

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

THOMAS JEFFREY MILES,
Defendant/Appellant.

Appellant is incarcerated

SUPPLEMENTAL 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

This case is before the Court following 23B proceedings in the district court. The subject of the 23B remand was trial counsel’s failure to introduce evidence regarding the content of a Craigslist ad that was important to the issue of consent at trial. The Court ordered supplemental briefing “on whether Miles’s trial counsel provided ineffective assistance of counsel by failing to use evidence regarding the content of the Craigslist ad.” *See* Addendum A (supplemental orders). Moreover, in his opening brief, Miles raised a separate issue of ineffective assistance—whether trial counsel provided ineffective assistance by failing to object to an incorrect instruction on recklessness. He also raised cumulative error. These issues have yet to be decided by the Court. In an amended order, this Court also allowed Miles to update his cumulative error argument in light of the supplemental facts developed on 23B remand. *See id.*

In this brief, Miles argues (in light of the supplemental facts) that counsel rendered ineffective assistance by failing to introduce evidence regarding the Craigslist ad's content. *See infra* Part I. He also argues that the cumulative effect of trial counsel's ineffective assistance undermines confidence that he had a fair trial. *See infra* Part II.

FACTUAL BACKGROUND

In 2018, this Court remanded Miles's case to the district court "for the limited purpose of entering findings of fact relevant to whether trial counsel's actions in failing to investigate and use evidence regarding the content of a Craigslist ad that Miles posted constituted ineffective assistance of counsel." Order granting 23B remand. Specifically, it ordered the district court to address the "following issues: (1) The content of the Craigslist ad; (2) The details available to defense counsel relating to the content of the Craigslist ad; and (3) Counsel's reasons for not investigating and introducing the content of the Craigslist ad at trial." *Id.*

A 23B evidentiary hearing took place on February 26, 2019. R.1454-1524. At this hearing, the Court heard testimony from Paul R. Christensen (Miles's trial attorney), Thomas Jeffrey Miles (Appellant/defendant), and M.C.M. (the alleged victim). R.1454-1524. The testimony addressed the three issues identified in this Court's order granting 23B remand. A transcript of the evidentiary hearing is attached at Addendum B.

Evidence regarding the ad's content. At the 23B hearing, the Court heard

witness testimony regarding the ad's content. A copy of the Craigslist ad was not introduced into evidence and "evidently does not presently exist in the files of the State, the Defense, or Mr. Christensen." R.1572.

Mr. Miles testified that the ad stated that he and "some friends were looking for an obedient, submissive slut for a gang bang" and that they "would have rough, kinky sex with the submissive that responded." R.1496-97. Mr. Miles testified that the ad went on to state that a "one-on-one [audition]" was required to make sure the responding party "could handle the type of things that [they] were going to do with her." R.1496-97. According to Mr. Miles, the ad then "gave a detailed list of the sexual activities [they] would participate in." R.1496-97. That list included: "[h]air pulling, bondage, face smacking, anal sex, double penetration, face fucking, choking, spanking, and just rough sex in general." R.1496-97.

Mr. Christensen likewise testified that the Craigslist ad included talk of "group sex ... anal sex." R.1574, 1460-61. He also testified that he did not recall the specific contents of the Craigslist ad. R.1473, 1481, 1574.

"M.C.M. did not dispute that the ad sought a partner willing to participate in 'double penetration.'" R.1574. "Nor did she challenge Miles's claim that the ad listed various sexual activities in which the responding party was expected to participate." R.1574. "Instead, M.C.M. testified that 'anal sex' and 'being pissed on' were not among the sexual activities listed in the ad." R.1510-11, 1574.

According to M.C.M., Miles's assertion that the "ad included such things as 'anal

sex” was “incorrect and a lie.” R.1510-11, 1574. On cross-examination, defense counsel impeached M.C.M. with her testimony from the preliminary hearing, at which M.C.M. testified that she could not recall the specifics of the ad. R.232-33, 1513-14; *see also* R.438.

Evidence regarding the details available to defense counsel. Mr. Christensen made inconsistent statements about whether he actually obtained and possessed a copy of the Craigslist ad. *Compare* R.1460, 1462-65, 1471, 1481-82 (testifying at 23B hearing that he possessed a copy of the Craigslist ad), *with* R.1469-71 (Mr. Christensen telling an LDA investigator that he was unable to obtain a copy of the ad), *and* R.1478 (Mr. Christensen failing tell State that he procured a copy). But “he was adamant at the Rule 23B hearing that he had a copy of the Craigslist ad, that he discussed it with Mr. Miles, and that he provided the appellate defense counsel his entire file.” R.1576.

Evidence regarding counsel’s reasons for not introducing the ad. Mr. Christensen gave inconsistent reasons for failing to introduce evidence regarding the content of the Craigslist ad. For instance, in a November 29, 2018 interview with an LDA investigator, Mr. Christensen claimed that he did not introduce the ad because he was unable to locate it. R.1463, 1469-72. Later, in a State-conducted interview held on February 8, 2019, Mr. Christensen expressed that he did not think that the ad was exculpatory or relevant to the issue of consent. R.1478-81.

At the 23B hearing, Mr. Christensen stated for the first time that he

obtained and possessed a copy of the Craigslist ad prior to trial. R.1460, 1462-65, 1471, 1481-82. He then offered several, contradictory reasons for not introducing a copy of the ad. For example, on direct, Mr. Christensen testified that: (1) he believed the scope of the behaviors solicited by the ad was relevant to the trial issues, R.1474; and (2) he believed he elicited trial testimony from Mr. Miles regarding the scope of the “behavior[s] ... sought” by the Craigslist ad, including its “talk of anal sex.” R.1460-61. Under these circumstances, Mr. Christensen said, there was no need “to bolster” Miles’s in-court testimony by introducing a copy of the Craigslist ad. R.1462; *see also* R.1473.

Later on direct, Mr. Christiansen offered different reasoning. Specifically, he testified that at the time of trial, he did not think that the scope of behaviors sought by the ad was relevant to the issue of consent. R.1475.

On cross, Mr. Christensen testified that he chose not to admit the ad “because [he] felt that the emails themselves were the contract between the parties.” R.1486-87. Mr. Christensen acknowledged that in these emails, M.C.M. stated that she had “no limits.” R.1484-85, 1487-88. He also acknowledged that some of the emails were missing. R.1488-89. Mr. Christensen further testified that the ad made Miles look “reprehensible,” and “that was the strategic decision to not use [a copy of the ad]. [He] knew what [Mr. Miles] was going to testify to” and “didn’t need a printed log to go into the jury room.” R.1491-92; *see also* R.1483-84, 1490-92.

Moreover, Mr. Christensen testified that his defense at trial was that

M.C.M. consented to all the sexual acts charged, including the act of anal sex. R.1472-73, 1493. And it was Mr. Christensen’s view—both at the time of trial and at the time of the 23B hearing—that Utah juries have a hard time understanding why anybody would consent to anal sex. R.1475-76, 1493. He further thought after trial that his failure to introduce the ad constituted grounds for a “good appeal.” R.1474-75, 1486-87.

The district court’s findings. The district court’s findings are set forth in Addendum C, but Miles briefly summarizes the findings here. The district court found that the “Craigslisat ad included reference to sexual activities including hair pulling, bondage, face smacking, *double penetration*, face fucking, choking, spanking and just rough sex in general.” R.1574 (emphasis added). As to the issue of whether the ad listed “anal sex” the district court found “M.C.M [to be] a more credible witness than Mr. Miles and as such, ... f[ound] that the Craigslisat ad did not include” this description. R.1574.

The district court also noted Mr. Christensen’s testimony that the ad “included talk of ‘group sex ... anal sex.’” R.1574. Moreover, it “f[ound] [Mr. Christensen’s] testimony credible and f[ound] that he had a copy of the Craigslisat ad during trial, he discussed it with Mr. Miles and was aware of its contents, both by his own possession of the actual Craigslisat ad and his discussion with Mr. Miles about its contents.” R.1576.

The court further found that “Mr. Christensen considered the evidential value of the Craigslisat ad” and chose not to introduce it for the following reasons:

(i) He expected to elicit from either Mr. Miles or M.C.M the sexual behavior the parties were to engage in and did not need to bolster the testimony of either one.

(ii) He thought that the “conversation between them would be sufficient for the jury to hear of what took place and what was expected of the parties,” which included the emails exchanges received into evidence which discussed the agreed upon activity.

(iii) He did not think that the ad was exculpatory or relevant to consent – though his testimony was inconsistent on this point.

(iv) He thought the details could have put Mr. Miles in a worse light in the jury's eyes.

(v) In his view, both at the time of trial and at the time of the Rule 23(B) hearing, Utah juries have a hard time understanding why anybody would consent to anal sex.

(vi) He chose not to admit the Craigslist ad []because [he] felt that the emails between M.C.M and Mr. Miles were the “negotiation” contract between the parties as to what would occur. Mr. Christensen acknowledged that in these emails M. C.M stated that she had “no limits.”

(vii) He felt the Craigslist ad would make Mr. Miles look “reprehensible,” and “that was the strategic decision to not use [a copy of the ad]. [He] knew what [Mr. Miles] was going to testify to” and “didn't need a printed log to go into the jury room.”

(viii) Mr. Miles testified that he did not like the way the emails portrayed him to the jury, he “shut down” at trial and refused to read the emails to the jury and that the introduction of the Craigslist ad could not have made him look any worse to the jury.

R.1577-78 (citations omitted).

The district court did not determine whether these reasons constituted “reasonable” trial strategy; whether counsel rendered deficient performance; or whether Miles was prejudiced.

ARGUMENT

I. Trial counsel’s failure to introduce evidence of the content of the Craigslist ad constituted ineffective assistance of counsel.

The Sixth Amendment provides a defendant with the right to effective assistance of counsel at all stages of the prosecution, including the investigation. *See Strickland v. Washington*, 466 U.S. 668, 688, 690-91 (1984). To establish ineffective assistance, a defendant must show: (1) his attorney’s performance was deficient in that it fell below “an objective standard of reasonableness,” and (2) “there is a reasonable probability that the outcome of the trial would have been different” “but for counsel’s deficient performance.” *State v. Montoya*, 2004 UT 5, ¶23, 84 P.3d 1183. In reviewing this issue, this Court defers to the district court’s finding of fact, “but determine[s] as a matter of law whether the defendant received ineffective assistance of counsel in violation of the Sixth Amendment.” *State v. Maestas*, 2000 UT App 22, ¶10, 997 P.2d 314 (internal quotations omitted).

Here, trial counsel performed ineffectively by failing to introduce the content of the Craigslist ad. As a threshold matter, Miles challenges the district court’s finding that the ad did not explicitly list “anal sex” among the activities sought. *See infra* Part I.A. In any event, the Craigslist ad alluded to anal sex by seeking a partner willing to engage in “double penetration.” *See infra* Part I.B. Moreover, as explained below, trial counsel’s failure to introduce the ad’s content amounted to deficient performance that prejudiced Miles. *See infra* Parts I.C-D.

A. *The district court clearly erred in finding that the Craigslist ad did not include a specific reference to “anal sex.”*

Under Utah law, a finding of fact “must not be set aside unless clearly erroneous.” Utah R. Civ. P. 52(a)(4). One way to show that a finding is clearly erroneous is to demonstrate that the finding is “against the clear weight of the evidence.” *Brown v. State*, 2013 UT 42, ¶37, 308 P.3d 486 (simplified). “The party seeking to overturn the [district] court's findings has the burden of marshaling the evidence in support of the findings and then demonstrating that, despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous.” *Crouse v. Crouse*, 817 P.2d 836, 838 (Utah Ct. App. 1991); *see also State v. Nielsen*, 2014 UT 10, ¶41, 326 P.3d 645 (explaining that the marshaling requirement is “a natural extension of an appellant's burden of persuasion,” not a ground for procedural default). Here, the marshaled evidence is as follows:

1. Mr. Miles testified that the “gave a detailed list of the sexual activities [they] would participate in.” R.1496-97. That list included: “[h]air pulling, bondage, face smacking, anal sex, double penetration, face fucking, choking, spanking, and just rough sex in general.” R.1496-97.
2. Mr. Christensen likewise testified that the Craigslist ad included talk of “group sex ... anal sex.” R.1574, 1460-61. He also testified that he did not recall the specific contents of the Craigslist ad. R.1473, 1481. The district court found that Mr. Christensen testified credibly. R.1576.
3. M.C.M. testified that ‘anal sex’ and ‘being pissed on’ were not among the sexual activities listed in the ad.” R.1510-11, 1574. According to M.C.M., Miles’s assertion that the “ad included such things as ‘anal sex’” was “incorrect and a lie.” R.1510-11, 1574. On cross-examination, defense counsel impeached M.C.M. with her

testimony from the preliminary hearing, at which M.C.M. testified that she could not recall the specifics of the ad. R.232-33, 1513-14; *see also* R.438.

4. “As to the issue of ‘anal sex’” the district court “f[ound] M.C.M. [to be] a more credible witness than Mr. Miles and as such,” it found that the ad did not include a description of “anal sex.” R.1574.

A finding that the ad did not include an explicit description of anal sex is against the clear weight of the evidence. Of the three parties who testified to seeing the ad, two individuals—Mr. Miles and Mr. Christensen—testified that the ad spoke of “anal sex.” The district court did not specifically determine that Mr. Christensen testified more credibly than M.C.M. on this particular point, but it did determine that Mr. Christensen’s testimony was credible. R.1576. M.C.M. was the only individual who testified that the ad did not explicitly reference anal sex. But defense counsel impeached M.C.M. with her testimony from the preliminary hearing, at which M.C.M. testified that she could not recall the specifics of the ad. R.232-33, 1513-14; *see also* R.438. Meanwhile, Miles consistently asserted that the ad listed anal sex among the activities sought. R.1496-97; State’s Ex. 3 (23B hearing exhibits).

Thus, two witnesses corroborated each other’s testimony that the ad listed “anal sex” among the behaviors sought. And the trial court found one of these witnesses credible. Meanwhile, M.C.M.’s contrary testimony was uncorroborated and the subject of impeachment. The weight of the evidence therefore reveals that the ad explicitly referenced anal sex. The district court’s finding otherwise was “so lacking in support as to be against the clear weight of the evidence and,

therefore, clearly erroneous.” *Crouse*, 817 P.2d at 838.

B. *In any event, the Craigslist ad alluded to anal sex by seeking a partner willing to engage in “double penetration.”*

The district court found that the “Craigslist ad included reference to sexual activities including ... *double penetration*.” R.1574 (emphasis added). The act of “double penetration” encompasses an act of anal sex.

“Double penetration” is commonly understood to mean an act “where a woman is penetrated vaginally and anally at the same time.” Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 I/S: J.L. & Pol’y for Info. Soc’y 317, 354 (2010); *see also, e.g.*, Rebecca Whisnant and Christine Stark, *Not for Sale: Feminists Resisting Prostitution and Pornography* 17 (2004) (describing double penetration as the act of a woman “having her vagina and anus penetrated simultaneously); Wikipedia, *Sex position*, https://en.wikipedia.org/wiki/Sex_position (last visited October 7, 2019) (double penetration may refer to the penetration of a woman “with one penis in her anus, and the other in her vagina or of a male, with two penises in his anus”); Urban Dictionary, *Double penetration*, <https://www.urbandictionary.com/define.php?term=double%20penetration> (last visited October 7, 2019) (“when a woman of the female sex has two penises inserted [in] any combo of her mouth, anus, or vagina, but is most commonly done in the anus and vagina”).

Indeed, the phrase suggests that the act of penetration is “double,” suggesting two types of penetration. Given the number of anatomical orifices

available for penetration, it is reasonable to infer—from the term alone—that “double penetration” may include simultaneous anal and vaginal penetration.

The term has also worked its way into the vocabulary of mainstream society. From 2001 to 2015, there were 8 references to “double penetration” on popular television shows and 13 references in non-pornographic movies.¹ Meanwhile, “double penetration ... ha[s] become almost [a] staple[] of mainstream porn.” Amalia Ziv, *Explicit Utopias* 68 (2015); see also Shira Tarrant, *The Pornography Industry: What Everyone Needs to Know* 91 (2016); Ana J. Bridges et al., *Sexual Scripts and the Sexual Behavior of Men and Women Who Use Pornography*, *Sexualization, Media, & Society* 1, 10 (2016) (noting that double penetration is present in 19% of pornography scenes); Simone Kuhn et al., *Brain Structure and Functional Connectivity Associated With Pornography Consumption*, 7 *JAMA Psychiatry* 827-834 (2014) (noting that “[r]esearch in the United States has shown that 66% of men and 41% of women consume pornography on a monthly basis. An estimated 50% of all Internet traffic is related to sex”).

The Craigslist ad, then, listed an activity that involves anal sex. This is consistent with a harmonized reading of the district court’s findings of fact. The marshaled evidence from the 23B hearing on this point is as follows: Miles testified that the Craigslist ad provided a “detailed list of the sexual activities” he

¹ These results were obtained by entering the keyword, “double penetration” into the “TV Corpus” and the “Movie Corpus” at the following website: <https://www.english-corpora.org/>.

wanted from any interested party, including “anal sex” and “double penetration.” R.1496-97, 1573. M.C.M. testified that the ad did not list “anal sex” among the activities. R.1510-11, 1574. Trial counsel testified that he possessed the ad and that the Craigslist ad “included talk of ‘group sex ... anal sex.’” R.1574, 1460-61. Both M.C.M. and trial counsel testified at some point that they did not recall the specifics of the ad. R.232-33, 1473, 1481, 1513-14; *see also* R.438. The district court found both trial counsel and M.C.M. credible. R.1574, 1576. The court did not find that M.C.M. was more credible than trial counsel or visa versa.

Thus, on the one hand, the district court found trial counsel credible, who testified that the Craigslist ad included talk of “group sex ... anal sex.” R.1574, 1460-61, 1576. And on the other hand, it found that M.C.M. was credible, who testified that the ad did not include “anal sex” in its list of sexual activities. R.1510-11, 1574. After harmonizing these findings, it is evident that the district court found that even though the Craigslist ad did not *explicitly* list “anal sex,” the ad referred to “double penetration”—which amounted to *implicit* “talk of anal sex.” Such a reading avoids a version of the findings that would otherwise be internally contradictory.

In the event that this Court does not accept Miles’s harmonized reading—determining instead that the district court found that double penetration *did not* constitute an allusion to anal sex—Miles asks the Court to reject the district court’s finding as internally inconsistent and clearly erroneous. As discussed, a finding of fact “must not be set aside unless clearly erroneous.” Utah R. Civ. P.

52(a)(4). One way to establish that a finding is clearly erroneous is to convince this Court that “a mistake has been made.” *Brown*, 2013 UT 42, ¶37 (simplified). Additionally, although district court findings resulting from credibility determinations are normally afforded great deference, a party may nevertheless succeed in demonstrating clear error if the findings are “internally inconsistent.” *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 575-76 (1985).

In this case, the marshaled evidence demonstrates that any finding that the Craigslist ad did not insinuate to anal sex would be clearly erroneous (the marshaled evidence appears above at pages 12-13). Any such finding amounts to a “mistake” because the ad referred to “double penetration.” *Brown*, 2013 UT 42, ¶37. As shown above, “double penetration” by definition encompasses anal sex. *See supra* pp. 11-12. Moreover, such a finding would be “internally inconsistent” because the district court found that trial counsel testified credibly. *Anderson*, 470 U.S. at 575-76. And trial counsel testified that the ad “included talk of ‘group sex ... anal sex.’” R.1574. Accordingly, any finding that the ad did not include *implicit* “talk of ... ‘anal sex’” would be mistaken and internally inconsistent, and therefore, clearly erroneous. *Anderson*, 470 U.S. at 575-76; *Brown*, 2013 UT 42, ¶37.

In short, the district court’s findings and the plain meaning of “double penetration” reveal that the Craigslist ad alluded to anal sex by seeking a partner willing to engage in “double penetration.” A finding to the contrary would be clearly erroneous.

C. *Counsel performed deficiently by failing to introduce the ad’s content, which would have shown that the ad sought a partner willing to engage in “anal sex” and/or “double penetration”—an act involving anal sex.*

To show deficient performance, “a defendant ‘must identify specific acts or omissions demonstrating that counsel’s representation failed to meet an objective standard of reasonableness.’” *Montoya*, 2004 UT 5, ¶24. An appellate court “will not second-guess trial counsel’s legitimate strategic choices.” *State v. Tennyson*, 850 P.2d 461, 465 (Utah Ct. App. 1993). But to qualify as legitimate, the strategic decision must be “reasonable.” *State v. Hales*, 2007 UT 14, ¶73, 152 P.3d 321. “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *State v. Silva*, 2019 UT 36, ¶20.

Here, counsel performed deficiently by failing to introduce evidence regarding the ad’s content and its solicitation of “anal sex” and/or “double penetration”—an act involving anal sex. Failing to introduce this critical evidence fell below an objective standard of reasonableness in light of prevailing professional norms. *See infra* Part I.C.1. Moreover, counsel’s purported reasons for not introducing the evidence were unreasonable. *See infra* Part I.C.2.

1. The failure to introduce this critical evidence fell below an objective standard of reasonableness.

The prevailing professional norm, as shown in our case law, is to present evidence that undermines the State’s claim of nonconsent in he-said-she-said cases that turn on consent. Counsel’s failure to do so here was unreasonable.

Case law reveals that a tactical decision is not reasonable if counsel has

“access to” important defense evidence, but does not use it at trial. *State v. Moore*, 2009 UT App 386, ¶¶5, 8-10, 223 P.3d 1137 (*Moore I*), *aff’d*, 2012 UT 62, 289 P.3d 487 (*Moore II*). This is especially true if the State fails to investigate and use evidence that undermines the credibility of the alleged victim regarding the issue of consent. *See Gregg v. State*, 2012 UT 32, ¶34, 279 P.3d 396.

For example, in *State v. Templin*, 805 P.2d 182 (Utah 1990), the Utah Supreme Court “held that it was ineffective assistance of trial counsel to fail to contact and interview a prospective witness who ‘would have testified that she saw [the] defendant and the [alleged] victim kissing passionately for over fifteen minutes ... within an hour of the rape reported by the victim.’” *Gregg*, 2012 UT 32, ¶36 (citing *Templin*, 805 P.2d at 188-89). The court noted that “it can never be a tactical decision to fail to investigate and introduce evidence that would undermine the credibility of the only witness who presented direct evidence of the defendant’s guilt.” *Id.* ¶34 (citing *Templin*, 805 P.2d at 188).

Likewise, in *State v. J.A.L.*, counsel performed deficiently even though he got the State’s expert to admit that complainant’s “injuries could have been the result of consensual intercourse” because he “did not present any additional evidence or expert testimony to corroborate this conclusion.” 2011 UT 27, ¶31, 262 P.3d 1. There, defendant “asked his counsel to investigate the physical evidence,” but counsel did not. *Id.* ¶29. Consequently, counsel failed to present evidence of an expert who would have “concluded that the results of the Code R kit were more consistent with consensual ... intercourse.” *Id.* ¶33. The jury

convicted after a rape trial that was “largely a credibility contest between [the defendant] and [the victim].” *Id.* ¶43. On appeal, our supreme court held that counsel’s decision “not to investigate” could not “constitute a strategic decision.” *Id.* ¶35.

Finally, in *Gregg*, counsel performed deficiently when he was aware of, but failed to further investigate or use evidence that would have undermined the victims “overall credibility and her testimony regarding the rape.” *Gregg*, 2012 UT 32, ¶33. Counsel’s failure “was particularly troubling” where the evidence would have “corroborated [the defendant’s] account that he and [the victim] engaged in consensual intercourse” and where the defendant’s “guilt or innocence rested on the issue of consent.” *Id.*

As in *Templin*, *Gregg*, and *J.A.L.*, trial counsel in this case performed unreasonably by failing to investigate and present evidence that undermined the State’s claim of nonconsent in a he-said-she-said case that turned on consent. The Craigslist ad evidence would have undermined M.C.M.’s overall credibility and testimony regarding the encounter; supported Miles’s account that M.C.M. consented to the anal sex; and showed that Miles lacked the requisite mens rea as to M.C.M.’s nonconsent. The evidence was particularly important given the he-said-she-said nature of the case and the fact that Miles’s “guilt or innocence rested on the issue of consent.” *Id.*

First, the evidence tended to make M.C.M.’s claim of nonconsent less credible while bolstering Miles’s claim that the anal intercourse was consensual.

M.C.M.'s pre-encounter expectations regarding the nature of the rendezvous with Miles was important. R.194. The ad's solicitation of anal sex and/or double penetration (an act encompassing anal sex) meant that the ad contemplated that anal sex was on the table. For instance, the ad's reference to double penetration would have shown that M.C.M. was aware that Miles sought a partner open to anal sex practices; that she responded to the ad; and that she went to his home expecting that anal sex might occur. Evidence that M.C.M. met Miles knowing that anal sex was on the table made it more likely that the anal intercourse was consensual.

In fact, trial counsel evidently recognized that M.C.M.'s pre-encounter expectations were important to the issue of consent. *See* R.931 (trial counsel arguing that "[M.C.M.] went there knowing what she was going to do"). It was unreasonable for trial counsel to overlook evidence that would have showed that M.C.M.'s pre-encounter expectations must have included double penetration, and hence, anal sex. This is particularly true given the jury's inquiries, which notified counsel that the jury attached importance to M.C.M.'s pre-encounter expectations regarding the "kind of sex" that would occur. R.194 (jury note submitted on the first day of trial asking counsel whether M.C.M. said "anything about the kind of sex" that she expected would occur before she left to meet Miles).

The evidence also showed that M.C.M. was open to participating in a practice that is often stigmatized. Anal sex is practiced by only a minority of the

population, making it likely that many of the jurors had never before participated in the act. *See* Debby Herbernack et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 19–49*, 7 J. Sexual Med. (supp. 5) 255, 255–65 (2010) (finding that only about 20 percent of men aged 25–49 and women aged 20–39 reported having anal sex in the last year; additionally, 40 percent of men aged 25–59 and women aged 20–49 reported having had anal sex in their lifetime).

One of the reasons it is a minority practice may be stigma. Daniel T. Halperin, *Heterosexual Anal Intercourse: Prevalence, Cultural Factors, and HIV Infection and Other Health Risks, Part I*, 13 AIDS Patient Care and STDs 717, 717 (1999) (“Anal intercourse has always been one of the most stigmatized of heterosexual behaviors, perhaps because of its association with male homosexual behavior in a homophobic society or alternatively with a cultural preoccupation with cleanliness and sanitation.”). At the time of Miles’s trial, anal sex was not only stigmatized; it was criminal—even if it was done consensually. The Utah Code made sodomy—“any sexual act . . . involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant”—a class B misdemeanor. Utah Code § 76-5-403 (2012). Even the term “sodomy” itself, stemming from the biblical city of Sodom, which God destroyed for its wickedness, suggests that this practice is unnatural and immoral. *See generally* Genesis 19.

Record evidence likewise supports the stigma associated with anal sex.

After prosecuting hundreds of cases, including sex crimes and rape cases, trial counsel was able to speak to the stigmatized nature of anal sex. R.1475-76, 1493, 1577. It was his view, both at the time of trial and at the time of the 23B hearing, that Utah juries have a hard time understanding why anybody would consent to anal sex. R.1475-76, 1493, 1577. Thus, when the jury returned its verdict, trial counsel told Miles that he thought Miles had a good appeal for counsel's failure to use the Craigslist ad. R.1474-75, 1486-87.

Evidence that M.C.M. responded to an ad seeking a partner who was willing to try an act involving anal sex was therefore critical. It would have shown the jury that M.C.M. might not have shared their potential misgivings about anal sex. Without evidence explaining that M.C.M. was open to the practice, jurors might have considered the stigmatized nature of anal sex as weighing against consent.

Actual consent aside, the evidence was critical in a second way: it undermined the State's claim that Miles acted with the requisite mens rea as to M.C.M.'s nonconsent. The missing evidence indicated that, even if M.C.M. did not consent, Miles could be truthful in his claim that there was nothing that made him believe that M.C.M. did not consent. R.836. Having drafted and posted the ad himself, the missing evidence would have shown that Miles was aware that M.C.M. came to his home after responding to his ad seeking anal sex and/or double penetration—an act known to involve anal sex. This evidence made it more likely that Miles believed M.C.M. consented to the anal sex.

Finally, the missing evidence undermined M.C.M.'s general credibility. According to M.C.M.'s trial testimony, she could not remember "the exact wording" of the Craigslist ad. R.438. Introducing the specifics of the ad would have undermined her general credibility by highlighting her inability to recall important details. Moreover, it supported the defense theory that M.C.M. was selectively presenting details and avoiding those that made her look bad. R.930-31.

In short, this was a he-said-she-said case that turned on consent, much like *Templin, Gregg*, and *J.A.L.* Convincing the jury that the often-stigmatized act of anal sex was consensual posed a unique hurdle for trial counsel, who recognized that Utah juries have a hard time understanding why anybody would consent to anal sex. EH 22-23, 29-40; R.1577. Counsel was also on notice that the jury attached importance to M.C.M.'s pre-encounter expectations regarding the "kind of sex" that would occur. Under these circumstances, counsel performed unreasonably by failing to introduce evidence that M.C.M. met Miles after responding to an ad that sought sexual acts involving anal sex.

2. Counsel's purported reasons for not introducing the ad were unreasonable.

While *Strickland* recognizes "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), "[t]his measure of deference ... must not be watered down into a disguised form of acquiescence." *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987). Thus, the deficient performance analysis requires

this Court to analyze whether counsel’s stated reason for not introducing the evidence was “reasonable.” *Hales*, 2007 UT 14, ¶73.

Indeed, a determination that a decision was tactical or strategic does not end the deficient performance analysis; the “reasonable[ness]” of counsel’s decision is the critical inquiry. *Id.* (“accept[ing] the district court’s factual finding that the decision was ‘tactical,’ but [] disagree[ing] to the extent that the district court concluded that this tactical decision was reasonable”); *see also, e.g., Commonwealth v. Crispell*, 193 A.3d 919, 931 (Pa. 2018) (assessing “counsel’s purported reason not to make use of [important] evidence” and determining that it “was unreasonable not to use [the] evidence” where the “case [] came down to whether the jury believed the defendant or a single Commonwealth witness” and “trial counsel should have presented any available evidence that might tip the balance in favor of the defendant”); *Seals v. State*, 551 S.W.3d 653, 661-62 (Mo. Ct. App. 2018) (acknowledging lower court’s finding that trial counsel “made a strategic decision not to include the claim,” but holding that counsel’s “failure to raise th[e] issue under the[] circumstances was not a reasonable legal strategy”); *State v. Sanford*, 948 P.2d 1135, 1139 (Kan. Ct. App. 1997) (rejecting counsel’s stated reason for declining to pursue an alibi witness and holding that counsel’s decision “was not reasonable under the circumstances”).

In this case, counsel’s purported reasons for not introducing the ad were not reasonable. The district court identified eight reasons for counsel’s failure to introduce the ad, but it did not opine on whether the reasons constituted

“reasonable” trial strategy. Miles discusses these reasons in turn.

First, the district court found that trial counsel decided not use the ad because “[he] expected to elicit from either Mr. Miles or M.C.M. the sexual behavior the parties were to engage in and did not need to bolster the testimony of either one.” R.1576-77. This reason was not reasonable simply because trial counsel never elicited testimony from Miles or M.C.M. regarding the behaviors discussed in the ad. It would be one thing if Miles or M.C.M. testified that the ad solicited “anal sex” and/or “double penetration”—an act involving anal sex—but that never happened in this case. Evidence of the ad’s contents would not “bolster” the testimony of either witness because neither testified to the ad’s list of behaviors.

Second, the district court found that trial counsel decided not to use the ad because “[h]e thought that the ‘conversation between them would be sufficient for the jury to hear of what took place and what was expected of the parties,’ which included the emails exchanges received into evidence which discussed the agreed upon activity.” R.1576-77 (citation omitted). The problem with this stated reason is that the emails and other conversations did not reveal that Miles wanted a partner willing to engage in “anal sex” and/or “double penetration”; that M.C.M. knew this; and that she met up with Miles nevertheless. As argued above, such evidence was critical to the issue of consent and Miles’s mens rea as to non-consent. *See supra* pp. 17-21. The emails and conversations did not show that anal sex and/or double penetration were “agreed upon activit[ies]” that

might occur during a sexual encounter. State's Exs. 1, 25. The jury note inquiring into the "kind of sex" that might take place further suggested that the jury was unclear on the extent of the agreed upon activity. R.194. With the jury note and extent of the agreed upon activities otherwise unclear from the trial evidence, this reason fails the reasonableness test.

Third, counsel claimed that he opted not to use the ad because "[h]e did not think that the ad was exculpatory or relevant to consent - though his testimony was inconsistent on this point." R.1576-77. This reason likewise fails. The test for relevance is "a 'very low' bar that deems 'even evidence with the slightest probative value' relevant and presumptively admissible." *State v. Richardson*, 2013 UT 50, ¶24, 308 P.3d 526. The Craigslist ad evidence easily clears this low bar. As demonstrated, the evidence is relevant and exculpatory regarding the issue of consent because it suggested that M.C.M. consented to the often-stigmatized act of anal sex; showed that Miles lacked the requisite mens rea as to M.C.M.'s non-consent; and undermined M.C.M.'s overall credibility. *See supra* pp. 17-21.

Fourth, counsel purportedly did not introduce the ad because "[h]e thought the details could have put Mr. Miles in a worse light in the jury's eyes." R.1576-77. But the behaviors referenced in the Craigslist ad were no more explicit or prejudicial than what the jury heard at trial. Indeed, the jury heard evidence that Miles posted an ad titled "obedient, submissive slut needed for group use"; that Miles wanted to organize a gangbang; that he was into dominant/submissive

roleplay; that he participated in anal sex; and that he choked, slapped, verbally degraded, and spit on M.C.M. *See* R.456-64, 545-46, 793-74, 847; State’s Exs. 1, 25. Miles also testified—as the district court noted—that once the jury had read the emails, the ad would not have made him look any worse than the emails already portrayed him. R.1507.

Nor would it be reasonable for counsel to fear that the ad would besmirch Miles’s character in a way that tipped the credibility contest in M.C.M.’s favor. If the Craigslist ad was admitted, the evidence would show that M.C.M. shared an interest in the unconventional behaviors listed in the ad. In fact, M.C.M. positively responded to the ad, stating “I think I’m what you’re looking for.” R.439; State’s Ex. 25. Whatever the ad said about Miles’s character and morals, it tended to say that same thing about M.C.M.’s. Thus, it was not reasonable to believe that the ad would work to the State’s advantage at trial. On the contrary, the ad only benefited the defense for the reasons discussed above. *See supra* pp. 17-21; *see also State v. Barela*, 2015 UT 22, ¶27, 349 P.3d 676 (trial counsel’s failure to act was unreasonable where “[t]here [wa]s only upside” in doing so).

Fifth, the district court found that counsel decided not use the ad because “[i]n [counsel’s] view, both at the time of trial and at the time of the Rule 23B hearing, Utah juries have a hard time understanding why anybody would consent to anal sex.” R.1576-77. But this is not a valid reason to decline to introduce the ad; this is a reason *to introduce* the ad. It was counsel’s job to help the jury understand that individuals may engage in anal sex consensually. A jury’s

difficulty understanding this point does not excuse counsel from diligently representing his client's interests. Utah R. Prof. Conduct 1.3 ("A lawyer shall act with reasonable diligence ..."); *see also id.* at cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."). Had counsel introduced the ad, the jury would have understood that M.C.M. responded to an ad soliciting a sexual activity (double penetration) that involved anal sex. It would have helped the jury understand that M.C.M. might not have shared their potential misgivings about anal sex. And it would have combatted any stigma that weighed against a finding of consent.

Sixth, counsel purportedly "chose not to admit the Craigslist ad because [he] felt that the emails between M.C.M. and Mr. Miles were the 'negotiation' contract between the parties as to what would occur. Mr. Christensen acknowledged that in these emails M.C.M. stated that she had 'no limits.'" R.1576-77 (quotations omitted). This reason does not qualify as reasonable. As far as the "'negotiation' contract" goes, the Craigslist ad was very much a part of that contract. It was, in fact, the opening offer. The jury thus needed evidence regarding the content of the Craigslist ad to make sense of the "contract." Moreover, the emails introduced at trial did not amount to the full chain of emails exchanged between Miles and M.C.M., as counsel himself acknowledged. R.1488-90. Accordingly, the jury was left with an incomplete picture of the

negotiations occurring prior to the sexual encounter. The evidence regarding the content of the ad was important because it helped complete that picture.

Moreover, M.C.M.'s initial email response to the ad in which she responded that she had "no limits" did not make the content of Craigslist ad any less important. "No limits" would be understood as hyperbole; it is highly doubtful that the jury would believe that M.C.M. literally had no limits at all. Instead, what M.C.M. meant by "no limits" could only be understood in light of the ad she was responding to. For instance, "no limits" has a very different meaning when it is stated in response to an ad seeking a night of passionate kissing or an evening of vaginal intercourse than when it is stated in response to an ad soliciting sex acts involving anal sex. "No limits" could only truly be understood in the context of the ad itself. As such, this sixth reason for not introducing the ad does not constitute reasonable trial strategy.

Seventh, the district court found that trial counsel did not use the ad because counsel "felt the Craigslist ad would make Mr. Miles look 'reprehensible,' and 'that was the strategic decision to not use [a copy of the ad]. [He] knew what [Mr. Miles] was going to testify to' and 'didn't need a printed log to go into the jury room.'" R.1576-77. This reason is not reasonable because as explained above, the explicit or "reprehensible" behaviors referenced in the Craigslist ad were no worse than what the jury heard at trial. *See supra* pp. 24-25. And trial counsel's reasoning that "[he] knew what [Mr. Miles] was going to testify to' and 'didn't need a printed log to go into the jury room'" fails too. R.1576-77. This reason

seems to assume—like reason number one discussed above, *see supra* p. 23—that trial counsel planned to elicit testimony from Miles regarding the content of the ad, and the ad (the “printed log”) would be cumulative of Miles’s testimony on this point. Had counsel elicited testimony from Miles regarding the content of the ad, this reason might have been reasonable. But as noted, trial counsel never elicited testimony from Miles or M.C.M. regarding the behaviors discussed in the ad. *See supra* p. 23. Consequently, the seventh reason does not qualify as reasonable.

Eighth and finally, the district court found that trial counsel did not use the ad because “Mr. Miles testified that he did not like the way the emails portrayed him to the jury, he ‘shut down’ at trial and refused to read the emails to the jury and that the introduction of the Craigslist ad could not have made him look any worse to the jury.” R.1576-77. Like several of the other reasons above, this reason was a reason *to introduce* the ad. Miles testified that he did not like the way the emails made him sound. R.1504. But as noted in the findings, Miles also testified that once the jury had read the emails, the ad would not have made him look any worse than the emails already portrayed him. R.1507. Where the ad did not make Miles look any worse than the evidence already admitted at trial, there was only “upside” to introducing the evidence. *Barela*, 2015 UT 22, ¶27 (trial counsel’s failure to act was unreasonable where “[t]here [wa]s only upside” in doing so).

In short, counsel’s purported reasons for not introducing the ad were unreasonable. Therefore, counsel rendered deficient performance by failing to

introduce the content of the ad and its reference to anal sex and/or double penetration.

D. Counsel's deficient performance prejudiced Miles.

“Prejudice is shown where there is ‘a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.’” *Gregg*, 2012 UT 32, ¶21. In determining prejudice, “an appellate court should consider the totality of the evidence, taking into account such factors as whether the errors affect the entire evidentiary picture or have an isolated effect and how strongly the verdict is supported by the record.” *Id.*

“[W]hen trial counsel fails to reasonably investigate and present evidence that was crucial to the defense, it amounts to prejudice when this evidence would have ‘affect[ed] the “entire evidentiary picture.”’” *Id.* ¶26. In he-said-she-said sexual assault cases, evidence affects the entire evidentiary picture if it challenges the “overall credibility” of the alleged victim, undercuts “the plausibility of her account of the alleged rape,” or “corroborat[es] [the defendant’s] account of the events.” *Id.* ¶42.

Likewise, deficient performance is prejudicial “where the conviction is not strongly supported by the record and trial counsel fails to investigate and present evidence impacting the victim’s credibility.” *Id.* ¶30. For instance, prejudice is likely to be present when the verdict “turned on whether the jury believed [the defendant’s] version of events or the victim’s,” and the verdict indicates that the jury “was conflicted about the evidence and the competing versions of events

offered by the victim and [defendant].” *Richardson*, 2013 UT 50, ¶¶41-44.

For instance, in *Richardson*—a forcible anal sodomy case—our supreme court held that the defendant was prejudiced by the exclusion of evidence that the defendant and victim had previously “engaged in consensual anal sex while the victim was menstruating.” *Id.* *Richardson* was a he-said-she-said case where the defendant claimed he engaged in consensual anal sex with the victim because she was menstruating. *Id.* ¶¶41-45. In finding prejudice, the supreme court reasoned that the prior instance of consensual anal sex made “it easier to accept [the defendant’s] version of what transpired.” *Id.* ¶42. “This increase in the believability of [the defendant’s] story naturally and likely would have resulted in a corresponding increase in skepticism of the victim’s story.” *Id.* The court’s confidence in the verdict further waned where the “jury obviously did not accept the victim’s story hook, line, and sinker” and convicted on “only two of the six counts.” *Id.* ¶43. Under those circumstances, the *Richardson* court could not “reject the idea” that the excluded evidence “could have tipped the scales wholly in [the defendant’s] favor.” *Id.* ¶44.

Here, counsel’s deficient performance prejudiced Miles. As in *Richardson*, knowing that M.C.M. traveled to Miles’s home after seeing his ad, which sought a partner willing to engage in “anal sex” and/or “double penetration,” made it “easier to accept [Miles’s] version of what transpired on the night in question”—that M.C.M. engaged in consensual anal sex with him, but they ultimately terminated the encounter. *Id.* ¶42; R.843-45. And at the very least, the evidence

would have created doubt as to whether Miles acted with the requisite mens rea as to M.C.M.'s nonconsent.

Moreover, with greater reason to accept Miles's account, the evidence corroborating his narrative would have taken on greater force in the eyes of the jury. For instance, there was no injury to M.C.M.'s anus, and the record reveals that Miles did not attempt anal sex during the sexual episode that occurred after the marijuana break. R.620, 830-32, 845; SE 24; *see also* SE 22.

"This increase in the believability of [Miles's] story naturally and likely would have resulted in a corresponding increase in skepticism of [M.C.M.'s] story." *Richardson*, 2013 UT 50, ¶42. In fact, M.C.M.'s story was already susceptible to doubt as she had a motive to fabricate the allegations to protect her standing in the community and at BYU. As another example, doubt also arose from M.C.M.'s reluctance to contact the police before the encounter. R.460-62.

Miles's threatening emails arguably corroborated aspects of M.C.M.'s account. But the emails the State presented did not represent the complete correspondence between Miles and M.C.M. *See* R.483, 554-55, 791, 796; *see also* SE 1, 25. In fact, Miles testified that among the missing correspondence was an email retracting that threat. R.796-800, 842-43, 858-59. Miles further testified that M.C.M. willingly engaged in sexual contact after Miles told her that "she didn't have to do anything with [him] if she didn't want to." R.797-98, 815, 830, 876-77. Thus, when it came to what occurred on the evening of March 20, 2014, it remained a credibility contest between Miles and M.C.M.

In any event, it does not appear that the jury was ultimately convinced by Miles's email threats. Even though the State argued that Miles took away M.C.M.'s consent as soon as he sent the threatening emails—a theory that would have applied to all the sexual acts—the jury acquitted on all but the anal sex count. R.906, 1005. The acquittals thus show that the jury did not find the email threats compelling enough to convict. The acquittals also show that even with evidence of the email threats, the jury “did not accept [M.C.M.'s] story hook, line, and sinker.” *Richardson*, 2013 UT 50, ¶43.

Despite M.C.M.'s testimony that Miles twice forced her to perform oral sex and while doing so, pulled her hair and slapped her, it acquitted on both counts of forcible oral sodomy. R.456-57, 462, 496. It also acquitted on both counts of rape despite M.C.M.'s testimony that Miles had sex with her vaginally, choked her, and ignored her as she cried and protested “no” and “stop.” R.458-59, 463-64. The acquittals thus indicate that the jury “was conflicted about the evidence and the competing versions of events offered by [M.C.M.] and [Miles].” *Richardson*, 2013 UT 50, ¶44.

Finally, the acquittals indicate that the jury considered the anal sex to be different in kind from the other counts of oral and vaginal sex. Whatever the reason for the perceived difference, evidence that M.C.M. met Miles knowing that anal sex and/or double penetration was on the table made it more likely that the anal intercourse was consensual (or that Miles believed it was consensual). Indeed, the jury itself appreciated the relevance of M.C.M.'s pre-encounter

expectations regarding the “kind of sex” that would occur. R.194 (jury note asking cousin whether M.C.M. said “anything about the kind of sex” that she expected would occur before she left to meet Miles). Under these circumstances, it is reasonably likely that the missing evidence “could have tipped the scales wholly in [Miles]’s favor.” *Richardson*, 2013 UT 50, ¶44. Thus, Miles has established a reasonable likelihood that the jury would have acquitted on the anal sodomy charge, as it did on all other counts, had counsel not performed deficiently.

II. This Court should reverse because the cumulative effect of defense counsel’s ineffective assistance undermines confidence that Miles had a fair trial.

Under the cumulative error doctrine, this Court will reverse “if the cumulative effect of the several errors undermines [the Court’s] confidence ... that a fair trial was had.” *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (omission in original) (citation and internal quotation marks omitted).


The instance of deficient performance raised in the opening brief—counsel’s failure to object to an erroneous instruction defining “recklessness”—along with the instance of deficient performance discussed here, undermine confidence in the fairness of Miles’s trial. *See State v. Campos*, 2013 UT App 213, ¶¶61-72, 309 P.3d 1160 (reversing for cumulative prejudice resulting from ineffective assistance). As explained, the jury acquitted on all counts except for forcible anal sodomy. Trial counsel’s failure to object to the recklessness instruction increased the likelihood that the jury convicted based on non-criminal conduct. Moreover, counsel’s failure to use critical evidence regarding

the content of the Craigslist ad undermined the defense, bolstered the State's theory of nonconsent, and increased the likelihood that the jury convicted based on preconceived notions regarding anal sex. Given the acquittals, it is evident that the jury had doubts about the State's case. Individually, either one of the errors could have meant the difference between conviction and acquittal on the forcible anal sodomy count. But considered cumulatively, Miles's case for a new trial is particularly strong.

CONCLUSION

Miles respectfully asks this Court to reverse and remand for a new trial because individually and cumulatively, the instances of deficient performance raised here and in the opening brief prejudiced him.


SUBMITTED this 8th day of October 2019.


ALEXANDRA S. McCALLUM
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

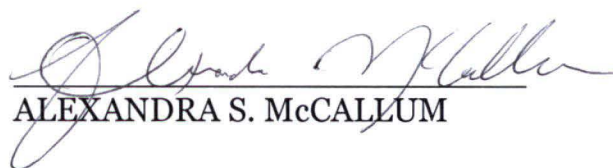
In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 8,773 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2016 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 or redacted from the public version of the foregoing opening 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 two 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 of the brief to be emailed to the Utah Court of Appeals at courtofappeals@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov, pursuant to Utah Supreme Court Standing Order No. 11, this 8th day of October 2019.


ALEXANDRA S. McCALLUM

DELIVERED this _____ day of October 2019.

ADDENDUM A

JUL 23 2019

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Appellee, v. THOMAS JEFFREY MILES, Appellant.	ORDER Case No. 20150809-CA
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Before Judges Appleby, Pohlman, and Hagen.

On September, 10, 2018, this court remanded the case to the district court to supplement the record on appeal with evidence and findings of fact relevant to Thomas Jeffrey Miles's claim that his trial counsel provided ineffective assistance of counsel by "failing to investigate and use evidence regarding the content of a Craigslist ad that Miles posted." *See* Utah R. App. P. 23B. The district court held an evidentiary hearing on February 26, 2019, and entered its findings of fact on June 28, 2019.

IT IS HEREBY ORDERED that the parties prepare supplemental briefing in accordance with rule 24 of the Utah Rules of Appellate Procedure on whether Miles's trial counsel provided ineffective assistance of counsel by failing to use evidence regarding the content of the Craigslist ad.¹ *See* Utah R. App. P. 24. Miles's brief must be served and filed in this court no later than thirty (30) days after issuance of this order. The State's brief must be served and filed in this court no later than thirty (30) days from service of Miles's brief. Miles's reply brief, if any, must be served and filed in this court no later than thirty days (30) from service of the State's brief.

Dated this 23rd day of July, 2019.

1. In reviewing this issue, we will defer to the district court's findings of fact, "but determine as a matter of law whether the defendant received ineffective assistance of counsel in violation of the Sixth Amendment." *State v. Maestas*, 2000 UT App 22, ¶ 10, 997 P.2d 314 (quotation simplified).

FOR THE COURT:

Kate Appleby
Kate Appleby, Judge

AUG 08 2019

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
THOMAS JEFFREY MILES,
Appellant.

ORDER MODIFYING THE
SUPPLEMENTAL BRIEFING ORDER TO
ALLOW BRIEFING OF CUMULATIVE
ERROR

Case No. 20150809-CA

Trial Court Case No. 141910634

Before Judges Appleby, Pohlman, and Hagen.

At issue is Thomas Jeffrey Miles's motion to "modify the new supplemental briefing order to allow briefing of cumulative error." On July 23, 2009, we requested supplemental briefing "on whether Miles's trial counsel provided ineffective assistance of counsel by failing to use evidence regarding the content of the Craigslist ad." Miles then filed a motion requesting that we (1) "strike the briefing schedule and reestablish it upon the filing of the supplemental record," and (2) modify the supplemental briefing order "to allow supplemental briefing on the issue of cumulative error." On July 29, 2019, after "the supplemental record and record index were filed in this court," we issued an order "on [our] own motion to reset the briefing schedule."

IT IS HEREBY ORDERED that Miles's motion to modify the supplemental briefing order to allow briefing of cumulative error is granted. Specifically, Miles may "update and develop his cumulative error argument in light of the supplemental facts" developed during the rule 23B remand proceedings. The briefing schedule will remain as established by our July 29 order. Miles's brief must be served and filed in this court on or before September 23, 2019. The State's brief must be served and filed in this court no later than thirty (30) days from service of Miles's brief or October 23, 2019. Miles's reply brief, if any, must be served and filed in this court no later than thirty (30) days from service of the State's brief.

Dated this 8th day of August, 2019.

FOR THE COURT:



Kate Appleby, Judge

ADDENDUM B

IN THE SALT LAKE JUDICIAL DISTRICT COURT

IN AND FOR THIRD COUNTY, STATE OF UTAH

--oo0oo--

STATE OF UTAH,)	
)	
)	
Plaintiff,)	
)	Case No. 141910634
VS.)	
)	
THOMAS JEFFREY MILES,)	
)	
Defendant.)	TRANSCRIPT OF:
)	EVIDENTIARY HEARING

BEFORE THE HONORABLE RANDALL SKANCHY

MATHESON COURTHOUSE
450 STATE STREET
SALT LAKE CITY, UTAH 84111

February 26, 2019

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A P P E A R A N C E S

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1 February 26, 2019

2 * * *

3 **THE COURT:** All right. We're hearing the matter of
4 State of Utah vs. Thomas Jeffrey Miles. It's Case 141910634.
5 Counsel, if you'll make your records of appearance,
6 please.

7 **MS. SERASSIO:** Melanie Serassio for the State.

8 **MR. NIELSEN:** John Nielsen for the State.

9 **MS. SINGLETON:** Lacey Singleton and Alexa McCallum
10 for Mr. Miles.

11 Your Honor, I think we would be invoking the
12 exclusionary rule if there is -- I'm not sure that we're all --

13 **THE COURT:** If you're here as an anticipated witness,
14 I'm going to ask you to wait out in the hallway so that when
15 you testify, you're not influenced by the testimony that you
16 might have heard from others. And I'll also ask you not to
17 talk about your testimony. And for those of you who remain in
18 the audience because you are not witnesses, I'll ask you not to
19 talk to people who are witnesses about testimony you may have
20 heard here.

21 All right. We have three issues: contents of a
22 Craigslist add; details available to defense counsel relating
23 to content of Craigslist add; and counsel's reasons for not
24 investigating or introducing content of Craigslist ad.

25 So how are we handling it in terms of who's calling

1 who?

2 **MS. SERASSIO:** I believe the Defense intends to call
3 the defendant and his attorney, Your Honor. The State has
4 Margo Crandall if we -- here for rebuttal. And they did
5 originally list Kim Ryan as a witness. I believe, at this
6 time, the Defense is not going to call her as a witness.

7 **MS. SINGLETON:** That is correct.

8 **MS. SERASSIO:** So if she's remaining in the
9 courtroom, I would ask that if they -- that they won't be able
10 to change their minds and then call her as a witness, Your
11 Honor.

12 **THE COURT:** Okay. We understand the ground rules,
13 then. Go ahead and call your first witness.

14 **MS. SINGLETON:** Your Honor, the Defense will call
15 Paul Christensen (inaudible).

16 **MR. NIELSEN:** For the record, Your Honor, the victim
17 is remaining in the courtroom, in exception to the exclusionary
18 rule.

19 **THE COURT:** Okay.

20 (Witness sworn.)

21 **MS. SERASSIO:** Your Honor, I believe at this time, we
22 have two stipulated exhibits, State's Exhibit 1, State's
23 Exhibit 2, which were State's Exhibit 1 and State's Exhibit 25
24 at the trial, Your Honor.

25 **THE STATE:** Okay.

1 * * *

2 PAUL RICHARD CHRISTENSEN,

3 Called by the Defense, having been duly
4 sworn, is examined and testifies as follows:

5 * * *

6 **DIRECT EXAMINATION**

7 **BY MS. SINGLETON:**

8 **Q.** Can I please have you state your full name and spell
9 your last name for the record?

10 **A.** Paul Richard Christensen. C-H-R-I-S-T-E-N-S-E-N.

11 **Q.** And Mr. Christensen, how are you employed?

12 **A.** I practice solo.

13 **Q.** As an attorney?

14 **A.** Correct.

15 **Q.** And back in -- did you have an occasion to represent
16 Thomas Jeffrey Miles?

17 **A.** Yes.

18 **Q.** Okay. And that is the -- and what were the -- did
19 you and (inaudible) go to trial in that matter?

20 **A.** We did.

21 **Q.** Okay. Are you familiar with the -- do you recall the
22 facts in the case that were -- that you represented Mr. Miles
23 on?

24 **A.** Yes.

25 **Q.** Okay. And as part of that trial, do you recall there

1 being the matter of the Craigslist ad?

2 **A.** Yes.

3 **Q.** Okay. And what -- how did you come to know about the
4 Craigslist ad?

5 **A.** Jeff related those things to me, what were said and
6 what were done.

7 **Q.** Okay. So he did explain to you the content of the
8 Craigslist ad?

9 **A.** Yes, he did.

10 **Q.** Okay. And do you recall specifically what the
11 content of that Craigslist ad were?

12 **A.** Only vaguely, it's been too far. But I knew that it
13 was the manner in which him and the alleged victim contacted
14 each other.

15 **Q.** Okay. Did he -- do you recall whether Mr. Miles
16 explicitly told you what the ad said, even if you can't recall
17 what that was?

18 **A.** Ask that question again.

19 **Q.** So although it's been a long time and you maybe not
20 remember right now what the content of the ad stated, do you
21 recall whether or not Mr. Miles told you, specifically, what
22 the ad said?

23 **A.** Yes, I think so.

24 **Q.** Okay. Did you ever make an attempt to obtain a copy
25 of that Craigslist ad?

1 **A.** Of all the communications?

2 **Q.** Yes.

3 **A.** Yes.

4 **Q.** You did attempt to get the Craigslist ad?

5 **A.** Uh-huh.

6 **Q.** Is that a "yes"?

7 **A.** Yes.

8 **Q.** Okay. And by what manner did you attempt to get that
9 ad?

10 **A.** Just by a letter to the advertiser, Craigslist
11 themselves.

12 **Q.** Okay.

13 **A.** Also, I believe, his mother gave me copies, or he
14 did, I'm not sure.

15 **Q.** So, you had copies of the ad, itself?

16 **A.** Uh-huh.

17 **Q.** You did?

18 **A.** Yes.

19 **Q.** Okay. And, did you -- was the -- did -- okay. So at
20 trial, when you went to trial in the case, you actually did
21 have the Craigslist ad in your possession?

22 **A.** Yes.

23 **Q.** Okay. And did you choose to introduce it into
24 evidence?

25 **A.** I did not.

1 **Q.** Okay. And why was that?

2 **A.** It was tactical strategy. I discussed it with Jeff.
3 I knew I would be able to elicit the communications, both from
4 the victim, as well as from Jeff, the content of that -- of
5 those communications.

6 **Q.** Okay. And did you, in fact, illicit from either the
7 victim or Jeff, the specific details of what the ad said?

8 **A.** It's been too long, but I believe I did, with regards
9 to the type of behavior that was being sought.

10 **Q.** And what do you recall, as far as that goes?

11 **A.** There was talk of group sex, there was talk of anal
12 sex, there was talk of things that Jeff had seen on the
13 internet.

14 **Q.** Who testified to that at trial, as far as you can
15 recall?

16 **A.** I know Jeff did. I do not recall what Margo
17 testified, as to what -- how she responded.

18 **Q.** And so, had she testified that she did not recall
19 what the ad said, would you have asked her? Would you have
20 showed her the ad to refresh her recollection of that?

21 **A.** Possibly.

22 **Q.** Okay. Do you recall whether or not that happened?

23 **A.** As I recall, she was honest and upfront about what
24 was in the ad and what took place.

25 **MS. SINGLETON:** Your Honor, can I have a minute,

1 please?

2 **THE COURT:** Yes.

3 **Q. (BY MS. SINGLETON:)** Okay. Well, let's just -- let's
4 go back. So it's your testimony here today that you did send a
5 letter to Craigslist to get the ad?

6 **A.** Uh-huh.

7 **Q.** Yes?

8 **A.** Yes.

9 **Q.** Okay. And you did, in fact, obtain the ad, itself?

10 **A.** Yes.

11 **Q.** And you are familiar with what it said?

12 **A.** Yes.

13 **Q.** Okay. And it was just your decision, on a tactical
14 reason, not to introduce the content of the ad at trial?

15 **A.** That would be correct. I knew that if I was able to
16 elicit, from both Jeff, as well as Margo, their communications,
17 I didn't think that I needed to bolster the testimony of either
18 one.

19 **Q.** Do you recall speaking to an investigator from our
20 office, Guy Yoshikawa recently about this case?

21 **A.** To who?

22 **Q.** Do you recall speaking to an investigator from the
23 LDA -- from our office, Guy Yoshikawa, about this case?

24 **A.** No.

25 **Q.** You don't recall speaking to him about that?

1 **A.** No.

2 **Q.** And, so I take -- so, if you had spoken to him -- so,
3 it's your testimony that you did not speak to anyone from the
4 LDA's office?

5 **A.** That doesn't sound familiar to me, the name, or
6 anyone from LDA calling me about it.

7 **Q.** Okay. Well, have you spoken to anybody, prior to
8 this hearing, about this case?

9 **A.** Yes. Once I found out that there was a subpoena for
10 me to testify, I met with the Attorney General's Office, as
11 well as the District Attorney's Office.

12 **Q.** Do you recall a phone call with another individual
13 that you had a conversation with about this case?

14 **A.** I do not.

15 **Q.** Okay. Do you recall telling anybody that you never
16 tried -- that you never got the ad?

17 **A.** No. Do you know when this conversation was supposed
18 to have taken place?

19 **Q.** It would have been, approximately, November 29th of
20 last year.

21 **A.** No, I don't recall any conversation with anybody.

22 **Q.** And so you never -- you don't recall telling anybody
23 that you never located the ad?

24 **A.** No.

25 **Q.** You -- okay. But your testimony here today is that

1 Jeffrey -- not only did you have the ad, but that Jeffrey told
2 you everything about it?

3 **A.** Yes.

4 **Q.** Do you recall telling, when you had the interview
5 with the AG's office or the DA's office, that you don't
6 remember the client ever telling you about the content of the
7 ad?

8 **A.** I don't remember saying that in the AG's office.

9 **MS. SINGLETON:** I'm sorry, Your Honor, if I could
10 just have a moment.

11 **THE COURT:** Sure.

12 **MR. NIELSEN:** Just one moment, Your Honor.

13 **THE COURT:** Absolutely.

14 **Q. (BY MS. SINGLETON:)** I just want to make sure that
15 we're all on the same page. So is it your testimony that you
16 did send a letter to Craigslist?

17 **A.** Uh-huh. Correct.

18 **Q.** And that you actually received something back from
19 Craigslist?

20 **A.** Yes, I did.

21 **Q.** Okay. And that was the ad?

22 **A.** Yes.

23 **Q.** And did you send that ad to the State?

24 **A.** No, I did not.

25 **Q.** Okay. And why?

1 **A.** I don't recall why I didn't send it.

2 **Q.** Okay.

3 **A.** I don't know if I didn't receive the discovery
4 request or not.

5 **Q.** And so, there were -- well, I want to make
6 sure -- because there were also -- there were also some emails
7 at issue in the trial, correct?

8 **A.** Correct.

9 **Q.** And I want to just make sure that like -- is what
10 you're referring to is what you received back from Craigslist
11 different than what we're talking about than the emails?

12 **A.** Ask that question again.

13 **Q.** So there were two different things. There's the
14 Craigslist ad that you received, you say, correct?

15 **A.** Correct.

16 **Q.** And that's -- in your testimony here today, is that
17 ad different than the emails that we're talking about?

18 **A.** Yes.

19 **Q.** Okay. Okay. And so it's your testimony here today
20 that you don't remember telling the AG's office that you don't
21 remember the client ever telling you anything about the ad?
22 About -- did you tell the DA's investigator that you don't
23 remember Jeffrey telling you anything -- Mr. Miles telling you
24 anything about the ad?

25 **A.** This interview happened less than a week ago, maybe

1 ten days ago.

2 Q. Right.

3 A. And I remember Jeff and I talking about the ad and
4 about the emails. And I also referred to the AG that we did
5 talk about those things.

6 Q. Okay. That you did -- you told the AG that you did
7 talk about --

8 A. Did talk to Jeff about those.

9 Q. Okay. And that Jeff told you the contents of that
10 ad?

11 A. Yes.

12 Q. And do you recall them asking you whether you thought
13 that the ad would have been helpful to your case?

14 A. Whether the AG told me what --

15 Q. Whether the AG or the DA asked you if the ad would
16 have been helpful to your case?

17 A. I don't remember them asking me that.

18 Q. Okay. And it's also your testimony here that you
19 don't recall having an interview with an investigator from the
20 LDA office --

21 A. I do not.

22 Q. -- you don't remember -- okay.

23 All right. I'm going to play a recording for you and
24 I'm going to ask you whether or not you recognize whether this
25 is you, in fact you, on the recording, okay?

1 (Recording played.)

2 **GUY YOSHIKAWA:** This is Guy.

3 **MR. CHRISTENSEN:** Sorry, Christensen calling you

4 back. How are you?

5 **GUY YOSHIKAWA:** Yes.

6 (Recording stopped.)

7 **Q. (BY MS. SINGLETON:)** Is that -- is that you --

8 **A.** Sounds like my voice. Can you play it again?

9 **Q.** Yes.

10 **MR. NIELSEN:** Sure.

11 (Recording played.)

12 **GUY YOSHIKAWA:** This is Guy.

13 **MR. CHRISTENSEN:** Sorry, Christensen calling you

14 back. How are you?

15 **GUY YOSHIKAWA:** Yes. Paul, I'm good, thank you.

16 (Recording stopped.)

17 **A.** That's me.

18 **Q. (BY MS. SINGLETON:)** That's you? Okay. Does this

19 refresh your recollection in any degree about whether or not --

20 **A.** No.

21 **Q.** -- you had a conversation with Guy, from our office?

22 **A.** Don't remember at all.

23 **Q.** But you would agree that this is your voice?

24 **A.** Yes.

25 **MS. SINGLETON:** And, Your Honor, at this point, I

1 would move to play this recording that he's identified as --

2 **MR. NIELSEN:** We're okay with that, Your Honor.

3 **THE COURT:** Let's put it up so -- next to a
4 microphone and put the -- well, you've done that already.

5 **MR. NIELSEN:** Yes.

6 **THE COURT:** Sounds like we're -- it's as good as
7 we're going to get it, unless we played it over our -- we can
8 play it over our intercom.

9 **THE CLERK:** No, we can't.

10 **THE COURT:** We can't.

11 **MR. NIELSEN:** Could Your Honor hear the first part?
12 Was that sufficient?

13 **THE COURT:** Yes.

14 **MR. NIELSEN:** Okay. I will --

15 **THE COURT:** Yes. It's a little softer than I'd
16 prefer, but --

17 **MS. SINGLETON:** Do you want me to play it on -- off
18 of mine on -- up here?

19 **THE COURT:** No, no. As long as Mr. Christensen can
20 hear it and Counsel can hear it and I can hear it, we should be
21 good. Sounds like you could hear it? I think I heard it.

22 **MR. NIELSEN:** Okay. I'll have it on full blast.
23 We'll try again.

24 (Recording Played)

25 **GUY YOSHIKAWA:** How are you?

1 **MR. CHRISTENSEN:** Good. Thank you.

2 **GUY YOSHIKAWA:** Good.

3 **MR. CHRISTENSEN:** "How can I be of assistance for
4 Jeff?

5 **GUY YOSHIKAWA:** I appreciate it. I realized that
6 Thomas's -- Thomas Miles's middle name was Jeff. Apparently,
7 I'm not aware if you know, but I guess there has been a court
8 hearing set for December 12th, I believe it is.

9 **MR. CHRISTENSEN:** I think it's the 7th.

10 **GUY YOSHIKAWA:** Is it the 7th? Okay. Yeah, they
11 told me it was the 12th, but okay. And then the attorney had
12 just a couple questions, you know, before the trial to ask you
13 and it was mentioned, I guess, on the message I left.

14 But, were you aware of any Craigslist ad at the time
15 of the trial?

16 **MR. CHRISTENSEN:** Craigslist ad?

17 **GUY YOSHIKAWA:** Yeah, apparently there was --

18 **MR. CHRISTENSEN:** Oh --

19 **GUY YOSHIKAWA:** -- a Craigslist --

20 **MR. CHRISTENSEN:** Yes, there was one mentioned.

21 **GUY YOSHIKAWA:** Okay.

22 **MR. CHRISTENSEN:** But I don't remember finding one.

23 **GUY YOSHIKAWA:** Okay. Okay.

24 **MR. CHRISTENSEN:** I don't remember finding one and I
25 don't think it ever came into any kind of evidence, unless

1 somebody testified about it. Maybe Jeff testified. But, you
2 know, the way I (inaudible), she was on the Craigslist.

3 GUY YOSHIKAWA: Right.

4 MR. CHRISTENSEN: Because that was the --

5 GUY YOSHIKAWA: Okay. So --

6 MR. CHRISTENSEN: The only thing -- and I told him
7 after -- after we got out verdict, they acquitted him of three
8 of the four counts.

9 GUY YOSHIKAWA: Uh-huh.

10 MR. CHRISTENSEN: I guess you're aware of that.

11 GUY YOSHIKAWA: Right.

12 MR. CHRISTENSEN: And I said, "You know what, you've
13 got a real strong possibility on an appeal here."

14 GUY YOSHIKAWA: Uh-huh.

15 MR. CHRISTENSEN: And I had tried to make a motion
16 to, you know --

17 GUY YOSHIKAWA: Uh-huh.

18 MR. CHRISTENSEN: -- for, you know, to dismissal,
19 notwithstanding the verdict and they didn't do that. Then, I
20 don't know if -- I'm sure the attorney knows that during her
21 testimony, some of her testimony was not recorded, because they
22 didn't turn it back on.

23 GUY YOSHIKAWA: Oh.

24 MR. CHRISTENSEN: So, Mr. (inaudible) and myself, we
25 tried to reconstruct it the best as we remembered it.

1 **GUY YOSHIKAWA:** Right.

2 **MR. CHRISTENSEN:** I'm sure that's part of the reason
3 they're getting a new trial off this one.

4 **GUY YOSHIKAWA:** Yes, that's probably it. Yeah. And
5 so you were -- I mean, you were somewhat aware of the
6 Craigslist ad, but not necessarily, you know, had reviewed it,
7 seen it --

8 **MR. CHRISTENSEN:** No.

9 **GUY YOSHIKAWA:** You know, or anything like that. So,
10 you know, you did introduce it because, you know, you --

11 **MR. CHRISTENSEN:** I didn't ever locate one.

12 **GUY YOSHIKAWA:** Right. Right. Okay. Good. I think
13 that --

14 (Recording Stopped.)

15 **Q. (BY MS. SINGLETON:)** So, did you hear your -- what you
16 told our investigator?

17 **A.** Yes, I did.

18 **Q.** Okay. But your testimony here today is that you did,
19 in fact, have the ad?

20 **A.** Yes.

21 **Q.** So why did you tell my investigator that you didn't?

22 **A.** In July, I had forgotten that I didn't.

23 **Q.** But you recall now that you did?

24 **A.** Yes.

25 **Q.** Okay. But, okay. So, all right, well, setting that

1 aside.

2 **THE COURT:** What was the date of that?

3 **MS. SINGLETON:** November 29, 2018.

4 **THE COURT:** November 29, two-thousand --

5 **MS. SINGLETON:** '18.

6 **THE COURT:** '18.

7 **Q. (BY MS. SINGLETON:)** Okay, well, let's move on. So,
8 assuming that you did have this trial -- this ad, at trial, as
9 you testified -- your testimony is today that you did. Yes?

10 **A.** Yes.

11 **Q.** Your decision -- your defense at trial was that this
12 was consensual?

13 **A.** Correct.

14 **Q.** Correct?

15 **A.** Correct.

16 **Q.** And do you recall -- actually, let's finish playing
17 this part of the recording. I'm going to play just the
18 remaining part of this recording for you first.

19 **MR. NIELSEN:** Counsel?

20 **MS. SINGLETON:** Yes.

21 **MR. NIELSEN:** Okay. That's fine.

22 (Counsel Confer.)

23 **Q. (BY MS. SINGLETON:)** Okay, so the defense of consent,
24 your defense was that all of these acts were consensual,
25 correct?

1 **A.** Correct.

2 **Q.** Including the count of the charge relating to anal
3 sex --

4 **A.** Correct?

5 **Q.** -- correct?

6 If this ad -- you don't recall right now, the
7 specific contents of the ad, correct?

8 **A.** No.

9 **Q.** No. Let's assume that the ad did reference anal sex,
10 would that have made your decision to introduce that relevant
11 or, would that have made it more likely that you would have
12 introduced the ad?

13 **A.** No.

14 **Q.** Okay. And why is it that you didn't introduce the
15 ad, strategically?

16 **A.** Strategically, I knew that if I could get it from
17 either Margo or from Jeff, about what the conversations were
18 between them, that would be sufficient for the jury to hear
19 what took place and what was expected of the parties.

20 **Q.** Okay. But if there was not evidence introduced from
21 either Margo or Jeff at trial about anal sex being expected, if
22 Margo denied that, would the ad have been relevant then?

23 **A.** Yes.

24 **Q.** And was that, in fact -- do you recall whether or not
25 that was, in fact, her testimony?

1 **A.** I don't recall her testimony, at this time.

2 **Q.** Okay. The ad's title -- do you recall the title of
3 the ad?

4 **A.** No.

5 **Q.** If it was "An Obedient, Submissive Slut Needed for
6 Group Use" sound familiar?

7 **A.** Yes. I remember Jeff testifying to that.

8 **Q.** Okay. Did you ask Jeff what -- did you ask Jeff, on
9 direct, what his -- what the content of the ad was?

10 **A.** No.

11 **Q.** Okay. And why is that?

12 **A.** I believe that I asked how did he first come in
13 contact with Margo. And that's what he said his contact came
14 through, was this ad that he had placed and the language he had
15 used in the ad.

16 **Q.** Okay. And why did you not think it was relevant,
17 what the ad was soliciting?

18 **A.** I believed it was relevant. I just didn't think that
19 I needed to enter it if I've got Jeff testifying to it.

20 **Q.** But you just testified that you did not ask Jeff to
21 testify about the contents of the ad, correct?

22 **A.** No, but he just did testify about the content of the
23 ad.

24 **Q.** I'm sorry, what?

25 **A.** He did testify as to the contact -- content.

1 **Q.** Okay. So, you did ask him, specifically, at trial,
2 what the ad said?

3 **A.** No, I didn't. I asked him how he came in contact
4 with Margo, as I remember, and he said, "I placed this ad," and
5 he said the language that he had placed, about asking for a
6 submissive --

7 **Q.** But I'm talking about more details of the
8 actual -- what the ad -- what the -- what kind of behavior and
9 sexual acts were being solicited. Did you ask him specifically
10 about that?

11 **A.** No.

12 **Q.** And did you not think that what was being solicited
13 in the ad was relevant to the issue of whether or not Margo
14 would have consented to certain acts?

15 **A.** At the time, as I recall, I did not. But I remember,
16 after the verdict, I turned to Jeff and I said, "You've got a
17 good grounds for appeal. I will file the motion within 30
18 days." Because then, at that point in time, I thought it would
19 probably additionally help him. But at the time of trial, the
20 time that the witnesses were on the stand, I did not think
21 that.

22 **Q.** Okay. Do you recall at -- when you -- in this
23 interview -- at the end of the interview -- or in the interview
24 that we had -- that you had with our investigator, ever having
25 a conversation about difficulties with Utah juries in these

1 kinds of cases?

2 **A.** I may have. I don't recall anything specific.

3 **Q.** As to whether or not a Utah jury might not ever
4 believe that one could consent to something such as anal sex?

5 **A.** I remember having that conversation with
6 Judge Hilder about that and I may have had it also with this
7 particular investigator, I don't know.

8 **Q.** Okay. But would that be your view?

9 **A.** That would be my view.

10 **Q.** Okay. That a Utah jury would have difficulty
11 accepting that anybody would consent to anal sex?

12 **A.** Yes.

13 **Q.** Okay. So would it not then be relevant to your
14 defense of consent if the ad specifically solicited anal sex?

15 **A.** Yes.

16 **Q.** Okay. And so if the ad that you claim you had at the
17 time did state specifically -- listed sexual acts, including
18 anal sex, it would have been relevant to introduce?

19 **A.** Yes.

20 **Q.** And you don't recall what the content of the ad was?

21 **A.** No.

22 **Q.** Just going back to your interview with the State's
23 attorney that you just had. This is on February 8th of this
24 year. Does that sound familiar?

25 **A.** It does.

1 **Q.** Okay. Do you recall him asking you whether or not
2 you made any efforts to get the ad?

3 **A.** I don't remember any conversation that way.

4 **Q.** Okay. And that you didn't --

5 (Counsel Confer.)

6 **Q. (BY MS. SINGLETON:)** I'm going to play you the
7 beginning part of your recorded interview with the state
8 attorney.

9 (Recording played.)

10 **LIEUTENANT ROB JACK:** All right. Today is February
11 8, 2019. It is approximately 9:38 in the morning. We're at
12 the Salt Lake County District Attorney's Office, West Jordan
13 Office. This is in reference to District Attorney Office No.
14 14012117.

15 Present in this interview is Lieutenant Rob Jack, I'm
16 an investigator with the DA's office. Also, attorney,
17 Mr. Paul Christensen and Deputy District Attorney,
18 Melanie Serassio, and from the Utah Attorney General's office,
19 Mr. John Nielsen.

20 **MR. NIELSEN:** All right. We just have a few
21 questions on the Craigslist ad. What conversations did you
22 have with the defendant about the Craigslist ad? What did he
23 tell you?

24 (Recording stopped.)

25 **Q. (BY MS. SINGLETON:)** Before I stop, does this refresh

1 your recollection as to having this interview yet, or --

2 **A.** Yes.

3 **Q.** Okay. Do you -- so you recall that you were present
4 in this interview?

5 **A.** Yes.

6 **Q.** Okay.

7 (Recording Played.)

8 **MR. NIELSEN:** -- that you recall?

9 **MR. CHRISTENSEN:** Yes. I mean, how far we going back
10 now? Four years? When did we try this, '13?"

11 **MS. SERASSIO:** Four years, I think. '13 or '14?"

12 **MR. NIELSEN:** Probably. It's a 2015 --

13 **MR. CHRISTENSEN:** There was a mention of it. I told
14 him that it was -- it was confuse the issues that there was no
15 reason for it to be brought up. Our defense is consent,
16 therefore, whatever (inaudible) on the Craigslist ad, would not
17 be something that would exculpate him from the behavior that
18 he's alleged to have committed.

19 **MR. NIELSEN:** Did you make any efforts to get it, or
20 after he told you, you just didn't think it was --

21 **MR. CHRISTENSEN:** Didn't think it was relevant. I --
22 whatever was in my file was what I got.

23 (Recording Stopped.)

24 **Q. (BY MS. SINGLETON:)** So does that refresh your
25 recollection of having told the State that you didn't make any

1 effort to get it?

2 **A.** No, that's not how I recall hearing that just now.

3 **Q.** Okay. Well, what did you --

4 **A.** I said everything that was in my file is what I got
5 from Craigslist.

6 **Q.** Okay. So when they specifically asked you if you'd
7 made any efforts to get it and then your answer was that you
8 didn't think that it was relevant?

9 **A.** Play it again. I don't know that that's what was
10 said.

11 (Recording Played.)

12 **MR. CHRISTENSEN:** Whatever (inaudible) on the
13 Craigslist ad, would not be something that would exculpate him
14 from the behavior that he's alleged to have committed.

15 (Recording Stopped.)

16 **A.** So, that's what I responded to Jeff when he asked me.

17 **Q. (BY MS. SINGLETON:)** I'm sorry, what?

18 **A.** That's what I responded to Jeff when he asked about
19 the ad.

20 **Q.** Okay. And -- let me just continue the -- when they
21 asked --

22 (Recording Played.)

23 **MR. NIELSEN:** Efforts to get it?"

24 (Recording Stopped.)

25 **Q. (BY MS. SINGLETON:)** Okay. So do you recall them

1 asking you that?

2 **A.** Uh-huh.

3 (Recording played.)

4 **MR. NIELSEN:** Or after he told you, you just didn't
5 think it was --

6 **MR. CHRISTENSEN:** Didn't think it was relevant.

7 (Recording Stopped.)

8 **Q. (BY MS. SINGLETON:)** So, when, in response to the
9 question: Did you make any effort to get it? And your answer
10 was, you didn't think it was relevant?

11 **A.** Is that the question? I didn't hear that. You need
12 to play it again.

13 (Recording played.)

14 **MR. CHRISTENSEN:** Our defense is consent, therefore,
15 whatever (inaudible) on the Craigslist ad, would not be
16 something that would exculpate him from the behavior that he's
17 alleged to have committed.

18 **MR. NIELSEN:** Did you make any efforts to get it, or
19 after he told you, you just didn't think it was --

20 **MR. CHRISTENSEN:** Didn't think it was relevant. I --
21 whatever was in my file was what I got.

22 (Recording stopped.)

23 **Q. (BY MS. SINGLETON:)** And so --

24 **A.** Okay. So the way I responded was what I said to
25 Jeff.

1 **Q.** Okay.

2 **A.** Mr. Nielsen asked me, and I said, "This is what I
3 said to Jeff, 'It will not exculpate him from the behavior'."

4 **Q.** Okay. Do you recall telling the State, during this
5 interview, that Mr. Miles did not ever detail for you what was
6 in the ad?

7 **A.** I don't remember saying that. I may have said that.

8 **Q.** But it's your testimony today here that you did?

9 **A.** I don't recall. I know we talked about it. I don't
10 know that -- you're asking me --

11 **Q.** Let me ask you: Do you recall whether or not your
12 client, Mr. Miles, detailed for you specifically what was in
13 the ad?

14 **A.** I don't remember him telling me in detail what was in
15 the ad.

16 **Q.** Okay. But, again, your testimony here today is that
17 you actually had the ad itself --

18 **A.** Yes.

19 **Q.** -- so you would have known what was in the ad?

20 **A.** Yes.

21 **Q.** And that you never turned that over to the State?

22 **A.** No.

23 **Q.** When this case went up on appeal, did you have
24 occasion to turn over your file to --

25 **A.** I did. Everything I had.

1 **Q.** Okay. You gave -- so when you dropped off your file,
2 you gave everything that you ever had in this case to LDA?

3 **A.** Best of my knowledge.

4 **Q.** And that would have included the ad itself?

5 **A.** Correct.

6 **MS. SINGLETON:** I think that's all I have, Your
7 Honor. Quick second -- one second.

8 **CROSS-EXAMINATION**

9 **BY MS. SERASSIO:**

10 **Q.** Mr. Christensen, is this your copy of the Craigslist
11 ad?

12 **A.** Excuse me?

13 **Q.** Did you keep a copy of the Craigslist ad?

14 **A.** I turned everything over to the public defender's
15 office.

16 **Q.** You didn't keep a copy of your files at all?

17 **A.** No.

18 **Q.** So you don't have any way to refresh your memory with
19 anything that would have been in the file?

20 **A.** No.

21 **Q.** Okay. And so when you talked to the District
22 Attorney's Office a couple of weeks ago, and Mr. Nielsen and I
23 were present, you told -- you told us that the Defendant never
24 told you about the contents of the Craigslist ad.

25 **A.** Is that what I said to you?

1 **Q.** Do you recall that?

2 **A.** I do not recall that.

3 **Q.** You don't recall it. So what has changed for you
4 between the two interviews that you had with my office and with
5 the investigator from LDA, where you told them you didn't do
6 anything to get the Craigslist ad?

7 **A.** Again, is that what it said? I didn't hear me say
8 that I didn't do anything.

9 **Q.** You don't recall you saying you didn't do anything to
10 get the ad?

11 **A.** Huh-uh. Huh-uh.

12 **Q.** Okay. So, you had the Craigslist ad all along?

13 **A.** Yes.

14 **Q.** And you know that you were ordered, by the Court, in
15 this case, to turn over discovery to the State, correct?

16 **A.** Yes.

17 **Q.** So anything that you were going to use as an exhibit
18 at trial, you would have had to have turned over, correct?

19 **A.** Correct.

20 **Q.** So you never intended to use that Craigslist ad at
21 trial?

22 **A.** No.

23 **Q.** You never did turn that over to the State?

24 **A.** No.

25 **Q.** Okay. And you had the content, you had the

1 opportunity to review it and make a strategic decision as to
2 whether or not that was helpful or hurtful to your client,
3 correct?

4 **A.** Correct.

5 **Q.** As a matter of fact, the contents of that ad probably
6 would have put him in a worse light with the jury, correct?

7 **A.** It's going back the three or four years. The
8 decision I would have made would have been base upon, probably
9 that thinking. I don't know how to reconstruct that in my mind
10 now.

11 **Q.** Okay. So, as a matter of fact at trial, the emails
12 all came in -- these emails all came in at trial.

13 **MS. SERASSIO:** If I could approach with Exhibits 1
14 and 2.

15 **Q. (BY MS. SERASSIO:)** And if you review those emails, at
16 one point, there's an actual reply to the ad from Margo. I
17 think it's on the back page of Exhibit 25, which is our Exhibit
18 No. 2.

19 **A.** The one where it says, "I think I'm what you're
20 looking for?" Is that what you're directing me to?

21 **Q.** I believe so. Well, it talks about her size and her
22 limits, et cetera. Is that --

23 **A.** Correct.

24 **Q.** And in that email, Margo says that she has no limits,
25 correct? It says, "No limits."

1 **A.** It says -- if I can read it, Your Honor?

2 **THE COURT:** Yes, please.

3 **A.** "Experience level: Only one-on-one.

4 Have you done DP? No.

5 Limits: None."

6 **Q. (BY MS. SERASSIO:)** Correct. Okay, so, Paul, let's
7 talk about your attorneying and your experience as an attorney.
8 When did you graduate law school?

9 **A.** '88.

10 **Q.** Where from?

11 **A.** Seattle University, previously known as Puget Sound.

12 **Q.** Okay. And how many years have you been practicing?
13 When did you pass the Bar?

14 **A.** Almost 20 years -- I mean 30 years.

15 **Q.** Is that in Utah?

16 **A.** Yes.

17 **Q.** So it was in '98 that you passed the Bar?

18 **A.** '90 in Utah.

19 **Q.** '90. Okay. Sorry. And then did you prosecute and
20 inform?

21 **A.** Yes. I was in private practice from '90 to '99. In
22 '99, I was a Deputy Washington County Attorney until 2007. And
23 I was also, from 2005 -- 2004 to 2007, Washington City
24 prosecutor. Then, I moved up to Summit County, where for three
25 years, I was a Deputy Summit County attorney as a prosecutor.

1 Then, from 2011 through present, I've been in private practice.

2 Q. Okay. So over your career, how many bench and jury
3 trials do you think you've done?

4 A. In the hundreds. I wouldn't be able to say exactly
5 how many, but in the hundreds.

6 Q. Jury trials alone, how many do you think you've done?

7 A. A hundred.

8 Q. Okay. And did you prosecute sex crimes in any form
9 as a prosecutor?

10 A. Yes.

11 Q. Including rape cases?

12 A. Yes.

13 Q. Okay. And would you have this ad, where Margo is
14 replying and she's stated that her -- she had no limits, was it
15 a strategic decision, on your part, to have the emails entered,
16 but not have the Craigslist ad entered?

17 A. I looked this as a contract. The ad is one thing.
18 This is a negotiation between my client and the victim, to know
19 what was expected of each other, what they were trading, what
20 they were going to do. At no time did the ad -- well, I can't
21 say no time.

22 After the trial, I turned to Jeff and said, "You've
23 got a -- a good appeal, I will fall on my sword for not doing
24 that." But at no time did I think that the ad itself would
25 assist us.

1 **Q.** Okay. And what were you going to fall on your sword
2 for, for Jeff?

3 **A.** For not having put it in.

4 **Q.** Having put the ad in? Is that a "yes"?

5 **A.** Yes.

6 **Q.** Okay. But at the time, your trial strategy was not
7 to put the ad in because you felt that the emails themselves
8 were the contract between the parties?

9 **A.** That's right.

10 **Q.** You also understand the law of consent, correct?

11 **A.** Yes.

12 **Q.** You understand that consent, in a sexual case, can be
13 revoked at any time?

14 **A.** Correct.

15 **Q.** So that would be based on the very details of how the
16 people testified at trial, correct?

17 **A.** Ask that question again, please.

18 **Q.** Consent, for the jury, would be based on the details
19 of what the parties testified to at trial, correct?

20 **A.** Yes. Yes, I believe so.

21 **Q.** Their testimony, the emails that we have, as well; is
22 that correct?

23 **A.** As -- the behavior between the two parties.

24 **Q.** How much more, from the victim in the case about what
25 she would consent to, would you need then "Limits: None."

1 What could possibly have been in that ad that would have given
2 you more than the victim saying she had no limits?

3 **A.** There wasn't anything.

4 **MS. SERASSIO:** Okay. That's all my questions.

5 **MS. SINGLETON:** Can I ask a couple follow up?

6 **THE COURT:** Sure.

7 **REDIRECT EXAMINATION**

8 **BY MS. SINGLETON:**

9 **Q.** Okay. So you did -- you did introduce a couple of
10 those emails in -- at trial, right? Those emails that we have
11 up there, those were introduced at trial?

12 **A.** They were introduced at trial.

13 **Q.** Okay. But those aren't all the emails that were
14 exchanged between Mr. Miles and Margo, correct?

15 **A.** No.

16 **Q.** Okay. But they couldn't retrieve all of them, right?

17 **A.** Correct.

18 **Q.** So we -- so the jury and everybody doesn't know what
19 was discussed in those emails?

20 **A.** Correct.

21 **Q.** Which, as you just testified, the emails you can look
22 at as kind of a contract, as far as what was anticipated to
23 happen between them, correct?

24 **A.** Yes.

25 **Q.** Okay. But again, if that's the case, we're missing

1 part of the contract, right, in those discussions?

2 **A.** We're missing part of the negotiation, yeah.

3 **Q.** And so, what the ad says, as far as what Mr. Miles
4 was looking for, would that not be relevant to what -- at least
5 as far as his view, was desired and on the table?

6 **A.** Once more. Ask that question again.

7 **Q.** Would the ad itself, although not part of this email
8 exchange, not be relevant to what Mr. Miles was seeking and
9 what potentially was on the table, as far as what was discussed
10 between the parties?

11 **A.** Possibly, I don't know.

12 **Q.** Well, let's put it this way: If the ad specifically
13 said that he's looking for somebody that would engage in, among
14 other things, anal sex, would that not be relevant to whether
15 or not Margo was aware that anal sex was on the table?

16 **A.** Yes.

17 **Q.** Okay. And whether or not that has been part of their
18 discussions, prior to meeting up?

19 **A.** Yes.

20 **Q.** Okay. And, in fact, if she did testify as to
21 what -- well, let me clarify this again. Your testimony is
22 that you did not specifically elicit from Mr. Miles at trial,
23 when he testified the specific details of what the ad had
24 requested?

25 **A.** No.

1 **Q.** Okay. But it was your position that your defense was
2 that all of this was consensual?

3 **A.** Correct.

4 **MS. SINGLETON:** I believe that's all I have.

5 **MS. SERASSIO:** Just quickly.

6 **RECROSS EXAMINATION**

7 **BY MS. SERASSIO:**

8 **Q.** So the emails, when Margo says she has "no limits,"
9 that puts her in a bad light, correct?

10 **A.** It does.

11 **Q.** With the jury, correct?

12 **A.** It does.

13 **Q.** And you have the potential of placing Jeffrey in a
14 worse light by placing that ad in, because he's the one that
15 placed the ad, correct?

16 **A.** Correct.

17 **Q.** Okay. At trial, there was testimony about bondage,
18 correct?

19 **A.** Correct.

20 **Q.** Choking?

21 **A.** Correct.

22 **Q.** There was testimony about group sex?

23 **A.** Yes.

24 **Q.** There was testimony about dirty talk?

25 **A.** Yes.

1 **Q.** There was testimony about spitting?

2 **A.** Yes.

3 **Q.** There was testimony about slapping?

4 **A.** Yes.

5 **Q.** There was testimony about name calling?

6 **A.** That, I don't recall.

7 **Q.** The "obedient slut," calling her a slut?

8 **A.** Yeah, I don't remember that, but there may have been.

9 **Q.** There is testimony about the "obedient slut" in the
10 title of the ad?

11 **A.** Yes, I do remember that Jeff did testify that he was
12 looking for group sex or a gang bang. I remember listening to
13 that from Jeff.

14 **Q.** Okay. And, as a matter of fact, you have emails in
15 front of you. What's the title, going back and forth in the
16 emails?

17 **A.** "Obedient, Submissive Slut Needed for Group Use."

18 **Q.** Okay. In the opened you talked about -- in the
19 opening statement you talked about anal sex, correct?

20 **A.** Uh-huh.

21 **Q.** And in closing statement, you actually said that the
22 sexual stuff was reprehensible, correct?

23 **A.** I did.

24 **Q.** And so, isn't it true that you probably didn't want
25 to put your client in any more light of looking more

1 reprehensible to the jury, he's the one who placed the ad?

2 **A.** Yes, he was. My thought process, as to what would
3 make Jeff look more or less reprehensible was probably used in
4 my decision, but I don't know why it is that I did or did not
5 say it, at that time, to the jury.

6 **Q.** Okay. Why you didn't say what?

7 **A.** Additionally. About the reprehensible behavior.

8 **Q.** Okay. But you -- your determination as to whether or
9 not to put in the Craigslist ad would have -- you would have
10 been looking at whether or not you were going to make your
11 client look more reprehensible by placing that ad into
12 evidence, correct?

13 **A.** That was the strategic decision to not use that. I
14 knew what Jeff was going to testify to. I didn't need a
15 printed log to go into the jury room.

16 **Q.** Okay. And it would be reasonable for the jury to
17 determine that -- to decide that if someone said they had no
18 limits, that that would include anal?

19 **A.** I would assume that's what people would think.

20 **Q.** Okay. But your testimony here today was that, you
21 know, your position is, and I assumed it would have been the
22 same back then, is that Utah juries would have a hard time
23 understanding why anybody would consent to anal sex?

24 **A.** My personal opinion, yes.

25 **Q.** Okay. Well, but -- so, that -- when you go to trial,

1 you're trying to anticipate what the jury is going to be
2 thinking about the evidence, correct?

3 **A.** Correct.

4 **Q.** Okay. And so, if your opinion is that -- you have a
5 hard time understanding why anybody would consent to that, is
6 that also what you would expect --

7 **A.** That's not what my opinion of what I think. It's
8 what I think other people think.

9 **Q.** It's what you think other people think, I wanted to
10 clarify. Okay, that's what you think?

11 **A.** Yeah.

12 **Q.** That the jury would have a hard time understanding
13 how anybody would consent to that, right?

14 **A.** Correct.

15 **Q.** But your defense was consent?

16 **A.** Correct.

17 **Q.** So absent any other evidence that came into trial
18 about whether or not -- about whether or not anal sex had been
19 discussed among them, if anal sex was included in the ad, would
20 that not have been relevant to show that Margo responded to an
21 ad soliciting, among other things, anal sex?

22 **A.** Yes.

23 **MS. SINGLETON:** Okay. Thank you.

24 **THE COURT:** Mr. Christensen, thank you. You may step
25 down. Thank you.

1 **MS. SERASSIO:** Actually, one -- one more, one quick
2 thing.

3 **THE COURT:** Not yet.

4 **REDIRECT EXAMINATION**

5 **BY MS. SINGLETON:**

6 **Q.** I just want to play the remaining part of this. So
7 your -- your testimony was that Mr. Miles never -- did tell you
8 all the details of the ad, correct?

9 **A.** No, I didn't say that. I said he told me what was in
10 the ad.

11 **Q.** I'm going to play a portion of the interview that you
12 did with the State, okay?

13 (Recording Played.)

14 **MR. CHRISTENSEN:** "the foundation, because the
15 Craigslist, other than that's the way they contacted each
16 other. That it would bring more to the case."

17 **MS. SERASSIO:** Well, you had the emails, too.

18 **MR. NIELSEN:** And did Mr. Miles ever give you any
19 detailed list or at least detail for you, what else was in that
20 ad?

21 **MR. CHRISTENSEN:** "No, he did not.

22 **MR. NIELSEN:** He never told you that?

23 **MR. CHRISTENSEN:** Not that I recall.

24 (Recording stopped.)

25 **Q. (BY MS. SINGLETON:)** Is that your testimony?

1 **A.** That's how I recall it.

2 **Q.** Okay. But your --

3 **MS. SINGLETON:** Okay. Thank you.

4 **MS. SERASSIO:** We don't have any questions.

5 **THE COURT:** You may step down, thank you. You're
6 excused.

7 **MS. SINGLETON:** Can we just have one minute, Your
8 Honor, before we call our next witness?

9 Your Honor, we would call Mr. Miles to the stand,
10 please.

11 **THE COURT:** It's okay. Get up on the stand first and
12 we can do it up there. Why don't you raise, to the best of
13 your ability, your right hand.

14 (Witness sworn.)

15 **THE COURT:** Thank you. And you might help pull that
16 microphone up because --

17 **THE DEFENDANT:** Yeah.

18 **THE COURT:** -- the chair is not on wheels, so it's
19 not too --

20 **MR. MILES:** Is that better?

21 **THE COURT:** Yes.

22 * * *

23 THOMAS JEFFREY MILES,

24 Called by the Defense, having been duly

25 sworn, is examined and testifies as follows:

DIRECT EXAMINATION

BY MS. SINGLETON:

Q. Can I have you state your full name and spell your last name, for the record, please?

A. Thomas Jeffrey Miles. M-I-L-E-S.

Q. Do you go by Jeff?

A. Yes.

Q. Okay. Jeff, you just heard your previous attorney testify. Did you, in fact, in March of 2014, place an ad on Craigslist?

A. I did.

Q. Okay. And what -- what was the purpose of placing that ad?

A. I was looking for a submissive female to have a sexual encounter with.

Q. Okay. And, in fact, was the title of that ad, "Obedient, Submissive Slut Needed for Group Use?"

A. Yes, it was.

Q. Okay. And what -- do you recall, specifically, what else you included in the content of the ad?

A. Yes, I do.

Q. Okay. Can you detail for the Court exactly what the ad -- as you recall, what the ad requested?

A. Yes. I said that me and some friends were looking

1 for an obedient, submissive slut for a gang bang, you know. I
2 said that we would have rough, kinky sex with the submissive
3 that responded. And I went on to state that we would need to
4 do, like, a one-on-one edition, just to make sure that she
5 could handle the type of things that we were going to do with
6 her.

7 Q. Let me -- let me stop you there. And why -- what did
8 you -- in your purpose in doing that, did you then detail what
9 those specific things would be?

10 A. Yes. I gave a detailed list of the sexual activities
11 we would participate in.

12 Q. And what -- what did it include?

13 A. Hair pulling, bondage, face smacking, anal sex,
14 double penetration, face fucking, choking, spanking, and just
15 rough sex in general.

16 Q. Okay. Is that, to the best of your recollection, all
17 that you included?

18 A. Yes.

19 Q. And did you -- do you specifically recall that you
20 included anal sex as part of this?

21 A. Yes, I did.

22 Q. Okay. Now, after you retained Mr. Christensen to
23 represent you in this case, did you talk to him about this
24 Craigslist ad?

25 A. I did.

1 **Q.** Did you -- did you ever tell him exactly what the ad
2 had said as you just testified?

3 **A.** Yes, I went over the ad in detail with him. I mean,
4 I thought it was very important to my case that he knew
5 everything the ad said.

6 **Q.** Okay. And did you ever ask him to obtain the ad?

7 **A.** I did.

8 **Q.** To your knowledge, did he ever make any effort to
9 obtain the ad?

10 **A.** Not to my knowledge. I just remember him saying he
11 would try to get it off my computer and he would try to
12 subpoena Craigslist, but I never saw any evidence of that
13 happening.

14 **Q.** Okay. Did you ever see the ad itself?

15 **A.** I did not.

16 **Q.** Okay. Did you ask him if he'd ever gotten it, when
17 he got to trial?

18 **A.** Yes, I did.

19 **Q.** And, did he inform you that he had obtained it?

20 **A.** No. He said that he would just question me about it
21 on the stand.

22 **Q.** Okay. And did you, in fact, testify at trial?

23 **A.** I did.

24 **Q.** And did Mr. Christensen ever ask you specifically at
25 trial, the details of what the ad had said?

1 **A.** I don't think he -- I mean, he might have mentioned
2 it, but I don't think that there were very many questions about
3 it, especially not, like, what activities were listed, or
4 anything like that.

5 **Q.** Okay. So in your testimony, did it ever come out
6 that the ad had included, you know, solicitation for, among
7 other things, anal sex?

8 **A.** No.

9 **Q.** If Mr. Christensen had asked you, at trial, what the
10 content of the ad had said, what would you testify to?

11 **A.** Pretty much what I just told you a minute ago.

12 **Q.** About what specifically the ad entailed?

13 **A.** Yeah, the sexual activities, the anal sex, hair
14 pulling, verbal humiliation, things like that.

15 **MS. SINGLETON:** Okay. Thank you.

16 **CROSS-EXAMINATION**

17 **BY MS. SERASSIO:**

18 **Q.** Thomas, at trial, you were given an opportunity to
19 talk about the details of the ad, weren't you?

20 **A.** I don't remember, specifically.

21 **Q.** Can't recall it? I specifically gave you the
22 opportunity to talk about the details of the ad. I said to
23 you, "Okay. So you said you wanted an obedience, submissive
24 slut needed for group use, correct?"

25 **MS. SERASSIO:** Page 115.

1 **Q.** **(BY MS. SERASSIO:)** And you said, "Yes, that was the
2 title."

3 **A.** Yes.

4 **Q.** And I said, "That was the title. Was there anything
5 else in the ad?" I asked you that, correct?

6 **A.** I don't remember.

7 **Q.** I'm telling you, okay, you said, "Yes."

8 **A.** Okay.

9 **Q.** And then I said, "So this doesn't reflect the actual
10 ad?"

11 You said, "No."

12 And then you had an opportunity. You could have
13 said, "This is what's in the ad," correct?

14 **A.** I suppose I could have.

15 **Q.** So if it was that important, why didn't you say it?
16 Why didn't you testify to it?

17 **A.** It was my first time ever being questioned. I
18 suppose I was nervous.

19 **Q.** Okay. But you were then asked, "When you reply, you
20 have to put in the specifics?"

21 And you told us, "We add the questionnaire."

22 I asked you about the questionnaire. You said that
23 you added a questionnaire, correct?

24 **A.** Yes.

25 **Q.** You said it was to save time. So -- and then I said,

1 "So, was it your questionnaire, your questions?"

2 You said, "Yes," correct?

3 **A.** I guess I did.

4 **Q.** You made the ad, right?

5 **A.** Right.

6 **Q.** So they were your questions in the ad?

7 **A.** Right.

8 **Q.** So and I said that Margo replied to your ad and I had
9 to refresh your memory. But this email we've got up here,
10 State's Exhibit No. 2, is this email from Margo Crandall,
11 correct?

12 **A.** Yes, that's correct.

13 **Q.** This very last one, the last page of Exhibit 2, this
14 is Margo's replay to you, correct?

15 **A.** Yes.

16 **Q.** And in that reply, she lists her name, her age, her
17 height, her weight, her bra size, her race, her experience
18 level, one-on-one. Have you done DP? No. Limits: None.
19 Correct?

20 **A.** Correct.

21 **Q.** Oh, and then it says, "Tell us how you like to get
22 fucked from behind," correct?

23 **A.** Right.

24 **Q.** All right. So that's pretty good detail about what
25 was in the ad, isn't it?

1 **A.** That's just what was at the end of the ad.

2 **Q.** That was -- but those were -- that's the
3 questionnaire in the ad, correct?

4 **A.** Yes, that is --

5 **Q.** So we know what Margo answered to you, correct?

6 **A.** Yes.

7 **Q.** It even talks about, "No limits," and "Getting fucked
8 from behind," correct?

9 **A.** Yes.

10 **Q.** Which a jury could very easily interpret as anal sex,
11 correct?

12 **A.** I suppose they could.

13 **Q.** Yes. And so if there was any more to add to this,
14 when you were being questioned, when I asked you, you didn't
15 bother to add to it?

16 **A.** I don't feel like you asked me specifically what the
17 ad stated.

18 **Q.** I didn't ask you specifically what the ad stated?

19 **A.** No. You said you asked me about the title of the ad
20 and then I'm not sure what you said after that.

21 **Q.** I said, "This doesn't reflect the actual ad."
22 And you said, "No."

23 **A.** Okay.

24 **Q.** And then I said, "But you had to put it in
25 specifics?" And you said, yes, you added the questionnaire.

1 But you never said, "But there was a whole bunch more to the ad
2 that we haven't talked about," did you?

3 A. No, I did not say that.

4 Q. Okay. And you -- you had -- in your testimony, you
5 told us that there were between 40 and 50 emails going back and
6 forth between you and Margo, correct?

7 A. Yes.

8 Q. But it was also your testimony that you erased them
9 all?

10 A. Yes.

11 Q. So is it your testimony today that you don't have
12 those, and you didn't turn any over to your attorney?

13 A. Yes.

14 Q. So the only reason we have the evidence at trial,
15 what the emails were, is because we got them from Margo,
16 correct?

17 A. Yes.

18 Q. And additionally, you turned your own computer over
19 to your attorney, correct?

20 A. Yes, I did.

21 Q. So if there was any other evidence, you would have
22 been in possession of it, not the State, correct?

23 A. My attorney would have, yes.

24 Q. You had turned it over to your attorney?

25 A. Correct.

1 **Q.** Correct. All right. When we -- when you testified
2 at trial, there was a point when you shut down and quit
3 answering my questions, correct?

4 **A.** Yes.

5 **Q.** And that was when I was asking you to read the emails
6 to the jury, correct?

7 **A.** Yes.

8 **Q.** You didn't like that.

9 **MS. SINGLETON:** Your Honor, I'm going to object at
10 this point. I think this is getting to be outside the circle
11 of what the issues are here, namely what the content was, what
12 information my client provided to his attorney, what
13 information the attorney knew about the ad and then what is
14 reasons for -- my client can't testify as to what, you know,
15 anything, as far as what his attorney's strategic reasoning
16 were, and I think, at this point, we're getting into the trial
17 itself and it's outside the scope.

18 **MS. SERASSIO:** Your Honor, what I'm getting to here
19 is part of the trial strategy, is that anything that didn't
20 make Thomas sound good, he didn't want to have to talk about at
21 trial.

22 **THE COURT:** Objection overruled.

23 **Q. (BY MS. SERASSIO:)** So, you didn't like the way those
24 ads made you sound, did you -- the emails made you sound?

25 **A.** No.

1 **Q.** You didn't want the jury to hear that coming from
2 your mouth, did you?

3 **A.** I just didn't want to read the emails that I had sent
4 to Margo.

5 **Q.** They didn't sound good, did they?

6 **A.** No.

7 **Q.** And the ad that you wrote would not have sounded good
8 to the jury either, would it?

9 **A.** I don't know if it would have or not.

10 **Q.** It wouldn't have put you in a positive light with the
11 jury, would it have?

12 **A.** I think it might have helped my case.

13 **Q.** You think it would have helped your case to detail
14 your sexual preferences and put that all in your own words, of
15 what you had said to Margo?

16 **A.** Yes.

17 **Q.** And you could have told the jury what the ad said,
18 correct?

19 **A.** I don't really feel like I had that opportunity.

20 **Q.** But you were on the stand for a long time.

21 **A.** I was, but I wasn't questioning myself.

22 **Q.** And I asked you, "There were more details?" And you
23 didn't even volunteer any of them, did you?

24 **A.** I might have not understood your question at that
25 time.

1 **Q.** But you would volunteer details on other questions,
2 you just didn't bother to volunteer the details about the
3 Craigslist's ad, did you?

4 **A.** I can't recall.

5 **Q.** Today, you've been able to volunteer details on the
6 questions, correct?

7 **A.** Yes, I have.

8 **Q.** Okay. So even when I ask a yes or no, you've been
9 able to give me more detail, correct?

10 **A.** I have.

11 **Q.** And you had that ability at the time of the trial as
12 well, correct?

13 **A.** I did.

14 **Q.** So those emails came into evidence, right? You knew
15 that the jury heard about the emails?

16 **A.** Yes.

17 **Q.** Okay. And those emails, again, detailed some pretty
18 specific stuff about what you guys were planning to do,
19 correct?

20 **A.** They did.

21 **Q.** What you were wanting and what potentially was going
22 to happen, right?

23 Let me ask you this: I mean, specifically, you know,
24 these emails, as far as, you know, pretty graphic, right?

25 **A.** Yes, yes, very graphic.

1 **Q.** Okay. You weren't really happy about the jury, I
2 mean, fair to say the State tried to point out, that -- that
3 wasn't the best thing to have the jury -- or best feeling of
4 the jury reading those emails, correct?

5 **A.** Correct.

6 **Q.** But at that point, once the jury had already read
7 those emails, would it have made any difference to you, as far
8 as your feeling about whether or not the ad had come into play?

9 **A.** Absolutely not. I don't think I could really have
10 been made to look any worse.

11 **Q.** Okay. And was this the first time that you had ever
12 testified?

13 **A.** Yes, it was.

14 **Q.** Were you nervous?

15 **A.** I was very nervous and anxious.

16 **Q.** And again, to your knowledge, your attorney didn't
17 even have the ad?

18 **A.** Yeah, to my knowledge, he never had the ad.

19 **MS. SERASSIO:** Okay. I don't have any other
20 questions, Your Honor.

21 **THE COURT:** You may step down, thank you.

22 **MS. SERASSIO:** Your Honor, if we could have, like, a
23 two-minute break to speak to our witness and decide whether or
24 not we're going to put her on the stand?

25 **THE COURT:** Sure.

1 **MS. SERASSIO:** Thank you.

2 **THE COURT:** We'll be in recess, let's see, it's about
3 4:35, why don't we come back about 4:40.

4 (Court in Recess)

5 **MR. NIELSEN:** We are going to call one more witness,
6 Your Honor, she's in the bathroom.

7 While we're waiting, Your Honor, maybe just some
8 housekeeping. It depends on what Your Honor would like to do.
9 In other -- I've seen some judges want to make findings from
10 the bench. Others want each party to submit proposed findings
11 at the same time and then the judge will make their own
12 findings. So whatever Your Honor would like to do, we're happy
13 to comply with that.

14 **THE COURT:** This has presented some issues that are a
15 little different than I think the parties anticipated.

16 **MS. SINGLETON:** Yes.

17 **MR. NIELSEN:** Yes.

18 **THE COURT:** So in terms of the testimony provided.

19 **MR. NIELSEN:** Sure.

20 **THE COURT:** Which is probably going to require me to
21 do two things, and that is, review my notes, but probably
22 review the transcript again, just to make certain I have as
23 clear of an understanding as the testimony will permit,
24 associated with the existence of the ad, itself. I think it
25 would be helpful to the court to have each party to provide

1 proposed findings associated with what you have heard today.

2 **MR. NIELSEN:** Sure.

3 **THE COURT:** And I think that -- I was anticipating
4 that, you know, I was thinking about the context of what will
5 have some closing arguments associated with that, asking you to
6 do what I don't know that I could do today, either. It would
7 be a little difficult. But I probably would like to hear your
8 thought, once you've submitted those proposed findings. So
9 what I'd suggest we do is have you submit proposed findings
10 simultaneously, or whatever.

11 **MR. NIELSEN:** And that's how I've done it in the
12 courts, I think that's perfect.

13 **THE COURT:** And then come back and make some argument
14 associated with it.

15 **MR. NIELSEN:** Okay.

16 **THE COURT:** All right. These two exhibits that
17 are -- the exhibits that have been stipulated by the parties
18 and received for purposes of this hearing today are Exhibits 1
19 & 2. 2 being the emails that we've been talking about.
20 Exhibit 1 is --

21 **MR. NIELSEN:** They're both the emails; they're from
22 different sources.

23 **MS. SERASSIO:** They're different copies of the same
24 emails.

25 **THE COURT:** I take it, then, that there will be no

1 effort to admit the existence of the ad itself, because neither
2 party has it, is that a correct understanding?

3 **MS. SINGLETON:** That's accurate, Your Honor.

4 **THE COURT:** Okay.

5 **MS. SERASSIO:** The State will call Margo Miner.

6 **THE COURT:** Ms. Miner, if you'd come and stand in
7 front of Susan, she'll administer an oath.

8 * * *

9 MARGO CRANDALL MINER,

10 Called by the State, having been duly
11 sworn, is examined and testifies as follows:

12 * * *

13 **DIRECT EXAMINATION**

14 **BY MS. SERASSIO:**

15 **Q.** If you'd please state your name and spell your last
16 name for the record.

17 **A.** Margo Crandall Miner. M-I-N-E-R.

18 **Q.** So you're still using Crandall, as well?

19 **A.** Yes.

20 **Q.** Okay. And, Margo, were you able to review
21 Thomas Miles' declaration in this case about what the
22 Craigslist ad said?

23 **A.** Yes.

24 **Q.** And when you -- were you also able to hear his
25 testimony today?

1 **A.** Yes.

2 **Q.** Was there anything in his testimony or his
3 declaration that's different than what you recall in the ad?

4 **A.** I found two inconsistencies, yes.

5 **Q.** Okay. What are those two inconsistencies?

6 **A.** He wrote in the ad that it included anal sex, and in
7 his words, "Being pissed on," those two things.

8 **Q.** Are you talking about the ad, or the declaration?

9 **A.** The declaration.

10 **Q.** Okay. So Thomas wrote in the declaration, what?

11 **A.** He wrote, in the declaration, that the ad included
12 such things as "anal sex," and "being pissed on," and those two
13 are incorrect and a lie.

14 **Q.** So are you saying those were not in the Craigslist ad
15 that you responded to?

16 **A.** They were not.

17 **Q.** Okay. Thank you.

18 **MS. SERASSIO:** Can I just have one moment, Your
19 Honor?

20 **THE COURT:** Sure.

21 **CROSS-EXAMINATION**

22 **BY MS. SINGLETON:**

23 **Q.** So it's your testimony today that what Mr. Miles
24 testified to, as far as the ad, the details of the ad, that
25 that -- that there were inconsistencies between what he

1 testified to today and what the ad actually said?

2 **A.** Correct.

3 **Q.** Okay. And so then I guess it would be your testimony
4 today that you recall specifically what the ad said?

5 **A.** Not specifically, but I can remember some pretty
6 shocking details that were not in there, yes.

7 **Q.** Okay. You testified both at the preliminary hearing
8 in this case and at the jury trial, correct?

9 **A.** Yes.

10 **Q.** Okay. And at that trial, did you -- that trial was
11 back in 2015, correct?

12 **A.** I believe so.

13 **Q.** Okay. And so that's about getting close to four
14 years later, correct?

15 **A.** Uh-huh. Yes.

16 **Q.** And do you remember being asked, at trial and at the
17 prelim, if you could recall the wording of the ad that
18 they -- that you responded to?

19 **A.** I believe they asked me; I believe I couldn't
20 remember the exact wording.

21 **Q.** Okay. But it's your testimony here today that now
22 you do remember the wording of the ad, as far as --

23 **A.** I -- I never said I remembered the exact wording of
24 an ad. I remember specifics, a few specifics, and, yes, those
25 are not in there.

1 **Q.** Okay. But you don't -- you didn't testify as to the
2 specifics in either the -- of what the ad -- you recall being
3 asked the specifics of the ad? Not the exact wording, I'm
4 talking about specifics, at the preliminary hearing and not
5 being able to recall that?

6 **A.** I don't follow what you're asking me.

7 **Q.** Okay. So your testimony here today is that you may
8 not remember the exact wording of the ad, but you remember the
9 specifics, basically, of the ad. Is that fair to say?

10 **A.** Certain specifics, yes. I remember.

11 **Q.** And do you remember being asked at the preliminary
12 hearing -- why don't I just show you a copy of this.

13 **MS. SINGLETON:** Your Honor, may I approach with this?

14 **THE COURT:** You may.

15 **Q. (BY MS. SINGLETON:)** Let me show you a copy of the
16 preliminary hearing transcript. Could you just read the
17 highlighted portion?

18 **A.** "What was the ad for? It was for anonymous" --

19 **Q.** No. No. To yourself. Sorry.

20 **A.** Oh.

21 **Q.** And so when you were asked at the preliminary hearing
22 about the details of the ad, you were asked whether or not the
23 ad was in general for sex or it was more specific than that,
24 correct?

25 **A.** Uh-huh.

1 **Q.** And then you were asked whether or not you recall
2 what the specifics were and your answer was that you do not,
3 correct?

4 **A.** At that time, yeah. If you asked me specifics
5 without giving me an option, then yes. But today, I could pick
6 out and tell you exactly what was in that ad and what was not.

7 **Q.** Because you remember exactly what was in the ad and
8 what was not. Is that your testimony today?

9 **A.** As far as what was expected, yes.

10 **MS. SERASSIO:** Just quickly.

11 **REDIRECT EXAMINATION**

12 **BY MS. SERASSIO:**

13 **Q.** So at the preliminary hearing, nobody gave you a list
14 of things to look at, correct?

15 **A.** Correct.

16 **Q.** But today, we gave you this declaration from Thomas?

17 **A.** Uh-huh.

18 **Q.** And you were able to look at that and say what was
19 and what was not in the ad, correct?

20 **A.** Correct.

21 **MS. SERASSIO:** Okay, thank you.

22 **MS. SINGLETON:** I don't have any more.

23 **THE COURT:** Ms. Miner, thank you. You may step down.

24 **THE WITNESS:** Thank you.

25 **THE COURT:** Any additional witnesses?

1 **MS. SERASSIO:** That's everything for the State, Your
2 Honor.

3 **MS. SINGLETON:** Likewise, Your Honor.

4 **THE COURT:** Okay. I have looked, and it must be a
5 matter of the appellate court record, as opposed to the State
6 record associated with the declaration from Mr. Miles. Is that
7 an accurate statement, or do you have the declaration that's
8 part of the proceedings in front of the court today?

9 **MS. SERASSIO:** I have -- I can give you a copy, Your
10 Honor.

11 **MR. NIELSEN:** It was an attachment to their 23(B)
12 motion, which I believe I attached to my prehearing memorandum,
13 but we do have a copy.

14 **THE COURT:** I do have both those, let me just see.

15 **MR. NIELSEN:** If the court would like one.

16 **MS. SERASSIO:** Your Honor, can I make an approach so
17 that we can make an Exhibit No. 3, if you want, or we can make
18 it Defense Exhibit 1.

19 **THE COURT:** Hang on just a minute. Let me see if I
20 have what I need. You know what, it might just be simpler to
21 give me a copy.

22 **MR. NIELSEN:** And it might have been attached to my
23 errata. I think I might have filed it and then neglected to
24 attach the exhibits, and then filed it a couple of days later,
25 but...

1 **THE COURT:** Yes, it's not there and that -- oh no,
2 there it is. I do have it as an addendum, but we'll take this.
3 Let's make it a copy, part of the record.

4 All right. So how much time do you think you need to
5 get a transcript and to be able to generate what you would
6 consider be proposed findings for the court to review?

7 (Counsel confer.)

8 **MR. NIELSEN:** Maybe we could just say within 30 days
9 or they'll be due 30 days after getting the transcript.

10 **THE COURT:** Okay.

11 **MR. NIELSEN:** Does that work?

12 **THE COURT:** Let's make it 30 days after getting the
13 transcript. After you have filed your responses, will you
14 notify the court to schedule a hearing, so that we can have a
15 hearing associated with the proposed findings and your
16 arguments associated with it. Okay?

17 **MR. NIELSEN:** Yes.

18 **MS. SERASSIO:** Okay.

19 **THE COURT:** Okay, thank you. Ms. Singleton, of
20 course, the question, you know, that has been bothering me all
21 afternoon, and that is: This wasn't another accident on the
22 top of your roof in the middle of winter, was it?

23 **MS. SINGLETON:** Ahhh, well, I had a -- I think it was
24 a seizure and it dislocated my shoulder and --

25 **THE COURT:** Okay. So, you weren't falling off your

1 roof?

2 **MS. SINGLETON:** No, I wasn't falling off my roof.

3 **THE COURT:** In the process of doing that? Because I
4 was going to suggest that perhaps you might put a hide-a-key
5 somewhere so you wouldn't have to climb through.

6 **MS. SINGLETON:** Yes, I have done that now. I have
7 keys hidden everywhere.

8 **THE COURT:** Okay. All right, then. All right, thank
9 you. We're in recess.

10 (End of Hearing.)

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C E R T I F I C A T E

STATE OF UTAH)
) SS
COUNTY OF SALT LAKE)

I, KATIE HARMON, a Certified Shorthand Reporter in
and for the State of Utah, do hereby certify that I received
the audio recording in this matter, and that I transcribed it
into typewriting and that a full, true and correct
transcription of said audio recording so recorded and
transcribed is set forth in the foregoing pages, inclusive
except where it is indicated that the recording was inaudible.

DATED this 26th day of March, 2019.

Katie Harmon

KATIE HARMON, RPR, CSR.
License No. 7386959-7801

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GUY YOSHIKAWA: [23] LIEUTENANT ROB JACK: [1] 24/9 MR. CHRISTENSEN: [30] MR. MILES: [1] 42/19 MR. NIELSEN: [33] MS. SERASSIO: [25] MS. SINGLETON: [26] THE CLERK: [1] 15/8 THE COURT: [52] THE DEFENDANT: [1] 42/16 THE STATE: [1] 4/24 THE WITNESS: [1] 61/23	7 7386959-7801 [1] 65/23 7801 [1] 65/23 7th [2] 16/9 16/10		
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ADDENDUM C

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

:

**RULE 23(B)
FINDINGS OF FACT**

Plaintiff,

:

vs.

:

Case No. 141910634

THOMAS JEFFREY MILES,

:

Defendant.

:

Judge Randall N. Skanchy

Appellant/Defendant Thomas Jeffrey Miles (“Mr. Miles”), pursuant to Rule 23(B) of the Utah Rules of Appellate Procedure, filed a Motion to Remand this matter to the Trial Court. The Utah Court of Appeals temporarily remanded Mr. Miles’ appeal to the Trial Court “. . . for the limited purpose of entering Findings of Fact relevant to whether trial counsel’s actions in failing to investigate and use evidence regarding the Craigslist ad that Mr. Miles posted constituted ineffective assistance of counsel.” “Specifically, the [district court] . . . should address the following issues: (a) the content of the Craigslist ad; (2) the details available to defense counsel relating to the content of the Craigslist ad; and (3) Counsel’s reasons for not investigating and introducing the content of the Craigslist ad at trial.” This Court understands from the specificity of this Remand that the Court is limited to the facts related of each question, and the Trial Court is not to provide Conclusions of Law on the ultimate issue on appeal, whether the facts constitute ineffective assistance of counsel.

An evidentiary hearing was held on February 26, 2019. At this hearing, the Court heard testimony from Paul R. Christensen (“Mr. Christensen”), who was Mr. Miles’ trial attorney, Thomas Jeffrey Miles (Appellant/Defendant), and M.C.M (the alleged victim). The Court also received the State’s trial Exhibits 1 and 2, which were copies of email exchanges between Mr. Miles and M.C.M. A copy of the State’s Exhibits are attached to these Findings of Fact.

The Court thereafter had the parties prepare Proposed Findings of Fact and heard arguments on those Proposed Findings of Fact on June 5, 2019. This Court has now heard the evidence presented both at trial and the evidence presented at the Rule 23(B) hearing on February 26, 2019, reviewed its notes and the transcript of the Rule 23(B) hearing and its notes from the trial, considered the arguments of counsel and their respective Proposed Findings of Fact, and now makes the following Findings of Fact:¹

**EVIDENCE ADDUCED
AND FINDINGS OF FACT**

1. CONTENTS OF THE CRAIGSLIST AD

A. Evidence Adduced. In March 2014, Mr. Miles posted an advertisement on Craigslist, R.437-38, 652, 853. The title of this Craigslist ad was “Obedient, Submissive Slut Needed for Group Use.” R 438, 446, 793-94, 841, 854; EH 21; SE 1, 25²

¹R cites are to the appellate record, “EH” cites are to the evidentiary hearing transcript page, which has not been date stamped into the appellate record. SE cites are to the State Exhibits 1 and 2.

²The Craigslist ad was never presented at the Rule 23B hearing and evidently does not presently exist in the files of the State, the Defense, or Mr. Christensen.

Mr. Miles testified that the Craigslist ad said he was looking for “rough, kinky sex,” which included a “detailed list of the sexual activities” he wanted from any interested party including: hair pulling; bondage, face smacking, anal sex, double penetration, face fucking, choking, spanking, and just rough sex in general.” *EH 43-44*

In a sworn Declaration previously filed in the Court of Appeals, Mr. Miles likewise stated that the ad listed “anal sex” and “double penetration” as well as acts like “being spit or pissed on.” M.C.M testified that the ad did not include any reference to “anal sex” or “being spit or pissed on.” *EH 58*

Mr. Miles further testified that the Craigslist ad included a questionnaire which asked any responding party to provide the following information: name, age, height, weight, bra size, race, experience level, done dp, and limits. *EH 47-49*

M.C.M responded to the Craigslist ad by email. In her email response, M.C.M stated, “I think I’m what you’re looking for,” *R 439; SE 25*, and provided the following information:

Name:	M.C.M.
Age:	22
Heights:	5' 8
Weight:	140
Bra Size:	34DDD
Race:	White
Experience Level:	Only one-on-one
Have you done dp?	No
Limits:	None
Tell us how you like to get fucked:	From behind ³ <i>SE 1, 25</i>

³M.C.M. testified that she understood “from behind” or “doggie style” to mean “vaginal sexual intercourse from behind.” *R 1109*

M.C.M did not dispute that the ad sought a partner willing to participate in “double penetration” nor did she challenge Mr. Miles’ claim that the ad listed various sexual activities in which the responding party was expected to participate. Instead, M.C.M testified that “anal sex” and “being pissed on” were not among the sexual activities listed in the ad and that Mr. Miles’ assertion that the “ad included such things as ‘anal sex’ and ‘being pissed on’ was incorrect and a lie.” *EH 57-58*

Mr. Christensen testified that the Craigslist ad included talk of “group sex . . . anal sex” and talk of what Mr. Miles “had seen on the Internet.” *EH 8* But he also testified that he did not recall the specific contents of the Craigslist ad. *EH 20, 28* Mr. Christensen also testified that M.C.M’s testimony at trial seemed “honest and up-front about what was in the ad and what took place. *EH 8*

B. Specific Findings of Facts

1. The Craigslist ad was titled “Obedient, Submissive Slut Needed for Group Use.”
2. The Craigslist ad included reference to sexual activities including hair pulling, bondage, face smacking, double penetration, face fucking, choking, spanking and just rough sex in general.
3. The Craigslist ad included a questionnaire which asked any responding party to provide the following information: name, age, height, weight, bra size, race, experience level, done dp, and limits.
4. As to the issue of “anal sex” and “being pissed on,” the Court finds M.C.M is a more credible witness than Mr. Miles and as such, the Court finds that the Craigslist ad did not include either of those two descriptions.

2. DETAILS AVAILABLE TO DEFENSE COUNSEL RELATING TO THE CONTENT OF THE CRAIGSLIST AD

A. Evidence Adduced

As noted, Mr. Miles' trial counsel was Mr. Christensen. *EH 5* At the time of the trial, Mr. Christensen had been a member of the Utah State Bar for approximately 25 years. *EH 32* He had practiced as a Deputy County Attorney in Washington County, City Attorney for Washington City, and a Deputy County Attorney in Summit County for a cumulative period of 11 years, during which he prosecuted hundreds of cases, including sex crimes and rape cases. *EH 32-33*

Mr. Christensen testified that he had received a copy of the Craigslist ad, both from Mr. Miles' mother or Mr. Miles and from a direct written request to Craigslist. *EH 7* Mr. Christensen received the Craigslist ad from Craigslist in response to that written letter request. *EH 11, 12* He testified that he had the Craigslist ad at trial; *EH 7* however, this testimony was inconsistent with prior statements to both the defense investigator and prosecutors that he either did not get the Craigslist ad *EH 16, 18*, or its absence from his file. *EH 12-18, 24-29* His explanation at the Rule 23(B) hearing for this prior inconsistency was that he forgot he had it when interviewed by defense counsel's investigator some months earlier. *EH 18* Mr. Christensen also testified that Mr. Miles told him of what was in the Craigslist ad, but never gave him a detailed list of what was in the ad. *EH 13, 28*

Mr. Miles testified that he told Mr. Christensen about the Craigslist ad "in detail" because he "thought it was very important to [his] case that he knew everything the ad said." *EH 44-45* Mr. Miles further testified that the Craigslist ad included a questionnaire which asked any responding

party to provide the following information: name, age, height, weight, bra size, race, experience level, done dp, and limits. *EH 47-49*

While Mr. Christensen's statements to investigators and to counsel were inconsistent about the Craigslist ad, he was adamant at the Rule 23B hearing that he had a copy of the Craigslist ad, that he discussed it with Mr. Miles, and that he provided the appellate defense counsel his entire file. *EH 28-31* Mr. Christensen further testified that when the jury verdict was returned, he told Mr. Miles that he thought Mr. Miles had a good appeal for Mr. Christensen's non-use of the Craigslist ad. *EH 22, 33-34*

B. Specific Findings While Mr. Christensen's testimony is contradicted by his prior statements to investigators, when he was no longer in possession of his files, the Court finds his testimony credible and finds that he had a copy of the Craigslist ad during trial, he discussed it with Mr. Miles and was aware of its contents, both by his own possession of the actual Craigslist ad and his discussion with Mr. Miles about its contents.

3. COUNSEL'S REASONS FOR NOT INVESTIGATING AND INTRODUCING THE CONTENT OF THE CRAIGSLIST AD AT TRIAL

A. Evidence Adduced

As discussed above, this Court has found that Mr. Christensen did investigate the contents of the Craigslist ad and had it in his possession at trial.

Mr. Christensen testified that he made a strategic decision not to use the Craigslist ad (*EH 7, 9, 20, 21, 25, 27, 30, 31, 38-39*) for the following reasons:

(i) He expected to elicit from either Mr. Miles or M.C.M the sexual behavior the parties were to engage in and did not need to bolster the testimony of either one. *EH 7-9*

(ii) He thought that the “conversation between them would be sufficient for the jury to hear of what took place and what was expected of the parties,” *EH 20* which included the emails exchanges received into evidence which discussed the agreed upon activity. *EH 34* and *State’s Exhibits 1 and 2*

(iii) He did not think that the ad was exculpatory or relevant to consent - though his testimony was inconsistent on this point. Compare *EH 26* with *EH 36, 40*

(iv) He thought the details could have put Mr. Miles in a worse light in the jury’s eyes. *EH 31, 37-39*

(v) In his view, both at the time of trial and at the time of the Rule 23(B) hearing, Utah juries have a hard time understanding why anybody would consent to anal sex. *EH 22-23, 29-40*

(vi) He chose not to admit the Craigslist ad “because [he] felt that the emails between M.C.M and Mr. Miles were the “negotiation” contract between the parties as to what would occur. *EH 33-34* Mr. Christensen acknowledged that in these emails M.C.M stated that she had “no limits.” *EH 31-32, 34-35*

(vii) He felt the Craigslist ad would make Mr. Miles look “reprehensible,” and “that was the strategic decision to not use [a copy of the ad]. [He] knew what [Mr. Miles] was going to testify to” and “didn’t need a printed log to go into the jury room.” *EH 38.-39; See also EH 30-31, 37*

(viii) Mr. Miles testified that he did not like the way the emails portrayed him to the jury, he “shut down” at trial and refused to read the emails to the jury and that the introduction of the Craigslist ad could not have made him look any worse to the jury. *EH 51-54*

B. **Specific Findings** Mr. Christensen considered the evidential value of the Craigslist ad and intentionally chose not to introduce it for all the reasons set forth above.

DATED this 14th day of June 2019

BY THE COURT:



RANDALL N. SKANCHY
DISTRICT COURT JUDGE

