IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JUAN CARLOS ESCOBAR-FLOREZ, Defendant/Appellant.	Case No. 20170390-CA Appellant is incarcerated.

Brief of Appellant

Appeal from conviction for rape of a child, a first degree felony, in the Third Judicial District, Salt Lake County, the Honorable Randall Skanchy presiding.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. JUAN CARLOS ESCOBAR-FLOREZ, Defendant/Appellant.	Case No. 20170390-CA Appellant is incarcerated.

Brief of Appellant

STATEMENT OF JURISDICTION

This Court has jurisdiction under Utah Code Section 78A-4-103 (2)(j).

INTRODUCTION

Mr. Escobar-Florez was convicted in January 2017 of rape of a child based largely on questionable allegations K.V. made against him in 2007 when she was nearly 14-years-old, and hearsay statements—some of which were not even attributable to an identified witness—from the investigating officers' police reports which were introduced as exhibits. There was no physical evidence that suggested K.V. was raped or even had sex, and even in 2007, K.V.'s story had several inconsistencies. Indeed, she only reported Mr. Escobar-Florez after being confronted by her mother about staying out all night at a time when she thought she might be pregnant.

STATEMENT OF THE ISSUES

1. Did trial counsel render ineffective assistance of counsel by stipulating to the use of the police reports in lieu of testimony—which included multiple hearsay statements, by arguing to the jury based on Mr. Escobar-Florez's immigration status, and by failing to keep Mr. Escobar-Florez adequately apprised of his case to allow him to participate in his own defense?

Standard of Review. Ineffective assistance of counsel is a question of law. *See, e.g., State v. Clark*, 2004 UT 25, ¶6, 89 P.3d 162.

Preservation. Ineffective assistance of counsel may be raised for the first time on appeal.

2. Did the trial court err in finding sufficient evidence of flight to issue a flight instruction?

Standard of Review. A trial court's decision to give a flight instruction is reviewed for correctness. *State v. Riggs*, 1999 UT App 271, ¶ 7, 987 P.2d 1281, *abrogated on other grounds by State v. Levin*, 2006 UT 50, 144 P.3d 1096.

Preservation. This issue was preserved at R421-23.

3. Was the evidence insufficient to sustain Mr. Escobar-Florez's conviction?

Standard of Review. This Court will reverse a jury verdict if the evidence, viewed in a light most favorable to the verdict, "is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable

doubt" as to the defendant's guilt. *State v. Brown*, 948 P.2d 337, 343-44 (Utah 1997) (citation omitted).

Preservation. This issue was preserved at R440 and R470.

4. Do the cumulative effect of the errors at trial require reversal?

Standard of Review. This Court "will reverse 'if the cumulative effect of the several errors undermines our confidence ... that a fair trial was had.'" *State v. Campos*, 2013 UT App 213, ¶61, 309 P.3d 1160 (quoting *State v. Dunn,* 850 P.2d 1201, 1224 (Utah 1993)) (omission in original) (citation and internal quotation marks omitted).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions and statute are reproduced in Addendum A:

U.S. Const. Amend VI;
Utah Const. art. I sec. 12;
Utah Code Section 76-5-402.1 (2007 version).

STATEMENT OF THE CASE

A. Statement of Facts.

In August, 2007, Mr. Escobar Florez was a co-worker of K.V.'s stepfather, and he rented a room at the home where K.V. and her family lived in the basement. R317-18, 339, 349. K.V. was about two months from her 14th birthday. R316. On August 29, 2007, after her mother questioned her about being out all night the night before, K.V. accused Mr. Escobar-Florez of raping her about three weeks earlier. R431.

K.V.'s testimony. According to K.V., on a night in August 2007, she went to bed around 9 or 10 p.m. R318-319. That night, her sister was sleeping in her parent's bedroom and her brother was asleep in his own room. R319. K.V. alleges that she woke up to go to the bathroom and saw Mr. Escobar-Florez standing outside the bathroom. R319-320. K.V. testified that Mr. Escobar-Florez grabbed her hand, covered her mouth, and pulled her to his bedroom. R320-21. According to K.V., Escobar-Florez then shut the door, put her on the bed, and while covering her mouth and grabbing her hands, also managed to touch her breasts with his hand. R321-323. K.V. testified that she did not call out for help—even though her parents, sister and brother were close by—because she was scared. R322. K.V. further alleged that Escobar-Florez told her that he'd "do some harm to my mom" if she screamed. R322. K.V. testified that Escobar-Florez then started to kiss her neck, and "put his penis inside my vagina." R323. After that, according to K.V., Mr. Escobar-Florez laughed and she left the room. R324. The next morning K.V. went to school, "like any other regular day." R325. She did not report the alleged incident to her parents or police. R325. Instead she told a "friend." R325-26.

K.V. testified that she saw Mr. Escobar-Florez just one other time, the next day, and then she never saw him at that house again. R328, 332. About three weeks later, K.V.'s mother picked her up from school and confronted her about staying out all night the night before. R326-27, 334-35, 356-57, 437. When her mother asked her what was going on, K.V. reported the alleged assault to her.

K.V. thought she might be pregnant. State's Ex. 2 at 4. K.V. testified that she moved "a few months" after the alleged assault, testifying first that it was "[t]hree months," then that it was "two months." R328, 341. Apart from going to a clinic and speaking to a doctor, did not recall any details of the investigation until 2016 when she heard that Mr. Escobar-Florez had been arrested. R327-30, 341.

Yolanda's Testimony. K.V.'s mother, Yolanda, testified that the alleged incident occurred while her family was living in a house on Navajo Street in Salt Lake City, which she said was the second location where Mr. Escobar-Florez lived with her family. R349. At some point she noticed that K.V. "was very emotional," and she asked "her because that day during the whole day she didn't leave her room." R350. But K.V. did not want to talk. *Id.* Yolanda took K.V. to a clinic that referred her to the hospital where K.V. received a pregnancy test—the result was negative. R352. Yolanda testified that her family moved from the house "after what happened." R349.

Francisco's Testimony. K.V.'s stepfather, Francisco, testified that he and Mr. Escobar-Florez worked together for about a year. R361. He lived with the family at a West Valley residence and then moved with them to the house on Navajo Street. R361-62. According to Francisco, Mr. Escobar-Florez moved out a few days before K.V. alleged that he assaulted her. R362-63. Francisco testified that he noticed K.V.'s behavior change "[a] week" before she reported the alleged incident. R365. The family moved from the house on Navajo Street to West Valley about three weeks after Mr. Escobar-Florez moved out because the family

could no longer afford the rent. R365. According to Francisco, Mr. Escobar-Florez quit work at some point. R365.

K.V.'s inconsistencies. K.V. testified both that she did not recall talking to the police, and that she did recall speaking to them after going to the clinic. R328-29, 334. Despite evidence to the contrary, she denied that she had been out all night before telling her mother about the alleged assault. R335, R431, 437; State's Ex. 2 at 5. There was evidence that K.V. only reported after her mother confronted her about staying out all night. *Id.* K.V. was also inconsistent about details of the incident. For example, K.V. denied at trial her original report to police that she and Escobar-Florez were boyfriend and girlfriend, and that they had sex twice; she denied making those reports at trial. R335; State's Ex. 2 at 7. She also was inconsistent as to the details of the alleged assault. For example, although K.V. testified that she saw Mr. Escobar-Florez for the first time standing by the bathroom door, she initially told investigators that he was sitting on the couch. R337-38; State's Ex. 2 at 5. She also apparently reported to the forensic examiner that Mr. Escobar-Florez had penetrated her anally as well, but K.V.'s police report and testimony only alleged vaginal penetration. R405. She further denied telling police that she and Mr. Escobar-Florez were in a relationship or that they had had sex twice on August 8 and August 9. R335-36. Before testifying, she did not tell authorities that Mr. Escobar-Florez laughed when she walked out of the room. R340, 405, State's Ex. 2. It was also the first time that she said anything about his purported fondling her breasts. R153, 405,

State's Ex. 2. Before testifying, K.V. had an opportunity to watch the recorded CJC interview to refresh her memory. R336.

It was also unclear from the record as to when Mr. Escobar-Florez moved. Some testimony suggested that he moved first, other testimony suggested that the family did. R362-63, 365. Although K.V. testified that Mr. Escobar-Florez moved soon after the incident—the last time she saw him was the next day—her parents' testimony suggested that he moved later. R328, 332 , 362-63, 365. According to the police report, Mr. Escobar-Florez moved from his last known address (not on Navajo Street) about "two weeks prior to the incident." State's Ex. 2 at 6.

The medical examination. The forensic examiner who conducted K.V.'s exam on September 12, 2007 did not testify. R402-03. Another forensic examiner, Karen Hansen, testified instead. *Id.* According to Dr. Hansen, the forensic examiner spoke to Yolanda and then to K.V. Yolanda said she learned of the "event" several weeks later. R404. They both said it occurred on August 8 or 9, 2007. R404. When asked what happened, K.V. said that Mr. Escobar-Florez's private went into her private, and when asked if it had gone into the front or back private, she said "both." R405. K.V. had no injuries, and the vaginal area appeared normal. R406, 409. The forensic examiner could not determine whether K.V. had even had sex at all. R410. K.V.'s hymen was intact. R407.

No DNA evidence was collected because of the length of time between the alleged assault and the exam. R409. K.V.'s tests for sexually transmitted disease

came back negative. R417. The examiner had a hard time getting K.V. to say where she lived when the alleged assault occurred. R417. Yolanda reported to the examiner that the family moved because the family asked Mr. Escobar-Florez to move out and he refused. R414.

B. Procedural History.

Mr. Escobar-Florez was charged on October 25, 2007, with rape of a child, a first degree felony. R1. His initial appearance was held on June 16, 2016. R6. He waived his right to preliminary hearing. R28. The original trial date was stricken over trial counsel's objection based on the State's motion for a continuance, and trial was scheduled to January 1, 2017. R60-61.

1. Stipulation to the police report

At the pretrial conference, trial counsel stated that he was ready to move forward, but "there are two police officers who are not available for trial, Constantine Rodin and Mark Shoeman. They are both out of state. My client wants to go forward anyway so Ms. Johnson and I are going to come to agreement on how to use those police reports at trial." R184. Trial counsel added that he told "Mr. Escobar-Florez that my preference would be to continue the trial in light of the officers not being here, but it was his decision." R185. At trial, counsel stipulated to "introduce the entirety of their police reports" as an exhibit that jurors could take "back to the jury room." R367; State's Exhibit 2. Pursuant

to the stipulation, the stipulation was read into the record, and then the jury took the police reports to the jury room to read them. R419-20.[1]

2. Voir Dire

Based on trial counsel's request, the trial court informed potential jurors that Spanish interpreters would be used, and asked members of the jury panel to raise their hands if they "might not be able to be fair to either the prosecution or the defense in light of the fact that Spanish is the primary language of several of the individuals involved in this case." R52, 226. However, defense counsel made no request for any questions to determine whether Mr. Escobar-Florez's legal status could be a cause for bias, and the trial court did not ask jurors about this. R227.

Trial counsel first brought up Mr. Escobar-Florez's illegal status in opening remarks, stating, "To be frank, he was in this country illegally." R312. Then in closing, trial counsel argued that the green card listing Mr. Escobar-Florez as a citizen of Mexico was fraudulent. R456. "[I]n fact, Juan was from El Salvador. So the real issue is, was that green card counterfeit? Something he got just to work? Was he Mexican or is he El Salvadoran? So, if, in fact, he's El Salvadoran and was working with a counterfeit green card, that too would provide all kinds of justification for not wanting to talk to police." R456.

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[1] The police reports were introduced as State's Exhibit 2, which is reproduced in Addendum C. For the Court's convenience, Appellant has added page numbers to that copy.

3. The flight instruction

At some point, Mr. Escobar-Florez or K.V.'s family stopped living together. At some point before September 5, 2007, Mr. Escobar-Florez apparently quit his job. State's Ex. 2 at 6. It does not appear that police took any efforts to locate Mr. Escobar-Florez beyond going to his place of employment. *See id.* Trial counsel objected to the flight instruction on the basis that the State had not presented sufficient evidence of flight to support such an instruction. R421. There was as much evidence that the family left the home as that Mr. Escobar-Florez did. R421-22. And there was no evidence that police took any efforts to locate Mr. Escobar-Florez, apart from going to his former employer. R422. Officers did not even attempt to locate him at his last known address. *Id.* The State argued that evidence that Mr. Escobar-Florez "stopped coming to the place of residence, and ... stopped coming to work" was sufficient to support a flight instruction, particularly given "the stipulation where he specifically quit his job at essentially right after he talked with the police officer ... citing problems with the police." R422-23. The trial court issued the flight instruction, ruling that "a reasonable juror could conclude that there is sufficient evidence to make a determination associated with flight." R423.

In closing the State argued that Mr. Escobar-Florez's decision not to talk to police, his moving, and his quitting his job, were all evidence of his guilt. "The detective calls the defendant and says, 'I want to meet with you, come and talk with me.' And the next day the detective goes to the defendant's work after he

didn't show up to talk to the detective and the defendant had quit. And said, 'I'm having problems with police.'" R452-53. "He's actually here legally according to the documentation that they have. So why else would you suddenly quit your job? And leave out of your residence? So nobody can find you." R453.[2]

C. Disposition.

Mr. Escobar Florez was tried by a jury on January 19, 2017, and convicted as charged. R125. He was sentenced to fifteen-years-to-life in prison on May 8, 2017. R132.[3] Mr. Escobar-Florez timely appealed. R161, 167.

SUMMARY OF ARGUMENT

Trial counsel provided deficient performance which prejudiced Mr. Escobar-Florez by stipulating to the admission of the police reports. The reports contained multiple unreliable hearsay statements and improperly commented on Mr. Escobar-Florez's right against self-incrimination. Trial counsel also unreasonably failed to object to other hearsay statements that should not have been admitted. Given that the scant evidence of guilt in this case, there is a reasonable likelihood that the outcome would have been different had the police reports and other hearsay statements been excluded. It was also objectively unreasonable for trial counsel to introduce evidence that Mr. Escobar-Florez was an illegal immigrant without asking any questions of the jury panel to weed out

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[2] The relevant instruction, argument and ruling are reproduced in Addendum D.
[3] The Jury Verdict and Sentencing Minutes are reproduced in Addendum B.

potential bias. In addition, counsel performed deficiently by not keeping Mr. Escobar-Florez adequately informed of his case status or in conducting a proper evaluation.

In addition, the trial court erred in instructing the jurors on flight, where there was little or no evidence to support that Mr. Escobar-Florez fled. There was also insufficient evidence to support his conviction.

Given the multiple errors and deficiencies in this case, in the event that any one error is insufficient for reversal, Mr. Escobar-Florez asks the Court to reverse based on the cumulative effect of the errors.

ARGUMENT

I. TRIAL COUNSEL PROVIDED CONSTITUTIONALLY DEFICIENT PERFORMANCE AND MR. ESCOBAR-FLOREZ WAS PREJUDICED AS A RESULT

"The sixth amendment to the United States Constitution" guarantees the accused "'the right to effective assistance of counsel.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n. 14 (1970) (additional citation omitted). A defendant's right to effective assistance is denied when counsel's performance falls "below an objective standard of reasonableness" and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" when considering the "totality of the evidence [and] 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.* at 694-96. It does not require a defendant to show that counsel's deficient representation "more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693-94. Rather, the standard is met if counsel's ineffective assistance can render the proceeding "unreliable, and hence the proceeding itself unfair." *Id.* at 694.

Here, Mr. Escobar-Florez's trial counsel's representation fell below an objective standard of reasonableness because he stipulated to otherwise inadmissible hearsay statements that violated Mr. Escobar Florez's constitutional rights to confront the witnesses against him and to not testify against himself. Trial counsel also unreasonably failed to conduct adequate voir dire before arguing based on Mr. Escobar-Florez's immigration status. Finally, trial counsel failed to adequately communicate with Mr. Escobar-Florez, denying him his right to participate in his own defense. This deficient performance prejudiced Mr. Escobar-Florez because in a case where there was little evidence of guilt, it enabled the State to use unreliable hearsay and Mr. Escobar-Florez's right against self-incrimination to convince the jury to convict him.

A. It was objectively unreasonable and prejudicial to stipulate to admission of the police reports.

Trial counsel's stipulation to the admission of the entire police reports violated Mr. Escobar Florez's constitutional right to confront the witnesses

against him and his constitutional right against self-incrimination. Mr. Escobar-Florez was prejudiced by their admission because they provided a basis for the State's argument that Mr. Escobar-Florez fled and—in a case in which evidence of guilt was weak—used hearsay to improperly bolster K.V.'s testimony.

1. It was objectively unreasonable to stipulate to the admission of the unredacted police reports.

Here, trial counsel stipulated to the admission of police reports that—even had the State made a showing of unavailability—would not have been admissible prior testimony because police reports are not sworn and because there was no opportunity for cross examination. The decision was apparently made based on Mr. Escobar-Florez's desire for a prompt trial rather than a continuance. But, as will be shown, the police reports contained not only the officers' hearsay statements, but also included statements from others, some of whom are not identified, and improperly implicated Mr. Escobar-Florez's right to remain silent.

(a) The police reports violated Mr. Escobar-Florez's right to confront the witnesses against him.

Criminal defendants have a constitutional right to confront the witnesses against them. U.S. Const. Amend. VI; Utah Const. art. I, sec. 12. "The right to confrontation is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). Utah courts "have long ago forsaken the practice of allowing a person to be convicted on the basis of out-of-court statements, whether written or oral, of

persons not subject to cross-examination." *State v. Bertul*, 664 P.2d 1181, 1185 (Utah 1983).

The Sixth Amendment guarantees that "[a] witness's testimony against a defendant is … inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009). The confrontation right applies to testimonial statements, which are those statements made when the "primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006). On the other hand, statements are nontestimonial when they are made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* A statement "knowingly given in response to structured police questioning," i.e. during "interrogations by law enforcement officers fall squarely within that class." *Crawford*, 541 U.S. at 53 & n.4. "The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." *Davis*, 547 U.S. at 826. It is "not … conceivable that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman recite the unsworn hearsay testimony of the declarant." *Id.*

Thus, police reports that contain "non-routine information non-routine information as to which the memory, perception, or motivation of the reporter

may raise a serious question of reliability, are inadmissible." *Bertul*, 664 P.2d at 1185 at 1184-85; *State v. Gonzalez—Camargo*, 2012 UT App 366, ¶27, 293 P.2d 1121 (same); *see also accord Bullcoming v. New Mexico*, 564 U.S. 647, 661, (2011) (quoting *Melendez-Diaz*, 557 U.S. a 319, n.6 ("[T]he analysts who write reports that the prosecution introduces must be made available for confrontation even if they possess 'the scientific acumen of Mme. Curie and the veracity of Mother Teresa.'").

In other words, the "Confrontation Clause imposes a burden on the prosecution to present its witnesses." *Melendez-Diaz*, 557 U.S. at 324. Here, rather than track down key witnesses, the State introduced the police reports that included problematic hearsay testimonial statements from the investigating officers, from one or more unnamed individuals at Mr. Escobar-Florez's workplace, from an unnamed source that his social security number was fake, and an unauthenticated copy of a green card.[4] *See* State's Ex. 2.

Although police reports are not admissible, a witnesses' prior testimony may be admitted when the statement's proponent can show the witness is unavailable to testify for one of the enumerated reasons in rule 804, Utah Rule of Evidence. Relevant here, prior testimony may be used if the witness "is absent from the trial or hearing and the statement's proponent has not been able, by

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[4] Indeed, the police report's statement about Mr. Escobar-Florez's social security number and photo copy of a green card resulted from trial counsel's mention of his immigration status. As stated in Point I(B) *infra* trial counsel performed deficiently by arguing based on Mr. Escobar-Florez's immigration status as well.

process or other reasonable means, to procure the declarant's attendance." Utah R. Evid. 804(a)(4)-(5). A witnesses' former testimony may be admitted only if it is offered against a party who had a prior "opportunity and similar motive to develop it by direct, cross-, or redirect examination." *Id.* R804(b)(1).

A showing of unavailability requires more than that the witness is out-of-state. *See, e.g., State v. Chapman*, 655 P.2d 1119, 1123 (Utah 1982) (State must show "good faith efforts" to procure an out-of-state witnesses' testimony). Rather, "there must be a showing that" an absence due to one of the reasons set forth in rule 804 "is of such an extended duration that a reasonable continuance would not allow the witness to testify." *State v. Ellis*, 2018 UT 02, ¶2. Even if an out-of-court statement is admissible under rule 804, it "'does not mean that those statements automatically pass constitutional muster. If the evidence violates a defendant's right to confront witnesses, it should not be admitted.'" *State v. Workman*, 2005 UT 66, ¶17, 122 P.3d 639 (quoting *State v. Moosman*, 794 P.2d 474, 479-80 (Utah 1990)). Rather, "'for a witness to be constitutionally unavailable, it must be practically impossible to produce the witness in court.'" *State v. Montoya*, 2004 UT 5, ¶ 15, 84 P.3d 1183 (quoting *State v. Webb,* 779 P.2d 1108, 1113 (Utah 1989)). Thus, the "'proponent of the out-of-court statement to do his utmost to 'procure the declarant's attendance by process or other reasonable means.'" *Id.* (quoting Utah R. Evid. 804(a)(5)). In addition, even if a witness is unavailable, that witness's prior testimony cannot be

introduced unless it bears "sufficient indicia of reliability to permit its introduction at trial." *See Chapman*, 655 P.2d at 1123.

Here, there is no indication that trial counsel had to choose between moving forward with trial and admitting otherwise inadmissible hearsay. Indeed, it was up to the State to show that its witnesses were unavailable and to procure adequate reliable prior testimony. *See id.* However, even assuming arguendo that it was reasonable under the circumstances to stipulate to the admission of the police reports, it was certainly objectively unreasonable to not at least redact the hearsay statements in the report that would have been inadmissible and prejudicial to Mr. Escobar-Florez even if the officers had testified.

This is because the police reports included multiple statements that amounted to inadmissible double hearsay and that were damaging to Mr. Escobar-Florez's case. "Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule." Utah R. Evid. 805. "If the purpose of the testimony is to use an out-of-court statement to evidence the truth of facts stated therein, the hearsay objection cannot be obviated by eliciting the purport of the statement in indirect form. Thus evidence as to the purport of 'information received' by the witness, or testimony of the results of investigations made by other persons, offered as proof of the facts asserted out of court, are properly classed as hearsay." McCormick on Evidence, Sec. 249, p. 735 (Cleary Rev., 3rd Ed. 1984). In addition to allowing in the officer's hearsay statements that were not subject to

cross-examination, substituting the police reports for testimony also introduced hearsay statements from other witnesses who were not called to testify. For example the State used the police report to introduce the following hearsay statements, for which the author of the report had no first-hand knowledge:

1. "I was informed Juan had quit his job citing problems with police." State's Ex. 2 at 6.
2. "Juan's SS# … is not valid." *Id.*
3. "Juan's 'green card' … list[s] him as a Mexican national. The people who worked with Juan told the management he was from El Salvador."

In addition, the police reports included the hearsay statements of what K.V. and Yolanda reported to police about the incident. Including that she reported that she was in a relationship with Mr. Escobar-Florez, and that she reported she thought she might be pregnant. *See id.* at 4-5. And it included an unauthenticated photocopy of what appears to be a green card. *See id.* at 3.

Apart from the prior inconsistent statements within the police reports, there was not much that would have been properly admitted even had the officers been available to testify. It was unclear, for example, how Officer Rodin determined that Mr. Escobar-Florez's Social Security Number was not valid. Nor was it clear who told Officer Rodin that "Juan had quit," or how that person knew the information. Nor was it clear how a copy of the green card was obtained, who

it was obtained from, or whether the officer took any steps at all to determine whether it was authentic.

(b) Admission of the police reports violated Mr. Escobar-Florez's right against self-incrimination

In addition, counsel's stipulation included the report's references to Mr. Escobar-Florez's inadmissible pre-arrest silence. A person is protected from "'compelled self-incrimination at all times, not just upon arrest or during a custodial interrogation.'" *State v. Gallup*, 2011 UT 422, ¶11, 267 P.3d 289 (quoting *State v. Palmer,* 860 P.2d 339, 349 (Utah App.1993) (additional citation omitted). "Merely because an individual does not need to be advised of his right to remain silent until he is subject to a custodial interrogation does not mean he should be penalized for invoking that right earlier." *See Palmer*, 860 P.2d at 349-50 (error to admit "portions of the stipulated testimony implicating defendant's decision to remain silent"). In other words, although pre-arrest silence may be used to impeach a defendant "once he took the stand," it cannot introduce silence evidence in its case-in-chief. *See Gallup*, 2011 UT 422, ¶17.

Here, the police reports contained statements that implicated Mr. Escobar-Florez's right to remain silent, and the State used that evidence against him in closing:

1. "Juan promised to come see me" but "failed to make an appointment."
2. "Juan told Officer Peterson he would come and see me ..."

State's Ex. 2 at 6.

The prosecutor argued in closing that Mr. Escobar-Florez's decision not to talk to police indicated a consciousness of guilt, arguing that "he didn't show up to talk to the detective and the defendant had quit... So why else would you suddenly quit your job? And leave and move out of your residence? So nobody can find you." R452-53.

As in *Gallup,* "this was a case based on credibility in which the jury had to determine whether [K.V.'s] testimony was credible enough to warrant conviction." *See Gallup*, 2011 UT App 422, ¶25. "The silence evidence impermissibly bolstered the State's case by directly putting [Mr. Escobar-Florez's] credibility into question before he had even opened the door to such an attack." *See id.*

(c) Admission of other hearsay statements

Other hearsay statements that were introduced at trial should have also been limited to the portions that constituted prior inconsistent statements. *See, e.g. State v. Zaelit*, 2010 UT App 208U (quoting Utah R. Evid. 801(d)(1)) (acknowledging prior inconsistent statements are not hearsay and may be introduced as substantive evidence). First, the State introduced the report of the forensic examiner, including her notes about the interview with K.V., through the testimony of a different examiner. R402-03. The State also introduced testimony of Gloria Ruiz, a DCFS caseworker, as to what K.V.'s parents told her. R431. And K.V.'s mother Yolanda testified as to what K.V. told her about the

alleged assault. R351. As with stipulation to the police reports' admission, it was objectively unreasonable for trial counsel to not object to the wholesale admission of hearsay statements purportedly made by K.V. or Yolanda. *See* Point I(A)(1) *supra.* In addition, because of the well-settled nature of a defendant's right to confront the witnesses against him, *see id.*, the error should have been obvious to the trial court and the trial court should have intervened. *See State v. Cox*, 2007 UT App 317, ¶10, 169 P.3d 806.

2. It was objectively unreasonable to stipulate to the admission of the police reports.

Given that it has long been well-settled that a criminal defendant cannot be convicted on the basis of hearsay statements, *see, e.g., Bertul*, 664 P.2d at 1185, it cannot be said that trial counsel acted reasonably in stipulating to admitting unredacted police statements that included several inadmissible statements that amounted to hearsay within hearsay, none of which satisfied the reliability standards of the rules of evidence, let alone *Crawford.* It appears that counsel's decision to stipulate to the admission of the police reports was not "based on 'strategy' but on counsel's mistaken beliefs" that admitting the un-redacted police report was the only way to move forward with trial. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (trial counsel's failure to conduct pretrial discovery demonstrated "startling ignorance of the law"). In other words, trial counsel failed "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688; *see, e.g.,*

Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (trial counsel's failure to adequately prepare for or introduce available evidence at sentencing was objectively unreasonable); *Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) ("[Counsel's] complete ignorance of the relevant law under which his client was charged, and his consequent gross misadvice to his client regarding the client's potential prison sentence, certainly fell below an objective standard of reasonableness under prevailing professional norms."); *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999) ("[A]n attorney who does not know the basic sentence for an offense at the time that his client is contemplating entering a plea is ineffective."). Counsel's performance was therefore objectively unreasonable.

3. Admission of the police reports and other hearsay statements prejudiced Mr. Escobar-Florez

In assessing prejudice, the court considers whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In making this determination, the Court reviews the "totality of the evidence before the judge or jury." *Id.* at 695. "Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture." *Id* at 695-96. And, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* The plain error harmfulness test is

equivalent to the prejudice test for ineffective assistance of counsel. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

Here, the error of admitting the police reports and other inadmissible hearsay statements altered the "entire evidentiary picture" by allowing the jury to assume that Juan Carlos fled, that he did so out of a consciousness of guilt, and that he either lied to his coworkers about his nationality or had a fraudulent green card. *See id.* at 696; *cf. State v. Lenkart,* 2011 UT 27, ¶40, 262 P.3d 1 (prejudicial for trial counsel to fail to investigate and present expert opinion concerning potentially exculpatory material). They also allowed multiple witnesses with no personal knowledge to testify as to K.V.'s story, i.e. inappropriately bolstering her testimony.

The jury had just one issue to decide: whether the State had proved beyond a reasonable doubt that Mr. Escobar-Florez and K.V. had had sex. That decision came down to the credibility of the only two witnesses who could testify as to what actually happened—K.V. and Mr. Escobar-Florez, who did not testify.

This was not a case with strong evidence of Mr. Escobar-Florez's guilt. Several factors weighed against K.V.'s credibility. There was virtually no medical or physical evidence to corroborate her claim of a sexual encounter, let alone sexual assault. *See, e.g.,* R406-409. K.V. had multiple inconsistencies and logical gaps in her testimony. *See supra* pp. 6-7. For example, K.V. initially reported that she had sex with Mr. Escobar-Florez twice, but then reported that it happened only once at trial. R335; State's Ex. 2 at 7. And although K.V. testified

that she saw Mr. Escobar-Florez for the first time standing by the bathroom door, she initially told investigators that he was sitting on the couch. R337-38; State's Ex. 2 at 5. K.V. also had a motive to lie—being worried that she may be pregnant would give her ample opportunity to cast blame on an easy target—the family's roommate. This motive was enhanced by the fact that K.V.'s mother confronted her about staying out all night. There was no testimony from the investigating officers. *See id.* And the bulk of the evidence against Mr. Escobar-Florez was hearsay, which should have been excluded.

In short, the evidence supporting the verdict was very scant. Although K.V. lacked credibility, the jury likely found her more credible because of the improper admission of hearsay, the prosecutor's argument in closing that imputed guilt to Mr. Escobar-Florez's based on his decision to not talk to police, and on the improper hearsay statements that were introduced at trial. In other words, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

B. It was objectively unreasonable and prejudicial for trial counsel to not inquire into the venire's potential bias against illegal immigrants.

As stated a defendant's right to effective assistance is denied when counsel's performance falls "below an objective standard of reasonableness" and there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 688, 694. Trial counsel also performed deficiently by not conducting adequate

voir dire before arguing to the jury about Mr. Escobar-Florez's illegal immigration status.

Criminal defendants have a "constitutional guarantee to a trial by an impartial jury." *State v. Shipp*, 2005 UT 35, ¶14, 116 P.3d 317 (citing Utah Const. art. I, sec. 10). "'[V]oir dire examination has as its proper purposes both the detection of actual bias ... and the collection of data to permit informed exercise of the peremptory challenge.'" *State v. James*, 819 P.2d 781, 798 (1991) (alteration in original) (quoting *State v. Worthen*, 765 P.2d 839, 845 (Utah 1988)). Indeed, "'[a]mong the most essential responsibilities of defense counsel is to protect [his or her] client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense.'" *State v. Courtney*, 2017 UT App 62, ¶10, (quoting *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001)).

"Voir dire questioning is essential to choosing an impartial jury, and an impartial jury is as essential to a fair trial as is an impartial judge." *State v. Saunders*, 1999 UT 59, ¶33, 92 P.2d 951. "Indeed, the damaging effect of juror bias may be even more insidious than judicial bias because once biased jurors are seated, the effect of their bias is essentially undiscoverable and unremediable." *Id.* As a result, "trial courts should liberally conduct voir dire proceedings 'in a way which not only meets constitutional requirements, but also enables litigants and their counsel to intelligently exercise peremptory challenges and which attempts, as much as possible, to eliminate bias and prejudice from the trial

proceedings.'" *State v. Reed*, 2000 UT 68, ¶11, 8 P.3d 1025 (quoting *State v. Piansiaksone*, 954 P.2d 861, 867 (Utah 1998); *James*, 819 P.2d at 798) ; *Saunders*, 1999 UT 59, ¶47 (trial court abused discretion by not allowing "further probing of the jurors' attitudes toward child sexual abuse, given their prior 'specialized knowledge.'"); *Pianskiaskone*, 954 P.2d at 867 (no constitutional violation where court "asked questions that addressed both possible racial bias and the jurors' willingness to apply the law."). Indeed, a juror may be stricken for cause if his or her "[c]onduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially." Utah R. Crim. P. 18(e)(14).

In opening and closing, trial counsel argued that Mr. Escobar-Florez was an undocumented immigrant. R312 ("[T]o be frank, he was in this country illegally"); R456 ("So the real issue is, was that green card counterfeit? ... So, if, in fact, he's El Salvadorian and was working with a counterfeit green card, that too would provide all kinds of justification for not wanting to talk to police."). But, there was no question to determine whether jurors had bias or prejudice against undocumented immigrants.

The only question that could even allude to bias against immigrants was asked of the group—whether the fact that English was not their first language and interpreters were present would bias them. R52, 226. But trial counsel did not question prospective jurors about their immigration status during voir dire, or

propose any such questions to that effect, thereby failing to conduct adequate examination into potential juror biases.

This failure was objectively unreasonable given that trial counsel's strategy from the beginning appears to have been to argue that Mr. Escobar-Florez was undocumented as a way of mitigating evidence that he may have eluded capture. *See, e.g., Courtney*, 2017 UT App 62, ¶14 (counsel performed deficiently by not objecting to seating a jury after becoming aware of "potential taint"); *cf. People v. Quintana*, 2011 WL 1901942U, *1 (Mich. 2011) (using defendant's illegal status was reasonable where prospective jurors were questioned "to test their reaction to illegal aliens"). This is particularly true given that the President of the United States has repeatedly referred to undocumented immigrants as criminals in general and more specifically as rapists. In announcing his candidacy for president, Donald Trump highlighted his view that "when Mexico sends its people, they're not sending their best … They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. *They're rapists.*" *See* Transcript: Donald Trump Announces His Presidential Candidacy, CNN, June 16, 2015, https://www.cbsnews.com/news/transcript-donald-trump-announces-his-presidential-candidacy/ (emphasis added). That rhetoric has not cooled as Mr. Trump recently dedicated a portion of his first State of the Union Address to state: "For decades, open borders have allowed drugs and gangs to pour into our most vulnerable communities … Most tragically, they have caused the loss of

many innocent lives." *See* President Donald J. Trump's State of the Union Address, Jan. 30, 2018, *available* at https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/. Trial counsel's strategy was also objectively unreasonable given that counsel's argument that Mr. Escobar-Florez was avoiding police because he was illegal was a response to evidence of flight that the State improperly introduced. *See supra* Point I(A)(1). In sum, counsel acted objectively unreasonably by failing "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

Prejudice is shown if but for counsel's performance, there is a reasonable probability of a different outcome. *See Strickland.* Because "a defendant's right to a trial by a fair and impartial jury is of a constitutional caliber," the issue is "whether it is reasonable to presume" that the jurors were impartial. *See. Courtney*, 2017 UT App 62, ¶19 (potential juror's comment that defendant had prior involvement in the type of crime he was charged with tainted entire pool). Here, Mr. Escobar-Florez was prejudiced because there was no probing to determine whether any of the jurors were biased against undocumented immigrants. *See id.*

C. Mr. Escobar-Florez alleges a break-down in attorney-client correspondence, and that his attorney failed to investigate.[5]

Mr. Escobar-Florez also asserts that his counsel was ineffective in representing him at trial because of a break-down in attorney-client communication and because of his attorney's failure to investigate the facts of his case. A motion for a remand under Rule 23B, Utah Rules of Appellate Procedure, is filed concurrently herewith. Mr. Escobar-Florez incorporates the arguments as stated in the motion herein and further argues in support thereof herein.

As stated, counsel performs deficiently if his performance is objectively unreasonable, and reversal is required, if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694-95. Specifically, Mr. Escobar-Florez alleges that he was unable to adequately assist in his own defense because his trial counsel did not explain things to him well enough to allow him to make informed decisions. In a criminal case, an attorney's constitutional duty includes consulting "with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688. "Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant." *Florida v. Nixon*, 543 U.S. 175, 178 (2004) (citing *Strickland*, 466 U.S. at 688); *accord State v. Menzies*, 2006 UT 81,

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[5] This point is supported by a Mr. Escobar-Florez's motion for rule 23B remand.

¶73, 150 P.3d 480 (counsel's conduct, including misleading client as to case status "was exceptionally deficient"). Based on the facts alleged in Appellant's affidavits, it appears that attorney-client communications broke down at trial, which resulted in Appellant being unable to make informed decisions about his case, including whether to move forward with trial using police reports rather than sworn testimony of police officers, understanding and making informed decisions about the medical records or potential expert testimony, and whether or not to testify in his own defense.

Counsel also "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *see also Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (trial counsel's failure to adequately prepare for or introduce available evidence at sentencing was objectively unreasonable); *Lenkart,* 2011 UT 27, ¶40 (prejudicial for trial counsel to fail to investigate and present expert opinion concerning potentially exculpatory material). As stated in his declarations, Mr. Escobar-Florez does not think that his trial counsel kept him adequately informed of the proceedings or explained things well enough to him to be able to make informed decisions about his case. *See generally*, Aplt. Decl. at 2. He also does not believe that his trial counsel adequately investigated his case. *See* Aplt. Supp. Decl. at 3-4. And he thinks that

his testimony would have assisted in his defense. *See id.* at 2-3. As a result, trial counsel's performance fell below an objective standard of reasonableness. There is a reasonable probability that this deficient performance impacted the results of the proceeding because there was little evidence of guilt and Mr. Escobar-Florez made an uniformed decision to not testify in his own defense based on a break-down in attorney-client communications. *See Strickland*, 466 U.S. at 694.

II. THE TRIAL COURT ERRED IN GIVING A FLIGHT INSTRUCTION WHERE THERE WAS NO EVIDENCE THAT MR. ESCOBAR-FLOREZ FLED

Flight is defined as: "The act or instance of fleeing, esp. to evade arrest or prosecution." Black's Law Dictionary 670 (8th edition 2004). A "flight instruction is appropriate if the circumstances could support a reasonable inference that the defendant is fleeing out of a consciousness of guilt." *State v. Loprinzi*, 2014 UT App 256, ¶28, 338 P.3d 253, *cert. granted*, 347 P.3d 405 (Utah 2015). There must be a nexus between the alleged flight and the evidence or such an instruction is not appropriate. *State v. Howland*, 761 P.2d 579, 580 (Utah App. 1988) (flight instruction inappropriate where alleged flight occurred before the charged crime); *but see State v. Dupont,* 2002 UT App 378 U, (flight instruction appropriate where defendant ran from the scene of traffic stop "immediately after the arresting officer opened a shaving kit" that contained controlled substances, and continued to flee after officers ordered him to stop."); *State v. Riggs*, 1999 UT 21, ¶12, 987 P.2d 1281 (flight instruction in DUI homicide case appropriate where defendant fled from police with "blood-alcohol

level of nearly twice the legal limit" before fatal crash because jury was instructed on lesser-included offense of driving under the influence); *State v. Harter*, 2007 UT App 5, ¶¶3, 16, 165 P.3d 116 (curative flight instruction would have been appropriate where defendant "immediately fled" after police saw him and asked him to stop and talk but any benefit would have been offset by drawing attention to the flight) .

In this case, the trial court erred in giving the flight instruction over trial counsel's objection because there was little to no evidence of flight at all, let alone any nexus to connect it to the charged crime. In allowing the instruction, the trial court ruled that "a reasonable juror could conclude that there is sufficient evidence to make a determination associated with flight." R423. But the court did not explain what it found the flight to be or what the nexus was. [6] Nor could it. As explained in Point I.A. above, evidence that Mr. Escobar-Florez declined to talk to police and that he quit his job "citing problem with the police" was not properly before the jury. However, even were that evidence properly before the

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[6] Indeed, this ruling may have been the result of the State's mischaracterization of the evidence. The prosecutor argued in support that Mr. Escobar-Florez quit his job specifically quit his job ... right after he talked with the police officer, the next day ... citing problems with the police." R422-23. But this argument was not supported by the evidence. The police report that was introduced gave no time frame as to when Mr. Escobar-Florez quit: "I was informed Juan had quit his job citing problems with the police." State's Ex. 2 at 6. And Francisco testified only that Mr. Escobar-Florez quit at some point "during the time" he saw K.V.'s behavior change. R365. "[A]prosecutor may not argue a case based on facts not admitted into evidence." *State v. Davis*, 2013 UT App 228, ¶19, 311 P.3d 538 (citing *State v. Palmer*, 860 P.2d 339, 344 (Utah App.1993)).

jury, it did not provide any nexus between the alleged flight and charged crime. That Mr. Escobar-Florez quit his job at some point in time before September 5 does not mean that he did so specifically to avoid capture for the charged offense. Nor does his decision not to talk to police lead to that conclusion. Indeed, there was no testimony to support . It was therefore improper to allow the instruction, and the State's argument in closing that had there is no nexus to support that Mr. Escobar-Florez, the State argued that Mr. Escobar-Florez "The flight instruction was from the police report—that Mr. Escobar-Florez did not show up for a police interview, that he quit his job sometime before September 5, 2007 citing problems with police, and that *See* State's Exhibit 2 at 9. No time frame is given in the record for when Mr. Escobar-Florez quit his job, and the person who purportedly gave that information to the police was not called to testify. *See id.*

Because this error implicates Mr. Escobar-Florez's constitutional rights against self-incrimination and to confront the witnesses against him, reversal is required unless the State can show that giving the flight instruction was harmless beyond a reasonable doubt. *See State v. Bond,* 2015 UT 88, ¶37, 361 P.3d 104 (acknowledging that preserved constitutional errors require reversal unless harmless beyond a reasonable doubt). As stated, what little evidence of flight that was admitted was improperly before the jury. *See supra* Point I(A)(1). The flight instruction—and the State's argument to the jury that Mr. Escobar-Florez fled because he was guilty—allowed the jury to convict on an improper basis: "

"[T]he detective goes to the defendant's work after he didn't show up to talk to the detective and the defendant had quit ... So why else would you suddenly quit your job? And leave and move out of your residence? So nobody can find you." R452-53. Under the circumstances, the trial court's improper issuance of the flight instruction cannot be said to be harmless beyond a reasonable doubt. Nor could it be said to be harmless under any prejudice standard because, as stated, it gave the jurors an improper basis on which to convict Mr. Escobar-Florez.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. ESCOBAR-FLOREZ'S CONVICTION

Mr. Escobar-Florez was charged with rape of a child. By statute, "[a] person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14." Utah Code Ann. § 76-5-402.1 (2007). The actor must do so intentionally, knowingly, or recklessly. *See* Utah Code Ann. § 76-2-102. This Court should reverse because the State failed to prove that Mr. Escobar-Florez had sex with K.V.

To carry his burden of persuasion on a claim of insufficient evidence, Mr. Escobar-Florez may marshal the evidence that supports the verdict, and then demonstrate that the evidence is insufficient when viewed in a light most favorable to the verdict. *See* Utah R. App. P. 24 2017 advisory committee note (citing *State v. Nielsen*, 2014 UT 10, 326 P.3d 645). The evidence presented at trial that supported the State's case was as follows:

1. K.V. testified that she and Mr. Escobar-Florez had sex at some point during August 2007.
2. K.V. had behavioral issues following the alleged incident.
3. Mr. Escobar-Florez moved out of the house sometime before or after the alleged incident.
4. Someone told the police that Mr. Escobar-Florez quit, citing problems with police.
5. Mr. Escobar-Florez did not talk to the police.

The Court should reverse because even when viewing the marshaled evidence in a light most favorable to the verdict, it was insufficient to prove that sexual intercourse occurred between K.V. and Mr. Escobar-Florez. As stated, the bulk of the testimony against Mr. Escobar-Florez should have been excluded as hearsay, or as an improper reference to Mr. Escobar-Florez's right to remain silent. *See* Point I *supra.* In addition, K.V.'s uncorroborated testimony was peppered with inaccuracies and denials that rendered it inherently improbable. *See State v. Workman*, 852 P.2d 981, 984 (Utah 1993) (citation omitted) ("[T]estimony which is inherently improbable may be disregarded, ... but to warrant such action there must exist either a physical impossibility of the evidence being true, or its falsity must be apparent, without any resort to inferences or deductions.").

For example, K.V. denied that she reported the alleged incident to her mother the day after she stayed out all night. R335. In fact, Yolanda reported

that K.V. was gone until 9 a.m. the morning that she reported the incident. State's Ex. 2 at 5. She also denied telling a police officer that Mr. Escobar-Florez was her boyfriend, even though she did tell the police that. R335; State's Ex. 2 at 4. K.V. also had a motive to lie—she reported the alleged incident only after being caught staying out all night, i.e. in order to not get in trouble. Despite evidence to the contrary, she denied that she had been out all night before telling her mother about the alleged assault. State's Ex. 2 at 5. K.V. originally reported to police on August 29, 2007 that she and Mr. Escobar-Florez were in a relationship, and that they had sex twice while living at the home on Navajo Street, but then changed her story to only having sex once. R335; State's Ex. 2 at 7. Her story also changed from Mr. Escobar-Florez purportedly sitting on the couch when he grabbed her to standing in the hall outside the bathroom. R319-320, R337-38; State's Ex. 2 at 5. In addition, as stated, K.V. had a motive to lie—she thought she might be pregnant, and her mother was confronting her about staying out all night. Her testimony was therefore inherently improbable. *See Workman*, 852 P.2d at 984.

Thus, the evidence was insufficient to support Mr. Escobar-Florez's conviction, and his conviction should be reversed.

IV. THE ERRORS CUMULATIVELY PREJUDICED MR. ESCOBAR-FLOREZ

This Court will reverse under the cumulative error doctrine "if the cumulative effect of the several errors undermines our confidence ... that a fair trial was had." *State v. Thompson*, 2014 UT App 14, ¶73, 318 P.3d 1221 (quoting

State v. Dunn, 850 P.2d 1201, 1229 (Utah 1993)) (omission in original). As stated, prejudice is shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Strickland*, 466 U.S. at 688, 694*.* Courts are more likely to reverse "'when a conviction is based on comparatively thin evidence'" and when "the pivotal issue at trial was credibility of the witnesses and the errors went to that central issue." *Id.* (quoting *State v. King,* 2010 UT App 396, ¶35, 248 P.3d 984) (additional citations omitted); *accord State v. Havatone*, 2008 UT App 133, ¶ 8, 183 P.3d 257 ("[W]hen taking [the errors] together, we cannot say that a fair trial was had.").

Here, there is a reasonable probability that had the police reports—particularly the hearsay within hearsay and Mr. Escobar-Florez's failure to talk to police—had been excluded, the outcome would have been different. *See Strickland*, 466 U.S. at 694-96. The errors altered the "entire evidentiary picture" by providing what basis there was if any for the flight instruction, allowing the jury to assume that Juan Carlos fled, that he did so out of a consciousness of guilt, and that he either lied to his coworkers about his nationality or had a fraudulent green card. *See id.* at 696; *cf. Lenkart,* 2011 UT 27, ¶40 (prejudicial for trial counsel to fail to investigate and present expert opinion concerning potentially exculpatory material)*.* In addition, failing to adequately conduct voir dire before raising the highly-charged issue of Mr. Escobar-Florez's immigration status denied him his right to a fair trial.

The jury had just one issue to decide: whether the State had proved beyond a reasonable doubt that Mr. Escobar-Florez and K.V. had had sex. That decision came down to the credibility of the only two witnesses who could testify as to what actually happened—K.V. and Mr. Escobar-Florez, who did not testify.

As stated, this was not a case with strong evidence of Mr. Escobar-Florez's guilt. Several factors weighed against K.V.'s credibility. There was virtually no medical or physical evidence to corroborate her claim of a sexual encounter, let alone sexual assault. *See supra* Point I(A)(3). K.V. had multiple inconsistencies and logical gaps in her testimony. *See id.* She also had a motive to lie—worried that she was pregnant after staying out all night would give her ample motive to cast the blame on an easy target—Mr. Escobar-Florez who happened to rent a room in the same house as her family. *See id*. There was no testimony from the investigating officers. *See id.* And the bulk of the evidence against Mr. Escobar-Florez was hearsay, which should have been excluded. *See id.*

In short, the evidence supporting the verdict was very scant. Although K.V. lacked credibility, the jury likely gave it more credibility than it was due because of the improper admission of hearsay, the prosecutor's argument in closing that imputed guilt to Mr. Escobar-Florez's based on his decision to not talk to police, and improper argument related to his immigration status. *See supra* Point I.

The individual and cumulative effect of the objectively unreasonable actions by Mr. Escobar-Florez's trial counsel prejudiced him and requires reversal for a new trial.

CONCLUSION

For all of the foregoing reasons, Mr. Escobar-Florez's conviction should be reversed and remanded with an order of dismissal because the evidence was insufficient to support his conviction. Alternatively, this Court should reverse his conviction and remand for a new trial because Mr. Escobar-Florez received ineffective assistance of counsel, because the court improperly instructed the jury on flight, and Mr. Escobar-Florez was prejudiced by the trial errors.

Respectfully submitted on February 16, 2017.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(f)(1) of the Utah Rules of Appellate Procedure, this brief contains 9,853 words, excluding the table of contents, table of authorities and addenda. I further certify that in compliance with rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared using Microsoft Word 2016, in the proportionally spaced Georgia 13-point font.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF SERVICE

In accordance with Utah Supreme Court Standing Order 11, I certify that on February 16, 2018, I caused electronic copies of the Brief of Appellant to be delivered by email to the following:

Utah Court of Appeals
450 South State Street, 5th Floor
Salt Lake City, Utah 84114

Courtofappeals@utcourts.gov;

Sean D. Reyes, Esq.
Utah Attorney General-Criminal Appeals Division
P.O. Box 140854
Salt Lake City, UT 84114-0854

Criminalappeals@agutah.gov.

Within seven days, six printed copies of the Brief of Appellant, including one with original signatures will be delivered by hand to the Court, and two printed copies will be delivered by U.S. Mail first-class postage prepaid to Appellee at the above addresses.

/s/ Deborah L. Bulkeley

ADDENDUM A

U.S. Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Utah Constitution Article I, Section 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Acts of the 2008 Legislative Session

HB 256, Chapter 179

Be it enacted by the Legislature of the state of Utah:

SECTION 1. Section **76-4-102** is amended to read:

76-4-102.Attempt -- Classification of offenses.

(1) Criminal attempt to commit:

[(1)] *(a)* a capital felony, *or a felony punishable by imprisonment for life without*

parole, is a first degree felony;

[(2)] *(b) except as provided in Subsection (1)(c) or (d),* a first degree felony is a second

degree felony[, except that an attempt to commit]*;*

(c) any of the following offenses is a first degree felony punishable by imprisonment

for an indeterminate term of not fewer than three years and which may be for life:

[(a)] *(i)* murder, [a violation of] Subsection 76-5-203 (2)(a)[, if the victim or another

suffers serious bodily injury in the course of the actor's commission of the offense];

[(b)] *(ii)* child kidnapping, [a violation of] Section 76-5-301.1 ; or

[(c)] *(iii) except as provided in Subsection (1)(d),* any of the felonies described in Title

76, Chapter 5, Part 4, Sexual Offenses, that are first degree felonies;

(d) except as provided in Subsection (2), any of the following offenses is a first degree

felony, punishable by a term of imprisonment of not less than 15 years and which may be for

life:

(i) rape of a child, Section 76-5-402.1 ;

(ii) object rape of a child, Section 76-5-402.3 ; or

(iii) sodomy on a child, Section 76-5-403.1 ;

[(3)] *(e)* a second degree felony is a third degree felony;

[(4)] *(f)* a third degree felony is a class A misdemeanor;

[(5)] *(g)* a class A misdemeanor is a class B misdemeanor;

[(6)] *(h)* a class B misdemeanor is a class C misdemeanor; and

[(7)] *(i)* a class C misdemeanor is punishable by a penalty not exceeding one half the

penalty for a class C misdemeanor.

(2) If, when imposing a sentence under Subsection (1)(d), a court finds that a lesser

term than the term described in Subsection (1)(d) 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) ten years and which may be for life;

(b) six years and which may be for life; or

(c) three years and which may be for life.

SECTION 2. Section **76-4-204** is amended to read:

76-4-204.Criminal solicitation -- Penalties.

(1) Criminal solicitation to commit:

[(1)] *(a)* a capital felony, *or a felony punishable by imprisonment for life without*

parole, is a first degree felony;

[(2)] *(b) except as provided in Subsection (1)(c) or (d),* a first degree felony is a second

degree felony;

(c) any of the following offenses is a first degree felony punishable by imprisonment

for an indeterminate term of not fewer than three years and which may be for life:

(i) murder, Subsection 76-5-203 (2)(a);

(ii) child kidnapping, Section 76-5-301.1 ; or

(iii) except as provided in Subsection (1)(d), any of the felonies described in Title 76,

Chapter 5, Part 4, Sexual Offenses, that are first degree felonies;

(d) except as provided in Subsection (2), any of the following offenses is a first degree

felony, punishable by a term of imprisonment of not less than 15 years and which may be for

life:

(i) rape of a child, Section 76-5-402.1 ;

(ii) object rape of a child, Section 76-5-402.3 ; or

(iii) sodomy on a child, Section 76-5-403.1 ;

[(3)] *(e)* a second degree felony is a third degree felony; and

[(4)] *(f)* a third degree felony is a class A misdemeanor.

(2) If, when imposing a sentence under Subsection (1)(d), a court finds that a lesser

term than the term described in Subsection (1)(d) 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) ten years and which may be for life;

(b) six years and which may be for life; or

(c) three years and which may be for life.

SECTION 3. Section **76-5-402.1** is amended to read:

76-5-402.1.Rape of a child.

(1) A person commits rape of a child when the person has sexual intercourse with a

child who is under the age of 14.

(2) Rape of a child is a first degree felony punishable by a term of imprisonment of:

(a) except as provided in Subsection (2)(b), [(2)(c), or (3),] not less than [15] *25* years

and which may be for life; *or*

(b) [except as provided in Subsection (2)(c) or (3),] life without parole, if the trier of

fact finds that*:*

(i) during the course of the commission of the rape of a child, the defendant caused

serious bodily injury to another; or

[(c) life without parole, if the trier of fact finds that]

(ii) at the time of the commission of the rape of a child the defendant was previously

convicted of a grievous sexual offense.

[(3) If, when imposing a sentence under Subsection (2)(a) or (b) a court finds that a

lesser term than the term described in Subsection (2)(a) or (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) for purposes of Subsection (2)(b), 15 years and which may be for life; or]

[(b) for purposes of Subsection (2)(a) or (b):]

[(i) ten years and which may be for life; or]

[(ii) six years and which may be for life.]

[(4) The provisions of Subsection (3) do not apply when a person is sentenced under

Subsection (2)(c).]

[(5)] *(3)* Imprisonment under this section is mandatory in accordance with Section

76-3-406 .

SECTION 4. Section **76-5-402.3** is amended to read:

76-5-402.3.Object rape of a child -- Penalty.

(1) A person commits object rape of a child when the person causes the penetration or

touching, however slight, of the genital or anal opening of a child who is under the age of 14 by

any foreign object, substance, instrument, or device, not

including a part of the human body,

with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse

or gratify the sexual desire of any person.

(2) Object rape of a child is a first degree felony punishable by a term of imprisonment

of:

(a) except as provided in Subsection (2)(b)[, (2)(c), or (3),] not less than [15] *25* years

and which may be for life; *or*

(b) [except as provided in Subsection (2)(c) or (3),] life without parole, if the trier of

fact finds that*:*

(i) during the course of the commission of the object rape of a child the defendant

caused serious bodily injury to another; or

[(c) life without parole, if the trier of fact finds that]

(ii) at the time of the commission of the object rape of a child the defendant was

previously convicted of a grievous sexual offense.

[(3) If, when imposing a sentence under Subsection (2)(a) or (b), a court finds that a

lesser term than the term described in Subsection (2)(a) or (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) for purposes of Subsection (2)(b), 15 years and which may be for life; or]

[(b) for purposes of Subsection (2)(a) or (b):]

[(i) ten years and which may be for life; or]

[(ii) six years and which may be for life.]

[(4) The provisions of Subsection (3) do not apply when a person is sentenced under

Subsection (2)(c).]

[(5)] *(3)* Imprisonment under this section is mandatory in accordance with Section

76-3-406 .

SECTION 5. Section **76-5-403.1** is amended to read:

76-5-403.1.Sodomy on a child.

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon

or with a child who is under the age of 14, involving the genitals or anus of the actor or the

child and the mouth or anus of either person, regardless of the sex of either participant.

(2) Sodomy upon a child is a first degree felony punishable by a term of imprisonment

of:

(a) except as provided in Subsection (2)(b), [(2)(c), or (3),] not less than [15] *25* years

and which may be for life; *or*

(b) [except as provided in Subsection (2)(c) or (3),] life without parole, if the trier of

fact finds that*:*

(i) during the course of the commission of the sodomy upon a child the defendant

caused serious bodily injury to another; or

[(c) life without parole, if the trier of fact finds that]

(ii) at the time of the commission of the sodomy upon a child, the defendant was

previously convicted of a grievous sexual offense.

[(3) If, when imposing a sentence under Subsection (2)(a) or (b), a court finds that a

lesser term than the term described in Subsection (2)(a) or (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) for purposes of Subsection (2)(b), 15 years and which may be for life; or]

[(b) for purposes of Subsection (2)(a) or (b):]

[(i) ten years and which may be for life; or]

[(ii) six years and which may be for life.]

[(4) The provisions of Subsection (3) do not apply when a person is sentenced under

Subsection (2)(c).]

[(5)] *(3)* Imprisonment under this section is mandatory in accordance with Section

76-3-406 .

ADDENDUM B

FILED DISTRICT COURT
Third Judicial District

JAN 19 2016

Salt Lake County

By:________________ Deputy Clerk

THIRD DISTRICT COURT, STATE OF UTAH
Salt Lake County, Salt Lake Department

STATE OF UTAH, **Plaintiff,** **vs.** **JUAN CARLOS ESCOBAR-FLOREZ,** **Defendant.**	**VERDICT** **Case No. 071907926**

We, the jurors in the above case find the defendant, JUAN CARLOS ESCOBAR-FLOREZ, as follows:

Count 1: RAPE OF A CHILD
______ **Not Guilty**
__✓__ **Guilty**

Dated this 19 **day of January, 2017**
[signature] **Foreperson**

Filed Jan 19 **, 2017**

By [signature]
Deputy Clerk

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

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCING
	:	NOTICE
	:	
vs.	:	Case No: 071907926 FS
JUAN CARLOS ESCOBAR-FLOREZ,	:	Judge: RANDALL SKANCHY
Defendant.	:	Date: March 6, 2017

PRESENT
Clerk: saram
Prosecutor: JOHNSON, SANDI
Defendant Present
Defendant's Attorney(s): SIKORA, MICHAEL R

DEFENDANT INFORMATION
Date of birth: December 26, 1980
Sheriff Office#: 393974
Tape Number: N42 Tape Count: 9:37

CHARGES
1. RAPE OF A CHILD - 1st Degree Felony
Plea: Guilty - Disposition: 01/19/2017 Guilty

HEARING

TIME: 9:40 AM
The above entitled case comes before the Court for a Sentencing. Defense objects to the PSR filed and needs to be amended. The Court orders a new PSR to be completed.

SENTENCING.
Date: 05/08/2017
Time: 08:30 a.m.
Location: FOURTH FLOOR-N45
THIRD DISTRICT COURT

450 SOUTH STATE STREET
SALT LAKE CITY, UT 84114-1860
Before Judge: RANDALL SKANCHY

CUSTODY

The defendant is remanded to the custody of the Salt Lake County Jail.

Individuals needing special accommodations (including auxiliary communicative aids and services) should call Third District Court-Salt Lake at (801)238-7500 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801)238-7300.

ADDENDUM C

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- JUAN CARLOS ESCOBAR-FLOREZ, Defendant.	**STIPULATION OF THE PARTIES** Case No. 071907926 FS Judge Skanchy

The lawyers in this case agree that the following facts are true:

1. The investigation in this case was conducted by the Salt Lake City Police Department, under case 2007-159949.

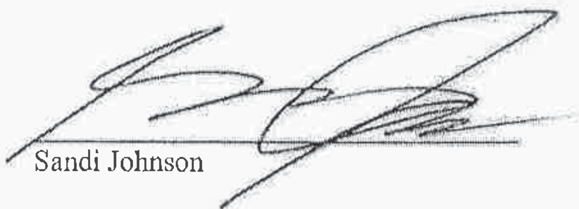
2. Detective Rodin and Officer Schuman were the only officers involved in the investigation.

3. Detective Rodin and Officer Schuman are unavailable to testify at this trial.

4. If Detective Rodin and Officer Schuman were to testify, they would testify to what is contained in their reports. They have no other memories of this case.

5. The attached pages of the Salt Lake City Police report 2007-159949 contain the entirety of their reports.

6. The Salt Lake County District Attorney's Office filed charges on October 25, 2007 and an arrest warrant was issued for Mr. Escobar-Florez. Mr. Escobar-Florez was arrested on that warrant on June 14, 2016 in Salt Lake County.



Sandi Johnson

Michael Sikora

Related Attachment(s) - Miscellaneous

Attachment Description: RESIDENT CARD/ESCOVAR-FLOREZJUAN, CARLOS
Reference Number:

07-159949

PERMANENT RESIDENT CARD
ESCOVAR-FLOREZJUAN,CARLOS
04/17/06
ESCOVAR<FLOREZ<JUAN<CARLOS<

Related Text Page(s)

Document: **INITIAL R/O**
Author: **J71 - Schuman, Mark**
Subject: **FLORES-ESCOBAR, JUAN CARLOS**
Related date/time: **Aug-29-2007 (Wed.) 2358**

This is a report of a child rape case.

I was dispatched to the listed location and met with the comp and the victim and the victim's family. They reside together at 4165 S 4150 W, WVC. The family requested a Spanish speaking officer. I did speak with them in Spanish, but was unable to fully speak with them as they know limited English, and I have somewhat limited Spanish.

The victim reports she and the suspect are in a relationship where they are boyfriend and girlfriend; about 1 month. He is about 30 years old, she is 13. She reports they has sexual relations on 8/8/07 in the evening and again on 8/9/07. The victim states that she believes this was at a home at 560 S Navajo St. There were no witnesses present.

The victim believes she may be pregnant as they went to the doctor today and police were called, presumably WVC.

The suspect is reportedly driving a brown colored Cadillac and does work at the same business as the family. The victim and the victim family resided in the same residence at 560 S Navajo St for about 6 months together.

I advised the family that Detectives may be contacting them to further the investigation in this case. They requested a Spanish speaking Detective to contact them.

Related Text Page(s)

Document: **INVSTGTR F/U**
Author: **J95 - Rodin, Constantine (Other)**
Subject: **CJC interview**
Related date/time: **Sep-04-2007 (Tue.)**

On September 4, 2007 I interviewed Karina at the SLC CJC. Karina's family lived at 560 S Navaho until recently. Karina told me that approximately 0230 hours on August 8, 2007 she went to the bathroom. When she passing through a room next to the kitchen Karina saw Juan sitting on a couch there. Juan grabbed Karina by her hand and told her to come to his room. Karina told Juan her sister was awake to what Juan told that he did not care. Karina told me Juan forced her into his room and locked the door behind them. Juan removed Karina's clothes and then his. He laid Karina on his bed and laid on top of her. Karina told me Juan put his penis into her vagina. When Karina tried to scream Juan covered her mouth with his hand and told her not to scream. Juan pulled his penis out before he ejaculated and did so into a towel. Karina left the room after that.
Karina asked Juan several times to tell her mother about what happened but he refused. The last time Karina attempted to talk to Juan was on August 28, 2007. Juan hang up on Karina. Refer to the recorded interview for further details. The interview went with the help of interpreter.
I talked to the victim's mother at the CJC location prior to the interview. The mother told me Karina told her about what had happened to her when Karina was confronted by her. The mother told me Karina left the at night and was gone until 9 am. When confronted by the mother Karina disclosed about the incident.
According to Karina's parents Juan also moved out from the Navajo address and his current address in unknown.

Related Text Page(s)

Document: **INVSTGTR F/U**
Author: **J95 - Rodin, Constantine (Other)**
Subject: **phone contact**
Related date/time: **Sep-04-2007 (Tue.)**

On September 4, 2007 I talked to the suspect on the phone (with help of Joann Vigil-records clerk) and Juan promised to come and see me at the PSB on the same day at 1800 hours.
Juan failed to make an appointment and at approx. 1840 hours Officer Peterson called and talked to Juan in Spanish. Juan told Officer Peterson he would come and see me on September 5, 2007 at 1500 hours.
On September 5, 2007 at approx. 0900 hours I was at Juan's place of employment at 2575 S 600 W, Euro Stone Tile. I was informed Juan had quit his job citing problem with the police. The last known address for Juan was 4171 W 5700 S. Juan left the place approx. two weeks prior to the incident. Juan's SS# 647472749 is not valid. I obtained a copy of Juan's "green" card where he is listed as a Mexican national. The people who worked with Juan told the management he was from El Salvador. Juan was employed as a laborer.

ADDENDUM D

1 at which point the State intends to rest and it's the present
2 intention of the defense not to call any witnesses, which means
3 let's examine our jury instructions and see where that leaves
4 us.
5 I have received some additional proposed instructions
6 from the State, I've reviewed them. And I'll hear if there are
7 any arguments associated with their acceptance.
8 **MR. SIKORA:** Your Honor, the only objection I have
9 with respect to the instructions that have been submitted by
10 Ms. Johnson is the flight instruction. Mine is not numbered.
11 At this point I think you told me that yours is, just for
12 clarification.
13 **THE COURT:** Yeah. I've just numbered it as 32.
14 **MR. SIKORA:** And it's in -- introduced by -- evidence
15 was introduced at trial that the defendant may have fled or
16 attempted to flee from the crime, et cetera, et cetera, et
17 cetera.
18 **THE COURT:** Yes. Uh-huh.
19 **MR. SIKORA:** I'm going to object to that on the
20 grounds that I just don't know that there was sufficient
21 evidence and I don't know that evidence will change at all with
22 respect to flight, especially in light of the last witness who
23 said -- this was Dr. Hansen, that what Yolanda told my -- or
24 what Yolanda told Dr. Frazier, the doctor who interviewed her,
25 was that it was the family, the family wanted him to leave, he

1 wouldn't leave, and so they were the ones who left.

2 And in fact the next witness who -- who testifies,

3 Gloria Ruiz from DCFS, will testify substantially the same way

4 regarding the statement that Yolanda -- Yolanda made to her. I

5 would also indicate that in the stipulated exhibit that has

6 gone to the jury now, when doc -- when officer -- Detective

7 Rodin was investigating and he went to Juan's place of

8 employment to try to find him, yes, in fact it -- it appears

9 that appointments were made for Juan to go in -- to go into the

10 police and he did not make those appointments.

11 Detective Rodin goes out to his place of employment.

12 They tell him that Juan had quit his job citing a problem with

13 the police. The last known address for Juan was 4171 West 5700

14 South. There's no indication that Detective Rodin ever went

15 out to that address to try and find him. So I'm not even sure

16 that there was much of an effort made to try to find him and

17 then the case was simply closed. So on that basis, I would

18 object to the flight instruction.

19 **THE COURT:** Ms. Johnson?

20 **MS. JOHNSON:** Your Honor, based on the testimony of

21 the witnesses, they indicated that at the same time that this

22 event occurred, that Mr. Escobar-Florez stopped coming home to

23 that place of residence, and also the father testified he

24 stopped coming into work. And I think the fact that in the

25 stipulation where he specifically quit his job at essentially

1 right after he talked with the police officer, the next day
2 that he quit citing problems with the police. I think that
3 indicates that there is -- the flight instruction is supported
4 the evidence.
5 **THE COURT:** I'm going to overrule the objection and
6 to receive the exhibit -- or Instruction No. 32 that the
7 previously labeled flight instruction finding that a reasonable
8 juror could conclude that there is sufficient evidence to make
9 a determination associated with flight. And we've leave that
10 final discussion for the jury.
11 All right. So we'll go ahead and make additional
12 copies beginning with Instruction No. 29 through 33.
13 And then we'll bring the jury out in about five
14 minutes.
15 **MS. JOHNSON:** Your Honor?
16 **THE COURT:** Yes.
17 **MR. SIKORA:** Just putting on the record, my client's
18 right to testify and his choice not to.
19 **THE COURT:** All right. Let's do that.
20 **MR. SIKORA:** Are we on?
21 **THE CLERK:** Yes.
22 **MR. SIKORA:** Okay. Your Honor, even though we
23 haven't gotten to the defense, the defense case yet, the State
24 has not rested. For purposes of the record, I want to indicate
25 that I have spoke at length with my client about his right to

INSTRUCTION NO. 32

Evidence was introduced at trial that the defendant may have fled or attempted to flee from the crime scene or after having been accused of the crime. This evidence alone is not enough to establish guilt. However, if you believe that evidence, you may consider it along with the rest of the evidence in reaching a verdict. It's up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a "guilty conscience," that does not necessarily mean he is guilty of the crime charged.