PUBLIC

No. 20150809-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,
Plaintiff/Appellee

v.

THOMAS JEFFREY MILES,
Defendant/Appellant.

Appellant is incarcerated

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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ALEXANDRA S. MCCALLUM (15198)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 200
Salt Lake City, Utah 84111
appeals@sllda.com
(801) 532-5444
Attorney for Appellant

SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854
Attorneys for Appellee

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JURISDICTION

Thomas Jeffrey Miles was convicted of forcible sodomy, a first degree felony. The Sentence, Judgment, Commitment is attached as Addendum A. This Court has jurisdiction after transfer from the Utah Supreme Court under Utah Code § 78A-4-103(2)(j). R.211-17.

INTRODUCTION

In March, 2014, Miles posted a Craigslist ad seeking anonymous sex. The complainant, Kim, responded to that ad.[1] After exchanging emails, Miles and Kim ultimately met in person, and engaged in five sexual acts at Miles's home. Those acts occurred in the following order: (1) oral sex, (2) vaginal sex, (3) anal sex, (4) oral sex, and (5) vaginal sex.

[1] Miles uses the name "Kim" to protect the privacy of the complainant.

Kim claimed that she did not consent to any of the five sexual acts that night. Specifically, Kim explained that she had previously sent Miles a pornographic video of herself and claimed that Miles blackmailed her by threatening to send the video to BYU (where she was a student) if she did not have sex with him. According to Kim, she met up with Miles in order to stop him from disclosing the video; she did not want to meet or have sex with him. Kim also claimed that she protested "no" and "stop" during the anal sex and during both instances of vaginal sex. Miles testified that all sexual acts were consensual. He further testified that during the consensual anal sex, Kim said she "couldn't handle it anymore." At that point, Miles stopped, and "[t]hen [he] pulled out of her anus."

Based on the five sexual acts during this encounter, the State charged Miles with two counts of forcible oral sodomy, two counts of rape, and one count of forcible anal sodomy. After a three-day trial, the jury acquitted on all counts except for Count 3—the forcible sodomy count pertaining to the anal sex act.

To convict Miles of forcible anal sodomy, the State needed to prove that (at a minimum) Miles acted with recklessness that Kim did not consent. At trial, the court instructed the jury on the definition of the mens rea term "recklessly." But that definition was incorrect because it omitted the requirement that the defendant must "consciously disregard" a substantial and unjustifiable risk. Thus, the jury could convict if they found Miles was aware of a risk of nonconsent, even if he did not consciously disregard that risk. Moreover, the

incorrect instruction was prejudicial—particularly in light of the evidence showing that Miles terminated the anal intercourse and thus heeded (rather than consciously disregarded) the risk that Kim withdrew her consent to the anal sex. Trial counsel provided ineffective assistance of counsel by failing to object to the incorrect and prejudicial instruction on recklessness.

Miles raises a separate claim of ineffective assistance in his accompanying rule 23B motion. *See* Revised Order Pertaining to Rule 23B ("if the [23B] motion is adjudicated in conjunction with the briefing, the briefs may reference the arguments in the motion"). There, he establishes that trial counsel was ineffective for failing to investigate and use evidence regarding the content of the Craigslist ad, which Miles initially posted and Kim ultimately responded to. Though absent from the record on appeal, the supplemental facts show that the ad sought a partner who was willing to participate in anal sex, among other things.

Miles asks this Court to reverse and remand for a new trial based on the issue raised in this brief. *See infra* Part I. Alternatively, this Court should presume the deficient performance identified in the 23B motion and reverse and remand for a new trial because the cumulative effect of all of the errors identified on appeal (in the opening brief and the 23B motion) undermine confidence in the verdict. *See infra* Part II. If the Court declines to reverse on the issue raised in this brief or to presume the deficient performance identified in the 23B motion for purposes of a cumulative error analysis, Miles asks this Court to remand for a

rule 23B hearing and supplementation of the record followed by supplemental briefing. *See* 23B memorandum.

ISSUES, STANDARDS OF REVIEW, PRESERVATION

Issue I: Whether a new trial is warranted where the instruction on recklessness omitted the "conscious disregard" element and, therefore, incorrectly instructed the jury on the meaning of "recklessly."

Standard of Review/Preservation: This Court reviews challenges to jury instructions for correctness. *Cheves v. Williams*, 1999 UT 86, ¶20, 993 P.2d 191. The issue is not preserved. But it can be reached under the doctrine of ineffective assistance of counsel, which is an exception to the preservation rule and is reviewed as a matter of law. *See, e.g.*, *State v. Kozlov*, 2012 UT App 114, ¶28, 276 P.3d 1207.

Issue II: Whether the cumulative effect of counsel's ineffective assistance warrants reversal.

Standard of Review/Preservation: A claim of cumulative error "requires [this Court] to apply the standard of review applicable to each underlying claim." *Radman v. Flanders Corp.*, 2007 UT App 351, ¶4, 172 P.3d 668. Preservation is inapplicable.

PROVISIONS

The following are attached at Addendum B: Utah Code §§ 76-2-101, 76-2-103, 76-5-403.

STATEMENT OF THE CASE

Miles was charged by amended Information with two counts of rape, first degree felonies, in violation of Utah Code § 76-5-402; and three counts of forcible sodomy, first degree felonies, in violation of Utah Code § 76-5-403(2). R.20-22. Two of the forcible sodomy counts pertained to alleged acts of forcible oral sodomy and one count pertained to an alleged act of forcible anal sodomy. *Id.*; R.926. Miles was subsequently bound over on those charges. R.284-86.

A three-day jury trial was held on July 15-17, 2015. R.119-22, 155-57. The jury acquitted on both rape counts and both counts of forcible oral sodomy. R.944, 1005; *see also* R.926. But the jury returned a guilty verdict on the single count of forcible anal sodomy. *Id.* The trial court sentenced Mr. Miles to an indeterminate term of 5 years to life in the Utah State Prison. R.201-02. Miles timely appealed. R.203-04.

STATEMENT OF FACTS[2]

Background

In March 2014, Miles posted an advertisement in the casual encounters category of Craigslist seeking anonymous sex. R.437-38, 562, 853. Miles was involved in "dominant-submissive role play" and the "S & M lifestyle." R.793-74, 847. For purposes of such role-playing, he identified himself as a "dominant." R.793, 841. According to Miles, those identifying as "dominant" are expected to

[2] A portion of Kim's trial testimony was not recorded. *See* R.573-74. Miles subsequently filed a motion to reconstruct the record, which was granted by this Court. The reconstructed testimony appears at R.1116-18.

portray and behave in a certain way when interacting with a submissive female. R.847. For instance, a dominant male may be referred to as "sir or master" and submissive female may be called "degrading names" or a "pet." R.793. This is part of the role-play. R.793-94.

In the Craigslist ad, Miles (a dominant) was looking for someone submissive. R.793-74, 841. The title of the ad was "obedient, submissive slut needed for group use," and somewhere, the ad mentioned the use of degrading names. R.438, 446, 793-94, 841, 854; SE 1, 25. Either in the ad or in an early email, Miles requested that the responding party indicate her height, weight, and bust measurements. R.439, 564, 568-69, 853-54. He also requested that the responding party include a video or picture. R.439. While the testimony acknowledged that there was more to the ad, its full content was not introduced into evidence. R.438-39, 854.

On March 16, 2014, the alleged victim, Kim, responded to the ad via email. R.437-48, 789-90. Kim was a student and [redacted] at BYU, [redacted] R.436, 474, 709. Kim and Miles had never met before. R.450.

In her email reply, Kim said, "I think I'm what you're looking for," R.439; SE 25, and provided the following information:

Name: [Kim]

[redacted]

Experience level: Only one-on-one
Have you done dp? No[3]
Limits: None
Tell us how you like to get fucked: From behind.[4]

SE 1, 25.

In the initial email or early in the correspondence, Kim also emailed Miles a pornographic video of herself. R.439-40, 446-47, 519, 552-53. According to Miles, the video revealed Kim penetrating her vagina with a "dildo," which "she would take turns sucking on," and eventually "bringing herself to an orgasm." R.790-91.

Miles replied back "pretty quick[ly]," and he and Kim began to exchange emails. R.440, 443; SE 25. Some of those emails appear in State's Exhibits 1 and 25. However, the testimony acknowledged that more emails were exchanged between them. *See* R.483, 554-55, 791, 796; *see also* SE 1, 25.[5] At some point, Kim told Miles: "Hey, I'm sorry this isn't going to work out" and then stopped responding to Miles's emails. R.443-44, 857. On March 19, 2014, after Kim stopped replying, Miles sent her an email saying, "Hey, slut, if you don't come

[3] It does not appear that the meaning of "dp" was introduced at trial.

[4] Kim understood "from behind" or "doggie style" to mean "vaginal sexual intercourse from behind." R.1118.

[5] At some point, Kim deleted all the emails she exchanged with Miles. R.483, 554-55. Kim testified that she was only able to retrieve some of them, which she then forwarded to the police. R.442-43, 482-83, 554-56, 674-76; SE 1, 25. Police were unable to extract the deleted information because they lacked the software to do so. R.748-49, 766-67, 777-82, 785. Miles also deleted the emails. R.843. Police did not seek to recover them from Miles's computer.

take my cock, I'm going to forward this video to the head of human resources at BYU. Come be a good little slut and I'll delete it.—Sir." R.445. Miles followed up with two more emails on March 19, 2014, though it appears that communications are missing from the exchange. *See* SE 1, 25. Those emails said:

[1:18 PM] That's fine if you don't want to gang bang, I understand if that's too much for you. Tomorrow night works for me, bitch. But I'm in charge here, slut, not you. I make the rules, understand me. I'll fuck you a couple of times and then I'll delete the video and the emails. I want you to address me as sir from now on, slut, understand me? And I want a pic that shows your big tits right now and don't keep me waiting.

> [2:04 PM] What's taking so long slut? Tomorrow I want you at my house at 7 pm. I want you in a skirt and a low cut top with no bra. If you're late I will have to spank you. I'll delete the pic of your titts [sic] you're going to send me tomorrow also. I want your number so I can text you. You have 30 minutes to reply with your number and a pic of your titts [sic]. Or you can text the pic to me at [phone number]. I expect a reply by 2:30 pm slut. Understand? Just so you don't think I'm full of shit here are the emails I will send your video to. The email will say BYU [redacted] [Kim], involved in kinky sex scandal. I will put all your emails in with the video talking about what a slut you are and how you want to be gangbanged. I think not only will you lose your job, but you'll be on the news and you're reputation will probably be ruined.
>
> academic_support@byu.edu
> human_resources@byu.edu
> orcastu@byu.edu
> and news@ksl5.com

SE 1, 25.

Kim and Miles ultimately met on the evening of March 20, 2014. R.450. The basic events of that night are undisputed. The two met at Jordan Landing in

the Barnes & Noble parking lot. R.450-53, 514-15, 795, 800; *see also* R.452-53; SE 1, 25. From there, Miles drove to his home in Kearns and Kim followed him there in a separate vehicle. R.450, 453-54, 514-15, 795. When they arrived, the two proceeded to Miles's bedroom where they engaged in five sexual acts. R.455, 556-58, 803. First, Kim performed oral sex on Miles, who took a picture of her doing so. R.456-457, 810-12, 867; SE 19. Next, they engaged in vaginal sex from behind. R.457-59, 812-14. Either before the oral sex or before the vaginal sex, Miles placed Velcro handcuffs on Kim to restrain her hands. R.457-59, 805-08, 837, 852-53. Moreover, during the vaginal sex, Miles took a video of himself having sex with Kim without her knowing. R.815, 831-32, 867-68; SE 21.

Following the vaginal sex, Miles penetrated Kim anally and came to an orgasm. R.459-60, 843-45. Miles then offered Kim a drink of water, left the room, and when he returned, the two smoked marijuana. R.460-62, 818-29. When they finished smoking, Kim once again performed oral sex on Miles, and the two engaged in another act of vaginal sex. R.462-64, 830-32. After they were finished, Kim left Miles's home in tears. R516-17, 520, 527, 832-34, 847-48, 870. On March 23, 2014, Miles contacted Kim over Facebook and told her that a "big shot" from "TMZ" had offered to buy the pictures and videos Miles had of Kim. R.757-62, 771; SE 2, 27. Miles wanted to meet with Kim to talk to her and to see if they could "work something out." SE 2, 27. Miles also indicated that he possessed "copies of all the video[s] along with the email" and knew "where to send everything if the cops were to get called or if [he] was to be attacked or anything

else." *Id*. On March 25, 2014, Kim went to the police. R.482, 471-72, 668.

Despite general agreement about these facts, Miles and Kim offered differing accounts regarding the sexual encounters. Particularly, their stories diverged regarding the question of consent and the content of the missing emails leading up to the encounter.

Kim's Story and the State's Case

Before the encounter: Kim claimed that she only agreed to meet Miles because of the threats he made; she did not want to meet or have sex with him. R.450, 1118; SE 25. She feared Miles would send the video to BYU and felt her "only option" was to meet Miles's demands. R.449, 567-68. Moreover, Miles's "very aggressive and violent" emails scared Kim, and she was concerned that Miles had identified her on the internet. R.474-75, 563-64, 567-68. Kim hoped that by meeting Miles, he would see that she was a "good person" and would "do the right thing." R.474-75.

Kim claimed she never contacted the police because she did not want BYU to find out and "didn't want to end up being involved in a police case." R.571; *see also* R.449. Kim "was scared of [the] repercussions [t]hat could happen" with her school, job, and family. R.449. She had previously been suspended from BYU Idaho for academic dishonesty, so Miles's threats were particularly "realistic." R.548. According to Kim, at no time did Miles make any pre-encounter retraction of his threats. R.562

To support its theory that Miles had coerced Kim to submit via threat, the

State introduced expert testimony regarding the BYU honor code. R.631-65. According to the expert, students who enroll at BYU must "sign a statement saying they are willing to abide by the honor code," which includes promises to "live a chaste and virtuous life, abstain from alcoholic beverages," and "obey the law." R.633, 635, 653. If a student violates the honor code, there are a "broad range" of consequences, among them suspension and dismissal. R.638-40. The expert opined that Kim's prior suspension made it likely that "suspension [wa]s again going to be on the table" if a violation was found. R.643-44; *see also* 640, 655. Moreover, in the expert's experience, it is common for students to be concerned about how the violation will be perceived by others in the community and how it will reflect on their families. R.643-45, 649-50. Accordingly, the expert did not find it surprising that Kim would be concerned about her family and the honor code office finding out about a violation. R.641, 646.

* * *

Prior to meeting Miles on the evening of March 20, 2014, Kim stopped at the home of her cousins. R.450-51, 511-13, 522-23. According to the cousins, Kim informed them that Miles "had a video of her and was using it against her to get some sort a sexual favor." R.523; *see also* R.518-19, 532-35. Kim described that there was "going to be a sexual thing going on," and that Miles was "was going to give a copy [of the video] back after the meeting." R.512, 523-24, 537; *see also* R.450-51.

The cousins tried to convince Kim not to go, and told her that she had

other options, such as calling the police. R.451, 512-13, 524, 532. However, Kim expressed that it was the "only way ... to get this video back," R.519, and "just want[ed] to get it done." R.532. Kim changed at the cousin's home, and departed wearing a short skirt and a tank top. R.451, 513, 518, 523, 795-96.

When Kim met Miles at Jordan Landing, Miles wanted her to ride with him. R.450, 454; SE 25. But Kim "didn't want to get in the car with [Miles]" and drove separately. R.450, 454; SE 25. As a precaution, Kim called her cousins and kept them on the line so they could listen in and call the police if necessary. R.467-69, 513-16, 524-26, 530. The cousins, could initially hear indistinct mumbles when Kim arrived at Miles's home, but loud, "head banging music" came on which prevented them from hearing any of the encounter. R.514-16, 525-27. The cousins decided to hang up. *Id.*

Kim's story regarding the sexual encounter: Once in the bedroom, Miles immediately told Kim to take off her clothes, which she did. R.456, 475. According to Kim, "[t]here was no conversing." R.456. Miles then told her to get on her knees, at which point he put his penis in her mouth and told her "to start sucking." R.456. During the oral sex, Miles pulled her hair and used it to control the movement of her head. R.457.

Next, Miles told Kim to get on the bed face down and used Velcro handcuffs to restrain her hands behind her back. R.457-58.[6] Miles then inserted

[6] The handcuffs are Velcro with a snap fastener that connects them. SE 28.

his penis into her vagina. R.458. At that point, she started "crying and ... saying no" at an audible volume. R.458. Miles then got up, turned on the music, and returned to the bed. R.458-59. Upon his return, Miles proceeded to penetrate Kim anally and eventually ejaculated in her anus. R.459-60. During the anal sex, Kim likewise cried, told him "no," "stop," and "that [] hurt[s]." R.459-60.

After finishing, Miles left the room for about five minutes and asked Kim if she wanted a drink. R.460. Kim said no. R.460. While Miles was out of the room, Kim remained handcuffed on the bed laying face down. R.460. Physically, her genital region and anus hurt. R.461-62. Kim claimed she "tried to move and sit up," but it was "difficult" because she was "face down with [her] hands tied behind [her] back on a soft bed." R.461. Kim said the handcuffs were tight and she was unable to remove them herself. R.460-61, 570.

Miles returned, pulled out a bong, and told her to come sit by him. R.461. Kim then informed Miles that she "couldn't get off the bed and so he came over and uncuffed [her]." R.461. Miles offered her marijuana and she smoked some "to dull some of the physical and emotional pain." R.461-62; 1117.

After smoking, Miles "told [Kim] to suck his dick again," and she complied. R.462. Like the last time, Miles grabbed her hair once again. R.462. But this time, he "kind of slapped" her cheek several times as well. R.462. Though the slap was not "full out, ... as hard as he could," it hurt and left her face red; on a scale of 1-10, the slapping was about a 6-7. R.462-63, 496.

Eventually, Miles ordered Kim to lay on her back on the bed. R.463. Miles

then inserted his penis into her vagina and choked her with both hands. R.463-64. According to Kim, the choking was hard enough that she had to gasp to get air and "couldn't breathe normally." R.464. During the intercourse, she told him "no," "stop," and "was crying." R.464. When she told him no, "he just spit in [her] face a couple of times." R.464, 545-46. Kim also recalled that when she said no at other points in the night, Miles would respond: "Shut up, bitch. Shut up, slut. Shut up, whore." R.545. Miles ultimately ejaculated in her vagina, got up, and went to his chair. R.464

Kim told Miles that she needed to leave, but Miles said he was "not done with [her] yet." R.464, 570. According to Kim, she pleaded with him to let her go until he finally agreed. R.464. Miles followed and said that that she "had only done enough to have him delete the video, not any emails"; for him to delete everything, she had to "come back weekly to see him." R.465, 546-47. Kim protested and Miles ultimately agreed that he would delete both the video and emails. R.465, 547.

The events after the encounter: Kim left, headed to her cousins' home, and called her cousins en route. R.465. R.526-27, 533. The cousins said she sounded like she was "shaky, crying, [and] fear[ful]" and seemed "really distressed"—"like something had definitely happened" and that "she had gone through ... a hard time." R.516-17, 520, 527. "[S]he was like this is way out of control." R.527.

Kim said that when she arrived at the cousins', she threw away her underwear in the outside dumpster. R.549, 681-82. The cousins testified that

Kim appeared tired and frazzled and it looked like "she'd been crying." R.527-28; *see also* R.517. According to the cousins, Kim reported that Miles forced her to have sex vaginally and orally, and "made her do [] anal" as well as "a bunch of other more obscure sexual things, and she just wasn't [expecting] that at all." R.517, 530-31. The cousins said that "she was expecting to have some kind of sex, but it went farther than ... what she had planned for." R.531. Kim stayed the night at the cousins and left the next morning. R.520, 528.

After Miles contacted her on Facebook, Kim decided to go to the police. R.481. Kim spoke with a detective who recalled her having a difficult time "get[ting] things out because she was crying." R.668-69, 674. Kim agreed to undergo a sexual assault examination at a local clinic, but did not meet the detective at the clinic as planned. R.678-79. When the detective managed to get a hold of her, Kim "hesitant[ly]" traveled to the clinic where she received an examination. R.679-80.

[redacted]

Miles' Account

Miles admitted to sending the threatening emails. R.857, 865-866; *see also* SE 26 (Miles explaining that he was "horny" and sent Kim the emails to see what she would say). However, after doing so, Miles experienced "a change of heart" and "recanted" his threats before Kim came over. R.796-800, 842-43, 858-59; *but see* SE 26 (Miles not mentioning in his police interview that he recanted his threats). He sent an email to Kim telling her that he would not send the emails and videos to BYU or KSL and would instead, delete them. R.796-800, 842-43, 882-83. He apologized, communicating to her that he still wanted to "hang out ... and get to know her" in person. R.796-98, 842, 882-83. Miles informed Kim that "she didn't have to do anything she didn't want to do" if she decided to come over. R.797-98; *see also* R.815, 830, 876-77 (Miles testifying that—at his home—he reiterated to Kim that he would delete the emails, that he had no plans to disclose them, and that "she didn't have to do anything").

When they ultimately met up, Miles believed that Kim was there voluntarily and by her own "freewill." R.799, 880. Miles was also aware of Kim's

unconventional sexual preferences. R.807-11, 838-39. According to Miles, Kim indicated via email that she was into bondage and other fetishes; that she "was very submissive and [] liked being told what to do in the bedroom"; and that she liked rough sex and having her hair pulled. R.807, 809, 811, 838-39.

Miles said he initiated the sexual encounter by asking Kim if she "[w]ould [] like to be a good little slut for [him]?" R.805-07, 836-37. Kim said yes without hesitation. R.805, 836. Miles placed handcuffs on Kim with her permission. R.805-08, 837, 852-53. Miles also told Kim that he "was going to be a little rough with her." R.810, 814. However, if she was uncomfortable with something, she should "let [him] know and [he] would stop and [] wouldn't do it again." R.810, 814, 831, 836.

Miles then asked Kim to perform oral sex, which she willingly did for approximately 4-5 minutes. R.810-11; *but see* R.696*;* SE 26 (Miles not initially mentioning oral sex in his police interview). During the oral sex, Miles pulled Kim's hair and placed his hand on her head. *Id.* Kim did not protest. *Id.* Miles admitted that during this time, he took a picture of Kim performing oral sex without her knowing. R.811-12, 867; *but see* R.693-94, 701-02; SE 26 (Miles fiddling with his phone and initially denying that he took pictures/videos in his police interview).

Next, Miles asked Kim if she "wanted to get fucked from behind, and she said yes." R.812-14. During the vaginal sex, Miles spanked her and pulled her hair. R.813. Unbeknownst to Kim, Miles also used his cell phone to take a video

of her. R.815, 831-32, 867-68; SE 19; *but see* R.693-94, 701-02; SE 26 (Miles initially denying that he took pictures/videos in his police interview). Miles testified that Kim "seemed to be enjoying herself." R.812-14. She did not say "no," "stop," or express discomfort. R.812-14.

Miles "was getting kind of close to orgasming," so he "asked [Kim] if she would like to try anal sex, and she said sure." R.843-44. To ensure that the anal sex was not too painful, Miles "prepare[d] her" by first applying lubricant and then inserting his fingers into her anus. *Id.* After doing so, Miles asked "her if she was ready, and she said yes." *Id.* Miles penetrated her anally. *Id.* But before he started to "mov[e] back and forth," he followed-up by "ask[ing] her if she was okay with it." *Id.* Kim once again said "yes" and the two engaged in anal sex. *Id.* After about a minute to a minute and a half, Kim stated that "she couldn't handle it anymore," at which point Miles "immediately stopped." *Id.* "Then, [Miles] pulled out of her anus." R.845. He proceeded to masturbate until he "ejaculated on her rear end." R.816, 845.

After, Miles asked Kim if he had been too rough and if the anal sex hurt her. R.845. Kim "nonchalant[ly] ... said she was okay but she just didn't want to do anal sex again." R.845. Miles then unhooked the handcuffs and left the room to clean up and retrieve water. R.823-29. Miles returned to the bedroom after about 5 to 10 minutes. *See id.* Kim answered affirmatively when Miles asked if she would like to smoke marijuana and have sex again. R.818. They spent approximately 20 minutes smoking and talking. R.821, 829-30. During this time

Miles attempted to take a picture of her, but Kim saw him and "asked [him] not to." R.811-12, 831, 838; *see also* R.499-500 (Kim testifying similarly). Miles did not take the picture and took no more the rest of the night. R.831. However, he did not inform her of the photo and video that he had already taken. R.838.

Eventually, Kim once again performed oral sex on Miles. R.830. He did not force her to do so. *Id.* Next, the two engaged in vaginal sex on Miles's bed. R.832. When they were done, Miles went to his computer to delete the video and emails in front of her. R.832-34, 843. When Miles asked if she was interested in getting together again, Kim seemed to "misunderst[a]nd" him. *Id.* She got off the bed, removed the restraints, dressed herself, and started to exit the house in tears. R.832-34, 847-48, 870. Miles followed her to the door, at which point she told him that she "thought this was just a one-time thing" and indicated that she did not "want to come back again." R.832-34, 839-40. Kim left and he did not hear from her again. R.833-835. When asked about the post-encounter Facebook message he sent, Miles testified that the whole thing was a lie and that he sent it because "he wanted to see [Kim] again." R.834-36, 849, 874-75, 879-80; *see also* R.700-701; 704-05; SE 26.

Miles testified that on the evening of March 20, 2014, Kim at no point said "no," or "stop." R.848. Nor did she cry during the sexual encounters or indicate that she was only at Miles's house because of the threats. R.838, 848. On the contrary, Miles testified that she "never hesitated" and that he "didn't force her to do anything." R.836. Miles was under the impression that the sexual acts were

consensual and testified that he "absolutely did not rape her." R.848, 882-83.

Jury Instructions, Closing Argument, and the Verdict

Trial counsel indicated that he had "[n]o objection" to the court's instructions, despite an incorrect instruction defining recklessness. R.888; *see infra* Part I. The erroneous definition was submitted to the jury. R.179, 896.

In closing, the defense asked the jury to acquit because all acts were consensual. R.927-32. Meanwhile, the State presented three theories of its case. First, the State's "main theory" of guilt was that Miles coerced Kim to submit to the sexual acts by threatening to send the emails and pornographic video to BYU. R.908-10, 915. Second, the State argued that Miles was guilty because Kim said "no" and expressed lack of consent through words. R.906-907. Finally, the State argued that Miles's "overc[ame] [Kim] through the application of physical force" by moving her head during the oral sex and using restraints. R.907.

In closing, the State also linked the counts to specific sexual acts. R.926. Specifically, it told the jury that "Count 3 [wa]s for the anal intercourse forcible sodomy." R.926. After deliberating for over five and a half hours, the jury returned a verdict acquitting Miles of all counts except for Count 3—forcible anal sodomy. R.155-57, R.944, 1005.

SUMMARY OF ARGUMENT

Issue I: This Court should reverse Miles's forcible sodomy conviction because the instruction defining recklessness omitted a critical statutory element. To convict Miles of forcible sodomy, the State was required to prove that (at a

minimum) Miles acted with recklessness that Kim did not consent. Moreover, when instructing the jury on the meaning of recklessness, the court must include all statutory elements of the definition of recklessness—including the requirement that the defendant "consciously disregard" a risk.

In this case, the instruction defining recklessness was incorrect. The definition of recklessness that applied to Kim's nonconsent omitted the requirement that the defendant must "consciously disregard" a substantial and unjustifiable risk. Thus, the jury could convict if they found Miles was aware of a risk of nonconsent, even if he did not consciously disregard that risk.

Additionally, the error was prejudicial in light of the evidence and the verdict. The jury had reason to doubt that Mile's acted with conscious disregard. Indeed, the jury heard evidence that Miles and Kim engaged in consensual anal sex; that mid-act, Kim made statements suggesting a risk that she withdrew consent (i.e. she "couldn't handle it anymore"); and that Miles was mindful of the risk and terminated anal intercourse. This evidence made the forcible anal sodomy count uniquely susceptible to the instructional error. And the fact that the jury acquitted on all counts except for forcible anal sodomy undermines confidence in the verdict. Finally, trial counsel rendered ineffective assistance of counsel by failing to object to the incorrect and prejudicial instruction on recklessness.

Issue II: Additionally, this Court should reverse because the cumulative effect of counsel's ineffective assistance warrants reversal. Under the cumulative

error doctrine, this Court will consider all identified errors as well as any errors the Court assumes may have occurred and will reverse if the cumulative effect of the errors undermines confidence that a fair trial was had. Here, this Court should assume that the error identified in the rule 23B motion occurred and reverse because the cumulative effect of all of the errors identified on appeal (in the opening brief and the 23B motion) warrants reversal.

ARGUMENT

I. Miles is entitled to a new trial because the instruction on recklessness omitted the "conscious disregard" requirement and, therefore, incorrectly instructed the jury on a critical mens rea element.

This Court should reverse because the trial court incorrectly instructed the jury on the meaning of "recklessly"—the requisite mens rea that applied to Kim's nonconsent. "'[I]t is fundamental that the State carries the burden of proving beyond a reasonable doubt each element of an offense.'" *State v. Martinez*, 2000 UT App 320,¶9, 14 P.3d 114, *aff'd*, 2002 UT 80, 52 P.3d 1276; *see* Utah Code §76-1-501(1) (2008). Accordingly, jury instructions must "accurately and adequately inform a criminal jury as to the basic elements of the crime charged." *State v. Lucero*, 866 P.2d 1, 3 (Utah Ct. App. 1993). To be adequate, an instruction must "specifically instruct the jury regarding the 'cu[l]pable mental state required' to commit the crime." *American Fork v. Carr*, 970 P.2d 717, 720 (Utah Ct. App. 1998). Failure to accurately instruct the jury on the basic elements of an offense "constitutes reversible error." *State v. Roberts*, 711 P.2d 235, 239 (Utah 1985); *see State v. Pearson*, 1999 UT App 220, ¶12, 985 P.2d 919.

In this case, the jury was not accurately instructed on the essential elements of forcible anal sodomy because the instruction defining "recklessly" was incorrect. To convict Miles of forcible anal sodomy, the State was required to prove every element of section 76-5-403, including the mens rea required for each element of the offense. Under section 76-5-403, a person is guilty of forcible sodomy "when the actor engages in any sexual act ... involving the genitals of one person and mouth or anus of another person" and does so "without the other's consent." Utah Code § 76-5-403 (1)-(2). While the forcible sodomy statute does not specify the requisite mens rea, Utah's "criminal code requires proof of mens rea for each element of a non-strict liability crime." *State v. Barela*, 2015 UT 22, ¶¶25-27 (citing Utah Code § 76-2-101(1)). Specifically, the code provides that "when the definition of the offense does not specify a culpable mental state," "intent, knowledge, or recklessness shall suffice to establish criminal responsibility." Utah Code § 76-2-102.

Thus, to sustain a conviction for forcible anal sodomy, the State was required to prove that Miles intentionally, knowingly, or recklessly engaged in a sexual act involving Miles's genitals and Kim's anus. And most pertinent to the issues here, the State needed to prove that Miles "had the requisite mens rea as to [Kim's] nonconsent." *Barela* 2015 UT 22, ¶26. That is, it was required to demonstrate that at a minimum, Miles acted with recklessness that Kim did not consent. *See id.*; Utah Code § 76-2-102.

The trial court, however, failed to adequately instruct the jury on forcible

sodomy's requisite mens rea because its instruction defining recklessness was incorrect. *See infra* Part I.A. Specifically, the court's instruction defining "reckless[ness] as to circumstances surrounding conduct"—which applied to Kim's nonconsent—omitted the requirement that the defendant "consciously disregard" a substantial and unjustifiable risk. *See id.* Thus, the jury could convict if they found Miles was aware of a risk of nonconsent, even if he did not consciously disregard that risk.

Moreover, the error was prejudicial and provides a basis for the jury's unusual verdict in this case. *See infra* Part I.B. This case turned on the issue of consent. According to Kim, all five of the sexual acts were nonconsensual because she was blackmailed and protested "no" throughout the encounter. *See* R.456-64, 560. Miles, on the other hand, testified that Kim consented and at no point used the words "no," or "stop." R.848. Nevertheless, only with respect to the consensual anal sex did Miles testify that Kim said she "couldn't handle it anymore." R.843-44. At that point, Miles stopped, and "[t]hen [he] pulled out of her anus." R.844-45. Despite Kim's testimony supporting the charges, the jury acquitted of both counts of rape and forcible oral sodomy, returning a guilty verdict on the sole count of forcible anal sodomy. R.1005.

Under the incorrect instructions, the jury could conclude that Miles acted recklessly because Kim's statement that she "couldn't handle it anymore" made Miles "aware of a substantial and unjustifiable risk that" Kim no longer consented to anal intercourse. This was the case even if Miles did not consciously disregard

the risk and "immediately stopped." Thus, given the testimony and the acquittals on all counts except for forcible anal sodomy, there was a reasonable likelihood of a more favorable result but for the erroneous recklessness instruction. *See infra* Part I.B. This Court should reverse because trial counsel's failure to object to the erroneous instruction constituted ineffective assistance of counsel. *See infra* Part I.C.

A. The court's instructions omitted an element of the statutory definition of recklessness.

The trial court provided two instructions relevant to the issue in this case. First, the court gave an elements instruction on forcible sodomy, which required the jury to "find beyond a reasonable doubt each of the following elements:"

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

R.184; Addendum C (jury instructions).

Second, the court gave an instruction defining "[r]eckless[ness] as to [c]ircumstances [s]urrounding [c]onduct or as to [r]esult." R.179; Addendum C.

It stated:

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

Id.

By using the word "or" and off-setting the paragraphs with different numerical headings, the instruction created two definitions—reckless as to circumstances and reckless as to result—each of which would satisfy the definition of "recklessly." Applied to the elements of forcible sodomy, it was the reckless-as-to-circumstance definition that pertained to Kim's nonconsent. Indeed, nonconsent is a "circumstance," not a "result." *State v. Marchet*, 2009 UT App 262, ¶23, 219 P.3d 75 (discussing consent in terms of "the circumstances.")

While the reckless-as-to-result definition correctly stated the law, the reckless-as-to-circumstance definition did not. Specifically, it omitted the critical requirement that the defendant must "consciously disregard" a risk. The instruction was therefore incorrect because it failed to instruct the jury on the elements needed to satisfy the statutory definition of recklessness. The plain language of Utah Code § 76-2-103 "compels" this conclusion. *State v. Liti*, 2015

UT App 186, ¶14, 355 P.3d 1078. That statute provides that

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

Utah Code § 76-2-103(3) (emphasis added).

"Determining whether a person acts recklessly under this definition 'presents a conjecture-laden inquiry, involving both objective and subjective elements.'" *State v. Robinson*, 2003 UT App 1, ¶6, 63 P.3d 105. "The first sentence in the statute defines reckless behavior in terms of the defendant's [1] knowledge *and* [2] disregard of a substantial and unjustifiable risk." *Liti*, 2015 UT App 186, ¶15 (emphasis added). These are the "[t]wo subjective elements of the definition," which require a determination of "whether the person actually *perceived* the risk that his or her actions presented *and* whether he or she *consciously* disregarded it." *Robinson*, 2003 UT App 1, ¶6 (second emphasis added). While the risk-awareness element is important to the definition, the conscious disregard element imposes a "volitional requirement" that encompasses an active decision to ignore a risk. *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1146 (9th Cir. 2001); *United States v. Voisine*, 778 F.3d 176, 184 (1st Cir. 2015), *aff'd* 136 S.Ct. 2272 (2016). Thus, the conscious disregard element heightens culpability, and its inclusion is critical to the definition of recklessness.

"The second sentence of the statute addresses whether the defendant's decision to disregard that risk constitutes a 'gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.'" *Liti*, 2015 UT App 186, ¶15. "This portion of the statute asks the jury to measure the defendant's decision to ignore the risk against an objective standard of behavior we would expect of a reasonable person similarly situated." *Id*.

To be correct, the definition of recklessness must include both subjective elements (risk awareness and conscious disregard) as well as the "gross-deviation element" of the second sentence. For instance, in *Liti,* this Court reversed where the trial court's instruction omitted an element of the statutory definition of recklessness. *Id*. ¶¶12-23, 28. In that case, the Court considered a recklessness instruction that omitted the gross deviation element. *Id*. ¶¶12-17. In doing so, this Court "presume[d] that the legislature intended for each portion of the statute to impose a meaningful requirement" and rejected an argument that the gross deviation requirement was "superfluous." *Id*. ¶17. Accordingly, this Court concluded that "[t]he omission of the gross-deviation element ... constitute[d] error." *Id*. ¶16. Moreover, reversal was required because it was "reasonably likely that the jury's verdict was based at least in part on a determination that [the defendant] acted recklessly" and the "omission ... allowed the jury to convict [] without considering whether the State had proved everything necessary" for conviction. *Id*. ¶22.

Similarly here, the court's recklessness instruction omitted an element of the statutory definition of recklessness—the requirement that the defendant "consciously disregard" a risk that is substantial and unjustifiable. The jury was instructed that a person acts "recklessly" with respect to the circumstances "when he is aware of a substantial and unjustifiable risk ... that certain circumstances exist relating to his conduct." R.179. But risk-awareness alone does not satisfy the requirements of the statutory definition of recklessness. The statute also requires that the defendant "consciously disregard" the risk. The conscious disregard element is one of the "[t]wo subjective elements of the definition" that must be shown to satisfy the reckless mental state. *Robinson,* 2003 UT App 1, ¶6. To conclude otherwise would ignore the well-established "presum[ption] that the legislature intended for each portion of the statute to impose a meaningful requirement." *Liti,* 2015 UT App 186, ¶17. Thus, the omission of the conscious disregard element constituted error, and it allowed the jury to convict based on conduct that was not statutorily-proscribed. [7]

[7] It is worth noting that the court's recklessness instruction not only represents a departure from the statutory language, but also from the Model Utah Jury Instruction's sample instruction on recklessness. The MUJI instruction provides in part that:

> A person acts "recklessly" when [he][she] is aware of a substantial and unjustifiable risk that:
>
> 1. certain circumstances exist relating to [his] [her] conduct, but [he] [she] consciously disregards the risk and acts anyway; or
> 2. [his] [her] conduct will cause a particular result, but [he] [she] consciously disregards the risk and acts anyway.

That error was compounded by testimony suggesting that Miles heeded—rather than consciously disregarded—the risk that Kim did not consent. Through Miles, the jury heard evidence that Kim and Miles engaged in consensual anal sex; that mid-act, Kim made statements suggesting a risk that she withdrew consent (i.e. she "couldn't handle it anymore"); and that Miles was mindful of the risk and terminated anal intercourse. R.843-45. The importance of the conscious disregard element is all the more critical in cases, like this one, where the evidence shows a risk that the victim withdrew consent in the middle of a sexual act that started off as consensual.

In these cases, the defendant is *already* engaging in the proscribed sexual act when he becomes aware of the risk of non-consent. Thus culpability depends on how the defendant responds to the known risk—i.e. whether he consciously disregards it. The defendant, for instance, may continue to engage in sexual contact, but verbally follow up with his partner regarding whether the partner would like to end the encounter; he may weigh the risks of nonconsent for a period of time, and after doing so, decide to terminate sexual contact; or he may cease all sexual contact immediately and reflexively. Ultimately, it is for the jury to decide whether these scenarios indicate conscious disregard. And more specifically here, it was for the jury to decide whether Miles acted with conscious disregard in light of testimony that Miles stopped and then pulled out when Kim

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CR304A, MUJI 2d.

said she "couldn't handle it anymore." R.843-45. The jury, however, did not have an opportunity to do so because the conscious disregard requirement was omitted.

Finally, the recklessness instruction, read as a whole, did not compensate for this omission. *Cf. State v. Maestas*, 2012 UT 46, ¶148, 299 P.3d 892. While the reckless-as-to-result definition correctly included the conscious disregard element, it was the reckless-as-to-circumstance definition that pertained to Kim's nonconsent. *See supra*. Moreover, the jury had little reason to apply the conscious disregard requirement—which appeared in a separately numbered paragraph—to the preceding definition of reckless as to circumstance. R.179. As explained, the reckless-as-to-result paragraph and the reckless-as-to-circumstance paragraph were separated by the word "or." The use of this disjunctive term told the jury that either definition was sufficient to satisfy the definition of recklessness, conscious disregard regard requirement or not. *See, e.g., Calhoun v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 56, ¶20, 96 P.3d 916 (explaining that the use of the word "or" is disjunctive, while the use of "and" is conjunctive).

Additionally, the error was in no way ameliorated by the recklessness instruction's inclusion of the following sentence: "The nature and extent of the risk must be of such a magnitude that disregarding it is a gross deviation from what an ordinary person would do in that situation." R.179. True, this sentence contemplates the "disregarding" of a risk. But it fails to impose any subjective

requirement that the defendant, in fact, consciously disregard the risk. Rather, the sentence only added to the definition in the sense that it offered the jury an objective way to measure the "magnitude of the risk itself." *Robinson*, 2003 UT App 1, ¶6; *see also State v. Wessendorf*, 777 P.2d 523, 526 (Utah Ct. App. 1989) ("[T]he statutory language includes application of an objective standard, i.e., that '[t]he risk in both cases must be of such a degree that an ordinary person would not disregard or fail to recognize it.' " (quoting *State v. Dyer*, 671 P.2d 142, 148 (Utah 1983)). It is not enough to be aware of a risk that objectively, is of such a degree that an ordinary person would not disregard it; as a subjective matter, the defendant must "consciously disregard" that risk as well. *Robinson*, 2003 UT App 1, ¶6.

In short, the instruction defining reckless as to circumstance was incorrect because it omitted the conscious disregard element. Where the omission was critical to Miles's mental state regarding Kim's nonconsent, it allowed the jury to convict without considering whether the State had proved everything necessary to obtain conviction for forcible sodomy. That was error.

B. Miles was prejudiced by the incorrect recklessness instruction.

This Court will reverse for jury instruction errors "if a review of the record persuades the court that without the error there was 'a reasonable likelihood of a more favorable result for the defendant.'" *State v. Fontana*, 680 P.2d 1042, 1048 (Utah 1984). Error is prejudicial if there is "a probability sufficient to undermine [the Court's] confidence in the outcome." *State v. Hales*, 2007 UT 14, ¶92, 152

P.3d 321. When "attempting to determine whether the omission of an element from a jury instruction" is prejudicial, this Court "'asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *State v. Ochoa*, 2014 UT App 296, ¶5, 341 P.3d 942.

Moreover, this Court's confidence in the outcome will be more quickly undermined in cases where "'the verdict is already of questionable validity.'" *State v. Richardson*, 2013 UT 50, ¶40, 308 P.3d 526. For example, an error is more likely to be prejudicial where the case "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]." *Id.* ¶¶40-44.

In this case, there was a reasonable likelihood of a different result but for the omission in the recklessness instruction. The jury convicted Miles of forcible sodomy without indicating whether it did so under a theory of intent, knowledge or recklessness. *See* R.1005. However, it is reasonably likely that the jury's verdict was based on a finding that Miles acted recklessly, and if properly instructed, it would have acquitted.

We know from the verdict that the jury found (1) that at some point during the anal sex, Kim did not consent and (2) that Miles was aware of a substantial and unjustifiable risk that she did not consent. *See* R.179, 1005. But if the instructions correctly included all the statutory elements of recklessness, the jury could have reasonably acquitted based upon a determination that Miles did not

act with conscious disregard.

According to Miles, he withdrew his threat to send the video to BYU. R.796-800, 842-43, 858-59. Subsequent to that, Kim 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. Kim said "sure" when he asked whether she wanted to try anal sex. R.843-44. He then applied lubricant, penetrated her anally, and received affirmative confirmation that Kim was okay to go forward. *Id.* At some point during the anal sex, Kim said "she couldn't handle it anymore." *Id.* Miles stopped immediately, and "[t]hen [he] pulled out of her anus." R.844-45. . Moreover, his account is further supported by evidence showing that he did not attempt to repeat anal sex during the sexual episode that occurred after the marijuana break. R.462-64, 830-32, 845.

Based on Miles's account, the jury could have reasonably concluded that Miles did not consciously disregard the risk of nonconsent. Instead, after Miles was placed on notice of the risk that Kim withdrew her consent, he stopped, thought better of the situation, and then "pulled out." R.844-45. Thus, "'the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *Ochoa*, 2014 UT App 296, ¶5.

Moreover, the State's case "turned on whether the jury believed [Miles's] version of events or [Kim's]." *Richardson*, 2013 UT 50, ¶¶40-44. "[W]hen the

evidence consists largely of competing narratives as to whether generally undisputed sexual activity was consensual, a jury might conclude that the sexual activity was nonconsensual but, if properly instructed, nevertheless entertain reasonable doubt as to whether the defendant was reckless as to the lack of consent." *State v. Reigelsperger*, 2017 UT App 101, ¶77 (citing *Barela*, 2015 UT 22, ¶¶28–32). This is particularly true where, as here, the jury had reason to question Kim's credibility.

Kim had a motive to fabricate the allegations to protect her reputation. In fact, the considerations that allegedly caused Kim to submit to Miles's threats—e.g., fear of being dismissed from BYU, fear of ramifications within her family and community—were the same considerations that provided Kim with a motive to make up lies to excuse her otherwise voluntary actions. That motive only became stronger when Miles contacted her on Facebook and threatened to disclose photos/videos of Kim having sex and smoking marijuana. SE 2, 27. Moreover, there were other reasons for the jury to question Kim's story and the State's version of events. For instance, doubt arose from the absence of the full chain of pre-encounter emails, Kim's reluctance to contact the police before the encounter, as well as undertones of "dominant-submissive role play," which colored both the evidence and issues. R.793-74, 847; *see also* R.196, 198 (jury questions about emails).

It is evident from the record that the jury "did not accept [Kim]'s story hook, line, and sinker." *Richardson*, 2013 UT 50, ¶43. Though this was a he-

said/she-said case where a jury would typically believe one side or the other and convict or acquit accordingly, the jury deliberated for over five hours, and ultimately acquitted on four out of the five counts. Indeed, the jury acquitted on both counts of forcible oral sodomy despite Kim's testimony that Miles twice forced her to perform oral sex and while doing so, pulled her hair and slapped her. R.456-57, 462, 496. It also acquitted on both counts of rape despite Kim'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 [Kim] and [Miles]." *Richardson*, 2013 UT 50, ¶¶40-44.

Furthermore, the verdict suggests a reasonable likelihood that the jury convicted due to the erroneous jury instruction. While a mixed verdict does not, by itself, justify reversal, it may provide evidence that the jury verdict was the product of an error. *Manley v. United States*, 238 F.2d 221, 222 (6th Cir. 1956). That is the case here. The verdict is consistent with the notion that the jury convicted after applying Miles's testimony to the erroneous instruction on recklessness.

The jury convicted Miles based on one sexual act that occurred in the middle of other sexual acts that it did not believe Miles was guilty of committing. It is difficult to reconcile the verdict with the State's evidence and its theories of the case. First, the State's "main" coercion theory applied to the sexual encounter

as a whole and did not discriminate between the sexual acts. *See* R.906 (State arguing that Miles took away Kim's consent as soon as he sent the threating emails). Given the acquittals, it appears that the jury was not convinced by this theory beyond a reasonable doubt.

Second, the jury verdict cannot be explained in light of Kim's testimony that she verbally protested during the sexual encounters. According to Kim, she said "no" and "stop" not only during the anal sex, but also during both acts of vaginal sex. R.458-60, 463-64. If the jury was convinced by this testimony and theory of the evidence, it would not have acquitted on both counts of rape.

Finally, the verdict cannot be explained by the State's force theory, which alleged that Miles overcame Kim by using handcuffs. R.907. Indeed, Kim's testimony showed that Miles used handcuffs during the first act of vaginal sex, but the jury nevertheless acquitted on that count. R.457-58.

While the verdict is not easily explained in light of the State's theories of the evidence, Miles's testimony distinguished the anal sex from the other acts. As discussed, his account regarding the anal sex was different because he testified that Kim made a mid-act statement that she "couldn't handle it anymore." R.843-45. At that point, Miles immediately stopped and then pulled out of her anus. *Id.*

This testimony—if believed, and applied to the erroneous recklessness instruction—provides an explanation for the jury's mixed verdict: the jury relied on Mile's testimony that Kim said she "couldn't handle it anymore"; it used that evidence to find that Kim did not consent and that Miles was aware of the

substantial risk that she did not consent; and it looked to the erroneous instructions, which told them that they had enough to convict. Indeed, through the lens of the erroneous jury instructions, conviction was warranted—there was touching between Miles's genitals and Kim's anus, Kim did not consent, and Miles was aware of that risk. R.179, 184. For purposes of the instructions, it did not matter that Miles subsequently "pulled out," even if the jury believed his testimony to this effect.

True, the erroneous recklessness instruction also applied to the oral and vaginal sex counts upon which the jury acquitted. But again, if the jury believed Miles's testimony, it had reason to acquit notwithstanding the erroneous instruction. While Miles testified that Kim said she "couldn't handle it anymore" during the anal sex, he identified no such statements uttered during the oral and vaginal sex. R.810-14, 830-32. Thus, the acquittals could have been based on a finding (1) that Kim consented and/or (2) that Miles was unaware of the risk of nonconsent due to the lack of verbal cues. Simply put, Miles's testimony that Kim said she "couldn't handle it anymore" made the anal sex count most susceptible to the instructional error. And in fact, that was the only count the jury convicted on.

On this record, the Court should not "reject the idea that [correct instructions] could have tipped the scales wholly in [Miles's] favor." *Richardson*, 2013 UT 50, ¶44. On the contrary, both the verdict and the evidence make it reasonably likely that a properly instructed jury would have followed suit and

acquitted on the anal sex count as well.

C. This Court should reverse because counsel's failure to object to the erroneous instruction constituted ineffective assistance.

This issue is unpreserved and may be reviewed for ineffective assistance of counsel. To prevail on an ineffective assistance claim, "'a defendant must show (1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different.'" *State v. Montoya*, 2004 UT 5, ¶23, 84 P.3d 1183. Here, this Court should reverse because counsel's failure to object to the omission in the definition of recklessness constituted deficient performance that prejudiced Miles.

First, counsel's failure to object constituted deficient performance. A choice is not strategic if counsel fails to "'adequately investigate'" the law relevant to that choice. *Hales*, 2007 UT 14, ¶69; *see State v. Lenkart*, 2011 UT 27,¶27, 262 P.3d 1. Nor is a choice strategic if counsel simply fails to perform an important task. *See State v. Moore*, 2012 UT 62, ¶¶7-9, 289 P.3d 487 (counsel performed deficiently when he failed to use important defense evidence that he had access to); *State v. Moritzsky*, 771 P.2d 688, 691- 92 (Utah Ct .App. 1989) (counsel performed deficiently when he "overlooked the statutory presumption by failing to check the 'pocket-part' of the Utah Code").

For instance, in *Barela*, the Utah Supreme Court held that counsel was deficient for failing to object to an instruction that "implied that the mens rea requirement ('intentionally or knowingly') applied *only* to the act of sexual

intercourse, and not to [the alleged victim]'s nonconsent." *Barela*, 2015 UT 22, ¶¶26-27. The *Barela* court explained that "no reasonable lawyer would have found an advantage in understating the mens rea r**e**quirement as applied to the victim's nonconsent." *Id.* ¶27. As the court pointed out, "[t]here is only upside in a complete statement of the requirement of mens rea." *Id.*

Likewise, in *Liti*, this Court held that counsel performed deficiently by not objecting to an instruction that omitted the "gross deviation" element from the definition of recklessness. *Liti*, 2015 UT App 186, ¶¶2-20. In doing so, it rejected the State's argument that "trial counsel could have reasonably concluded that 'exploring a subtle nuance of recklessness would risk distracting the jury'" from the primary defense theory and "'lessen [the defendant's] chances of a full acquittal.'" *Id.* ¶20. Rather, this Court followed *Barela*'s reasoning and "conclude[d] that 'no reasonable lawyer would have found an advantage in understating the mens rea requirement.'" *Id.*

Here, counsel's failure to object to the erroneous recklessness instruction was not a legitimate strategic choice. By omitting the "conscious disregard element," the instruction "understat[ed] the mens rea requirement [that] applied to [Kim]'s nonconsent." *Barela*, 2015 UT 22, ¶27. As in *Barela* and *Liti*, "no reasonable lawyer would have found an advantage" in such an understatement. *Barela*, 2015 UT 22, ¶27; *Liti*, 2015 UT App 186, ¶20. "There [wa]s only upside in a complete statement of the requirement of mens rea." *Barela*, 2015 UT 22, ¶27. Thus, counsel was deficient for failing to object to the omission in the

recklessness instruction.

Second, counsel's deficient performance was prejudicial. As explained, there is a reasonable likelihood that a properly instructed jury would have returned a verdict more favorable to Miles. *See supra* Part I.B. Thus, this Court should reverse because trial counsel rendered ineffective assistance by failing to object to the erroneous jury instruction.

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). In assessing a claim of cumulative error, this Court will "consider all the identified errors, as well as any errors [the Court] assume[s] may have occurred." *Id.*

This Court has not yet addressed Miles's 23B motion. But the rule permits Miles to reference the 23B motion in his brief. *See* Revised Order Pertaining to Rule 23B ("if the motion is adjudicated in conjunction with the briefing, the briefs may reference the arguments in the motion"). Utah's appellate courts have previously presumed acts of deficient performance raised in a 23B motion and addressed the issues for prejudice and cumulative error. *See, e.g., State v. Goodrich*, 2016 UT App 72,¶¶10 n.4, 26, 372 P.3d 79 (presuming deficient performance alleged in 23B motion and addressing prejudice and cumulative

error); *State v. Heywood*, 2015 UT App 191,¶¶31-33, 57-62, 65, 357 P.3d 565 (same); *cf. State v. Potter*, 2015 UT App 257,¶6 n.1, 361 P.3d 152 (same but no cumulative error analysis). And that presumption is particularly appropriate here where the 23B motion is based on Miles's testimony, which provides a clear picture of what the 23B remand hearing will establish. *See* 23B memorandum.

In his Brief of Appellant, Miles has identified one instance of ineffective assistance. That is, trial counsel provided ineffective assistance by failing to object to an incorrect instruction on recklessness. *See supra* Part I. Miles has identified a separate claim of ineffective assistance in his rule 23B motion. *See* 23B memorandum. This Court should presume that the deficient performance identified in the 23B motion occurred, address that error for prejudice, and include that error in the cumulative error analysis here.

The cumulative effect of the errors raised in this brief and in the 23B motion undermine confidence in the fairness of Miles's trial. *See State v. Martinez-Castellanos*, 2017 UT App 13, ¶¶77-81, (Utah Ct. App. 2017), *cert. granted*, 389 P.3d 432 (Utah 2017) (reversing for cumulative prejudice resulting from ineffective assistance); *State v. Campos*, 2013 UT App 213, ¶¶61-72, 309 P.3d 1160 (same). 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. *See supra* Part I. 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. *See* 23B memorandum. 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.

In sum, this Court should reverse based on the issue raised in this brief. *See infra* Part I. Alternatively, this Court should presume the deficient performance identified in the 23B motion and reverse because Miles was prejudiced by the combined effect of the errors raised in this brief and in the 23B motion. *See infra* Part II. If, however, the Court declines to reverse for the reasons set forth in Parts I-II of this brief, Miles asks this Court to remand for a rule 23B hearing and supplementation of the record followed by supplemental briefing.

CONCLUSION

For the foregoing reasons, Miles asks this Court to reverse and remand for a new trial based on the issue raised in Part I. Alternatively, this Court should presume the deficient performance identified in the 23B motion and reverse and remand for a new trial because the cumulative effect of all of the errors identified on appeal (in the opening brief and the 23B motion) undermine confidence in the verdict. *See infra* Part II.

If the Court declines to reverse on the issue raised in this brief or to

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

SUBMITTED this 13th day of September, 2017.

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 11,261 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted 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 private brief, and one copy of the public brief to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies of the private brief, and one copy of the public brief 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 private and public briefs 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 13th day of September, 2017

ALEXANDRA S. McCALLUM

DELIVERED this _____ day of September, 2017.

ADDENDUM A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 141910634 FS
THOMAS JEFFREY MILES,	:	Judge: RANDALL SKANCHY
Defendant.	:	Date: August 31, 2015

PRESENT
Clerk: saram
Prosecutor: SERASSIO, MELANIE M
Defendant
Defendant's Attorney(s): CHRISTENSEN, PAUL R

DEFENDANT INFORMATION
Date of birth: January 31, 1979
Sheriff Office#: 222034
Audio
Tape Number: 12:43

CHARGES
3. FORCIBLE SODOMY - 1st Degree Felony
- Disposition: 07/17/2015 Guilty

HEARING

TIME: 12:46 PM
The above entitled case comes before the Court for a Sentencing. A motion for a judgment not withstanding the verdict, is denied.
SENTENCE PRISON

Based on the defendant's conviction of FORCIBLE SODOMY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

restitution is to be left open. The Court will make no reccomendation for Credit for time served.
CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

Date: 31 August 2015

RANDALL SKANCHY
District Court Judge

ADDENDUM B

Utah Code § 76-2-101

§ 76-2-101. Requirements of criminal conduct and criminal responsibility

(1)(a) A person is not guilty of an offense unless the person's conduct is prohibited by law; and
(b)(i) the person acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
(ii) the person's acts constitute an offense involving strict liability.

(2) These standards of criminal responsibility do not apply to the violations set forth in Title 41, Chapter 6a, Traffic Code, unless specifically provided by law.

Credits

Laws 1973, c. 196, § 76-2-101; Laws 1983, c. 90, § 1; Laws 1983, c. 98, § 1; Laws 2005, c. 2, § 300, eff. Feb. 2, 2005.

Utah Code § 76-2-103

§ 76-2-103. Definitions

A person engages in conduct:

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

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

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

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

Credits

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

Utah Code § 76-5-403

§ 76-5-403. Sodomy--Forcible sodomy

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

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

(3) Sodomy is a class B misdemeanor.

(4) Forcible sodomy is a first degree felony, punishable by a term of imprisonment of:
(a) except as provided in Subsection (4)(b) or (c), not less than five years and which may be for life;
(b) except as provided in Subsection (4)(c) or (5), 15 years and which may be for life, if the trier of fact finds that:
(i) during the course of the commission of the forcible sodomy the defendant caused serious bodily injury to another; or
(ii) at the time of the commission of the rape, the defendant was younger than 18 years of age and was previously convicted of a grievous sexual offense; or
(c) life without parole, if the trier of fact finds that at the time of the commission of the forcible sodomy the defendant was previously convicted of a grievous sexual offense.

(5) If, when imposing a sentence under Subsection (4)(b), a court finds that a lesser term than the term described in Subsection (4)(b) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:
(a) 10 years and which may be for life; or
(b) six years and which may be for life.

(6) The provisions of Subsection (5) do not apply when a person is sentenced under Subsection (4)(a) or (c).

(7) Imprisonment under Subsection (4)(b), (4)(c), or (5) is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-403; Laws 1977, c. 86, § 2; Laws 1979, c. 73, § 3; Laws 1983, c. 88, § 21; Laws 2007, c. 339, § 16, eff. April 30, 2007; Laws 2013, c. 81, § 8, eff. May 14, 2013.

ADDENDUM C

INSTRUCTION 30

Reckless as to Circumstances Surrounding Conduct or as to Result.

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

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

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

"Conduct" means either an act or an omission.

INSTRUCTION 35

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

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

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