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.

Reply 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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Reply Brief of Appellant

Pursuant to rule 24(b), Utah Rules of Appellate Procedure, Appellant Juan Carlos Escobar-Florez, through counsel, answers the facts and arguments raised in the Brief of Appellee as follows:

ARGUMENT

I. The State's Arguments Related to the Police Reports are Unpersuasive.

The State's assertion that it was reasonable for trial counsel to stipulate to the admission of the police reports in their entirety is based on the incorrect assumption Mr. Escobar-Florez had just two options—1) stipulate to the admission of the police reports in their entirety or 2) agree to continue the trial. Br.Aple. 22-29.[1] In doing so, the State assumes that the officers were unavailable

[1] Contrary to the State's assertion, Mr. Escobar-Florez has acknowledged that he wanted to move forward with trial even though his counsel advised him to agree to a continuance. Br.Aplt. 8, 14, 18; Br.Aple. 21.

even though, as stated in Mr. Escobar-Florez's opening brief, the State made no such showing in the trial court. *Id.*

The State's argument in this regard cites scant legal authority and does little to refute Mr. Escobar-Florez's argument that it was objectively unreasonable and prejudicial for trial counsel to not even try to hold the State to its burden of presenting its witnesses. Br.Aplt. 13-25. Instead, it presents a false choice—preserving Mr. Escobar-Florez's right to make decisions regarding his defense or preserving Mr. Escobar-Florez's right to confront the witnesses against him. This is not only unpersuasive, it is unresponsive to Mr. Escobar-Florez's argument.

"[T]he brief of the appellee must contain the contentions and reasons of the appellee with respect to the issues presented in the opposing brief." *Brown v. Glover*, 2000 UT 89, ¶ 22, 16 P.3d 540 (citing prior version of Utah R. App. P. 24). Thus, this Court need not consider a brief of appellee that fails to comply with rule 24, Utah Rules of Appellate Procedure. *See, e.g., State v. Roberts*, 2015 UT 24, ¶ 19, 345 P.3d 1226 ("Although the briefing standard articulated in rule 24(a) is directed in the first instance to appellants, rule 24(b) applies those same requirements to the brief of the appellee.") (quoting *Broderick v. Apt. Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶ 10, 279 P.3d 391).

The State's assertion that the prosecutor could have unilaterally forced the trial to go forward, apparently without a showing of unavailability or reliability, is not responsive to Mr. Escobar-Florez's argument in this regard. Br.Aple. 21-22.

Indeed, this assertion is contrary to the "'bedrock principle that a competent criminal defense lawyer must put the prosecution to its proof' and therefore has a 'duty to be a zealous advocate.'" *State v. Martinez-Castellanos*, 2017 UT App 13, ¶ 63, 389 P.3d 432 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 353 (2009)), *cert. granted*, 400 P.3d 1045 (Utah 2017).[2]

The State finally asserts that it was reasonable to stipulate to admitting the reports in their entirety on the basis that the evidence supported the defense theory, that the police reports had the advantage of "avoid[ing] any unfavorable surprise testimony" and that much of the information was cumulative. Br.Aple. 28. However, the State again cites no authority to suggest that it is ever objectively reasonable to waive a client's right to confrontation in favor of otherwise inadmissible hearsay evidence that is largely detrimental to the client's case. The State's argument is therefore unpersuasive. *See, e.g., Roberts,* 2015 UT 24, ¶ 19.

Simply stated, Mr. Escobar-Florez's argument is that reasonable trial counsel, knowing his client did not want a continuance, would have tried to move the trial forward while also taking steps to halt, or at least, mitigate the admission of inadmissible and prejudicial evidence. *See* Br.Aplt. 18. As stated in his opening brief, the State had the burden to make a showing of unavailability

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[2] The State also ignores that the trial had already been continued once over Mr. Escobar-Florez's objection, something which the trial court might not have been willing to do a second time particularly where the State had ample notice and time to secure its witnesses. R60-61.

before the court could even consider whether to use the officers' out-of-court statements or a continuance. Br.Aplt. 15-18. Finally, even if the State argued for a continuance, and the trial court were inclined to grant one, trial counsel could have mitigated the damage, for example, by stipulating to remote testimony by the officers, *see* Utah R. Crim. P. 17.5, or by at least attempting to mitigate the damage by requesting the State produce sworn statements, or at a bare minimum, arguing to remove the prejudicial inadmissible hearsay statements from the reports. Br.Aplt. 22-23.

The only potential value the reports had for Mr. Escobar-Florez's case was impeachment value, and counsel could have impeached without stipulating to the State's introduction of them in its case-in-chief. *See* Utah R. Evid. 801(d)(1)(A) (excluding from hearsay rule admission of inconsistent statement of declarant witness). It was therefore objectively unreasonable to stipulate to the admission of the police reports in their entirety as a first-resort. *See* Br.Aplt. 22-23. And, as stated the hearsay police reports were prejudicial because they altered the "entire evidentiary picture" by allowing witnesses, some of whom were unnamed, to give unsworn statements against Mr. Escobar-Florez that were not subject to cross-examination. *See* Br.Aplt. 23-25.

In short, the Confrontation Clause's "value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324-25 (2009). The

State's argument to the contrary–that it is perfectly reasonable to stipulate to admitting unsworn hearsay statements—is unsupported by any legal authority and therefore lacks merit. *See, e.g., Roberts*, 2015 UT 24, ¶ 19.

II. The State has not adequately disputed Mr. Escobar-Florez's argument related to his pre-arrest silence.

Next, while faulting Mr. Escobar-Florez for inadequate briefing his argument that his decision to not show up to the police interview was pre-arrest silence, the State cites no authority to suggest that declining to show up for a police interview is not pre-arrest silence. Br.Aple. at 23-25.

"[A]n appellee who argues only that the appellant has inadequately briefed issues will likely fail to submit a brief that 'contain[s] the contentions and reasons of the appellee with respect to the issues presented in the opposing brief.'" *Roberts*, 2015 UT 24, ¶ 19 (second alteration in original) (quoting *Brown*, 2000 UT 89, ¶ 22). "Appellees who rely solely on inadequate briefing arguments therefore assume a considerable risk of defaulting on appeal." *Id.*; *accord Broderick v. Apt. Mgmt. Consultants, L.L.C.*, 2012 UT 17, ¶ 10, 279 P.3d 391 (alteration in original) (quoting *Brown v. Glover*, 2000 UT 89, ¶ 22, 16 P.3d 540) (requiring "'the brief of the appellee [to] contain the contentions and reasons of the appellee with respect to the issues presented in the opposing brief.'"). As a result, "an appellee who fails to respond to the merits of an appellant's argument will risk default." *Roberts*, 2015 UT 24, ¶ 20.

The State argues that not attending a scheduled police interview was not pre-arrest silence. Br.Aple. 24-25. But it does not explain how declining to show

up to talk to police is substantially different from hanging up the phone or telling an officer that he would call back—actions that have long been considered inadmissible in the State's case-in-chief as pre-arrest invocation of the right to remain silent. *See State v. Gallup*, 2011 UT App 422, ¶ 17, 267 P.3d 289 (hanging up phone on officer was inadmissible exercise of pre-arrest silence); *State v. Palmer*, 860 P.2d 339, 345 (Utah Ct. App. 1993) (error to admit stipulated testimony that defendant declined to admit or deny culpability and instead "told [the officer] he would call back" after getting "some advice").

Such statements cannot be used in the State's case-in-chief to infer a consciousness of guilt. *Id.* at 349-50. "[T]he import of the trial court's ruling admitting Gallup's [pre-arrest] silence placed Gallup in 'a veritable 'Catch-22' because both of his options—to speak with the trooper or to remain silent—would be admissible against him." *Gallup*, 2011 UT App 422, ¶ 17 (quoting *Palmer*, 860 P.2d 339 (Utah Ct. App. 1993) (additional citations omitted).

As in *Gallup* and as stated in his opening brief, the prosecutor here inappropriately argued that Mr. Escobar-Florez's failure to talk to police was 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 the police." Now the defendant, as you see in the exhibit, he has a permanent residency card. And on that permanent residency card it shows that he has permanent residency from April of 2006 to April 2016. So this isn't one of those instances where he's here illegally and he's afraid of contact with police because he a green

> card. He's actually here legally, according to the documentation that they have. *So why else would you suddenly quit your job? And leave and move out of your residence? So nobody can find you*.

R452-53 (emphases added). By arguing that his failure to talk to police was evidence of his guilt, the State impermissibly used Mr. Escobar-Florez's pre-arrest silence against him in its case-in-chief. *See Gallup*, 2011 UT App 422, ¶ 18 ("[T]he State should not have been permitted to rely on the silence evidence in its case-in-chief.") (citing *State v. Travis*, 541 P.2d 797, 799 (Utah 1975)). Worse, it used that evidence to bolster its case for a flight instruction. R422-23 (prosecutor arguing that Mr. Escobar-Florez quit his job "right after he talked with the police officer").

As a result, and for the reasons stated in his opening brief, Mr. Escobar-Florez has shown that stipulating to the admission of his pre-arrest silence was ineffective assistance of counsel, as was the failure to object to the State's closing argument that invoked his pre-arrest silence as evidence of guilt.

III. The Holding of *State v. King* Does Not Apply to the Facts of this Case.

The State's argument that Mr. Escobar-Florez must prove actual prejudice under*State v. King*, 2008 UT 54, 190 P.3d 1283, presumably by reconducting voir dire of the entire jury, attempts to expand that opinion to a circumstance that is not present in this case. *King,* was an aggravated sexual abuse case in which questioning during voir dire revealed that two of the jurors who sat were potentially biased because they had either been victims of abuse or knew someone who had. *King*, 2008 UT 54, ¶¶ 8, 19. But the trial court did not

conduct further inquiry into those two specific jurors and trial counsel did not preserve an objection to the seating of those two jurors. *See id*. ¶ 19. Under those circumstances, the Supreme Court ruled that a rule 23B hearing was the route for further inquiry to determine whether either of the two individual potentially biased jurors was actually biased. *See id*. ¶¶ 43, 47 (holding a rule 23B hearing is "appropriate in this case to determine if the jurors who were not further questioned would have been biased despite their claims that they would not").

The *King* court did not address the circumstance present here—a case where there is no questioning of the venire that could even raise the question of potential or actual bias. *See King*, 2008 UT 54, ¶¶ 8, 19; Br.Aplt. 25-29. Nor was *King* a case in which defense counsel elected to make an issue of the very subject that would have made juror questioning into potential bias relevant, in this case the defendant's immigration status an issue. *See King*, 2008 UT 54, ¶ 8; Br.Aplt. 27-28. Finally, *King* was not a case where the potential bias comes from evidence that the defendant had committed another highly politically charged crime—illegally entering the United States. *See* 8 U.S.C. § 1325 (2012) (defining crime of "[i]mproper entry by alien"); *Courtney*, 2017 UT App 62, ¶ 16 (noting that "evidence of other crimes is itself highly prejudicial") (quotation marks and citations omitted). This Court should decline the State's invitation to so extend *King*.

Apart from *King*, the State cites no authority to suggest that in a case such as the instant one, an entire jury panel must be re-questioned to determine

whether one or more members of that panel is actually biased. *King* simply does not apply to cases where there is a significant risk that the entire jury was not impartial. *See, e.g., State v. Courtney,* 2017 UT App 62, ¶ 22, 415 P.3d 604 (reversal required where there was no questioning into potential taint caused by potential juror's comment). Requiring a defendant to call the entire jury panel into a post-trial hearing to determine bias under the facts of this case would impose an undue burden on defendants. *King* acknowledged the fine line between a defendant's right to an impartial jury and the need to insulate jurors from questioning into the deliberative process. *See King*, 2008 UT 54, ¶¶ 45-46. *King* also acknowledged that the court "may presume prejudice . . . where it is 'unnecessary and ill-advised to pursue a case-by-case inquiry to weigh actual prejudice.'" *Id.* ¶ 30 (quoting *Parsons v. Barnes*, 871 P.2d 516, 523 n.6 (Utah 1994)) (omission in original).

In the event, however, that this Court accepts the State's invitation to expand the scope of *King*, Mr. Escobar-Florez requests leave of the Court to amend its request for a rule 23B remand hearing to include calling all of the jurors for post-trial voir dire to determine whether there was actual prejudice, or to issue such a remand on its own motion.

The State also argues that "any bias a prospective juror harbored against undocumented aliens would have been immaterial to" counsel's strategy of arguing that Mr. Escobar-Florez was reluctant to talk to police only because of his immigration status. Br.Aple. 35-36. This argument is not supported by any

authority and it defies logic. *See Roberts*, 2015 UT 24, ¶ 19. As stated in his opening brief, if any juror harbored bias against undocumented immigrants, that bias would have 1) made it more likely that the juror would convict because of Mr. Escobar-Florez's immigration status rather than because the State proved guilt beyond a reasonable doubt; and 2) made it more likely that the juror would find Mr. Escobar-Florez's version of events less credible. Moreover, Jury Instruction 6 was a general, not a curative instruction. R111. It said only that the decision should be based on evidence, which included evidence that Mr. Escobar-Florez was undocumented. R111. The State has not shown that this instruction was sufficient to overcome the prejudice from defense counsel's decision to introduce evidence that Mr. Escobar-Florez was an undocumented immigrant.*See, e.g.,* S*tate v. Harmon,* 956 P.2d 262, 273 (Utah 1998) ("Some errors may be too prejudicial for curative instructions to mitigate their effect, and a new trial may be the only proper remedy."); did not vary in any significant manner from the general instructions. *State v. Deng Akok*, 2015 UT App 89, ¶¶ 26, 29, 348 P.3d 377 (curative instruction that "did not vary in any significant manner from the general instruction" was ineffective to cure harm from prosecutorial misconduct because it "failed to specifically address the prosecutor's misstatement").

IV. The State has not shown there was evidence of flight to support the instruction.

The State argues that there was evidence of flight sufficient to support the flight instruction in the police report that Mr. Escobar-Florez argues should have

been excluded. Br.Aple. 39-40. In doing so, the State does not even attempt to address Mr. Escobar-Florez's argument that what little evidence of flight there was not properly before the jury or that there was no nexus to the charged crime because there was no evidence as to when Mr. Escobar-Florez quit his job. Br.Aplt. 33-34.

As stated in Mr. Escobar-Florez's opening brief opening brief, a flight instruction is not appropriate unless there is a nexus between the alleged flight and the evidence. Br.Aplt. 32-33. The only evidence the State points to in support of its argument that the flight instruction was appropriate was that Mr. Escobar-Florez quit his job, "apparently after police contacted him." Br.Aple. 40. The State then cites *State v. Prater*, 2017 UT 13, 392 P.3d 398 to support its argument that "[t]he most reasonable inference from Defendant's disappearance was a matter for the jury to sort out." Br.Aplt. 34. However, *Prater* considered the issue of whether testimony was inherently improbable, not whether a flight instruction was warranted. *See Prater*, 2017 UT 13, ¶ 39.

The problem with the State's argument that the jury should sort out why Mr. Escobar-Florez quit his job is that there was no evidence as to when he quit. *See* Br.Aplt. 33 & n.6. Based on the evidence presented, Mr. Escobar-Florez could have quit long before police called him. R365; State's Ex. 2 at 6. Moreover, the flight instruction was issued even though, apart from going to his former workplace, police made no efforts to locate Mr. Escobar-Florez. *Id.* Without more, simply quitting a job cannot be sufficient to support a flight instruction.

See, e.g., S*tate v. Howland,* 761 P.2d 579, 580 (Utah Ct. App. 1988) ("It seems almost axiomatic that instructions must bear a relationship to evidence reflected in the record, and we cannot enjoy the luxury of sustaining a conviction on trite aphorism unsupported by any kind of evidence.'") (quoting S*tate v. Pacheco,* 495 P.2d 808, 808 (Utah 1972)).

V. The Court can Reevaluate K.V.'S Credibility Because her Testimony was Inherently Improbable.

The State argues that this Court should not reevaluate K.V.'s credibility because her inconsistencies were immaterial. Br.Aple. 42-44. "[T]estimony is apparently false if its falsity is 'apparent, without any resort to inferences or deductions.'" *State v. Robbins*, 2009 UT 23, ¶ 17, 210 P.3d 288 (quoting *State v. Workman*, 852 P.2d 981, 984 (Utah 1993)). This occurs when, as here, "a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion, and there is a complete lack of circumstantial evidence of guilt." *Id.* ¶ 18 (citation omitted).

The State argues that K.V.'s initial report that she was Mr. Escobar-Florez's girlfriend, that they had sex twice, that she initially reported both vaginal and anal sex, and where Mr. Escobar-Florez was when she first saw him were not material because the inconsistencies could have been the result of communication difficulties and, apparently, because she never recanted. Br.Aple. 43-44. However, the stated facts are all material, as is the fact that—despite evidence to the contrary, K.V. denied having been out all night before reporting her mother, and only did so after her mother confronted her about staying out all

night. Br.Aplt. 6; R328-29, 224-25, 431, 437; State's Ex. 2 at 5. She also added several facts to her testimony that were never reported before. Br.Aplt. 6; R335-36, 340, 405.

Contrary to the State's assertion, the record does not reflect that K.V. ever testified that the the inconsistencies were the result of her inability to communicate with investigators. Also contrary to the State's assertion, key details, such as the number of times abuse allegedly occurred, whether or not Mr. Escobar-Florez was her boyfriend, and even whether the purported sex was anal or vaginal, were material to the allegations. Also material was K.V.'s adding new details at trial such as whether he purportedly laughed or fondled her breasts, are indeed material to the allegations. *See, e.g., Robbins*, 2009 UT 23, ¶¶ 8-9 (adding "more specific details" over time and change of date were factors leading to reversal based on insufficient evidence); *State v. Kamrowski*, 2015 UT App 75, ¶ 18, 347 P.3d 861 (acknowledging that "an inconsistency in the victim's testimony as to the number of times she had been abused would be a closer call" as to whether testimony was "materially inconsistent with her pre-trial statements.").

Moreover, to the extent that the State cites other "circumstantial evidence," Br.Aple. 44, that evidence was all either inadmissible hearsay, or could have just as easily been the result of K.V. attempting to create an excuse for her changed behavior. *See* Br.Aplt. 36.

As a result, and as stated in his opening brief, Mr. Escobar-Florez was convicted based on K.V.'s inherently improbable testimony and his conviction should therefore be reversed, and the charges against him dismissed with prejudice.[3]

VI. Showing Prejudice Requires Only a Reasonable Probability of a Different Outcome.

Finally, Mr. Escobar-Florez challenges the State's characterization of *Strickland* prejudice standard as "proof" that the outcome would have been different absent the errors. *See, e.g.,* Br.Aple. 29. The *Strickland* standard does not require proof, or even that it is more likely than not that the outcome of the proceedings would have been different. Rather, it requires only a "reasonable probability" of a different outcome, taking into account such factors as whether the errors "have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture," and whether the verdict is "only weakly supported by the record." *Strickland v. Washington*, 466 U.S. 668, 694-96 (1984).

In other words, "the purpose of the effective assistance guarantee in the Sixth Amendment 'is simply to ensure that criminal defendants receive a fair trial.'" *Martinez-Castellanos*, 2017 UT App 13, ¶ 77 (quoting *Strickland*, 466 U.S.

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[3] The State's suggestion that K.V. should be treated as a "child witness" is not persuasive as K.V. was an adult when she testified at trial. *See* Br.Aple. 42; R1, R316 (K.V. was 13 at the time of the alleged abuse in 2007, and was 22-years-old when the trial was held January 18, 2017). The State also makes no effort to explain any purported significance to K.V.'s prior inconsistent statements not being made under oath. *See Roberts*, 2015 UT 24, ¶ 19.

at 689). Thus, "'the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.'" *Id.* (quoting *Strickland*, 466 U.S. at 696).

This Court should therefore reverse Mr. Escobar-Florez's conviction if there is a "reasonable probability" of different outcome absent the errors, i.e. that the effect of one error, or the cumulative effect of several errors, "undermines [the Court's] confidence that a fair trial was had." *See Martinez-Castellanos,* 2017 UT App 13, ¶ 30 (quoting *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993); *Strickland*, 466 U.S. at 694-96.

CONCLUSION

For the above reasons, and for the reasons stated in Mr. Escobar-Florez's opening brief, Mr. Escobar-Florez respectfully requests that his conviction be reversed and remanded with an order of dismissal. Alternatively, Mr. Escobar-Florez respectfully requests that his conviction be vacated and his case be remanded for a new trial.

Respectfully submitted on July 25, 2018.

/s/ Deborah L. Bulkeley
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g)(1) of the Utah Rules of Appellate Procedure, this brief contains 15 pages, excluding the table of contents, table of authorities and addenda, and that it complies with Rule 21, Utah Rules of Appellate Procedure. In compliance with rule 27(b) of the Utah Rules of Appellate Procedure, this brief has been prepared using 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 July 25, 2018, I caused electronic copies of the Brief of Appellant to be delivered by email to the following:

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Within seven days, printed copies will be delivered to the above addresses by U.S. Mail, first class postage, or by hand as follows: six copies, including one with original signatures to the Court of Appeals; two copies to Appellee.

/s/ Deborah L. Bulkeley