Pecht*, 2002 UT 41, ¶¶ 40–44, 48 P.3d 931 (counsel's not objecting to evidence of defendant's incarceration was sound trial strategy); *State v. Bullock*, 791 P.2d 155, 159 (Utah 1989) (counsel reasonably decided to allow child victims' out-of-court statements rather than insist that they testify).

And competent counsel may simply overlook a possible objection. *See Richter*, 562 U.S. at 111 (although "'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' … it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy") (citation omitted).

Thus, "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986).

"Judicial scrutiny of counsel's performance," therefore, "must be highly deferential." *Strickland*, 466 U.S. at 689. A "court considering an ineffectiveness claim must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). While it "is all too tempting" and "easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," courts must resist that temptation. *Strickland*, 466 U.S. at 689. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

Again, the determinative question "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. The rule distills to this: counsel's representation is objectively reasonable, and therefore constitutionally compliant, unless "no competent attorney" would have proceeded as he did. *Moore*, 562 U.S. at 124.

Importantly, Defendant's strict reliance on the American Bar Association standards for defense counsel to prove deficient performance, *see* Aplt.Br. 26,33,40, conflicts with the law. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89. In fact, "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id*. at 689.

Thus, "[p]revailing norms of practice as reflected in American Bar Association standards and the like" are only "guides to determining what is reasonable." *Id*. at 688. They are "not 'inexorable commands.'" *Bobby v. Van Hook*, 558 U.S. 4, 8- 9 (2009). While "private organizations … 'are free to impose whatever specific rules they see fit to ensure that criminal defendants

are well represented, … the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.'" *Id*. at 9 (citation omitted).

To prove *Strickland* prejudice, the defendant must prove "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different"–"the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 688, 694-95. A reasonable probability is one "sufficient to undermine confidence in the outcome.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 694). Thus, it "is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693). Defendant must prove that the "likelihood of a different result" is "substantial, not just conceivable." *Id.* at 112 (citation omitted).

B. Defendant has not proved that all competent counsel would have persisted in objecting to evidence of Victim's prior consistent statements once the trial court ruled that the statements were admissible to rehabilitate Victim after Defendant impeached her. Defendant also has not proved either that the statements were excludable or a reasonable probability of a more favorable outcome if they had been excluded.

At Defendant's trial, Mother, Counselor, and the officer who conducted Victim's CJC interview testified about prior statements Victim had

made to them that were consistent with Victim's trial testimony. Defendant asserts that those prior statements were made after Victim had a motive to fabricate and, thus, were inadmissible under Utah R. Evid. 801(d)(1)(B). Aplt.Br. 17-31. Accordingly, Defendant argues, defense counsel performed deficiently when they withdrew their objections after the trial court ruled the statements were admissible. *See id.* Defendant's argument fails because reasonable counsel could conclude that, as the trial court ruled, Victim's prior consistent statements were admissible despite rule 801(d)(1)(B).

1. Background.

Victim's testimony.[1] Victim testified that Defendant had vaginal and anal sex with her without her consent on December 6, 2014. R1084-87. On cross-examination, defense counsel asked Victim about statements she had made both before and after the sexual assault that, according to the defense, suggested the sex was not unwelcomed and thus were inconsistent with Victim's testimony that she did not consent. For example, the defense referred to a message from Victim to Defendant the day before the assault stating that she had a present for him—mushrooms and birth control. F1135. The defense asked if Victim remembered telling Defendant after the sexual

[1] A transcript of Victim's testimony is attached at Addendum B.

encounter that "I gave everything away to you and you don't even fucking care. That kills me." R1140. The defense asked if Victim remembered tweeting him the day after the assault that she had lost her virginity to him the night before and that he meant "everything" to her. R1141. And the defense asked if Victim remembered telling Defendant after the assault that she loved him. R1163.

Mother's testimony.[2] Mother testified next. R1278. Mother testified about the changes she observed in Victim after she started high school and started interacting with Defendant. R1279.1281. And she testified about being called to Victim's school on December 8, 2014—two days after Defendant's sexual assault of Victim—and taking Victim to the hospital that day because Victim was suicidal. R1294-96.

Mother then testified about when, the following January, Counselor called Mother to come in for a session. R1297,1304. When the prosecutor asked what Victim told Mother during the session, defense counsel objected. R1298. The prosecutor argued that the defense had brought out inconsistent statements by Victim during its cross-examination of Victim and that Victim's

[2] A transcript of Mother's testimony is attached at Addendum C.

prior consistent statements were now admissible to rebut that impeachment evidence. R1298-99. The court ruled that prior consistent statements are admissible "to rebut an impeachment about a prior inconsistent statement." *Id.*[3] Defense counsel said, "Okay." R1299.

Officer's testimony.[4] Officer Bruce Huntington was the lead investigator in the case. R1368. As part of his testimony, Huntington testified that he interviewed Victim at the Children's Justice Center. R1368-69. When asked whether Victim told him what had occurred on December 6, 2014, the officer responded, "That she had been raped." R1369. The prosecutor did not ask the officer any further questions about what Victim said. R1369-80. Defense counsel did not object.

C***ounselor's testimony.***[5] When Counselor testified, the prosecutor asked what Victim had told Counselor about Defendant when the two met a month after the rape. R1517. When the defense objected on hearsay grounds, the prosecutor withdrew the question. *Id.* Instead, the prosecutor asked

---

[3] The trial transcript identifies the court's statement as a question. R1298. But defense counsel's response indicates that the court's statement was a ruling. R1299.

[4] A transcript of the officer's testimony is attached at Addendum D.

[5] A transcript of Counselor's testimony is attached at Addendum E.

Counselor what her understanding of Victim and Defendant's relationship was, based on what Victim had told her. *Id.* Counselor testified that Victim could get drugs from Defendant and that his house was a place where she could go that had no rules. *Id.* When Counselor said she "could keep going," the defense objected that Counselor's testimony was cumulative and based on hearsay. R1518. The court ruled that Counselor's testimony was corroborating, not cumulative. R1519. The court did not specifically address defense counsel's hearsay objection, but did admonish the prosecutor to make sure that Counselor's testimony on Victim's prior statements did not go beyond Victim's testimony. *Id.*

Counselor then testified that she knew that Defendant was older than Victim, and that Victim had been seeing Defendant. R1520. Counselor also knew from Victim that Victim was a virgin. *Id.* And Counselor learned from Victim on January 6, 2015, that Victim had lost her virginity. R1521.

When the prosecutor asked what Victim told Counselor about her lost virginity, the defense objected on hearsay grounds. R1528. The prosecutor seemed to argue that Victim's statements to Counselor were made before Victim had a reason to fabricate. R1528. But the trial court admitted the evidence on a different basis—that Victim's prior consistent statements were

admissible once the defense impeached Victim "on different statements she's made." *Id.* Defense counsel said, "I'll withdraw." *Id.* Counselor then paraphrased what Victim had told her—that Defendant held her down, hit, and scratched her; that Defendant penetrated her vaginally and anally; that when Victim "begged him to stop," Defendant "would do it harder"; that he "was chanting some sort of bizarre chant" during the rape; and that "there was blood everywhere." R1530.

2. Defendant has not proved deficient performance.

Defendant has not proved that all competent counsel would have insisted that evidence of Victim's prior consistent statements was inadmissible hearsay. Competent counsel could have reasonably concluded, as the trial court did, that the statements were admissible to rehabilitate Victim even if they were not admissible under rule 801 for the truth of the matter asserted.

Hearsay "is not admissible except as provided by law or by these rules." Utah R. Evid. 802. "Hearsay" is any out-of-court statement offered "to prove the truth of the matter asserted in the statement." Utah R. Evid. 801(c).

Notwithstanding these general rules, any out-of-court statement that is "consistent with the declarant's testimony" is admissible for the truth of

the matter asserted if "offered to rebut an express or implied charge that the declarant recently fabricated it …." Utah R. Evid. 801(d)(1)(B). But prior consistent statements are admissible to rebut that charge "only" if they "were made prior to the time a motive to fabricate arose." *State v. Bujan*, 2008 UT 47, ¶1, 190 P.3d 1255; *accord Tome v. United States*, 513 U.S. 150, 165 (1995) (interpreting federal rule). The recent-fabrication rule, then, "creates a narrow avenue by which premotive statements are considered nonhearsay" and can be admitted "both for rehabilitative purposes *and, more importantly to the purpose of the rule, for their substance*." *Bujan*, 2008 UT 47, ¶¶11-12 (emphasis added).

But rule 801(d)(1)(B) applies only to statements that are admitted substantively—for the truth of the matters asserted—for the specific purpose of rebutting "a charge of recent fabrication, improper influence, or motive." *Bujan*, 2008 UT 47, ¶1. Rule 801(d)(1)(B), therefore, does not exclude all post-motive prior consistent statements. *Id.* at ¶9.

For example, rule 801(d)(1)(B) does not bar prior consistent statements that are not offered for the truth of the matter asserted but, rather, are offered to rehabilitate a witness whose credibility has been challenged on cross-examination. *Id.* at ¶12; *see also United States v. Ellis*, 121 F.3d 908, 919 (4th Cir.

1997) ("where prior consistent statements are not offered for their truth but for the limited purpose of rehabilitation, … Rule 801(d)(1)(b) and its concomitant restrictions do not apply.") *accord United States v. Simonelli*, 237 F.3d 19, 26 (1st Cir. 2001); *People v. Eppens*, 979 P.2d 14, 22 (Colo. En Banc. 1999).

To prove deficient performance, then, Defendant must do more than show that Victim's prior consistent statements were inadmissible as substantive evidence under rule 801(d)(1)(B). He had to show that no competent counsel would have concluded that the statements might nonetheless be admissible, for example, for rehabilitation.

Defendant has not even tried to make that additional showing here. *See* Aplt.Br. 17-31. Instead, Defendant asserts that defense counsel should have continued to object under rule 801(d)(1)(B) because in connection with Counselor's testimony, the prosecutor inaccurately argued that Victim's statements predated her motive to lie. Aplt.Br. 24.

Defendant's assertion is unavailing. Regardless of what the prosecutor argued, the court ruled during Mother's testimony that Victim's prior consistent statements were admissible "to rebut an impeachment about a prior inconsistent statement." R1298. And during Counselor's testimony, the

court reached the same conclusion—that Victim's prior consistent statements were admissible because the defense impeached Victim "on different statements she's made." R1528. As shown, the law supports the trial court's ruling. *Bujan*, 2008 UT 47, ¶12. And Defendant has not proved that no competent counsel could conclude, based on the law, that the evidence offered through Mother and Counselor was admissible as non-substantive rehabilitation. *See Kelley*, 2000 UT 41, ¶26 (counsel is not ineffective assistance for not making futile objections).

Defendant's contention about the officer's testimony fails for the same reason, as well as an additional one. The prosecutor's questions to Mother and Counselor specifically asked the witnesses to testify about what Victim had told them. R1298 (prosecutor asking Mother, "what did she tell you?"); R1527 (prosecutor asking Counselor, "what words was she able to tell you?"). In both instances, then, the prosecutor's question warned defense counsel what was coming, and counsel could make a pre-emptive objection before the challenged evidence was put before the jury.

The prosecutor's question to the officer, however, asked whether Victim said anything, not what Victim said. R1369 (prosecutor asking officer, "And did she say what occurred?"). Arguably, then, the prosecutor's

question to the officer did not give defense counsel the same notice. The officer's statement—"That she had been raped," R1369—was thus before the jury before the defense could object to it. In the split second that followed, defense counsel could have reasonably concluded that no juror would be surprised by the officer's recap of what Victim told him. And defense counsel could have reasonably decided that it would therefore be "ill-advised to call undue attention to the unanticipated testimony.'" *State v. Reid*, 2018 UT App 146, ¶47, 870 Utah Adv. Rep. 24 (quoting *State v. Harper*, 2006 UT App 178, ¶25, 136 P.3d 1261). In other words, "'counsel's actions in ignoring the testimony may be considered sound trial strategy.'" *Id.* (quoting *Harper*, 2006 UT App 178, ¶25); *see also State v. Colonna*, 766 P.2d 1062, 1067 (Utah 1988) (defense counsel not deficient in not objecting to inadmissible evidence of past offenses because "it is conceivable that counsel made a deliberate and wise tactical choice in not focusing jury attention on [the statements] by objecting"). *Cf. State v. Houston,* 2015 UT 40, ¶76, 353 P.3d 55 ("When we review an attorney's failure to object to a prosecutor's statements during closing argument, the question is "not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only

defensible choice was to interrupt those comments with an objection.") (citation omitted).

In sum, Defendant has not proved that all competent counsel would persist in objecting to the admission of Victim's statements to Mother and Counselor—rather than withdrawing the objections, as counsel did here—or would have objected to the officer's single statement summarizing what Victim told him. Defendant thus has not shown that counsel performed deficiently.

3. Defendant has not proved prejudice.

Defendant's argument also fails because he has not proved prejudice. Defendant asserts that the evidence in this case was thin because the prosecution presented no witnesses who could corroborate that Defendant raped Victim and "no physical or forensic evidence to establish lack of consent." Aplt.Br. 28-29. Consequently, Defendant argues, the "pivotal issue for the jury" was Victim's credibility as to non-consent. Aplt.Br. 27. And, Defendant concludes, because Victim's prior consistent statements bolstered her credibility on "that central issue,", there is a reasonable likelihood of a different result had defense counsel objected to it. *Id.*

Defendant's argument, however, rests on his assumption that Victim's statements would have been excluded had defense counsel persisted in objecting to them under rule 801(d)(3)(B). *Id.* at 27-31. But, as shown, there was at least one other basis for admitting the evidence. *See* Point I.A.2 *supra*. Consequently, Defendant cannot show any reasonable likelihood of a different result had defense counsel persisted in objecting the evidence.

Moreover, Defendant's argument asserts only that, absent the evidence, the jury may have doubted whether Victim was an unwilling participant in the sexual encounter. *Id.* at 27-31. In support, Defendant notes that Victim texted him about birth control the day before their sexual encounter; that Victim "went freely" with him into the bedroom; that when Defendant asked if she wanted to have sex, she said yes; that she then sat next to and hugged Defendant when he dropped her off after the sex; that she then texted, "thank you lovely" and "you're amazing"; and that she talked about getting together with him the next day. *Id.* at 29. Defendant also notes that the examination of Victim a month after the assault found no evidence of anal injury and that the hymenal cut was consistent with both consensual and nonconsensual sex. *Id.* at 30. And Defendant notes that Victim's jealousy over

Defendant's relationship with other girls gave her a motive to fabricate her lack of consent. *Id.*at 30-31.

Defendant's prejudice argument fails because it goes to only one theory supporting the rape—that Victim expressed her lack of consent through words or conduct. R1800-01 (Jury Instr. 35, attached at Addendum F). But the prosecution also alleged non-consent based on evidence that Victim "was 14 years old or older, but younger than 18 years old," and Defendant "was more than three years older than" Victim and "enticed or coerced" her "to submit or participate under circumstances not amounting to physical force or violence or the threat of retaliation." *Id.*;R1808 (prosecution's closing argument, attached at Addendum G); *see also* Utah Code Ann. § 76-5-406(11) (defining such enticement as non-consent).

Further, the evidence on the enticement theory of non-consent was *not* thin and did not depend on Victim's credibility alone. Indeed, it included evidence that Defendant sent thousands of messages to Victim, including sexual messages; that Defendant provided Victim with drugs and a place without rules; that Defendant knew about Victim's problems with her father and said he would take care of Victim; that he persisted in contacting her even after her father got a protective order; and that when Victim voiced wanting

to break up, Defendant threatened to commit suicide or to hurt either her or her father. *see, e.g.*, R1059-1173,1239-77; Def.Exh. 1; St.Exh. 20. Much of this was proved by the actual text messages between Defendant and Victim.

Fatally, Defendant's prejudice argument does not address this overwhelmingly evidence that Defendant "enticed or coerced" Victim "to submit or participate" in his raping her. For this reason also, Defendant's prejudice argument fails.

C. Defendant has not proved that all competent counsel would have objected to Mother's isolated statement that Victim did not seem to be faking when she confirmed what Counselor told Mother about Defendant's assault. Defendant also has not proved prejudice.

As stated, Mother testified that she learned of Defendant's assault at a meeting with Victim and Counselor. When the prosecutor asked, "what did [Victim] tell you?," the defense objected on hearsay grounds. After the court overruled the objection, Mother testified that, in fact, Counselor provided most of the details of the assault and that Victim only apologized and, while crying, said it was true. The prosecutor asked if it appeared that Victim "was faking?" Mother said, "Not at all, no." The defense did not object.

Defendant argues that defense counsel was ineffective for not objecting when the prosecutor asked Mother if she believed Victim was faking. Aplt.Br.

32-34. Defendant's contention appears to be that counsel had an obligation to object because counsel had a basis to do so. *Id.* Again, Defendant has not shown deficient performance or prejudice.

1. Defendant has not proved deficient performance.

Relying on *State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989), Defendant argues that counsel should have objected that Mother could not testify to whether Victim was telling the truth during Mother's meeting with Victim and Counselor. Aplt.Br. 32-34. But as stated, an objection's potential merit is not dispositive on whether defense counsel performed deficiently in not raising it. *See Bedell*, 2014 UT 1, ¶¶21-25; *Clark*, 2004 UT 25, ¶7; *Pecht*, 2002 UT 41, ¶¶40-44; *Bullock*, 791 P.2d at 159. In fact, the "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *Nguyen*, 379 Fed.Appx. at 181; *accord Thomas*, 520 Fed.Appx. at 281. In other words, "the defense may be aware of a prosecutor's misstep but choose not to highlight it through an objection." *State v. Hummel*, 2017 UT 19, ¶109, 393 P.3d 314.

Here, competent defense counsel could reasonably conclude that the jury would be neither surprised nor swayed by Mother's testimony that she

did not believe her daughter was "faking" an emotional response to disclosing Defendant's assault. Competent counsel could also reasonably conclude that the jury might be offended by any attempt by the defense to silence a mother's testimony about her own child's demeanor. Competent counsel could reasonably conclude that an objection would be futile, given that the question arguably went to Mother's perception of Victim's demeanor, not to whether Victim was being truthful. And, finally, competent counsel could reasonably conclude that objecting to Mother's isolated comment would encourage the jury to give her comment more attention than the jury might otherwise.

In sum, Defendant only points to an objection that counsel could have made. But he has not proved that all competent counsel would have made it.

2. Defendant has not proved prejudice.

Defendant's argument also fails to prove prejudice. As with his previous prejudice argument, Defendant's argument here focuses on only one of the State's theories of non-consent—that Victim expressed non-consent through words and conduct. *See* Aplt.Br. 33-34. Defendant's argument nowhere addresses the prosecution's arguably stronger enticement theory. *See id.* Even if Defendant could establish that Mother's isolated comment

could have had some effect on the prosecution's evidence supporting the first theory, then, Defendant still has not shown prejudice, because he has not shown any reasonable likelihood that it would have had any effect on the prosecution's enticement theory. *See id.*

Furthermore, Mother's isolated comment came on the second day of a four-day trial involving 13 witnesses. R867-69. In addition, it was unlikely that the jury would be surprised that a mother would voice faith in what her daughter had told her. *Cf. State v. Houskeeper*, 2002 UT 118, ¶26, 62 P.3d 444 (improperly admitted evidence of defendant's attempt to obtain drugs was harmless because, in light of other evidence, defendant's solicitation "would come as little surprise to the jury"). For these reasons also, Defendant cannot prove prejudice.

D. Defendant has not proved that all competent counsel would have objected to Victim's two passing references to Defendant having been in jail instead of forgoing an objection so as not to emphasize the references, as defense counsel did here.

Defendant argues that defense counsel should have objected to Victim's two fleeting references to Defendant having been in jail at one point in their relationship, equating the references to "requiring a defendant to appear in prison clothes or informing the jury about prior unrelated

convictions." Aplt.Br. 34. Defendant has not proved deficient performance or prejudice.

1. Defendant has not proved deficient performance.

Defendant's contention appears to be that counsel should have objected because counsel had a basis to do so. *Id.* But counsel's later explanation makes clear that counsel knew they could object and strategically chose not to. And Defendant has not shown that no other counsel would have made that decision. Again, then, Defendant has not shown deficient performance.

On direct examination, Victim testified about how she met Defendant, how they started talking with each other over social media, and how, eventually, she started sneaking out of her home and skipping school to visit Defendant. R1061-69. Victim also testified that after her father got a protective order to keep Defendant and Victim apart, Defendant and Victim found new, more secretive ways to stay in contact. R1073.

Victim then testified that after her friend committed suicide, she felt overwhelmed and sent Defendant a message. R1077. Victim testified that the two started talking more and "finally hung out" after Defendant "got out of jail." *Id.* She continued that it was on their first visit after Defendant "got out

of jail" that Defendant told Victim that she could not see other people. R1078. And it was during that same visit that Defendant referenced Victim's friend who had committed suicide and "almost apologized to me for killing" the friend. R1078.

Victim then testified about what else happened on that first day she and Defendant saw each other again. R1078-79. And she testified how, the next day, Defendant had vaginal and anal sex with her as she screamed and cried for him to stop. R1083-87.

After the jury was excused during a break in Victim's testimony, the court asked whether either party wanted to put anything on the record. R1090-91. Defense counsel said: "No. I mean, I caught her saying about him getting out of jail a couple times, but didn't want to draw attention to it." R1091. Counsel then asked the prosecution to "instruct its remaining witnesses and remind [Victim] not to mention anything about jail." R1092. And the court instructed the prosecution to talk with its witnesses on the matter. R1093-94.

Thus, Defendant's counsel made a conscious choice not to object. And to prove that that choice was constitutionally unacceptable, Defendant must

overcome the strong presumption otherwise. *See Strickland*, 466 U.S. at 689. Defendant has not undertaken that burden.

As an initial matter, two brief references to Defendant having been in jail are not the same as references to prior convictions or being tried in prison garb. First, evidence that a defendant has a prior conviction is evidence that the defendant has actually previously been found guilty of committing a crime. But a person's being in jail may simply indicate an arrest. And here, where there was evidence that Defendant used drugs, a jury would likely believe he was arrested for that, not for any more nefarious reason. Second, the Utah Supreme Court has expressly rejected as "meritless" a defendant's attempt to equate a reference to his having been in jail "clearly elicited inadvertently, made during a three-day trial to the prejudice inherent in requiring a defendant to stand trial while wearing prison garb." *State v. Velarde*, 734 P.2d 440, 448 (Utah 1986).

Defendant's argument, then, is simply that counsel was deficient because he could have objected, but did not. Aplt.Br. 34. As shown, that alone is insufficient. *See Bedell*, 2014 UT 1, ¶¶21-25; *Clark*, 2004 UT 25, ¶7; *Pecht*, 2002 UT 41, ¶¶40-44; *Bullock*, 791 P.2d at 159.

And on this record, Defendant cannot overcome the strong presumption that counsel's decision was reasonable. Victim's references were "vague," "fleeting," and "not elicited by the prosecutor." *State v. Butterfield*, 2001 UT 59, ¶47, 27 P.3d 1133 (trial court did not abuse discretion in denying mistrial motion where officer's improper reference to defendant's being in jail was "a 'vague,' 'fleeting' remark that was not elicited by the prosecutor"); *see also State v. Velarde*, 734 P.2d at 448 (rejecting defendant's attempt to "equate[] a single phrase" about his having been in jail, "clearly elicited inadvertently, made during a three-day trial to the prejudice inherent in requiring a defendant to stand trial while wearing prison garb").

Further, as stated, whether to object "is a quintessential matter of strategy and discretion on the part of the trial attorney." *Nguyen*, 379 Fed.Appx. at 181. In other words, "strategically refusing to object" can be "an acceptable trial strategy." *State v. Larrabee*, 2013 UT 70, ¶27, 321 P.3d 1136.

A different attorney may have exercised his discretion differently. But Defendant's attorney could and did reasonably conclude that the better course was to avoid drawing attention to the two isolated jail references made by the first witness in a four-day trial, thereby avoiding emphasizing that fact for the jury. *Cf. Houston*, 2015 UT 40, ¶76 ("When we review an attorney's

failure to object to a prosecutor's statements during closing argument, the question is "not whether the prosecutor's comments were proper, but whether they were so improper that counsel's only defensible choice was to interrupt those comments with an objection.") (citation omitted); *see also Barela*, 2015 UT 22, ¶21 (question in determining *Strickland* deficient performance is "whether a reasonable, competent lawyer could have chosen the strategy that was employed in the real-time context of trial").

Defendant, therefore, has not proved deficient performance.

2. Defendant has not proved prejudice.

Defendant also has not proved that objecting to the two isolated and fleeting jail references would have changed the evidentiary picture enough to make a more favorable outcome reasonably likely.

First, as with his previous prejudice arguments, Defendant focuses on only one of the State's theories of non-consent—that Victim expressed non-consent through words and conduct. *See* Aplt.Br. 34-40. Again, therefore, Defendant nowhere addresses the prosecution's arguably stronger enticement theory. *See id.* Even if Defendant could establish that Victim's isolated references could have had some effect on the prosecution's evidence supporting the first theory, then, Defendant still has not shown prejudice,

because he has not shown any reasonable likelihood that they would have had any effect on the prosecution's enticement theory. *See id.*

Second, Victim's isolated references came in the first 20 pages of the first witness's testimony on the first day of a four-day trial where 13 witnesses testified. *Cf. Butterfield*, 2001 UT 59, ¶47 (trial court did not abuse discretion in denying mistrial motion where officer's improper reference to defendant's being in jail was "a 'vague,' 'fleeting' remark that was not elicited by the prosecutor"); *Velarde*, 734 P.2d at 448; *State v. Yalowski*, 2017 UT App 177, ¶18, 404 P.3d 53 ("because Victim's statement [that defendant had previously been violent] lacked detail, was not elicited by the prosecutor, and was not emphasized or dwelt on during trial, we conclude that Defendant was not prejudiced by the statement").

Defendant's claim thus also fails for lack of prejudice.

II

WHERE THERE WAS NO ERROR, THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY

Defendant finally argues that even if this Court concludes that no individual error warrants a new trial, this Court should reverse Defendant's rape conviction under the cumulative error doctrine. Aplt.Br. 40-42.

The cumulative error doctrine applies "'when a single error may not constitute grounds for reversal, but many errors, when taken collectively,' do." *State v. Martinez-Castellanos*, 2018 UT 46, ¶39, 872 Utah Adv. Rep. 51 (quoting *State v. Perea*, 2013 UT 68, ¶97, 322 P.3d 624). Thus, the doctrine does not apply "when 'claims are found on appeal to not constitute error, or the errors are found to be so minor as to result in no harm.'" *Id.* at ¶40 (quoting *State v. Maestas*, 2012 UT 46, ¶363, 299 P.3d 892). "In other words, the doctrine will only be applied to errors that are 'substantial' enough to accumulate." *Id.*

Here, Defendant has not established any error, let alone any substantial prejudice therefrom. Thus, his cumulative error claim fails.

CONCLUSION

On appeal, Defendant does not challenge his protective-order convictions. Thus, this Court should affirm them outright.

Although Defendant does challenge his rape conviction on the ground that his defense counsel was constitutionally ineffective, Defendant has not proved either that defense counsel performed deficiently or that he was prejudiced by counsel's deficient performance. This Court should therefore also affirm Defendant's rape conviction.

Respectfully submitted on October 29, 2018.

SEAN D. REYES
Utah Attorney General

/s/ Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 9, 335 words, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☐ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☑ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Karen A. Klucznik
KAREN A. KLUCZNIK
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on October 29, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

Troy L. Booher
Zimmerman Booher
Felt Building, Fourth Floor
Salt Lake City, UT 84111
tbooher@zbappeals.com

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick