No. 20161070-CA

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee,
v.
ASHTEN NUNES,
Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Vernice Trease, District Court No. 151903010

Mr. Nunes is incarcerated.

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Oral Argument Requested

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Introduction

As set forth in the opening brief, Ashten's counsel provided ineffective assistance by failing to object to inadmissible hearsay, impermissible vouching, and MB's testimony that Ashten had been in jail prior to their sexual encounter. In response, the State does not dispute that the evidence was inadmissible. Instead, it argues that some competent counsel would not have objected. The State is incorrect. No competent counsel would have allowed the jury to base its verdict on inadmissible and prejudicial evidence.

The State's real defense is that Ashten suffered no prejudice as a result of the ineffective assistance because, even if the jury had rejected MB's testimony that she had sex due to physical force, the jury would have convicted based on the threat or enticement theories of non-consent. This argument makes no sense. The State did not put on any evidence that MB did not consent due to a threat or enticement. The only evidence of non-consent was MB's testimony that she objected and was overcome by physical force or violence. If counsel had provided effective assistance, there is a reasonable likelihood the jury would have rejected MB testimony and had reasonable doubt with regard to consent.

This reply will first address the State's prejudice argument that the jury would have convicted under the threat or entice theories of non-consent. This reply will then address the State's arguments on each claim of ineffective assistance. Finally, this reply will address the cumulative error doctrine.

Argument

1. The State's Prejudice Argument Fails Because It Did Not Put On Any Evidence of Non-Consent Under The Threat or Enticement Theories

In the opening brief, Ashten demonstrated that the trial court committed a number of evidentiary errors that bolstered MB's credibility. Ashten also demonstrated that the bolstering of MB's credibility was prejudicial because she provided the only evidence of the disputed elements of rape, including that the sex was non-consensual because she claimed she objected and was overcome by physical force or violence. [R.1085-87.]

For each issue raised by Ashten, the State argues that Ashten suffered no prejudice because, even if the jury had rejected MB's testimony without the improper bolstering, the jury would have convicted Ashten of rape under the threat and enticement theories for non-consent. The problem with the State's argument is that it produced *no* evidence to establish non-consent by either threat or enticement. Without direct evidence of non-consent under either theory, there is a reasonable likelihood that the jury would not have convicted under either alternative theory, leaving the errors prejudicial.

The threat theory of non-consent requires that Ashten "*coerced the victim to submit by threatening* immediate or future *retaliation* against M.B. or any person." [R.515 (emphasis added).] But the State did not put on any evidence that Ashten

threatened MB with retaliation if she did not have sex with him.[1] Nor did the State put on any evidence that MB engaged in sexual intercourse with Ashten because he threatened her with retaliation if she did not. Instead, MB testified that she objected and was overcome by physical force or violence, a distinct type of non-consent. [R.1084-85.] The State has not shown that the jury would have convicted based upon the threat theory.

The enticement theory of non-consent does no better. It requires that Ashten "enticed or coerced M.B. to submit or participate, *under circumstances not amounting to physical force or violence* or the threat of retaliation."[2] [R.515 (emphasis added).] MB testified to circumstances that *did* amount to physical force or violence. [R.1085-87.] And the State did not produce any evidence that MB had sex based upon "circumstances *not* amounting to physical force or violence." [R.515 (emphasis added).] If the jury rejected MB's account, the jury would have had no basis to convict under the threat or enticement theories of

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[1] The State says that "when Victim voiced wanting to break up, Defendant threatened to commit suicide or to hurt either her or her father." [Resp. Br. at 35.] But these were not threats to retaliate if MB did not engage in sexual intercourse, and there was no evidence that MB engaged in sexual intercourse with Ashten as a result of these threats.

[2] In addition, the purpose of the entice standard is "is to prevent *mature adults* from preying on younger and inexperienced persons." *State v. Gibson*, 908 P.2d 352, 356 (Utah Ct. App. 1995) (emphasis added) (a father convinced his daughter's 14-year-old friend to engage in sexual conduct with him); *State v. Scieszka*, 897 P.2d 1224 (Utah App. 1995) (a 35-year-old religious leader manipulated a 14-year-old girl into engaging in sexual conduct with him).

non-consent. The only evidence was of non-consent by physical force, not threat or enticement, so the errors were prejudicial.

Showing prejudice requires demonstrating "a reasonable probability that the outcome of the trial would have been different." *State v. Hales*, 2007 UT 14, ¶ 68, 52 P.3d 321 (internal quotation marks omitted). The pivotal issue was MB's credibility. MB gave the only account of the sexual encounter. MB gave the only account of non-consent. If counsel had objected to the inadmissible testimony that impermissibly bolstered MB's testimony, there is a reasonable probability the jury would have rejected MB's testimony of non-consent based upon force.[3]

The ineffective assistance of counsel was prejudicial. This court should order a new trial.

2. Trial Counsel Was Ineffective In Failing To Object To Inadmissible Testimony Repeating MB's Hearsay Allegations Against Ashten

As set forth in the opening brief, counsel was ineffective for failing to object to inadmissible hearsay from three witnesses. The hearsay concerned MB's out-of-court allegations against Ashten and bolstered MB's credibility and provided the jury an improper basis for conviction. [Op. Br. at 17-31.] The State admits that the "prosecutor inaccurately argued that the Victim's statements predated her motive to lie." [Resp. Br. at 30.] Thus, the statements were

[3] The jury rejected MB's account of forcible sodomy and did not convict Ashten based upon either the alternate theories. [R.575.]

inadmissible under rule 801, and it was an error to admit the hearsay testimony for its substance. *State v. Bujan*, 2008 UT 47, ¶ 9, 190 P.3d 1255.

Despite its concession, the State asserts that reasonable counsel might have believed the statements would have been admissible "as non-substantive rehabilitation." [Resp. Br. at 30.] But the Utah Supreme Court held in *State v. Bujan* that it is an error to admit hearsay statements for their substance if they were admissible only as non-substantive rehabilitation. *Id.* ¶¶ 9-10. Under *Bujan*, counsel's performance was deficient for not objecting and ensuring the hearsay was excluded or that the jury's consideration was properly limited.

Counsel's performance was also deficient because, under *Bujan*, the statements would *not* have been admissible as non-substantive rehabilitation. *Id.* ¶¶ 9-10. As demonstrated below, no competent counsel would have failed to object to the hearsay.

2.1 Under *Bujan*, the statements were inadmissible for their substance

In *Bujan*, the Utah Supreme Court held that it is an error to admit prior consistent statements for their substance if they do not predate a motive to fabricate, even if such statements might be admissible for a non-substantive purpose. *Id.* ¶ 9. [Op. Br. at 20-21.] MB's out-of-court allegations against Ashten were admitted for their substance. [R.1298-1300,1527-31,1369.] The court did not provide the jury with a limiting instruction, and defense counsel failed to object or request a limiting instruction. Thus, even if the hearsay would have been

admissible for rehabilitation, it was an error to admit it for its substance without a limiting instruction. *Bujan*, 2008 UT 47, ¶ 9.

In *Bujan*, over defense counsel's objection, the trial court admitted hearsay, which the prosecutor erroneously argued predated a motive to fabricate under rule 801. *Id.* ¶¶ 5, 9. On appeal, the State argued (as it does here) that even if the statements were not admissible under rule 801, the hearsay could have been admissible "under the common law for nonsubstantive purposes" such as rehabilitation. *Id.* ¶ 9.

The Utah Supreme Court held otherwise: "Even if the evidence should have been admitted for rehabilitative purposes . . . the trial court erred in admitting the evidence substantively." *Id.* The court distinguished the hearsay in *Bujan* from cases allowing hearsay for non-substantive purposes under the common law as follows: "[T]he State requested and the trial court admitted Detective Oberg's testimony substantively under rule 801(d)(1)(B). No limiting instruction was provided to the jury that the testimony was only admitted for rehabilitative purposes. As such, the testimony was inappropriate hearsay and its admission improper." *Id.*

The same is true here. The only difference between this case and *Bujan* is that counsel in *Bujan* made additional objections to the hearsay testimony that were overruled, whereas counsel here withdrew the objection, and failed to follow up or make subsequent objections to the hearsay. *Id.* ¶¶ 4-5. [R.1298-

1300,1527-31,1369.] Had counsel appropriately objected to each instance of hearsay, *Bujan* would have rendered the hearsay inadmissible. *Id.* ¶ 9.

2.2 Under *Bujan*, the statements were inadmissible for rehabilitation

Just as *Bujan* does not support that counsel acted reasonably in allowing the statements to come in for their substance, *Bujan* does not support that counsel could have reasonably believed the statements would have been admissible for the non-substantive purpose of rehabilitation.

In *Bujan*, the court said, "Rule 801(d)(1)(B) does not bar admission of *all* postmotive statements seeking to be admitted for rehabilitative purposes. As discussed above, *there are other rules* available, *if the proper conditions are met*, under which postmotive statements can be admitted." 2008 UT 47, ¶ 12 (emphases added). In this case, the prosecutor did not lay the foundation demonstrating the proper conditions were met to admit the statements for non-substantive rehabilitation, and the State likewise fails to do so on appeal. *Id.*

This is likely because, under *Bujan*, the hearsay would *not* have been admissible for non-substantive rehabilitation. In *Bujan*, the court held that "[e]ven if the testimony had been offered for rehabilitative purposes, it was still inappropriate to admit the entirety of the testimony. *Only testimony that directly rebuts charges of recent fabrication is appropriate*." *Id.* ¶ 10 (emphasis added). The court held that "Detective Oberg's testimony should not have been admitted in its entirety for either substantive *or rehabilitative* purposes," because "Detective

Oberg was not asked to complete or rebut any particular statements from K.B.'s prior testimony." *Id.* (emphasis added).

The same is true here. Mother, Counselor, and Detective were not asked to "complete or rebut any particular statements from [MB's] prior testimony," and their hearsay testimony would not have been admissible "for either substantive or rehabilitative purposes." *Id.* The State had to demonstrate admissibility. But it fails to identify any portion of the hearsay testimony from Mother, Counselor, or Detective that would have been admissible for rehabilitation in light of *Bujan*. *Id.* ¶ 10. The State does not point to any statement made by MB in cross-examination or explain how any hearsay statement testified to by Mother, Counselor, or Detective would have served to rehabilitate MB.

Given the standards established in *Bujan*, no competent counsel would have failed to object based on the mistaken view that the statements were admissible for rehabilitative purposes. *Id.*

2.3 Counsel's performance was deficient

As set forth above, under *Bujan*, it was an error to admit the post-motive hearsay for its substance without a limiting instruction. *Id.* ¶ 9. In addition, the hearsay statements at issue would not have been admissible for rehabilitation. *Id.* ¶ 10. The State has not demonstrated otherwise.

Bujan predated this case, so counsel should have been aware of it.[4] As set forth in the opening brief, trial counsel had a duty to know the law, to make objections and preserve issues, and to serve as a zealous advocate on behalf of his client. [Op. Br. at 26.] Counsel had a duty to ensure that MB's allegations were not improperly bolstered by inadmissible evidence, particularly where the entire case hinged on MB's credibility. *See, e.g.*, *State v. Larrabee*, 2013 UT 70, ¶ 33, 321 P.3d 1136; *see also* ABA Stds. §§ 4-3.6, 4-7.5(c), 4-7.9. No competent counsel would have allowed MB's inadmissible hearsay allegations against Ashten to be admitted (particularly for their substance).

Aside from its misreading of *Bujan*, the State's arguments against deficient performance are that (i) "Defendant's strict reliance on the American Bar Association standards for defense counsel to prove deficient performance . . . conflicts with the law," and that (ii) defense counsel might not have had an opportunity to object prior to the Detective's hearsay testimony because the prosecutor asked *if* MB said what had occurred rather than *what* she said. [Resp. Br. at 22,31-32.] The State is incorrect on both points.

As to the first point concerning the ABA Standards, Ashten did not rely only on the ABA standards. Ashten instead cited case law, the Utah Rules of Evidence, and the ABA standards. Based upon all of these standards, Ashten

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[4] *Bujan* was decided in 2008; Ashten's trial was in 2016. [R.865.]

demonstrated that it was unreasonable for counsel not to object to the hearsay, and therefore, counsel's performance fell below an objective standard of reasonableness. [Op. Br. at 17-27.] *Larrabee*, 2013 UT 70, ¶ 33. In any event, the State does not demonstrate that the ABA Standards are inconsistent with Utah case law and constitutional requirements. [Resp. Br. at 22]

As to the second point concerning phrasing, the State claims that "[t]he prosecutor's question to the officer . . . asked whether Victim said anything, not what Victim said," and that the Detective's response came "before the defense could object to it." [Resp. Br. at 31.] But this is incorrect. While asking the Detective about interviewing MB, the following exchange occurred:

> Q So at this point, did she tell you when it occurred?
>
> A Yes.
>
> *Q And what did she say?*
>
> A She had said that it occurred on December 6th.
>
> Q Okay. *And did she say what occurred?*
>
> A That she had been raped.

[R.1369.] The prosecutor *did* ask Detective "And what did she say?," alerting counsel of the need to object before the prosecutor elicited the statement "That she had been raped." [R.1369.]

In sum, no competent counsel would have withdrawn or failed to follow up or object to the post-motive statements. Given the law established by *Bujan* and the Utah Rules of Evidence, competent counsel would have objected to

ensure the hearsay was excluded or limited in its scope and purpose. As discussed below, Ashten was prejudiced by this deficient performance.

2.4 Ashten was prejudiced

The State primarily argues that Ashten was not prejudiced because the statements would have come in for rehabilitation. [Resp. Br. at 33.] As demonstrated above, the hearsay statements at issue would not have been admissible for rehabilitation. *Bujan*, 2008 UT 47, ¶ 10.

In determining if Ashten was prejudiced by the hearsay, "[j]ust as [courts] are more ready to view errors as harmless when confronted with overwhelming evidence of a defendant's guilt, [courts] are more willing to reverse when a conviction is based on comparatively thin evidence." *State v. Charles*, 263 P.3d 469, 479 n.14 (2011). Where evidence is thin, "almost any error has the potential to be prejudicial." *Id.* at 479. As discussed *supra* section 1, MB provided the only evidence establishing the elements of rape. But her testimony was inconsistent and at odds with her behavior and the physical evidence.

The hearsay elicited by the State gave MB's dubious allegations against Ashten the imprimatur of the authoritative, trustworthy adults. Prejudice exists where "[t]he jury may well have regarded [evidence from other witnesses] . . . as more persuasive than that of [the original complaining witness]." *State v. Sibert*, 310 P.2d 388, 392 (1957). For that reason, "[e]vidence that a witness made a prior consistent statement is generally inadmissible for the purpose of corroborating

the trial testimony. Such evidence unfairly enhances the credibility of the witness because a jury is more apt to believe something that is repeated." *People v. Maldonaldo,* 922 N.E.2d 1211, 1228 (Ill. App. Ct. 2010).

While all the hearsay was prejudicial, Counselor's testimony was especially prejudicial because she testified to details that MB did not testify to at trial. Specifically, Counselor said MB told her Ashten had "hit her" and that he "was scratching her as hard as he could," and "[t]hat when she was screaming for him to stop, he would do it harder." [R1530-31.] Although MB did not testify to these things [R.1084-85], the jury was permitted to credit the hearsay statements as truth in determining if MB was overcome by physical force or violence and to convict Ashten of rape based on this hearsay.

If counsel had objected to the hearsay to ensure it was excluded, "there is a reasonable probability that the outcome of the trial would have been different." *State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321 (internal quotation marks omitted). This court should vacate Ashten's rape conviction and order a new trial.

3. Trial Counsel Was Ineffective In Failing To Object To Mother's Inadmissible Testimony Vouching For MB's Truthfulness When She Made The Rape Allegations

Rule 608 of the Utah Rules of Evidence prohibits "any testimony as to a witness's truthfulness on a particular occasion." *State v. Rimmasch*, 775 P.2d 388, 391 (Utah 1989). The State does not appear to dispute that Mother's vouching for

MB's truthfulness violated rule 608 of the Utah Rules of Evidence and was inadmissible. [Resp. Br. at 35-37.]

Instead, the State suggests that reasonable counsel might have failed to make a meritorious objection to the inadmissible vouching on three grounds: (i) counsel could have thought Mother's testimony arguably went to Mother's perception of MB's demeanor, (ii) counsel could have concluded that the jury would not be "surprised or swayed" by Mother's vouching, and (iii) counsel could have thought that the jury "might be offended" by an objection. [Resp. Br. at 37.] These arguments are without merit.

As to the State's first argument concerning demeanor, no competent counsel would have failed to object on the basis that Mother was testifying about MB's demeanor. The prosecutor did not ask Mother about MB's demeanor—i.e., MB's behavior, facial expressions, or body language. [R.1300.] And Mother did not provide any information that could help a jury determine for itself MB's veracity. [*Id.*] Because Mother did *not* give any "testimony from which a jury could infer the veracity of [MB]," and instead gave "direct testimony regarding the truthfulness of [MB] on a particular occasion," Mother's testimony was inadmissible under rule 608. *State v. Adams*, 2000 UT 42, ¶ 14, 5 P.3d 642. No competent counsel would have failed to object to Mother's vouching.

As to the State's second argument concerning surprise, no competent trial counsel would have foregone objecting under an assumption that the jury would

not be "surprised or swayed" by Mother's vouching. To the contrary, counsel must guard against improper vouching for truthfulness on occasion precisely because it has "the potential to usurp the fact-finding function of judge or jury." *State v. Stefaniak*, 900 P.2d 1094, 1096 (Utah Ct. App. 1995) (quotation simplified).

Indeed, Mother was not a passing stranger whose assessment of MB's credibility was based on a momentary interaction. Given that a mother should know her daughter better than a jury, the jury would have likely viewed Mother's assessment of MB's truthfulness as persuasive and helpful evidence in assessing the veracity of MB's allegations. The bottom line is that the jury was free to credit Mother's testimony that MB was not "faking" as truth and to convict on that basis. Competent counsel would have objected.

As to the State's third argument concerning the jury's being offended, no counsel would have forgone an objection on that basis. [Resp. Br. at 37.] If the State means the jury could have been offended by counsel's *reason* for objecting, the record makes clear that this was not a concern. The trial court regularly took objections at sidebar, and counsel could have asked for a sidebar to object. [*See, e.g.,* R.1106, 1108-09, 1112-13.] If the State thinks the *timing* of the objection could have offended the jury, the record says otherwise. Counsel made objections that were more likely to offend the jury, including during MB's accounts of telling Counselor and her parents about the alleged rape. [R.1105,1108.]

In any event, the State does not cite any legal authority for the proposition that counsel may allow the jury to hear inadmissible testimony because an objection might be offensive. [Resp. Br. at 37.] Instead, an "attorney's duty to represent the interests of a client with zeal and loyalty." *State v. Holland*, 876 P.2d 357, 359 (Utah 1994). Counsel's duty of providing effective assistance includes making timely objections to inadmissible evidence that improperly bolsters the State's case to the defendant's detriment. *See, e.g.*, *Larrabee*, 2013 UT 70, ¶ 33; *see also* ABA Stds. §§ 4-3.6, 4-7.5(c), 4-7.9. Competent counsel would not have foregone objecting based on speculation that the jury would be offended.

In sum, Ashten has demonstrated that no competent counsel would have foregone a meritorious objection to Mother's impermissible vouching. The State disputes that Ashten was prejudiced primarily on the basis that Mother's vouching was a small amount of testimony. [Resp. Br. at 38.] But the testimony went to the very heart of what the jury was being asked to decide—whether MB was telling the truth about being raped by Ashten. Mother answered this question for the jury. [R.1230.] The testimony was prejudicial.

4. Trial Counsel Was Ineffective In Failing To Object To MB's Twice Testifying That Ashten Had Been In Jail Right Before The Sexual Encounter

MB twice testified that Ashten had been in jail prior to the sexual encounter where she alleged he raped and forcibly sodomized her. [R.1077-87.] The State does not dispute that the jail references were inadmissible. [Resp. Br. at

39, 41.] Instead, the State argues that counsel was not ineffective for failing to object because counsel said on the record that he did not want to draw the jury's attention to the references. [Resp. at 40; R.1091.]

But whether counsel had a strategy or an explanation is not determinative; the question is whether counsel acted *reasonably* under the circumstances. "[T]he mere incantation of strategy does not insulate attorney behavior from [appellate] review." *Larrabee*, 2013 UT 70, ¶ 32 n.30 (quotation simplified). And the Utah Supreme Court has stated that "the 'fear of highlighting' argument . . . always warrants careful scrutiny." *Id.* ¶ 31. In *Larrabee*, the court held that under the circumstances of the case and given the prejudicial nature of the statement at issue, it was "patently *unreasonable*" for defense counsel to fail to object. *Id.* ¶ 28.

In this case, it was likewise unreasonable for counsel to remain silent. As a practical matter, there is no merit to counsel's fear of calling the jury's attention to the jail references. The trial court regularly took objections at sidebar, and counsel could have asked for a sidebar to object or move for mistrial without calling the jury's attention to the issue.[5] [*See, e.g.*, R.1106, 1108-09, 1112-13.]

[5] If counsel feared the timing could have called the jury's attention to the improper testimony, counsel could have objected during or after the prosecutor's next question, which was "Did you and Ashten ever talk about Devin and Devin's death?" [R.1077.] An objection at this point would not have called the jury's attention to the jail reference and would have prevented MB from again testifying Ashten had been in jail in an even more prejudicial context. [R.1078.]

In addition, given the prejudicial context in which MB testified to Ashten having been in jail, it was unreasonable for counsel to remain silent. *Larrabee*, 2013 UT 70, ¶ 28. Ashten's accuser testified that the first time she saw Ashten after he got out of jail, he "basically almost apologized to [her] for killing Devin," and the second time she saw him, he raped and forcibly sodomized her. [R.1077-87.] Given the context of her testimony that Ashten had been in jail, the risk was high that the jury would "infer that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character." *State v. Thornton*, 2017 UT 9, ¶ 35, 391 P.3d 1016 (quotation simplified).

The State summarily asserts that the references were harmless because they were "vague," "fleeting," and "not elicited by the prosecutor." [Resp. Br. at 41 (quotations simplified).] But the State fails to address Ashten's arguments demonstrating that the testimony was harmful under *State v. Velarde*, 734 P.2d 440, 448 (Utah 1986). As set forth in the opening brief, the testimony was not innocuous or unconnected to the allegations, there was no other evidence suggesting that Ashten had any prior convictions or arrests, the jury would not otherwise have known Ashten had been in jail, and there was not significant evidence of Ashten's guilt. [Op. Br. at 34-40.] Given the State's inadequate briefing on this point, this court should accept Ashten's unchallenged arguments

demonstrating that the remarks were harmful under *Velarde*. *Broderick v. Apartment Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶ 20, 279 P.3d 391.

Instead of confronting Ashten's arguments, the State asserts that "a person's being in jail may simply indicate an arrest" rather than a conviction. [Resp. at 41.] But this supposition is irrelevant. References to prior arrests are impermissible under rule 404 of the Utah Rules of Evidence. Utah R. Evid. 404(b)(1). The jury's being informed of prior arrests (like convictions and uncharged bad acts) creates a risk that the jury will infer that the defendant acted in conformity with a reprehensible character. *Thornton*, 2017 UT 9, ¶ 35.

The State also speculates that "where there was evidence that Defendant used drugs, a jury would likely believe he was arrested for that, not for any more nefarious reason." [Resp. Br. at 41.] Certainly the jury could believe there was a more nefarious reason where MB testified the first time she saw Ashten after he got out of jail, he "basically almost apologized to [her] for killing Devin." [R.1077.] But if the jury believed Ashten was in jail for drugs, the risk remains that the jury would infer Ashten acted in conformity with a reprehensible character, particularly as there was evidence drugs were involved the night of the alleged rape. [R.1102,1135; Def.Ex.5; Def.Ex.6.] *Thornton*, 2017 UT 9, ¶ 35.

The question is whether MB's testimony that Ashten had been in jail shortly before the sexual encounter made the jury more likely to believe her testimony that Ashten raped her. *Thornton*, 2017 UT 9, ¶ 35. The testimony at

issue turned MB's allegation that she had been raped by another teenager into an allegation that she had been raped by a criminal who had recently been released from jail. Given the thin evidence of guilt and the prejudicial context in which MB testified that Ashten had been in jail, there is a reasonable probability that Ashten would have been acquitted of rape if the jury had not heard MB's testimony that Ashten had been in jail. *Hales*, 2007 UT 14, ¶ 68.

5. Cumulative Error

To reverse for cumulative error, a court "must determine that (1) an error occurred, (2) the error, standing alone, has a conceivable potential for harm, and (3) the cumulative effect of all the potentially harmful errors undermines its confidence in the outcome." *State v. Martinez-Castellanos*, 2018 UT 46, ¶ 42, 428 P.3d 1038. The State asserts summarily that "Defendant has not established any error." [Resp. Br. at 45.] But here it is undisputed that errors occurred and that those errors had a conceivable potential for harm.

The State does not dispute that MB's testimony regarding Ashten having been in jail was inadmissible. [Resp. Br. at 39.] And MB twice testified he had been in jail in the context of saying Ashten "almost apologized . . . for killing" her friend and that he raped and forcibly sodomized her the second time she saw him after he got out of jail. [R.1077-78.] The State likewise does not dispute that Mother's improper vouching for MB's truthfulness on a particular occasion was inadmissible. [Resp. Br. at 35-36.]

Further, the State admits the prosecutor obtained admission of MB's out-of-court allegations against Ashten by "inaccurately argu[ing] that [MB's] statements predated her motive to lie." [Resp. Br. at 30.] Given that the State concedes the prosecutor was wrong in arguing the statements were eligible to be admitted substantively, the State cannot dispute it was an error for MB's out-of-court statements to be admitted for their substance. *State v. Bujan*, 2008 UT 47, ¶ 9. Indeed, it likewise would have been an error for the statements to be admitted for the non-substantive purpose of rehabilitation. *Id.* ¶ 10.

As Ashten has demonstrated in the opening brief and this reply, counsel repeatedly provided ineffective assistance by allowing this undisputedly inadmissible evidence to be presented to the jury, to Ashten's detriment. Thus, several errors occurred in Ashten's trial, and each error standing alone has a conceivable potential for harm for the reasons set forth in his briefing to this court. *Martinez-Castellanos*, 2018 UT 46, ¶ 42.

As to the third factor, this court must consider whether the cumulative effect of all potentially harmful errors, including "the identified errors, as well as any errors [the court] assume[s] may have occurred," undermines its confidence in the outcome of Ashten's trial. *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993). The question for this court is whether, without the trial errors, Ashten would have been convicted of rape rather than acquitted, as he was on the forcible sodomy charge based on the same allegations from MB.

This court should seriously question whether Ashten might have likewise been acquitted of rape if counsel had performed competently and prevented the prosecutor from presenting and relying on inadmissible evidence to obtain the rape conviction. Accordingly, this court's confidence in the rape verdict should be undermined, and it should reverse under the cumulative error doctrine.

Conclusion

For the reasons set forth above, this court should vacate Ashten's conviction for rape and remand for a new trial.

DATED this 31st day of December, 2018.

ZIMMERMAN BOOHER

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Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 5,015 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 31st day of December, 2018.

/s/ Freyja R. Johnson

Certificate of Service

This is to certify that on the 31st day of December, 2018, I caused two true and correct copies of the Reply Brief of Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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