No. 20150809-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

THOMAS JEFFREY MILES,
Defendant/Appellant.

Appellant is incarcerated

REPLY BRIEF OF APPELLANT

Appeal from a judgment of conviction for forcible sodomy, a first degree felony, in violation of Utah Code § 76-5-403(2), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Randall Skanchy, presiding

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INTRODUCTION

In opening, Miles argues that the instruction defining recklessness omitted a critical statutory element—the "conscious disregard" requirement. *See* Aplt. Br. at 22-41. A new trial is warranted because counsel's failure to object to the omission constituted ineffective assistance of counsel. *See id.* Alternatively, Miles argues that this Court should assume that the error identified in the rule 23B motion occurred and reverse because the cumulative effect of all of the errors identified on appeal (in the opening brief and the 23B motion) warrants reversal. *See id.* at 41-43.

In this reply, Miles addresses the State's argument that despite the omission in the recklessness instruction, Miles has not shown deficient performance, *see infra* Part A, or prejudice. *See infra* Part B. Miles's cumulative error argument was adequately addressed in opening. *See* Aplt. Br. at 41-43. As

required by Utah Rules of Appellate Procedure 24(b), this reply brief is "limited to responding to the facts and arguments raised in the appellee's . . . principal brief." The brief does not restate arguments from the opening brief or address matters that do not merit reply.

ARGUMENT

A. Counsel performed deficiently by failing to object to an instruction that omitted an important element of recklessness and understated the requisite mental state.

The instruction on recklessness omitted the "conscious disregard" requirement and, therefore, incorrectly instructed the jury on a critical mens rea element. *See* Aplt. Br. at 22-32, 39-41. The State does not defend the recklessness instruction as legally correct. *See* Aple. Br. 10-21. Nor does it argue that an objection would be futile. *See id*. Instead, it argues that "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." *See id*. 19. Miles responds to the State's articulation of the deficient performance standard. *Id*. at 13-15. He also responds to the State's claim that counsel could have reasonably decided to forgo an objection due to "logical" and "factual" reasons. *See id*. at 2, 10, 19-21.

Deficient performance standard: This case is governed by Utah case law applying the *Strickland* standard for deficient performance. Cases such as *State v. Barela* and *State v. Liti* hold that "[t]here is only upside in a complete statement of the requirement of mens rea" and "no reasonable lawyer would []

f[ind] an advantage in understating" that requirement. *State v. Barela*, 2015 UT 22, ¶27, 349 P.3d 676; *see also State v. Liti*, 2015 UT App 186, ¶20, 355 P.3d 1078. As explained in opening, these cases control and demonstrate that trial counsel was deficient for allowing an instruction that made it easier for the jury to convict. *See* Aplt. Br. at 22-32, 39-41.

Nevertheless, the State cites *Premo v. Moore*, 562 U.S. 115, 124 (2011), for the assertion that "[c]ounsel's performance is deficient under *Strickland* only when 'no competent attorney' would have acted similarly." Aple. Br. at 14. But *Premo* and several other cases cited by the State[1] are appeals from a "federal habeas corpus" petition controlled by the "Antiterroism and Effective Death Penalty Act of 1996 (AEDPA)" after the ineffective assistance claims had already been "'adjudicated on the merits in State court proceedings.'" *Premo*, 562 U.S. at 118-21; *Harvey*, 629 F.3d at 1237.

Compared to the *Strickland* standard, the AEDPA standard in federal habeas is "'doubly'" deferential. *Premo*, 562 U.S. at 122. Under the federal habeas standard, "'the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.'" *Id.* at 123. "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (cited at Aple. Br.

[1] *E.g.*, *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000); *Harvey v. Warden*, 629 F.3d 1228 (11th Cir. 2011).

12).“[H]abeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Id.* at 102-03. In fact, “a *de novo* review of *Strickland*” “is an unnecessary step” where AEDPA is involved. *Id.* at 109.

The State is therefore incorrect that “[c]ounsel’s performance is deficient under *Strickland* only when ‘no competent attorney’ would have acted similarly.” Aple. Br. at 14. Instead, the focus of a deficient performance analysis is on the reasonableness of counsel’s performance within the context of the case. *Barela*, 2015 UT 22, ¶27. And here, “no reasonable lawyer would have found an advantage in understating the mens rea requirement.” *Id.*

Counsel’s failure to object was not logically or factually sound. Even though the incorrect recklessness instruction made it easier for the jury to convict, the State contends that counsel’s failure to object was excusable. *See* Aple. Br. at 19-21. It points to the jury instructions, which, as a whole, required the jury to find that Miles “acted with” awareness of a risk of Kim’s non-consent. *Id.* at 20; *see also* R.179, 184. “Logically”—the State argues—“where an actor is aware of a risk that could result from his action and then acts, he necessarily consciously disregards that risk.” *Id.* at 2, 10. In the State’s estimation, the omission was a “technical defect”; “whatever the recklessness definition lacked, the elements instruction, logic, and the evidence supplied.” *Id.* at 20. The State's arguments are not persuasive.

The conscious disregard element imposes a meaningful requirement and

its omission "changed the meaning of the jury instruction" on recklessness. *Liti*, 2015 UT App 186, ¶ 14. In *Liti*, for instance, this Court held that trial counsel performed deficiently by failing to object to an instruction that omitted the gross deviation element of recklessness. *Id*. ¶¶12-20. In doing so, it rejected the State's contention "that the gross deviation language would have added little, if anything, to this definition under the circumstances of th[e] case." *Id*. ¶17 (quotation marks omitted).

To accept the State's argument, the *Liti* court reasoned, would require a conclusion that the gross deviation language was "essentially[] superfluous." *Id*. Instead, this Court exercised the presumption "that the legislature intended ... [the gross deviation language] to impose a meaningful requirement." *Id*. Thus, by omitting this language, the recklessness instruction "failed to correctly state the law with respect to the mental-state." *Id*. Moreover, failing to object to the instruction was deficient performance. *Id*. ¶20.

For similar reasons, this Court should reject the State's contention that conscious disregard was "logically implied" in the evidence and instructions. *See* Aple. Br. 8-10, 19-21. As in *Liti*, the State's interpretation would render the conscious disregard element "essentially[] superfluous." 2015 UT App 186, ¶17.

Under the recklessness statute, "[a] person engages in conduct ... [r]ecklessly with respect to circumstances surrounding his conduct ... when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist." Utah Code § 76-2-103(3). In other words, a reckless actor is

one who (1) "engages in conduct", i.e., acts, (2) while aware of the requisite risk, but (3) consciously disregards that risk. Meanwhile, the instructions as a whole told the jury that it was sufficient if Miles (1) "acted" (2) "with" awareness of a risk of non-consent. *See* R.179, 184. The plain language of the statute dictates that action plus risk awareness is not enough. *See* Utah Code § 76-2-103(3). By including the conscious disregard language, it is evident that the legislature rejected the view that this element was "logically implied" when the defendant engages in the proscribed act despite his awareness of the risk. *See id*.; *see also* Aple. Br. 8-10, 19-21. To conclude otherwise would run contrary to the established "presum[ption] that the legislature intended for each portion of the statute to impose a meaningful requirement." *Liti*, 2015 UT App 186, ¶17.

Moreover, acting with awareness of a risk is not the same as acting with conscious disregard of that risk. A finding of "conscious[] disregard[]" requires the jury to find additional facts and invokes a higher degree of culpability. *See* Utah Code § 76-2-103(3). First, the statute requires that the defendant engage in the conduct while "disregard[ing]"—or paying no attention to —the risk that he is aware of. *Id*.; *see also Disregard*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014) (defining "disregard" as "to pay no attention to: treat as unworthy of attention or notice."). It does not, however, capture those who act while thoughtfully weighing or responding to a risk that is known. *See* Utah Code § 76-2-103(3).

Additionally, the disregard itself must be "conscious[]"—something

different than awareness. *See id*. The dictionary defines "aware" as "having or showing perception or knowledge" and "conscious" as "perceiving, apprehending, or noticing *with a degree of controlled thought* or observation." *Aware*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014) (emphasis added). The term "conscious" thus implies a higher level of mental appreciation than mere "awareness." *See id.*; Utah Code § 76-2-103(3). It also suggests that the "disregard" is a deliberate decision that comes from "a degree of controlled thought." *See Disregard*, Merriam-Webster's Collegiate Dictionary (11th ed. 2014).

Recklessness, then, is not satisfied when a defendant becomes aware of a risk and continues to act. Rather, the legislature chose to include the additional element of "conscious[] disregard[]"—language that denotes a deliberate choice to ignore a risk that the defendant has acknowledged and considered. Utah Code § 76-2-103(3). Trial counsel should have objected to the instruction that omitted this element. The element is necessary to the definition of recklessness and requires the jury to find additional facts ("disregard" and a "conscious" decision to do so). "[N]o reasonable lawyer would have found an advantage" in the omission of language that "understat[ed] the [recklessness] mens rea." *Liti*, 2015 UT App 186, ¶20.

Additionally, as argued in opening at pages 30-31, the conscious disregard requirement assumes special significance in cases, like this one, where a mid-penetration withdrawal of consent is at issue. The State fails to address this

argument. Instead, it argues that counsel's failure to object was reasonable because "[f]actually, recklessness was not at issue for the anal sex count." Aple. Br. at 10, 19. The State is incorrect for the reasons in opening and those discussed in Part B of this reply. *See* Aplt. Br. at 30-31, 33-34; *infra* Part B. But notwithstanding the extent to which recklessness was at issue, "[n]o reasonable lawyer would have found an advantage" in withholding a meritorious objection to an instruction that made it easier to convict. *Barela*, 2015 UT 22, ¶27. Put short, counsel's failure to object to the recklessness instruction was deficient performance.

B. The failure to object to the incorrect recklessness instruction was prejudicial.

It is reasonably likely that the jury's verdict was based on a finding that Miles acted recklessly, and if properly instructed, it would have acquitted. *See* Aplt. Br. 32-39. Contrary to the State's claims, recklessness was an important issue, and the mixed verdict is highly relevant to the prejudice analysis. *See* Aple. Br. 19, 21-25.

Recklessness was at issue: Based on the evidence, recklessness was at issue in two ways. First, the jury had reason to believe that Miles acted with awareness of only *a risk* that Kim did not consent (recklessness)—not *actual* awareness of Kim's non-consent (knowledge). Second, there was evidence upon which the jury could find that Miles did not act with conscious disregard, making the conscious disregard element an issue as well. The State's arguments to the contrary are

unpersuasive.

The State is incorrect to argue that recklessness was not at issue because Miles admitted that he "knew [] [Kim] was not consenting the moment that she asked him to stop." Aple. Br. 19, 24. As a factual matter, Miles testified that Kim told him "she couldn't handle it anymore." R.844. He made no admission that Kim unambiguously asked him to "stop" or protested "no"—a point that trial counsel emphasized to the jury. *See* R.843-44 ("[Defense Counsel]: And she didn't say no [] -- she just said, ... I can't handle it anymore? [Miles]: Right"). On the contrary, Miles testified Kim "never said the word 'no' or 'stop'" during the events of that evening. R.848.

Additionally, there was room for the jury to doubt that the statement, "I can't handle it anymore," established knowledge. *See* R.843-44. Evidently, Kim could not handle "it." *Id*. But what she meant by "it" was not necessarily clear. *Id*. Was "it" the speed of the intercourse? *Id*. The roughness of the anal sex? *Id*. The way Miles was "mov[ing] back and forth?" *Id*. Reasonable minds could find ambiguity in Kim's statement, particularly when considered alongside the other circumstances Miles testified to. These circumstances included Kim's initial willingness to try anal sex. *Id*. They also included Kim's statement (made after Miles penetrated her anus) confirming that she was okay to continue with the anal intercourse. *Id*. An additional layer of ambiguity came from the evidence of sexual roleplay, which raised questions about whether Kim's statement would be understood as roleplay-speak or as an actual withdrawal of consent. Finally, in

closing argument, the prosecutor pointed the jury to the erroneous recklessness instruction and argued that Miles acted recklessly. *See* R.922-23.

Faced with these circumstances, there is a reasonable likelihood that at least one juror would resolve ambiguity against a finding of knowledge and in favor of a finding of recklessness. *See* R.184. Consequently, "it is reasonably likely that the jury's verdict was based at least in part on a determination that [Miles] acted recklessly." *Liti*, 2015 UT App 186, ¶22.

Second, whether Miles acted with conscious disregard was likewise an issue. The jury did not necessarily find conscious disregard when it found that Miles "acted with" awareness of a risk that Kim did not consent. *C.f.* Aple. Br. 8-10, 19-21; *see also* R.179, 184. As explained above, acting with awareness of a risk is not the same as acting with conscious disregard of that risk. *See supra* pgs. 6-7. Had the jury been correctly instructed, it would have been required to find additional facts and greater mental culpability. *See id*.

Moreover, "the record contain[ed] evidence that could rationally lead to a contrary finding with respect to the omitted [conscious disregard] element.'" *State v. Ochoa*, 2014 UT App 296, ¶5, 341 P.3d 942. What made the conscious disregard requirement so critical was Miles's testimony that he "pulled out of [Kim's] anus" after Kim said, "I can't handle it anymore." R.844-45. From this, the jury could conclude that any continued anal penetration occurred while Miles was weighing or responding to the risk of non-consent—a risk that he ultimately did not "disregard."

The State suggests that the conviction shows that the jury disbelieved Miles's testimony that he terminated the anal intercourse. *See* Aple. Br. 9, 24. The State is incorrect. The conviction only tells us this: At some point, Miles engaged in the proscribed anal-genital touching while aware of the risk of non-consent. R.179, 184. But the jury could have also believed that after this point, Miles "pulled out of [Kim's] anus" and terminated the sexual encounter. R.844-45. The verdict says nothing about how long thereafter the penetration continued, let alone that Miles must have continued the act to completion because he "'had to finish.'" Aple. Br. 9, 24.

Nor does the verdict preclude the possibility that the jury believed Miles's testimony in full. Indeed, Miles's own testimony accounts for a brief period of time after becoming aware of the non-consent risk where he continued to penetrate Kim's anus. *See* R.844-45 ("[Miles]: [S]he said she couldn't handle it anymore and so I immediately stopped ... [Defense Counsel]: What happened next? [Miles]: *Then* I pulled out of her anus" (emphasis added)).[2] If the jury believed Miles's testimony, the erroneous instructions told the jurors that they had enough to convict—Miles was engaging in the sexual act (anus-genital

[2] According to the State, "[Miles] said that he 'immediately' withdrew" upon learning of the risk of non-consent. Aple. Br. 24. But the record reveals a subtle difference in the timeline. R.844-45. Miles testified that Kim said "she couldn't handle it anymore" after which Miles "immediately stopped"—presumably stopping the "back and forth" movement he had previously testified to. *Id.* When asked what happened next, Miles testified that he "then ... pulled out of her anus." *Id.* The testimony thus suggests that Miles "immediately stopped" moving "back and forth" and "then" withdrew a short time later. *Id.*

"touching") with awareness of the risk of nonconsent. R.179, 184. The verdict is thus consistent with a jury who credited Miles's testimony. And again, evidence that Miles "pulled out" shortly thereafter allowed the jury to find that any continued penetration occurred while Miles was thoughtfully weighing—not consciously disregarding—the risk of non-consent.

Kim, of course, offered a competing version of events. R.459-60. And we cannot be certain "how the jury processed these two stories," perhaps finding "the truth to lie somewhere between." *Barela*, 2015 UT 22, ¶¶30-32. But ultimately, conscious disregard is a question for the jury, and its omission "allowed the jury to convict [Miles] without considering whether the State had proved everything necessary to obtain a [forcible sodomy] conviction." *Liti*, 2015 UT App 186, ¶22. Particularly given the evidence that Miles was responsive to the risk of non-consent, "there is a reasonable likelihood that a properly instructed jury would have returned a verdict more favorable to [Miles]." *Id.* ¶23.

The mixed verdict: The jury's acquittals on four of the five counts make the likelihood of a favorable result even stronger. The State disagrees. It argues that the split verdict should bear no weight in the prejudice analysis because, in the State's estimation, it is "just as likely" that the jury acted based on another motive such as "mistake[] or lenity." Aple. Br.22. For support, the State relies on inconsistent verdict cases such as *United States v. Powell*, 469 U.S. 57 (1964) and *State v. Cady*, 2018 UT App 8. The State's claim fails because the analysis for inconsistent verdict cases is irrelevant to the prejudice analysis.

In inconsistent verdict cases, defendants argue that their convictions should be dismissed not because of trial error but because the jury returned "inconsistent verdicts." *See, e.g.*, *Powell*, 469 U.S. 474-76; *Cady*, 2018 UT App 8, ¶32. Courts, however, "'are under no duty' to reconcile seemingly inconsistent acquittals and convictions.'" *State v. Salt*, 2015 UT App 72, ¶28, 347 P.3d 414. Therefore, a "claim of inconsistency alone is not sufficient to overturn the conviction." *Cady*, 2018 UT App 8, ¶32. Rather, "there must be additional error beyond a showing of inconsistency." *Id.* When a defendant argues inconsistent verdicts without identifying any "additional error," the appellate court will review the case for sufficiency of the evidence. *See id*. And, in deciding sufficiency, the court "will not reverse unless 'reasonable minds could not rationally have arrived at the verdict of guilty beyond a reasonable doubt.'" *Id.*

Unlike inconsistent verdict cases, the prejudice analysis is not a sufficiency-of-the-evidence analysis. When reviewing an error for prejudice, the court will review the error "in light of the 'totality of the evidence,' not just the evidence supporting the verdict." *Barela*, 2015 UT 22, ¶31. Moreover, the court will not require a defendant to establish that reasonable minds could not have convicted him. *Salt*, 2015 UT App 72, ¶29. Indeed, the court will not even require a defendant to show "that the jury would have more likely than not" returned a different verdict but for the error. *State v. Hales*, 2007 UT 14, ¶92, 152 P.3d 321. Rather, the court will reverse if there is "a reasonable likelihood" of a different result but for the error. *State v. Reece*, 2015 UT 45, ¶40, 349 P.3d 712.

As explained in opening, split verdicts are highly relevant to the prejudice analysis. Aplt. Br.35-36. This Court should therefore decline the State's invitation to disregard *Richardson* and "refrain from assigning any meaning to [the] mixed verdict." Aple. Br. 22-23. On the contrary, *Richardson* rejected a similar argument raised by the State here and conducted a correct prejudice analysis. *State v. Richardson*, 2013 UT 50, ¶¶40-44, 308 P.3d 526. *Richardson* was a he-said/she-said case where the jury returned a split verdict. *Id.* ¶¶40-44. On appeal, the State argued that the split verdict did not support prejudice because it could be explained as a series of "'mercy' acquittals." *Id.* Our supreme court acknowledged that the acquittals could "[p]erhaps ... be explained away as 'mercy' acquittals." *Id.* But this did not matter to the prejudice analysis. Though the court did not know why the jury reached the verdict it did, the court weighed the split verdict in favor of prejudice because the acquittals were "consistent with the notion that the jury was conflicted about the evidence and the competing versions of events offered by the victim and Richardson." *Id.*

Here, as in *Richardson*, the split verdict should undermine this Court's confidence in the verdict. Similar to *Richardson*, this was a he-said/she-said case where the jury returned a mixed verdict. *See* Aplt. Br. 34-37. Additionally, there were reasons in the evidence for the jury to question Kim's credibility and the jury acquitted on four of the five counts despite Kim's testimony. Aplt. Br. 35-36. Under these circumstances, this Court should hold that the split verdict strongly supports prejudice. *See Richardson*, 2013 UT 50, ¶¶40-44. For these reasons and

the reasons stated in opening, this Court should reverse. Aplt. Br. 32-39.

CONCLUSION

For the reasons here and in opening, Miles asks this Court to reverse and remand for a new trial based on trial counsel's ineffective assistance in failing to object to the recklessness instruction. *See* Aplt. Br. 22-41. Alternatively, this Court should presume the deficient performance identified in the 23B motion and reverse and remand for a new trial because the cumulative effect of all of the errors identified on appeal (in the opening brief and the 23B motion) undermine confidence in the verdict. *See id.* at 41-43.

If the Court declines to reverse on the issues raised in opening or to presume the deficient performance identified in the 23B motion for purposes of a cumulative error analysis, Miles asks this Court to remand for a rule 23B hearing and supplementation of the record followed by supplemental briefing.

SUBMITTED this 13th day of March 2018.

ALEXANDRA S. McCALLUM
Appellate Attorney

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 3,695 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted from the foregoing brief of defendant/appellant.

ALEXANDRA S. McCALLUM

CERTIFICATE OF DELIVERY

I, ALEXANDRA S. McCALLUM, hereby certify that I have caused to be hand-delivered an original and five copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114. I have also caused a searchable pdf to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and a copy emailed to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 13th day of March 2018.

ALEXANDRA S. McCALLUM

DELIVERED this _____ day of March 2018.