Case No. 20150809-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

THOMAS JEFFREY MILES,
Defendant/Appellant.

Brief of Appellee

Transferred appeal from a conviction for forcible sodomy, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Randall N. Skanchy presiding

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INTRODUCTION

A defendant commits forcible sodomy when he has nonconsensual anal sex with another. The defendant must be at least reckless as to the victim's nonconsent. A person acts recklessly when he is aware of a substantial and unjustifiable risk that certain circumstances exist or a certain result will occur, but consciously disregards that risk and acts anyway. The nature of the risk must be serious enough that in disregarding it, the person grossly deviates from the standard of care that an ordinary person would exercise under the circumstances.

The jury instruction here defining recklessness—to which counsel had "[n]o objection"—contained this definition, but separately numbered the "existing circumstances" and "result" portions. With this formatting, the

"existing circumstances" line did not include the "conscious disregard" language, but the "result" line did.

Miles argues that his trial counsel should have argued that this instruction required the jury to convict if it believed only that he was aware of the risk that nonconsent existed. Miles has not shown ineffective assistance for two reasons, one logical, one factual.

Logically, where an actor is aware of a risk that could result from his action and then acts, he necessarily consciously disregards that risk. Factually, both the victim and Miles agreed that Miles performed anal sex, and that the victim asked Miles to stop because it hurt her; they disagreed only on whether Miles continued after the victim objected (as the victim testified) or "immediately stopped" (as Miles claimed). By convicting, the jury necessarily believed that Miles intentionally or knowingly continued the act despite that objection. Given this logic and these facts, counsel could have reasonably decided not to object to the recklessness instruction. And at any rate, a differently formatted instruction would have made no difference.

STATEMENT OF THE ISSUES

1. Was counsel ineffective when he did not object to the jury instruction defining recklessness?

Standard of Review. An ineffective assistance claim raised for the first time on appeal presents a question of law. *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162.

2. Miles argues cumulative error based on extra-record material. Where he alleges only a single error based on the record, may this Court accumulate error?

Standard of Review. None applies.

STATEMENT OF THE CASE

A. Summary of facts.

M.C. hit a low point: her father had just been diagnosed with cancer, her friend had just died in a motorcycle accident, and her fiancé had just broken up with her. R436-37. Out of curiosity—and likely a desire to distract from her personal problems—she went online and started exploring personal ads for sex. *Id.*; R440. She came across Defendant Thomas Miles's ad looking for an "obedient submissive slut needed for group use" and answered it: "I think I'm what you're looking for." R438-39. As requested in the ad, she included her weight, height, bust measurements, and sexual preferences.

R439, SE 1, 3/16/14, 3:28:07pm.[1] She also sent, unsolicited, a video of herself masturbating. R447, 552-53.

After some correspondence with Miles, M.C. thought better of it and decided to cut off contact by not replying to Miles's emails. R443; SE1, 3/19/14 at 9:35am. But Miles was not having it. After a few emails without response, Miles told M.C. that he did not "like being played with," that she needed "to be a good slut," "do as [she was] told," and meet with him. R445; SE1, 3/19/14 at 12:48pm. If she did not, he said, he would "forward this video to the head of human resources at byu." SE1, 3/19/14 at 2:19am. R445. Because extramarital sex and masturbation violate BYU's honor code, M.C. faced possible expulsion from school and firing from her job as a BYU research assistant if the video were released. R633, 644-46; *see also* Church Educational System Honor Code, available at https://policy.byu.edu/view/index.php?p=26, last accessed October 31, 2017.

Miles followed up with another threat—which included email addresses at BYU and KSL that he would send the video to—coupled with

[1] SE1 is a collection of emails; the State cites the emails by date and time stamp. The time stamp on M.C.'s emails is 6 hours ahead of Mountain Time. R755-56.

instructions on what to wear and how to contact him. R448, SE1, 3/19/14 at 1:18pm; 3/19/14 at 2:04pm.

M.C. was "scared and . . . didn't know what to do." R449. She was "reluctant to go to the police," embarrassed, and "scared of repercussions [that] could happen" to her schooling and employment at BYU if the video came to light. *Id.* She thought that "meeting his demands" was her "only option." *Id.*; *see also* R519.

M.C. dressed as Miles had requested, met him in a parking lot, and followed him to his father's home, where Miles lived in the basement. R450, 454-55; SE26 at 10:10. Once there, Miles ordered her to take her clothes off, which she "immediately" did. R455-56. Using derogatory terms, he instructed her to give him oral sex, which she did. R456. He then handcuffed her and had vaginal sex over her objection. R458. When he started having anal sex with her, M.C. told him to "stop and that it hurt," but Miles continued until he ejaculated. R459-60. The two then smoked marijuana and had another round of oral and vaginal sex, again over the M.C.'s objection. R461-63.

As M.C. left, Miles told her that she "had only done enough to delete the video or the emails," and "in order to get rid of everything"—which

included photos and videos that he had taken of that night, *see* SE19 (picture); SE21 (brief video)—she would have to "come see him weekly." R465.

Feeling guilty and ashamed, M.C. blocked Miles's further emails, deleted her emails and copy of the video, and tried to forget what happened. R477, 555-57. But Miles found her on Facebook and again threatened her with exposure that would "ruin [her] life." SE2. M.C. eventually told her father, who urged her to go to police. R481-82. Police were able to recover some, but not all, of the deleted emails. R555-57, 671-73, 748-49; SE1, SE25.

Defendant's story. Miles admitted the two instances of oral sex, the two instances of vaginal sex, and the single instance of anal sex, but claimed that they were all consensual. R810-13, 818, 829-30, 832-33; SE26 at 10:20, 11:20. He admitted sending M.C. threats about the video, but claimed to have retracted them before having sex. R796; SE26 at 11:15. He also admitted that M.C. told him during the anal sex that "she couldn't handle it anymore," but claimed that he "immediately stopped." R844-45; SE26 at 17:35-18:50; *see also id.* at 29:50-30:15.

B. Summary of proceedings.

The State charged Miles with five counts: two counts of rape (for the instances of vaginal sex), and three counts of forcible sodomy (two for the instances of oral sex, one for the instance of anal sex). R20-22.

Jury instructions. Defense counsel affirmatively stated that he had "[n]o objection" to the jury instructions, R888, 896-97, including instruction 30, which defined recklessness:

> A person acts "recklessly" when he is aware of a substantial and unjustifiable risk that:
>
> 1. certain circumstances exist relating to his conduct; or
>
> 2. his conduct will cause a particular result, but he consciously disregards the risk, and acts anyway.
>
> The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.
>
> "Conduct" means either an act or an omission.

R179.

Counsels' arguments. The State's primary theory was that none of the acts were consensual because Miles had blackmailed M.C. by threatening to make the video public if she did not do what he wanted. R905-27 (State closing). At a "bare minimum," the prosecutor asserted, Miles acted recklessly because the victim's apparent consent would have been given only after he threatened her multiple times. R922-24. The prosecutor also argued that the acts were not consensual because M.C. said no, and that the anal sex in particular was not consensual because M.C. said to stop and that it hurt, but Miles "still had to finish." R906-07.

Defense counsel argued that M.C. made voluntary choices that she later regretted, that she was not credible, and that her spontaneously sending an "extremely graphic" video to Miles was naturally seen as "an invitation" to sexual activity. R927-29.

The jury acquitted on the four counts stemming from oral and vaginal sex, and convicted of the forcible sodomy count for anal sex. R926 (prosecutor designating count 3 as anal sex count); 944 (verdict, guilty on count 3). The court sentenced Miles to the statutory term of five years to life, and Miles timely appealed to the Utah Supreme Court, which transferred the case to this Court. R199-200, 203-04, 211-15.

SUMMARY OF ARGUMENT

Issue I: Recklessness definition instruction. Miles argues that his trial counsel was ineffective for not objecting to the recklessness jury instruction. He argues that the instruction omitted the requirement that he consciously disregard the risk of nonconsent. Without this, he contends, the instruction permitted the jury to convict him if it believed that he was merely aware of a risk that the victim was not consenting to anal sex—even if it believed that he ceased at the victim's request. He cannot prove ineffective assistance. He has not shown deficient performance because counsel could reasonably conclude that a conscious disregard of the risk of nonconsent was logically implied

from (1) a knowledge of the risk and (2) continued action notwithstanding that knowledge, both of which the jury had to find. And he has not shown prejudice because even if the jury instruction read as he now insists it should have, the result would have been the same. The conviction rested not on Miles's recklessness, but on his intentional or knowing disregard of the victim's objection. Miles agreed that the victim objected during anal sex, and thus necessarily understood that whatever she may have agreed to before, she wanted the anal sex to stop. He said that he "immediately" stopped, but she said that he continued despite her objection. If he did not immediately stop—which the jury necessarily believed—then recklessness was not an issue, and any error in the recklessness instruction could not have affected the outcome.

Issue II: Cumulative error. Miles has filed a motion for remand under rule 23B, Utah Rules of Appellate Procedure, and argues that this Court should presume deficient performance and consider his allegations in that motion to find cumulative prejudice. This Court cannot do what Miles requests. Though it sometimes presumes deficient performance for purposes of rejecting 23B remand, it cannot presume deficient performance to grant relief. Because Miles has only alleged a single error with record support, he necessarily cannot show cumulative error.

ARGUMENT

I.

Miles cannot prove ineffective assistance because logic, evidence, and the elements instruction supplied what he says the recklessness instruction lacked, and the result would have been the same with the instruction he says was required.[2]

Miles argues that his counsel was ineffective for not objecting to the jury instruction defining recklessness. He says that it omitted the requirement that he consciously disregard the risk of nonconsent and thereby permitted conviction if the jury merely believed that he was aware of a risk that the victim did not consent. Aplt.Br. 22-41.

Miles has not proven ineffective assistance for two reasons, one logical, one factual. Logically, counsel could conclude that knowledge of a risk plus action despite that knowledge necessarily required the jury to find a conscious disregard of the risk. Factually, recklessness was not at issue for the anal sex count, because Miles admitted that the victim objected during the act. With knowledge of this objection, he necessarily acted intentionally or knowingly.

To prove ineffective assistance, Miles must show both (1) deficient performance and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687

[2] The forcible sodomy and recklessness statutes are included in Addendum A; the jury instructions are included in Addendum B.

(1984). Surmounting this "high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). Deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The reviewing court must "evaluate the conduct from counsel's perspective at the time," rather than with the benefit of hindsight. *Id.* at 689.

This timeframe is important because it is all too easy to second-guess counsel's trial strategy after the fact and all too tempting to conclude that counsel acted unreasonably because a strategy was unsuccessful. *State v. J.A.L.*, 2011 UT 27, ¶25, 262 P.3d 1 (refusing to "second guess counsel's actions" and noting "that an attorney's job is to act quickly, under pressure, with the best information available"). That is not how *Strickland* works. The Sixth Amendment guarantees only the reasonably effective assistance of counsel, not the *successful* assistance of counsel. *State v. Tyler*, 850 P.2d 1250, 1258 (Utah 1993).

A court must also "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This presumption makes good sense, in part because counsel, "[u]nlike a later reviewing court, . . . observed the relevant proceedings, knew of materials outside the record, and interacted with the

client, with opposing counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). The point is not to "grade counsel's performance" or determine best practices, *Strickland*, 466 U.S. at 697; rather, it is merely to determine whether counsel could have had a reasonable basis for what he did or did not do. *Harrington*, 562 U.S. at 105.

Miles can rebut *Strickland*'s strong presumption only "by persuading the court that there was no conceivable tactical basis for counsel's actions." *State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162 (emphasis, quotations, and citation omitted). And the focus is on counsel's strategy—not the existence of alternative strategies that, in hindsight, might have been equally reasonable or even more reasonable. *State v. Lucero*, 2014 UT 15, ¶¶41-43, 328 P.3d 841.

Moreover, the State is not required to articulate a reasonable explanation for counsel's acts or omissions. Nor does a defendant succeed merely because this Court cannot conceive of a tactical explanation for counsel's performance. Rather, "'the defendant'" always bears the burden to "'overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.'" *Benvenuto v. State*, 2007 UT 53, ¶19, 165 P.3d 1195 (quoting *Strickland*, 466 U.S. at 689); *see also State v. Powell*, 2007 UT 9, ¶46, 154 P.3d 788. Of course, when it is possible to conceive of a reasonable tactical basis for trial counsel's actions, then a defendant

clearly has not rebutted the strong presumption that his counsel performed reasonably. *See Clark*, 2004 UT 25, ¶7; *State v. Holbert*, 2002 UT App 426, ¶58, 61 P.3d 291.

The *Strickland* presumption of a sound strategy thus can be dispositive, but only of a finding of effective performance, not deficient performance. In other words, when counsel's actions appear designed to further a reasonable trial strategy, then a defendant has necessarily failed to show objectively unreasonable performance. *See Strickland*, 466 U.S. at 688; *Clark*, 2004 UT 25, ¶6.

But the lack of a considered strategic basis for counsel's performance cannot alone prove that counsel's performance was objectively unreasonable. *See Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Bullock v. Carver*, 297 F.3d 1036, 1048, 1050-51 (10th Cir. 2002). Even when a considered strategic reason for counsel's performance seems elusive, a defendant still cannot carry his burden to show deficient performance unless he can show that counsel's performance "fell below an objective standard of reasonableness." *Strickland*,

466 U.S. at 687-88. Thus, whether counsel's course of action is part of a considered strategy may be relevant, but it is not controlling.[3]

The ultimate inquiry under *Strikland*'s deficient performance prong "is not whether counsel's choices were strategic, but whether they were reasonable." *Flores-Ortega*, 528 U.S. at 481. The Sixth Amendment requires that counsel's representation "be only objectively reasonable, not flawless or to the highest degree of skill." *Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000).

Thus, counsel does not necessarily perform deficiently even if he makes "minor mistakes" and appears "momentarily confused" during trial. *Id*. at 487. Counsel's performance is deficient under *Strickland* only when "no competent attorney" would have acted similarly. *Premo v. Moore*, 562 U.S. 115, 124 (2011); *Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1239 (11th Cir. 2011) (explaining that counsel is deficient only when "counsel's error is so egregious that no reasonably competent attorney would have acted similarly"); *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (explaining that even "if many reasonable lawyers would not have done as defense counsel

[3] The State has made this argument before. *See State v. Jamieson*, 2017 UT App 236, ¶37 n.7, __ P.3d __. But this Court rejected it as "not supported by our case law." *Id.* The State does not really take issue with the *Jamieson* court's assessment of Utah case law. But as the citation in the text shows, the argument is "supported" by controlling United States Supreme Court "case law."

did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so").

Miles must also prove prejudice—"that counsel's errors were so serious as to deprive the defendant of a fair trial . . . whose result is reliable." *Strickland*, 466 U.S. at 687. A defendant must demonstrate that in the absence of counsel's deficiency, there is a reasonable likelihood of a result more favorable to him. *Id.* at 694; *State v. Bond*, 2015 UT 88, ¶46, 361 P.3d 104 (need to prove prejudice on all unpreserved claims). Prejudice cannot be based on speculation, but must be a "demonstrable reality." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); *see also Allen v. Friel*, 2008 UT 56, ¶21, 194 P.3d 903 (same).

Miles fails to prove both *Strickland* elements, and the failure to prove either defeats the claim. But because of the way that Miles has structured his argument, some preliminary clarification is necessary. To begin with, Miles puts the focus on the wrong actor. Though he claims ineffective assistance, he does not analyze counsel's actions until the end of his argument. Aplt.Br. 39. For the bulk of his argument, he focuses on the trial court's actions. *See, e.g.,* Aplt.Br. 22 ("This Court should reverse because the trial court incorrectly instructed the jury on the meaning of 'recklessly[.]'"); 23-24 ("The trial court, however, failed to adequately instruct the jury on forcible sodomy's requisite

mens rea because its instruction defining recklessness was incorrect."); 25 ("The trial court provided two instructions relevant to the issue in this case."); 29 ("Similarly here, the court's recklessness instruction omitted an element of the statutory definition of recklessness[.]"). If the issue were preserved or Miles asserted plain error, then this Court would analyze the trial court's decisions. But it is counsel's actions—not the trial court's—that are the focus of an ineffective assistance claim.

In addition to the wrong focus, Miles's analysis also has the wrong standard for reversal. He asserts at the beginning of his argument that "[f]ailure to accurately instruct the jury on the basic elements of an offense 'constitutes reversible error,'" Aplt.Br. 22, quoting *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985), and citing *State v. Pearson*, 1999 UT App 220, ¶12, 985 P.2d 919. But he does not acknowledge that both *Roberts* and *Pearson* have been overruled. In *State v. Garcia*, 2017 UT 53, __ P.3d __, the supreme court made clear that jury instruction arguments raised under an ineffective assistance claim require the defendant to prove *Strickland* prejudice, even if the error goes to an element of the offense. *Id.* at ¶40. The court disavowed language in *State v. Bluff* that "failure to give" "an accurate instruction on the basic elements of an offense" "can never be harmless error." *Garcia*, 2017 UT 53, ¶40 (quoting *State v. Bluff*, 2002 UT 66, ¶26, 52 P.3d 1210). *Bluff* quoted this

language from *State v. Jones*, 823 P.2d 1059, 1061 (Utah 1991), which in turn relied on *Roberts*. *Bluff*, 2002 UT 66, ¶26. *Pearson* also ultimately relied on *Roberts*. *Pearson*, 1999 UT App 220, ¶12 (quoting *State v. Stringham*, 957 P.2d 602, 608 (Utah App. 1998), which quoted *State v. Souza*, 846 P.2d 1313, 1320 (Utah App. 1993), which quoted both *Jones* and *Roberts*). Though *Garcia* issued three weeks before Miles filed his brief, he does not even cite it.

In sum, this Court must evaluate counsel's decisions from his perspective at the time they were made, indulging a strong presumption of reasonably effective performance, and reverse only if Miles proves both that his counsel acted entirely unreasonably and that there is a reasonable likelihood of a more favorable result for him absent the unreasonable action.

To prove forcible sodomy, the State had to prove that Miles had anal sex with M.C. without M.C.'s consent, and that Miles acted at least recklessly regarding her nonconsent. *See* Utah Code Ann. § 76-5-403, 76-2-102; *State v. Barela*, 2015 UT 22, ¶26, 349 P.3d 676.

Jury instruction 35 contained the elements of forcible sodomy. The jury had to find, beyond a reasonable doubt that (1) Miles; (2) "in Salt Lake County"; (3) "Intentionally, knowingly, or recklessly" had anal sex with M.C.; (4) "Without M.C.'s consent"; and (5) Miles "acted with intent, knowledge[,] or recklessness that M.C. did not consent." R184.

A person acts recklessly "with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exists or the result will occur." Utah Code Ann. § 76-2-103(3). "The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." *Id.*

Jury instruction 30 contained the substance of this statutory definition, but with some paraphrasing and added formatting:

> A person acts "recklessly" when he is aware of a substantial and unjustifiable risk that:
>
> 1. certain circumstances exist relating to his conduct; or
>
> 2. his conduct will cause a particular result, *but he consciously disregards the risk, and acts anyway*.
>
> The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.
>
> "Conduct" means either an act or an omission.

R179 (emphasis added).

Miles argues that the italicized "conscious disregard" language should have been included in both 1. and 2. Without it, he argues, the jury could have convicted him without finding that he acted with conscious disregard of the circumstances relating to his conduct. Aplt.Br. 24-25, 29-30.

A. Miles has not shown deficient performance because counsel could reasonably decide that any technical defect in the recklessness definition was cured by the inescapable logic of the evidence and argument at trial.

Miles has not shown that, based on the evidence and case theories, all competent counsel would have asked to modify the recklessness definition. To the contrary, counsel could have reasonably believed that under the instructions as given and in light of the evidence presented, a "conscious disregard" was logically required between an awareness of a risk that a circumstance (nonconsent) existed and action (anal sex) despite that awareness.

And on the only evidence before the jury, Miles's disregard of the victim's nonconsent was at least conscious; indeed, the only fair inference was that it was no less than knowing. By his own admission, Miles knew that M.C. was not consenting the moment that she asked him to stop. If he continued—as the victim testified—then he proceeded with full knowledge that she had withdrawn her consent to him proceeding. His own testimony foreclosed the possibility that he continued through unconsciousness, carelessness, or the like on the issue of consent. Under his version, he did not consciously disregarded a known risk and act anyway; rather, he consciously *regarded* the risk and immediately *stopped* acting.

Miles asserts that by not objecting to the instruction as written, counsel essentially conceded to lowering the State's burden of proof. According to him, the instruction allowed the jury to convict even if it believed Miles's story entirely, because once the victim objected to the anal sex, he was aware of the risk of nonconsent and therefore acted recklessly under the instruction, notwithstanding his (alleged) immediate withdrawal. Aplt.Br. 24-25. Miles also argues that other instructions did not fill in the gap. Aplt.Br. 31-32.

But Miles's argument undermines a core axiom of jury instruction analysis: reading the instructions "as a whole" rather than in isolation. *State v. Lambdin*, 2017 UT 46, ¶¶46-47, __ P.3d __. Reading the elements and definitional instructions together defeats his argument. The elements instruction required the jury to find both that the anal sex was "[w]ithout M.C.'s consent" and that Miles "acted with intent, knowledge or recklessness that M.C. did not consent." R184. Thus, the jury would have understood that it needed to find both that the victim did not actually consent and that Miles "acted" despite his awareness of a risk that the victim was not consenting. R179, 184. Thus, whatever the recklessness definition lacked, the elements instruction, logic, and the evidence supplied.

Miles's also likens this case to *State v. Liti*, 2015 UT App 186, 355 P.3d 1078. Aplt.Br. 28-29. But that case was too distinguishable to put all reasonable counsel on notice that the instructions here needed clarification. Liti was convicted of manslaughter, and argued that his counsel was ineffective for not objecting to an instruction defining recklessness that omitted the "gross deviation" language. *Liti*, 2015 UT App 186, ¶10. Counsel performed deficiently, this Court reasoned, because the omitted portion was necessary to a full understanding of what recklessness required. *Id.* at ¶20. But unlike in *Liti,* the omitted portion in the instruction was readily filled in by the evidence.

B. Miles has not shown prejudice because the jury had to conclude that he at least consciously disregarded the victim's objection by not stopping immediately.

For many of the same reasons, Miles has not shown prejudice—whatever the recklessness instruction omitted, the elements instruction, logic, and evidence supplied. *See United States v. Carson*, 870 F.3d 584, 602-03 (7th Cir. 2017) (holding no prejudice from recklessness instruction permitting conviction if defendant *carelessly* disregarded risk where evidence made it "hard to imagine how" defendant could have acted carelessly rather than consciously). Indeed, the jury acquitted on two counts of the same offense

when given identical instructions. *See* R183, 184, 186 (jury instructions for three forcible sodomy counts); R944 (verdict).

Miles argues that the jury's acquittal on the other counts shows that he would have been acquitted on this count had the recklessness instruction read as he now says it should have. Aplt.Br. 24-25, 32-39. But divining meaning from acquittals is akin to reading tea leaves, and fraught with the same uncertainty.

Jury deliberations are, by design, a black box. Absent rare exceptions not applicable here—*see, e.g.,* Utah R. Evid. 606(b)(2); *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017)—"an individualized assessment of the reason for" a given verdict "would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *United States v. Powell*, 469 U.S. 57, 66 (1984). Acquittals are just as "likely to be the result of mistake[] or lenity" as they are to result from believing or not believing certain evidence. *Id.* at 68; *see also State v. Cady*, 2018 UT App 8, ¶¶34-40, __ P.3d __ (noting "myriad ways the jury might have reasonably reached its separate verdicts" on different counts); *cf. State v. Beck*, 2006 UT App 177, ¶15, 136 P.3d 1288 (noting that different conclusions regarding the source of a mixed verdict were "feasible"). As such, courts should refrain from assigning any meaning to a mixed verdict.

The State acknowledges that despite the inherent uncertainty of this approach, both this Court and the Utah Supreme Court have relied on mixed verdicts in determining prejudice in the past. *See, e.g., State v. Richardson*, 2013 UT 50, ¶43, 308 P.3d 526; *State v. Cruz*, 2016 UT App 234, ¶45, 387 P.3d 618. The State believes that the Court should not do that here, but to the extent that this Court believes otherwise, the record here shows that a more comprehensive recklessness definition would have made no difference.

The State's main theory was that all the acts were nonconsensual because they were based on blackmail: unless M.C. met Miles for sex, he would release a video that had the potential to get her kicked out of school, fired from her job, and cause great embarrassment to her and her family. R905-27 (State closing). At a "bare minimum," the prosecutor asserted, Miles acted recklessly under the blackmail theory because the victim's apparent consent would have been given only after he threatened her multiple times. R922-24. The prosecutor alternatively argued that the acts were not consensual because M.C. said no, and that the anal sex in particular was not consensual because M.C. said to stop and that it hurt, but Miles "still had to finish." R906-07.

The acquittals may show that the jury rejected both the blackmail theory and the victim's testimony that she said "no" before or during any of

the oral or vaginal sex. *See* Aplt.Br. 36-37. But this does not mean, as Miles suggests, that "the verdict is not easily explained." *Id.* at 37. The State had one remaining theory on the remaining count, which Miles does not acknowledge: that the anal sex was nonconsensual because Miles "had to finish" despite the victim's objection. R906-07. Both the victim and Miles agreed that she objected during the act. By his own admission, then, he knew that her consent had ended. So the only question was what Miles did in response. He said that he "immediately" withdrew; she said that he continued. The conviction shows that the jury believed this portion of the victim's testimony. In short, Miles's defense did not fail because of the way that the recklessness jury instruction was formatted; it failed because the jury did not believe he stopped when the victim told him to.

Miles also argues that the victim was not credible. Aplt.Br. 34-36. But absent rare exception—which Miles does not argue here—credibility is an issue for the factfinder, not an appellate court. *See State v. Prater*, 2017 UT 13, ¶¶31-41, 392 P.3d 398. And jurors are "free to believe or disbelieve all or part of any witness's testimony." *State v. Hayes*, 860 P.2d 968, 972 (Utah App. 1993); *see, e.g., State v. Ray*, 2017 UT App 78, ¶27, 397 P.3d 817 (noting that jury "apparently disbelieved Victim as to many aspects of her testimony" but "likely believed other aspects"). Given the sheer volume of sexual activity

here, the jury could rationally disbelieve that Miles had the self-restraint to cease mid-act and believe the victim on this point, even if it disbelieved other aspects of her testimony.

II.

Miles has alleged merely one error with record support, and thus cannot show cumulative error.

Miles also argues that this Court should reverse for cumulative error. Aplt.Br. 41. But because he argues only a single error with record support, he cannot show cumulative error.

Miles has filed a motion for remand to supplement the record under rule 23B, Utah Rules of Appellate Procedure, on another claim of ineffective assistance, which the State addresses separately. This Court may not consider the alleged evidence and argument in that motion unless and until it grants the motion and the trial court makes findings. As explained, ineffective assistance claims may not be based on speculation. *Chacon*, 962 P.2d at 50. "It should go without saying that the absence of evidence cannot overcome the" *Strickland* presumption of reasonably effective assistance. *Burt v. Titlow*, 134 S.Ct. 10, 17 (2013); *see also State v. Litherland*, 2000 UT 76, ¶17, 12 P.3d 92 (holding that "[w]here the record appears inadequate in any fashion, ambiguities or deficiencies resulting therefrom will simply be construed in favor of a finding that counsel performed effectively."). Time and again, this

Court has reminded appellants that it considers 23B affidavits "solely to determine the propriety of remanding" the case, not as supporting evidence for appellate claims. *State v. Norton*, 2015 UT App 263, ¶15, 361 P.3d 719; *see also State v. Jaramillo*, 2016 UT App 70, ¶27, 372 P.3d 34; *State v. Heywood*, 2015 UT App 191, ¶40, 357 P.3d 565; *State v. Gunter*, 2013 UT App 140, ¶12 n.4, 304 P.3d 866; *State v. Johnson*, 2007 UT App 184, ¶39, 163 P.3d 695; *State v. Bredehoft*, 966 P.2d 285, 290 (Utah App. 1998).

Miles argues that "the rule permits" him "to reference the 23B motion in his brief," but he does not cite the rule itself. Aplt.Br. 41. Rather, he cites to an unspecified "Revised Order Pertaining to Rule 23B," presumably from this Court. *Id.* But whatever "referenc[ing]" means, it cannot mean that an appellant can argue extra-record evidence to support an appellate claim, because this Court steadfastly refuses to consider new evidence on appeal. *See, e.g., Norton*, 2015 UT App 263, ¶15.

Miles further argues that "Utah's appellate courts have previously presumed acts of deficient performance raised in a 23B motion and addressed the issues for prejudice and cumulative error" and that "this Court should presume the deficient performance identified in the 23B motion and reverse" for cumulative prejudice. Aplt.Br. 41-42, 43 (citing *State v. Goodrich*, 2016 UT App 72, ¶10 n.4, 372 P.3d 79; *Heywood*, 2015 UT App 191, ¶¶31-33; and *State*

v. Potter, 2015 UT App 257, ¶6 n.1, 361 P.3d 152). But the cases that Miles cites show no such thing. *Goodrich* denied remand and explained that deficient performance was "immaterial" because it concluded that the defendant could not show prejudice. 2016 UT App 72, ¶10 n.4. *Heywood* denied remand by explaining that the alleged witness testimony was irrelevant. 2015 UT App 191, ¶¶31-33. And *Potter* denied remand for failure to prove prejudice "even assuming defense counsel performed deficiently." 2015 UT App 257, ¶6 n.1.

Though courts sometimes assume deficient performance without deciding it, *see id.*, they do so only to *deny* claims. This is in keeping with *Strickland*'s admonition that if "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697. But Miles requests the opposite: a presumption in aid of granting relief. This flies in the face of the well-established law cited above, and this Court should therefore decline the invitation.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted on January 12, 2018.

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Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on January 12, 2018, two copies of the Brief of Appellee were ☐ mailed ☑ hand-delivered to:

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Also, in accordance with Utah Supreme Court Standing Order No. 8, a courtesy brief via email in searchable portable document format (pdf):

☑ was emailed to the Court and emailed to appellant.

☐ will be filed and served within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 2. Principles of Criminal Responsibility (Refs & Annos)
Part 1. Culpability Generally

U.C.A. 1953 § 76-2-103

§ 76-2-103. Definitions

Currentness

A person engages in conduct:

(1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

(2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(3) Recklessly with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

Credits
Laws 1973, c. 196, § 76-2-103; Laws 1974, c. 32, § 4; Laws 2007, c. 229, § 4, eff. April 30, 2007.

U.C.A. 1953 § 76-2-103, UT ST § 76-2-103
Current through 2017 First Special Session.

End of Document

West's Utah Code Annotated
Title 76. Utah Criminal Code
Chapter 5. Offenses Against the Person (Refs & Annos)
Part 4. Sexual Offenses (Refs & Annos)

U.C.A. 1953 § 76-5-403

§ 76-5-403. Sodomy--Forcible sodomy

Currentness

(1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.

(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

(3) Sodomy is a class B misdemeanor.

(4) Forcible sodomy is a first degree felony, punishable by a term of imprisonment of:

(a) except as provided in Subsection (4)(b) or (c), not less than five years and which may be for life;

(b) except as provided in Subsection (4)(c) or (5), 15 years and which may be for life, if the trier of fact finds that:

(i) during the course of the commission of the forcible sodomy the defendant caused serious bodily injury to another; or

(ii) at the time of the commission of the rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or

(c) life without parole, if the trier of fact finds that at the time of the commission of the forcible sodomy the defendant was previously convicted of a grievous sexual offense.

(5) If, when imposing a sentence under Subsection (4)(b), a court finds that a lesser term than the term described in Subsection (4)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(a) 10 years and which may be for life; or

(b) six years and which may be for life.

Addendum B

INSTRUCTION 30

Reckless as to Circumstances Surrounding Conduct or as to Result.

A person acts "recklessly" when he is aware of a substantial and unjustifiable risk that:

1. certain circumstances exist relating to his conduct; or
2. his conduct will cause a particular result, but he consciously disregards the risk, and acts anyway.

The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation.

"Conduct" means either an act or an omission.

INSTRUCTION 35

THOMAS JEFFREY MILES is charged in Count 3 with committing Forcible Sodomy, on or about March 20, 2014. You cannot convict him of this offense unless, based on the evidence, you find beyond a reasonable doubt each of the following elements:

1. THOMAS JEFFREY MILES;
2. in Salt Lake County;
3. Intentionally, knowingly, or recklessly; committed a sexual act involving any touching of the skin, however slight, of the genitals of Thomas Jeffrey Miles or M.C. and the mouth or anus of Thomas Jeffrey Miles or M.C.;
4. Without M.C.'s consent; and
5. Thomas Jeffrey Miles acted with intent, knowledge or recklessness that M.C. did not consent.

After you carefully consider all the evidence in this case, if you are convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant GUILTY. On the other hand, if you are not convinced that each and every element has been proven beyond a reasonable doubt, then you must find the defendant NOT GUILTY.