Case No. 20170390-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

v.

JUAN CARLOS ESCOBAR-FLOREZ,
Defendant/Appellant.

Brief of Appellee

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

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INTRODUCTION

Defendant rented a room in the basement apartment of the victim's family. In August 2007, Defendant accosted the 13-year-old victim after she got up to use the bathroom in the middle of the night. He covered her mouth, forced her into his bedroom, and raped her.

On appeal, Defendant argues that his counsel was ineffective for various reasons—because counsel stipulated to admitting the police reports about the incident, did not object to admitting other hearsay statements, did not ask the jurors on voir dire about any bias against illegal immigrants, purportedly did not keep Defendant adequately informed about the case, and did not call him to testify.

To prevail on any of these claims, Defendant must show both that counsel's performance was deficient and that absent counsel's deficient performance, the result of the trial would likely have been different. Defendant has not made that showing with respect to any of his claims.

Counsel stipulated to admitting the police reports, but did so against counsel's preference because Defendant insisted on going to trial even though the officers were unavailable to testify and even though counsel had advised Defendant that getting a continuance was a better option. Counsel did not object to certain hearsay statements from a doctor and a caseworker, but those statements furthered the defense theory of the case. Counsel did not ask for more extensive voir dire, but Defendant has not shown, as he must, that a biased juror sat. Defendant has not shown that counsel did not keep him adequately informed or how keeping him better informed might have resulted in a more favorable outcome. Moreover, Defendant has not shown that counsel performed deficiently for not calling him to testify. The record shows that counsel advised Defendant not to testify, but that the decision not to testify was Defendant's. And there is no evidence in the record about what Defendant would have testified to, let alone that it would have so materially changed the evidentiary picture that there would have been a reasonable likelihood of a result more favorable to Defendant.

Accordingly, Defendant has not met his burden to show both deficient performance and prejudice with respect to his ineffective assistance claims.

Defendant also has not shown that the trial court erred when it ruled that the evidence was sufficient to support a jury instruction on flight or when it ruled that the evidence was sufficient to support Defendant's conviction. This Court should therefore affirm his conviction.

STATEMENT OF THE ISSUES

1. Defendant argues that his trial counsel was ineffective because counsel stipulated to the use of police reports in lieu of testimony after Defendant insisted on going forward with trial despite the unavailability of the officers who prepared the reports. Has Defendant proved that no competent counsel would have made the decision that his counsel made and that, as a result, Defendant suffered prejudice?

Standard of Review. When a defendant argues for the first time on appeal that his counsel was ineffective, there is no ruling for an appellate court to review. The issue therefore presents a question of law. *State v. Ott*, 2010 UT 1, ¶16, 247 P.3d 344.

2. Has Defendant proved that trial counsel was ineffective because he did not object to other hearsay statements that actually supported the defense theory?

Standard of Review. See standard for issue 1.

3. Has Defendant proved that trial counsel was ineffective because he did not ask about bias against illegal immigrants during voir dire?

Standard of Review. See standard for issue 1.

4. Has Defendant proved that trial counsel was ineffective because he purportedly did not keep Defendant adequately informed about the case or because he did not call Defendant to testify?

Standard of Review. See standard for issue 1.

5. Was the evidence sufficient to support an instruction that allowed the jury to consider Defendant's flight as evidence of consciousness of guilt?

Standard of Review. This Court reviews a trial court's decision to give a flight instruction for correctness. *State v. LoPrinzi*, 2014 UT App 256, ¶10, 338 P.3d 253.

6. Was the evidence sufficient to support Defendant's conviction?

Standard of Review. The appellate courts will not disturb a jury verdict unless "the evidence and all inferences which may be reasonably drawn from it," when viewed "in the light most favorable to the verdict, " are "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime." *State v. Shumway*, 2002 UT 124, ¶15, 63 P.3d 94.

7. Does the cumulative effect of any error undermine confidence that Defendant's trial was fair?

Standard of Review. Under the cumulative error doctrine, an appellate court will reverse "only if the cumulative effect of the several errors undermines [its] confidence … that a fair trial was had." *State v. Lucero*, 2014 UT 15, ¶11, 328 P.3d 841.

STATEMENT OF THE CASE

A. Summary of relevant facts.

At the time of the offense, on or about August 8, 2007, Defendant worked with the 13-year-old victim's stepfather. R317. The victim's family lived in a Salt Lake City basement apartment. R339. They rented one of the rooms to Defendant. R317. The victim shared one of the bedrooms with her sister, but her sister was sleeping with their parents the night of the offense. R319.

That night the victim got up to use the bathroom. R320. When she exited, Defendant was waiting outside the bathroom. R320. He grabbed her, covered her mouth, told her not to scream, took her to his bed, forced her down onto the bed with her hands behind her back, and began touching her breasts. R321-22. He told her not to scream or he would harm her mother. R322. He kissed her neck, continued touching her breasts, and then put his

penis inside her vagina. R323. She had not had sex with anyone before this time. R324. It hurt and she asked him to stop, but he did not. *Id.* He "was just laughing." *Id.* He then turned around and left the room. *Id.*

The victim returned to her room and cried. R325. But in the morning she "went to school, like any other regular day." *Id.* She told a friend what had happened, but she did not tell her parents or police until later. *Id.* She was afraid to tell her mother because she "had lost [her] virginity" and thought her mother would be upset. R326. She saw Defendant the day after the offense, but not again until Defendant was caught about nine years later. R327, 332.

The victim's mother noticed that at about the time of the incident the victim became fearful and emotional, "not talking anymore, not playing or going out with [her family] anymore." R350. Both her mother and stepfather asked her what was wrong, but "she didn't want to say anything." *Id.* Finally, apparently a few weeks after the offense, the victim agreed to tell her mother what had happened. *See* R351-52. She told her mother that Defendant grabbed her in the corridor outside the bathroom, said he would harm her family if she screamed, and penetrated her vagina. *Id.*

Her mother and stepfather then took her to a medical clinic, and the clinic sent her to a hospital. R351. Hospital personnel examined the victim,

found no injuries, and told her mother that she was not pregnant. R352. The mother did not remember talking to police. *Id.* The mother took the victim to a psychologist two or three times, but the victim did not want to talk to the psychologist or anyone else about the incident. R355. The victim and her family moved out of their home about two months after the offense. R341.

At trial ten years later, the victim acknowledged that she told her mother about the incident sometime after it occurred. R340. She remembered that police came to her home and that her parents talked to them. R341. She did not remember talking to the police herself. R341-42. Asked about State's Exhibit 1, a screenshot of a video in which she was being interviewed at the Salt Lake City Children's Justice Center (CJC), she acknowledged talking to the interpreter and a man in a blue shirt. R343; *see also* State's Ex. 1, p.18. The victim did not know the man in the blue shirt or whether he was a police officer, but she agreed that he was the only one who asked her questions. R343. While some of her answers to his questions differed somewhat from what she testified at trial, she testified that her testimony at trial accorded with the truth as she remembered it. R344.

The victim's stepfather testified that the victim's behavior changed in August 2007 and that within a week she told her mother and him what had

happened. R365. By that time, Defendant had stopped coming home and stopped coming to work. *Id.*

B. Summary of proceedings and disposition of the court.

In October 2007, the State charged Defendant with rape of a child and issued a warrant for his arrest. R1-5. Defendant was apprehended and made his initial appearance in June 2016, almost ten years later. R6-7. Defendant waived his right to a preliminary hearing and the court bound him over. R28.

At a November 2016 scheduling conference, the court scheduled a jury trial for January 18, 2017. R87. At a January 9 scheduling conference, defense counsel told the court that the defense was ready for trial. R184. Counsel noted that he had spoken to Defendant earlier in the week about two officers who were both out of state and would not be available for trial. R184. Counsel said that Defendant wanted to go forward with trial anyway. *Id.* So, counsel explained, he and the prosecutor were going to try to come to an agreement about how to present at trial the police reports the two officers had prepared. *Id.* Counsel added that he would have preferred a continuance until the officers were available and had conveyed that preference to Defendant, but that Defendant had decided he wanted to go forward even though the officers could not be present. R185.

The prosecutor and defense counsel stipulated to admitting the police reports, and the prosecutor put the stipulation on the record. *See* R367. The prosecutor explained that both defense counsel and the State had subpoenaed as witnesses Officer Mark Schuman, a uniformed officer who responded to the victim's home, and Detective Constantine Rodin, who conducted the CJC interview and tried to locate the defendant. *Id.* Both officers were out of state and unavailable. *Id.*

Both counsel had agreed to introduce the officers' entire reports. *Id.* The prosecutor noted that neither of the officers had "an independent recollection of anything about the case." *Id.* If they "were called to testify, [they] would get on the stand and essentially read their report[s]." *Id.*; *see also* State's Ex. 2 (Stipulation of the Parties) (included in Addendum) (received into evidence at R419).

The State called five witnesses at trial: the victim; her mother; her stepfather; pediatrician Karen Hansen, a University of Utah faculty member working on the Safe and Healthy Families Child Protection Team at Primary Children's Hospital; and Gloria Ruiz, a DCFS caseworker. The defense called no witnesses. The victim, her mother, and her stepfather testified to the facts set forth in the summary of the facts above.

Dr. Hansen's testimony. Dr. Lori Frazier examined the victim on September 12, 2007, a month after the offense. R403. Ten years later, at the time of trial, she had relocated to Pennsylvania. R402.

Dr. Hansen testified to Dr. Frazier's report. Dr. Hansen explained that while she did not examine the victim, she relied on the notes made by Dr. Frazier, who did the exam, and on photo documentation of the victim's anogenital area. *Id.* The notes indicated that Dr. Frazier spoke through an interpreter to the victim and her mother. R403. Both the victim and the mother indicated that the offense had occurred on August 8 or 9. R404. The victim told Dr. Frazier that Defendant grabbed her and took her to his room, undressed her, and put his private into her private. R405. When Dr. Frazier asked her whether the penis had gone in the front private and the back private, the victim said, "both." *Id.* Although a nurse had asked the victim what words she used for the areas, the victim declined to provide her names for the body parts. *Id.* The victim said there was some pain at first, but that she did not recall any blood and did not know whether Defendant had used a condom. R406.

Dr. Hansen testified that Dr. Frazier used a colposcope to look into the anal-genital area and that Dr. Frazier collected samples from the victim to

check for sexually transmitted diseases (STDs). *Id.* Dr. Frazier saw no injuries to the victim's anal area. *Id.* The samples for STDs came back negative. R417.

Dr. Hansen reviewed the photographs of the vaginal area and concluded that labia majora, minora, and clitoris appeared normal. R406. The hymen appeared estrogenized, meaning the victim had gone through puberty. R407. Dr. Hansen explained that an examiner cannot tell whether someone has or has not had sex simply by looking at the hymen. R408. Once estrogen is produced in the process of puberty, the hymen becomes very stretchy and does not necessarily tear and leave evidence. *Id.* In fact, of women who have sex for the first time after they have reached menses, only about 40% of them will have an injury that leaves evidence. *Id.* In sum, Dr. Hansen could not determine whether the victim had or had not had sex from the photographs. *Id.* Asked what she could determine from the photographic evidence, Dr. Hansen conceded, "Not much." R410.

Moreover, because the exam was conducted more than 72 hours after the offense, Dr. Frazier had not collected any DNA swabs. R409. Such evidence must be collected within three days of the event or the DNA evidence is gone. *Id.*

Dr. Hansen also testified that the victim's mother told Dr. Frazier that the family had asked Defendant to leave their home, but he did not want to leave and so the family moved. R413-414.

Gloria Ruiz's testimony. The victim was interviewed at the Salt Lake City CJC on September 4, 2017, almost a month after the offense. *See* R426; *see also* State's Ex. 1 (date-stamped screenshot of CJC interview). Gloria Ruiz was then a DCFS caseworker investigating cases of child sexual abuse. *Id.* According to Ruiz's notes, Detective Rodin interviewed the victim at the CJC and she interviewed the mother and the stepfather. R428-30. Ruiz testified that the mother told her that Defendant had declined to move out of the family home and so the family was moving out. R431.

Ruiz also testified that the mother told her that at some point after the offense the victim had left the family home in the middle of the night. *Id.* The victim was found in the early morning hours near a parking lot close to the place where Defendant worked. *Id.* The victim said that the reason she wanted to talk to Defendant was to ask him to talk to her mother about the incident. *Id.*

Ruiz never interviewed Defendant. R435. Asked why, she testified that "he was not found back then, nobody knew where he was." R435. The family told her that after they moved out, Defendant also moved out. R436.

Other matters. Just before Ruiz testified on the second day of trial, the trial court read to the jury the parties' stipulation to receive the police reports as evidence. R419-20. The court then gave each juror a copy of the police reports attached to the stipulation and allowed the jurors to go back into the jury room and read the reports so that they would have before them all the evidence before closing arguments. R367-70, 419-20

The trial court judge also advised the parties that he had read some proposed additional jury instructions and asked whether there was any objection to them. R421. Defense counsel objected to the State's proposed flight instruction. *Id.* Counsel argued that the evidence was insufficient to support the instruction. *Id.* Counsel relied on testimony that the family had asked Defendant to leave and that he would not. R421-22. Counsel also claimed that the police did too little to try to find Defendant after he failed to keep an appointment. R422. The court denied the objection, ruling that a reasonable juror could find that Defendant had fled. R423.

Defense counsel also put on the record that he had spoken at length with Defendant about his right to testify at trial. R423. Counsel stated that he had advised Defendant that he did not think it was in Defendant's best interest to testify, and that Defendant had chosen to take that advice and not

testify. R424. But counsel made clear that Defendant did "understand that it's his choice — ultimately his choice alone not to do so." *Id.*

Following closing arguments, defense counsel put on the record his motion for a directed verdict, reserved at the end of the State's case in chief. R469-70. The trial court denied the motion, ruling that a reasonable juror could have found all the elements of the offense based on the evidence presented. R470.

The jury found Defendant guilty of rape of a child. R125. The trial court sentenced him to an indeterminate term of fifteen years to life. R158. Defendant timely appealed. R161.

SUMMARY OF ARGUMENT

1. Defendant has not shown that counsel was ineffective for stipulating to admitting the police reports. Counsel did so only after Defendant insisted on going to trial despite the unavailability of the two police officers who had prepared the reports and only after Defendant had rejected counsel's advice that getting a continuance was likely a better option. Further, admitting the reports did not result in any comment on his exercise of his right to silence and did not otherwise violate his right against compelled self-incrimination. And, significantly, the reports contained information that helped support the defense theory.

2. Defendant has not shown that counsel was ineffective for not objecting to hearsay testimony from Doctor Hansen and DCSF caseworker Ruiz. Their testimony was potentially helpful to the defense. Dr. Hansen testified that she could not tell whether the victim had or had not had sex. And Ms. Ruiz testified that the victim's mother told her that the victim did not tell the mother about the rape until the mother confronted the victim at some point after the attack, when the victim had stayed out all night, potentially supporting defense counsel's argument that the victim got into trouble with her mother and then accused Defendant to get out of trouble.

3. Defendant claims that trial counsel was ineffective because he did not ask about bias against illegal immigrants during voir dire. He argues that counsel's not asking about such bias violated his right to a trial by an impartial jury. But Defendant has not proved or even argued that this was a line of inquiry that all competent counsel would have pursued. The court told the prospective jurors that Spanish was the primary language of the defendant, the victim, and several of the other individuals involved in this case. They court asked the prospective jurors whether they would be able to be fair to both the prosecution and the defense in light of this matter. Counsel could reasonably have decided that the court's question about language was enough to elicit any bias towards immigrants and that further inquiry was

not necessary. Moreover, counsel could reasonably have anticipated that the court would instruct the jury, as it did, that the verdict must be based only on the evidence produced in court.

Most significantly, in a case like this one, Defendant must prove that counsel's not questioning the prospective jurors about any bias toward undocumented immigrants prejudiced him because the omission resulted in seating an actually biased juror. Defendant has not attempted to make that showing.

4. Defendant claims that trial counsel performed deficiently for not keeping him informed about the case and for not calling him to testify. But Defendant has not alleged what counsel failed to tell him or how telling him would have changed the result. Moreover, the record shows that although counsel advised Defendant not to testify, counsel left the decision to Defendant, who chose not to testify.

5. The evidence sufficed to support the trial court's decision to give the jury an instruction on flight. The evidence supported a reasonable inference that Defendant fled out of a consciousness of guilt.

6. The evidence sufficed to support Defendant's conviction. Although there were some inconsistencies between the victim's earlier reports and her testimony at trial, her testimony was not so inconclusive or

inherently improbable or so counter to human experience that no reasonable person could have believed it.

7. Defendant's cumulative error claim fails. The cumulative error doctrine applies where a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of the trial. Here, Defendant has not demonstrated any ineffective assistance, but even if he had, given counsel's overall performance, the identified acts or omissions did not overcome the presumption that counsel rendered reasonable professional service. Moreover, if the trial court erred in any way, the error did not undermine confidence in the fairness of the trial.

ARGUMENT

I.

DEFENDANT HAS NOT SHOWN THAT COUNSEL WAS INEFFECTIVE FOR STIPULATING TO ADMITTING THE POLICE REPORTS

Defendant claims that trial counsel was ineffective because he stipulated to admitting police reports in lieu of the testimony of unavailable police witnesses. Br.Aplt. 12-22. Defendant argues that the stipulation deprived him of his right to confront the witnesses against him and of his right to remain silent and not incriminate himself. *Id*

To demonstrate that his counsel was ineffective, Defendant must prove two elements. *See Strickland v. Washington*, 466 U.S. 668, 687, 697 (1984). First, he must prove that his counsel's performance was deficient, that is, objectively unreasonable. *Id.* at 687. Second, he must prove that his counsel's deficient performance was prejudicial—that there is a reasonable likelihood that, absent counsel's deficient performance, the result at trial would have been different. *Id*. It is "not enough" for a defendant to show that "counsels' performance could have been better or that counsels' performance might have contributed to his conviction." *State v. Tyler*, 850 P.2d 1250, 1258–59 (Utah 1993). Rather, he must show "*actual unreasonable representation and actual prejudice*." *Id.* at 1259 (emphasis in original).

"*Strickland's* standard, although by no means insurmountable, is highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). And surmounting it "is never an easy task." *Premo v. Moore*, 562 U.S. 115, 122 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 346, 371 (2010)).

A. Defendant has not shown that trial counsel performed deficiently when he stipulated to admitting the police reports at trial.

Defendant claims that trial counsel performed deficiently when he stipulated to admitting the police reports at trial. To establish deficient performance under *Strickland*, a defendant must show that his counsel's

performance "fell below an objective standard of reasonableness." 466 U.S. at 688. "Judicial scrutiny of counsel's performance," is "highly deferential." *Id.* at 689. And "counsel is strongly presumed to have rendered adequate assistance." *Id*. at 690. A defendant must rebut that presumption to prove deficient performance.

Objective reasonableness is the measure of constitutionally compliant representation, not whether counsel had a considered strategy for everything that happened at trial. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *accord Premo v. Moore*, 562 U.S. 115, 121 (2011); *Harrington v. Richter*, 562 U.S. 86, 104 (2011); *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). And the purpose of the effective assistance guarantee "is not to improve the quality of legal representation.'" *Flores-Ortega*, 528 U.S. at 481 (quoting *Strickland*, 466 U.S. at 689). Rather, it is "'simply to ensure that criminal defendants receive a fair trial.'" *Id*. (quoting *Strickland*, 466 U.S. at 689).

"The Sixth Amendment," therefore, "guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam); *accord Burt v. Titlow*, 571 U.S. 12, 24 (2013); *Strickland*, 466 U.S. at 687.

The Supreme Court has also recognized that "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at

689. And the Court has held that "while in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' … it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). "Judicial scrutiny of counsel's performance," therefore, "must be highly deferential." *Strickland*, 466 U.S. at 689. A "court considering an ineffectiveness claim must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 689). While it "is all too tempting" and "easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," courts must resist that temptation. *Strickland*, 466 U.S. at 689. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.

The standard of proof for *Strickland*'s deficient performance element thus "sets a high bar." *Buck v. Davis*, 137 S.Ct. 759, 775 (2017). And it distills

to this—to prove deficient performance, a defendant must prove that "no competent attorney" would have proceeded as his counsel did. *Moore*, 562 U.S. at 124.

1. Defendant has not proved that no competent counsel would have stipulated to admitting the reports particularly when, as here, Defendant disregarded counsel's advice and insisted on going forward with trial rather than wait until the officers were available to testify.

Defendant claims that counsel's stipulation to admitting the entire police reports violated his right to confront the witnesses against him. Br.Aplt. 14. But Defendant does not acknowledge that counsel spoke with him about going forward without live testimony from the officers who prepared the reports. R184. Nor does Defendant acknowledge that counsel told him that counsel believed it would be better to get a continuance and go to trial when the witnesses became available. R185. Nor has Defendant shown that the prosecutor would have agreed to go forward without either the police reports or the officers' live testimony.

Thus, Defendant has not proved that he could have gone forward with trial, as Defendant determined he wanted to do, had counsel not stipulated to admitting the police reports. And he has not proved that counsel performed deficiently by acceding to Defendant's insistence that the trial go

forward, even though that meant that the trial would proceed, in part, on reports from unavailable police officers substituting for their live testimony.

Nor has Defendant shown that trial counsel should have tried to excise selected portions from the police report. The prosecutor agreed to proceed without a continuance, admitting the entirety of the reports in lieu of the officers' testimony. R367. Nothing suggests that she would have been willing to go forward with trial, admitting the reports in lieu of the officers' testimony, had trial counsel demanded that they excise the portions of the police reports to which Defendant now objects.

Accordingly, Defendant has not proved that no competent counsel would have stipulated to admitting the police reports in order to avoid the continuance to which Defendant objected. To the contrary, the Sixth Amendment "implies a right in the defendant to conduct his own defense, with *assistance* at what … is his, not counsel's trial." *State v. Maestas*, 2012 UT 46, ¶235, 299 P.3d 892 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)) (emphasis in *Maestas*). "Further, the [Supreme] Court has stated that the 'language and spirit of the Sixth Amendment contemplate that counsel … shall be an aid to a willing defendant — not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Id.* (citing *Faretta v. Caifornia*, 422 U.S. 806, 820 (1975)). "In other words, the

Sixth Amendment speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* (citing *Faretta*, 422 U.S. at 820). "Thus, a defendant has a Sixth Amendment right to make important decisions about his or her defense." *Id.* And once he has exercised that right contrary to his counsel's advice not to, he generally cannot blame counsel for that decision.

In sum, Defendant has not proved that trial counsel performed deficiently when counsel stipulated to admitting the police reports in order to avoid the very thing Defendant insisted on avoiding—a continuance to secure the officers' in-court testimony. On this record, Defendant could not have it both ways. He had to accept the continuance to exercise his right to confront the officers. Or he had to waive that right to in order to avoid a continuance. He chose the latter against his counsel's advice. He cannot nullify that choice by arguing that counsel was deficient for letting Defendant make the choice that Defendant had the right to make.

2. Defendant has not proved that no competent counsel would have stipulated to admitting the reports where the reports did not reference coerced self-incrimination or evidence that he invoked his right to silence.

Defendant further claims that admitting the police reports violated his right against compelled self-incrimination. Br.Aplt. 20. He apparently believes that the police reports commented on his exercise of his right to

silence. *Id.* 20-21. This is so, according to Defendant, because the officers reported that Defendant agreed to come in to talk to them, but ultimately failed to do so.

But Defendant has not adequately briefed this claim. "An issue is inadequately briefed when 'the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.'" *Smith v. Smith*, 1999 UT App 370, ¶ 8, 995 P.2d 14 (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1998)). An "appellant who fails to adequately brief an issue will almost certainly fail to carry its burden of persuasion on appeal." *State v. Johnson*, 2017 UT 76, ¶47, 416 P.3d 443 (citation and internal quotation omitted).

Defendant does not even attempt to explain how noting that Defendant did not fulfill his agreement to talk to police was so clearly a comment on his right to remain silent that all competent counsel would have raised the issue. The Court should deny the claim for that reason alone.

In any event, competent counsel could conclude that the objection was not supportable. The notations in the report did not clearly comment on Defendant's right to remain silent. Officer Rodin's police report contained statements that Defendant "promised to come see me" but "failed to make an appointment" and that "Juan told Officer Peterson he would come and see

me on September 5." State's Ex. 2 (report attached to stipulation at p.9). But Defendant has not proved that not following through on promises to meet with police was so clearly an exercise of Defendant's right to remain silent that all competent counsel would have recognized it to be so and objected to the jury knowing about it.[1]

3. Defendant has not proved that no competent counsel would have stipulated to admitting some version of the officers' anticipated testimony because counsel relied on it to support the defense.

If Defendant means that counsel should have tried to force the trial to go forward without the jury hearing any evidence from the officers, he has not proved that that was even an option. In any event, it is plain from the record that trial counsel wanted the jury to hear what the officers had to say — counsel subpoenaed them. R63, 83.

[1] Moreover, Defendant misapplies the authorities upon which he relies. In *State v. Palmer*, 800 P.3d 339, 345 (Utah App. 1993), the trial judge admitted a document that stated, "Mr. Palmer told me he would call back after he decided whether or not he wanted to talk to me in person or not" and "Mr. Palmer then said he had never once claimed that it didn't happen, he just wanted to get some advice before talking to me." And in *State v. Gallup*, 2011 UT App 422, ¶17, 267 P.3d 289, the State argued that Gallup's hanging up the phone on a police officer demonstrated his guilt. These cases involved improper reference to and improper inference from Palmer's and Gallup's exercise of the right to silence. But here, the testimony did not refer to Defendant's exercise of his right to silence, and the prosecutor did not argue that Defendant was guilty because he somehow exercised his right to silence.

Defendant has not argued that no competent counsel would have done as trial counsel did. And the record establishes the contrary—counsel relied on the reports to support the defense theories.

The reports are very brief. Officer Schuman's August 29, 2007, report includes the following information:

- The victim reports that she and the suspect are in a relationship where they are boyfriend and girlfriend; about 1 month. He is about 30 years old, [and] she is 13. She reports they had 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.

State's Ex. 2 (report attached to stipulation at p.7). In both his opening statement and closing argument, trial counsel told the jury that the victim could not be believed because of the inconsistencies in her report of the offense. *See* R313-24, 315, 457-65. For example, the victim testified at trial that she and Defendant had sex only once—at the time of the offense. R149. But Officer Schuman's report states that she claimed in 2007 that they had sex on two different occasions and thereby provided evidence of an inconsistency in her story. State's Ex. 2, p.7. In his opening statement, defense counsel told the jury that the "inconsistencies" in the case would not "add up," but would show that "[Defendant] did not have sex with [the victim]." R315. He argued

again in closing that Officer Schuman's report showed that in August 2007, she reported having had sex on both August 8 and August 9. R454.

Detective Rodin's September 4, 2007 report of his CJC interview included a statement from the victim's mother. State's Ex. 2 (report attached to stipulation at p.8). The mother told him that the victim left the home one night and was gone until 9 a.m. State's Ex. 2, p.8. The mother said that when she confronted the victim about this, the victim disclosed the rape. *Id.* Defense counsel argued in closing that the victim stayed out all night, got in trouble with her mother, and then got out of trouble by blaming Defendant. *See* R458. And Defendant has not proved that the evidence was available from another source—mother and victim both denied the victim's all-night absence during their trial testimony. *See* R335, 356-57.

Detective Rodin's second September 4, 2007 report also provided information potentially helpful to the defense. It indicated that Defendant's "green" card listed him as a Mexican national, but that the people who worked with him said that he was from El Salvador. State's Ex. 2, p.9. This information was potentially helpful to defense counsel's argument that Defendant's fleeing was motivated by immigration problems, not by consciousness of guilt in this case. *See* R456 ("[H]e's El Salvadoran and

working with a counterfeit green card, that too would provide all kinds of justification for not wanting to talk to the police.").

In sum, defense counsel reasonably could have decided that evidence from the police reports was important to support the defense theory. And because the officers were unavailable to testify without a continuance that Defendant rejected, Defendant left counsel with no choice but to admit the reports.

Moreover, it would also have been objectively reasonable for counsel not to object to admitting the reports. *See Strickland*, 466 U.S. at 688. Competent counsel could reasonably have preferred to deal with the police reports, which were minimal, and to avoid any unfavorable surprise testimony that the officers might have offered had trial been continued until they could appear to testify in person. This too would have been an objectively reasonable basis not to object to presentation of the police reports in their entirety.

Finally, much of the information in the reports was cumulative of other evidence to which witnesses testified, and counsel may have concluded that its additional effect on the evidentiary picture would be inconsequential. *See, e.g.,* Detective Rodin's report of the parents' statements about Defendant's moving out, State's Ex. 2, p.8, and similar testimony the stepfather gave at

trial, R.362; *see also* Detective Rodin's report about the victim's CJC interview describing the rape, State's Ex. 2, attached report at p.8, and her similar testimony about the rape at trial, R.319-24.

And some parts of the reports would have been admissible as non-hearsay— not offered to prove the truth of the matter asserted, but to show why police proceeded as they did. *See, e.g.,* State's Ex. 2, attached report at p.9 (Officer Rodin's statements about the officers' scheduling successive interview appointments with Defendant).

B. Defendant has not proved that admitting the police reports prejudiced him.

Moreover, Defendant has not shown prejudice—that but for counsel's stipulating to admitting the reports, "the result of the proceeding would have been different." *State v. Sessions*, 2014 P.3d 44, ¶131, 342 P.3d 738. The reports allowed him to put on evidence both of the victim's inconsistent stories about the sexual abuse and of her potential motive for fabricating her allegation that he had raped her. In fact, the reports provided the primary basis for the latter theory. Defendant has not proved that in the context of all the evidence, any negative evidence in the reports outweighed the potential value of this evidence to undermine the victim's credibility.

II.

DEFENDANT HAS NOT SHOWN THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT OBJECT TO ADMITTING OTHER HEARSAY STATEMENTS FAVORABLE TO DEFENDANT

Defendant argues that trial counsel was ineffective because he did not object to other hearsay evidence. Br.Aplt. 21. He claims specifically that counsel should have objected to the testimony of Dr. Karen Hansen, who relied on the report of Dr. Lori Frazier and on photo documentation from Dr. Frazier's exam, and to the testimony of DCSF caseworker Gloria Ruiz, who testified about what the victim's parents told her. *Id.* Defendant has not proved either deficient performance or prejudice.

A. Defendant has not shown that counsel performed deficiently

Caseworker Ruiz's testimony added little, if anything, to the to the State's case. Ruiz testified that the mother told her that the sometime after the offense, the victim left home in the middle of the night and was found in the early morning hours the next day at a parking lot close to where Defendant worked. R431. Ruiz testified that the mother said that when she confronted the victim, the victim said that she was looking for Defendant to ask him to come and talk to the mother. *Id.* Her notes indicated that Defendant could not be found at the time. R435. This evidence is cumulative;

the mother reported confronting the victim about the same all-night absence to Detective Rodin. *See* State's Ex. 2, attached to report at p.8.

Moreover, as explained, the testimony was favorable to the defense. Ruiz's testimony that the mother told her that the victim was out all night, R431, supported trial counsel's closing argument that the victim stayed out all night, got in trouble with her mother, and then accused Defendant of sexual abuse to get out of trouble, *see* R457-78. It also undercut the mother's testimony that she never said that the victim finally told her what was going on after the victim had stayed out all night. *See* R356-57. Thus, counsel could reasonably have chosen not to object to Ruiz's testimony.

Trial counsel could even more reasonably have decided not to object to Dr. Hansen's testimony. First, nothing suggests that had defense counsel objected to Dr. Hansen's testifying from Dr. Frazier's report, the State could not have secured Dr. Frazier's presence to testify about her own report. Moreover, competent trial counsel could reasonably have concluded that it was better to have Dr. Hansen present the report, where her testimony was limited by the report, rather than risk having Dr. Frazier testify and possibly give additional facts that could have undermined the defense.

Even more significantly, defense counsel could reasonably have decided not to object because Dr. Hansen's testimony was helpful to the

defense. Dr. Hansen testified, based on Dr. Frazier's report and on the photographic documentation, that there was no medical evidence of any injury to the victim's anal or vaginal areas. R406-09. Dr. Hansen also testified that no one could tell from examining the victim or the photos of her vaginal area whether the victim had had sex. R407-09. Dr. Hansen also testified that the tests for STDs all came back negative and that there was no DNA evidence linking Defendant to the victim. R409, 417.

Asked what she could say about what the medical evidence showed on whether victim had had sex, Dr. Hansen conceded, "Not much." R410. But what she did say was useful to the defense — there was no forensic evidence (anal or genital injuries, STDs, DNA, etc.) supporting victim's accusation that Defendant had sex with the her or even that she had sex at all.

B. Defendant has not shown prejudice based on trial counsel's alleged deficient performance.

Nor has Defendant proved that Defendant suffered prejudice as a result of trial counsel's not objecting to admission of Dr. Hansen's and Ms. Ruiz's testimony. First, where the State could have called Dr. Frazier and where Dr. Frazier could permissibly have testified to what she learned from the exam and what she included in her report, Defendant cannot show that he suffered any prejudice for not objecting to Dr. Hansen's doing so. *See State v. McNeil*, 2016 UT 3, ¶31-45, 365 P.3d 699 (where hearsay evidence could

have been admitted through alternative permissible source, failure to object to hearsay is not prejudicial).

Second, he cannot show prejudice because, as explained, both Dr. Hansen and Ms. Ruiz presented testimony that furthered the State's theory of the defense. Ms. Ruiz testified that the mother told her that she confronted the victim after the victim had been absent from her home all night and that only then did the victim accuse Defendant of rape. R431. This furthered the defense theory that the victim fabricated the rape because she was in trouble for staying out overnight. As explained, Dr. Hansen testified that examination of the victim showed no evidence of any sexual injury, any transmission of a STD, or any evidence of Defendant's DNA evidence. *See* R406-09, 417.

Their testimony was favorable to Defendant. Defendant has pointed to nothing in their testimony that would have negatively outweighed this favorable testimony. Thus, he cannot show the reasonable probability of a more favorable outcome had counsel objected to Dr. Hansen's and Ms. Ruiz's testimony.

III.

DEFENDANT HAS NOT SHOWN THAT TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT ASK ABOUT THE PROSPECTIVE JURORS ABOUT ANY BIAS AGAINST UNDOCUMENTED IMMIGRANTS DURING VOIR DIRE

Defendant claims that it was "objectively unreasonable and prejudicial for trial counsel to not inquire into the venire's potential bias against illegal immigrants." Br.Aplt. 25. He argues that criminal defendants have a constitutional guarantee to a trial by an impartial jury and that trial counsel should not have argued that Defendant was an undocumented immigrant without first having asked the jurors whether they had any bias or prejudice against undocumented aliens. Br.Aplt. 27.

Again, with respect to any ineffectiveness claim, a defendant must "demonstrate that counsel's performance was deficient, in that it fell below an objective professional standard of reasonable judgment." *State v. Litherland*, 2000 UT 76, ¶19, 12 P.3d 92 (citing *Strickland v. Washington*, 466 U.S. 668,687-88 (1984)). And he must then demonstrate that the deficient performance resulted in prejudice. *State v. Sessions*, 2014 P.3d 44, ¶17, 342 P.3d 738 (citing *Strickland*, 466 U.S. at 691-92). Prejudice, in this context, means that Defendant must prove that a biased juror sat. *State v. King*, 2008 UT 54, ¶47, 190 P.3d 1283.

This claim may most easily be disposed of for lack of prejudice. *See Strickland*, 466 U.S. at 697. Defendant has wholly failed to prove prejudice. To meet that burden in the jury-selection context, Defendant must prove that because counsel did not inquire into the prospective jurors' attitudes about immigration a biased juror sat. *King*, 2008 UT 54, ¶47, 190 P.3d 12. Defendant has not even attempted to meet that burden. This claim fails for that reason alone.

Defendant has also failed to show deficient performance. Defendant argues that trial counsel should have asked prospective jurors whether they had any bias against undocumented aliens. But "jury selection is more art than science" and because "there are a multitude of inherently subjective factors typically constituting the sum and substance of an attorney's judgments about prospective jurors," an "attorney's decision regarding jury selection may even appear counterintuitive particularly when viewed from the perspective of a bare transcript on appeal." *Litherland*, 2000 UT 76, ¶¶21-22. So long as counsel actively participates in the process, his selection decisions will ordinarily not be second guessed. *Id.* ¶23-27.

Here, bypassing an inquiry into the jurors' potential bias about undocumented immigrants did not conflict with counsel's trial strategy. Counsel argued that Defendant's fleeing after the offense resulted from his

immigration problems, not from consciousness of guilt for raping the victim. Any bias a prospective juror harbored again undocumented aliens would have been immaterial to this strategy. Accordingly, Defendant has not proved that all competent counsel would have insisted on a more specific inquiry related to immigration status.

Moreover, the trial court noted that the primary language of both the victim and Defendant was Spanish. R226. The court asked the prospective jurors whether any of them would be unable to be fair to either the prosecution or the defense in light of the fact that Spanish was the primary language of the individuals involved in this case. *Id.* No prospective juror indicated that he or she would be unable to be fair. *Id.* Competent counsel could reasonably have believed that the court's question about bias based on language was sufficient to elicit evidence of bias based on immigration status, had it existed. Moreover, counsel could reasonably have anticipated that the court would instruct the jury, as it did, that the verdict must be based only on the evidence produced in court. *See* Jury Instruction 6, R111 & 299.

In sum, Defendant's has not proved that counsel was ineffective for not asking the prospective jurors whether they had any bias against undocumented aliens. He has not shown that no reasonable counsel would have bypassed an inquiry into the jurors' attitudes toward undocumented

immigrants. Most clearly, he has not even attempted to demonstrate, as required to prove prejudice, that a biased juror sat.

IV.

DEFENDANT HAS NOT PROVED THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT KEEPING HIM ADEQUATELY INFORMED ABOUT THE CASE OR FOR NOT CALLING HIM TO TESTIFY

As explained, to demonstrate ineffective assistance, Defendant must prove that counsel's *specific* acts or omissions were objectively unreasonable and prove that, had counsel chosen differently, a more favorable result would have been reasonably likely.

Defendant has not met his burden to identify specific acts or omissions, let alone his burden to demonstrate that no competent counsel would have proceeded as his counsel did. Nor has he proved how any unidentified failure to keep him informed—either alone or collectively—undermines confidence in the outcome. Rather, Defendant argues generalities—"he does not think that 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"; he "also does not believe that his trial counsel adequately investigated his case"; and "he thinks that his testimony would have assisted in his defense." Br.Aplt. 31-32 (citing to Defendant's affidavit in support of his rule 23B motion).

Even these general these allegations depend on Defendant's affidavit submitted in support of his rule 23B motion. But it is not part of the appellate record and cannot be relied on to find that counsel was ineffective. And Defendant's proffer about what he thought or believed about trial counsel's decisions does not constitute "a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true could support a determination that counsel was ineffective." Utah R. App. P. 23B. Thus, as explained in the State's opposition to Defendant's motion for a rule 23B remand, they do not suffice to support a rule 23B remand. *See* State's Opposition to Motion for Remand.

And the record contradicts his claim that counsel should have called him to testify. Trial counsel put on the record that he spoke with Defendant about testifying and advised him not to testify. But counsel made clear that Defendant alone made the decision not to testify. R423-24. Having made that decision himself, he cannot fault counsel for not overriding it.

Nor has Defendant demonstrated prejudice. He has pointed to no evidence that trial counsel would have presented, had counsel kept him better informed or had counsel investigated more thoroughly or had counsel urged him to testify, that would have resulted in the likelihood of a more favorable result at trial.

V.

THE EVIDENCE SUPPORTED A JURY INSTRUCTION ON FLIGHT

Evidence of flight is probative because it can demonstrate consciousness of guilt. *State v. LoPrinzi*, 2014 UT App 256, ¶25, 338 P.3d 253 (citations omitted). Therefore, flight instructions "are proper when supported by the evidence," meaning the instructions "bear a relationship to evidence reflected in the record." *Id.* (additional citations and quotation omitted). "A flight instruction bears a relationship to the evidence reflected in the record if the flight occurred after [the] commission of the crime charged." *Id.* (additional citations and quotation omitted). A "flight instruction is appropriate if the circumstances could support a reasonable inference that the defendant is fleeing out of a consciousness of guilt." *Id.* ¶27.

Defendant claims that the trial court erroneously gave a flight instruction. Br.Aplt. 32. He claims that "there was no evidence" that he fled. *Id.*

But Defendant reaches that result only by viewing the evidence in a light favorable to his arguments and not in the light most favorable to the jury verdict. To so view the evidence is contrary to the governing standard. When a defendant challenges the sufficiency of the evidence, this Court reviews

"the evidence and all inferences therefrom in a light most favorable to the verdict." *State v. Guzman*, 2018 UT App 93, ¶11, ___ P.3d ___.

Here, the State presented evidence to show that Defendant quit his job and disappeared following the rape, apparently shortly after police contacted him and made an appointment to meet with him. State's Ex. 2, p.9. These circumstances support a reasonable inference that Defendant fled out of a consciousness of guilt. *See Loprinzi*, 2014 UT App 256, ¶25. That there may have been other reasons for disappearing does not mean that the court should not have given the instruction. The most reasonable inference from Defendant's disappearance was a matter for the jury to sort out. *See Prater*, 2017 UT 13, ¶39, 392 P.3d 398 ("witnesses' pre-trial inconsistent statements do ot render their testimony 'apparently false.' The question of which version of their stories was more credible is the type of question we routinely require juries to answer").

VI.

THE EVIDENCE SUFFICED TO SUPPORT DEFENDANT'S CONVICTION

Defendant next claims that the evidence was insufficient to support Defendant's conviction for rape of a child. Br.Aplt. 35. Defendant specifically asserts that the evidence failed to prove that he had sex with the victim. *Id.* Defendant moved for a directed verdict below, but the trial court ruled that

a reasonable juror could have concluded that the evidence was sufficient to support the conviction. R470.

This Court "will not disturb a jury verdict unless 'the evidence and all inferences which may reasonably be drawn from it,' when viewed 'in the light most favorable to the verdict,' are 'sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime.'" *State v. Robertson*, 2018 UT App 91, ¶38, ___ P.3d ___ (quoting *State v. Shumway*, 2002 UT 124, ¶15, 63 P.3d 94).

Defendant acknowledges that the victim testified that she and Defendant had sex in 2007 when she was thirteen. Br.Aplt 36. He acknowledges that she had behavioral issues following the incident. *Id.* And he acknowledges other evidence that he moved out of the house and that he quit his job, citing problems with the police. *Id.*

He nevertheless claims that the evidence was insufficient to support the conviction. *Id.* He argues that the victim's testimony "was peppered with inaccuracies and denials that rendered it inherently improbable." *Id.* In making this argument, he cites *State v. Workman*, 852 P.2d 981, 984 (Utah 1993). But this Court explained in *State v. Prater*, 2017 UT 13, ¶33, 392 P.3d 398, that a child's "inconsistent accounts regarding the extent of the physical

abuse she suffered, her age when the abuse occurred, and what she was wearing at the time of abuse may alone be insufficient to invoke the inherent improbability exception." *Id.* (citing *State v. Robbins*, 2009 UT 23, ¶22, 210 P.3d 288). A child's testimony is inherently improbable only "when it runs so 'counter to human experience' that 'no reasonable person could believe' it." *Id.* ¶33 (citing *Campbell v. State*, 732 N.E.2d 197, 207 (Ind.Ct.App. 2000)). The district court may reevaluate the jury's credibility determinations "only in instances 'where (1) there are material inconsistencies in the testimony and (2) there is no other circumstantial or direct evidence of the defendant's guilt.'" *Id.* (quoting *Robbins*, 2009 UT 23, ¶19) (internal quotation omitted).

Here, the victim testified that she got up to use the bathroom, that Defendant grabbed her and covered her mouth, told her not to scream, took her to his bed, kissed her neck, touched her breasts, and put his penis inside her vagina. R321-23. Although the victim described loathsome acts, her testimony did not run so counter to human experience that no reasonable person could believe it.

Moreover, the inconsistencies upon which Defendant relies are not inconsistencies in her testimony, but inconsistencies between her testimony and the information she may have earlier provided to others. One police officer reported that she told him that Defendant was her boyfriend. State's

Ex. 2, attached report at p.7. She denied having said that. R335. The same officer reported that she said that she had sex with the Defendant on August 8, 2007, and again on August 9, 2007. *Id.* She testified that she had sex with Defendant only once. R335. She told the second officer at the time of the investigation that when she exited the bedroom she saw Defendant sitting on a couch. State's Ex. 2, attached report at p.8. She testified at trial that he was standing outside the bathroom. R337. But she admitted that she had misremembered the event until she saw a recording of the CJC interview. R338.

These inconsistencies do not make her testimony inherently improbable. Officer Schuman, who interviewed the victim at the family home on August 29, 2007, and prepared the first report, stated that he "was unable to fully speak" with the victim and her family members because their English and his Spanish were limited. State's Ex. 2, p.7. And Detective Rodin, who interviewed the victim at the CJC on September 4, 2007, and prepared the second report, spoke Russian as his first language and had to have an interpreter to conduct the CJC interview. R313, 451. The inconsistencies may have resulted from the difficulties of communication.

Moreover, whether the victim had sex with the Defendant once or twice, or once in "her front private parts" and once in "her back private

parts," R314, and whether she considered him a boyfriend or not, her testimony about the material issue here—whether 30-year-old Defendant had sex with her—did not change.

And here, not only were any inconsistencies in the victim's testimony not material, but there was evidence of Defendant's guilt in addition to her testimony. Defendant's statement to coworkers that he was quitting because he had problems with the police, State's Ex. 2, attached report at p.9, and his flight following the offense constituted circumstantial evidence of his guilt, *see LoPrinzi*, 2014 UT App 256, ¶25. And testimony from the victim's mother and stepfather that her behavior changed after the alleged incident likewise constituted circumstantial evidence of Defendant's guilt. *See* R350, 365.

In sum, the evidence of Defendant's rape of a child was not so inconclusive or inherently improbable or so counter to human experience that no reasonable person could have believed it. Any inconsistencies in the testimony were the kinds of inconsistencies properly left for a jury to consider in fulfilling its duty to weigh credibility. *See Prater*, 2017 UT 13, ¶39. Thus, the evidence sufficed to support Defendant's conviction.

VII.

DEFENDANT HAS NOT SHOWN THAT THE CUMULATIVE EFFECT OF ANY ERROR UNDERMINES CONFIDENCE THAT HIS TRIAL WAS FAIR

In reviewing a cumulative error claim, this Court will reverse only "if the cumulative effect of the several errors undermines … confidence that a fair trial was had." *State v. Perea*, 2013 UT 68, ¶33, 322 P.3d 624 (internal quotation marks and citations omitted). The cumulative error doctrine applies where "a single error may not constitute grounds for reversal, but many errors, when taken collectively, nonetheless undermine confidence in the fairness of a trial." *Perea*, 2013 UT 68, ¶97.

Here, the doctrine does not apply. First, no single error occurred, and thus no collective error exists. Second, even if collective error did exist, given the evidence against Defendant, the effect of any collective error was not sufficient to undermine confidence in the fairness of Defendant's trial.

CONCLUSION

In sum, Defendant has not proved that counsel was ineffective for any of the reasons he raises. Moreover, the trial court did not err in its challenged decisions. Accordingly, this Court should affirm Defendant's convictions.

Respectfully submitted on June 25, 2018.

SEAN D. REYES
Utah Attorney General

/s/ Jeanne B. Inouye
JEANNE B. INOUYE
Assistant Solicitor General
Counsel for Appellee

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 9856 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Jeanne B. Inouye
JEANNE B. INOUYE
Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on June 25, 2018, the Brief of Appellee was served upon appellant's counsel of record by ☑ mail ☐ email ☐ hand-delivery at:

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Carr Woodall, PLLC
10808 S. River Front Pkwy., Ste 175
South Jordan, UT 84095
deborah@carrwoodall.com

I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on appellant by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on appellant.

☐ will be filed with the Court on a CD or by email and served on appellant within 14 days.

/s/ Melanie Kendrick

Addenda

Addendum A

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.

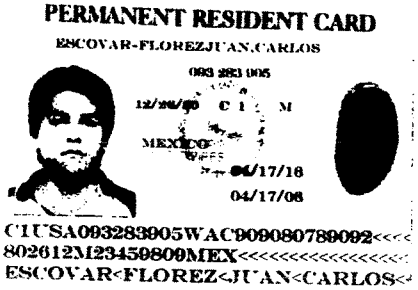
Sandi Johnson

Michael Sikora

Related Attachment(s) - Miscellaneous

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

07-159949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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.