No. 20170851–CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,
vs.

KAIN BLACKWING,
Defendant/Appellant.

APPELLANT'S OPENING BRIEF

On appeal from a Sentence, Judgment, Commitment involving 11 felony convictions entered in the Third District Court, the Honorable Bruce Lubeck presiding. Case no. 151401859.

Oral Argument Requested
Appellant is Incarcerated

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INTRODUCTION

The State of Utah charged Kain Blackwing with eleven felonies, seven of which were for rape. The State's theory was that the victim, TS, was legally incapable of consenting to sex due to her age and Blackwing's special trust position in her life. Blackwing was convicted on all counts.

The State, however, failed to present any evidence on two of the counts, and a third count was purely speculative as to location. Because location is a fundamental component of criminal jurisdiction—Utah can only prosecute crimes that happened wholly or partially within the state—the district court did not have jurisdiction over the unsupported charges.

Further, even if the court did have jurisdiction, Blackwing's counsel still failed to recognize that the State had presented insufficient evidence to support a conviction, and thus failed to remedy the problem by seeking a directed verdict. As a result, the jury convicted Blackwing for three

felonies that should not have been submitted to it. This Court should vacate the convictions and dismiss the three unsupported convictions on the basis of jurisdiction. Alternatively, the Court should review the convictions under ineffective assistance of counsel. Either way, the three unsupported convictions cannot stand.

In addition, the jury took an improperly-marked exhibit to the jury room during its deliberations. The exhibit was a CD of calls that Blackwing made from jail, and the title of the CD impermissibly showed the jury that Blackwing was incarcerated and invited it to convict based on factors other than the State's evidence. Although such an improper exhibit might not always be prejudicial, it was under the circumstances of this case. As a result, this Court should reverse the other eight convictions and remand for a new trial.

* * *

STATEMENT OF THE ISSUES

1. Should this Court vacate three of Blackwing's felony convictions for lack of criminal jurisdiction because the State failed to establish the alleged crimes took place in Utah?

Standard of Review: "Criminal jurisdiction is a form of subject matter jurisdiction and an appellate court may dismiss a criminal charge for lack of criminal jurisdiction at any time, regardless of whether the defendant raised the issue before or during trial." *State v. Mills*, 2012 UT App 367, ¶ 34, 293 P.3d 1129 (simplified).

Preservation: Because subject matter jurisdiction may be raised at any time, no preservation is necessary for the Court to reach this issue. *See id.*

2. In the alternative, should this Court vacate the three felony convictions under ineffective assistance of counsel because the State failed to present sufficient evidence from which a reasonable jury could find guilt, but defense counsel did nothing to address the State's failure?

Standard of review. Ineffective assistance of counsel claims raised for the first time on appeal present a question of law. *State v. Idrees*, 2014 UT App 76, ¶ 8, 324 P.3d 651.

Preservation. Ineffective assistance of counsel "is a stand-alone constitutional claim attacking the performance of a criminal defendant's counsel," and it "can be brought in a post-trial motion or on direct appeal." *State v. Johnson*, 2017 UT 76, ¶¶ 22–23, 416 P.3d 443.

3. Did the trial court err when it did not grant a new trial to Blackwing even though the jury took prejudicial evidence to its deliberations?

Standard of review. This Court "review[s] a trial court's ruling on a motion for a new trial under an abuse of discretion standard." *State v. Billingsley*, 2013 UT 17, ¶ 9, 311 P.3d 995.

Preservation. This issue was preserved when the defense moved for new trial. R. 872.

* * *

STATEMENT OF THE CASE

1. Statement of the facts.

Background

In early fall of 2013, TS was 17 and in a relationship with her then-boyfriend Dalton. R. 1087–89. In late August or early September of 2013, Dalton began training in mixed martial arts and survival with Kain Blackwing at Blackwing's home. R. 1089. After a month or two, Dalton introduced TS to Blackwing, R. 1090, and shortly after the meeting TS also began training with Blackwing. R. 1093.

TS's training consisted of survival and fighting skills, among other things. R. 1097–99. Initially TS would train once or twice a week, R. 1098, and Dalton did most of the training alongside her, R. 1099. Through the training, Blackwing introduced TS to the "Shen Wei," a philosophy supposedly designed to help one become more in tune with the natural elements of the world. R.1096–97.[1]

In mid to late November, TS and Dalton got into a fight which ended with Dalton choking TS until she lost consciousness. R. 1107. When she went to her next training, Blackwing saw bruising on her neck and asked what happened. *Id.* TS explained the incident to him. *Id.* According to TS, she did not file a police report and Blackwing handled the situation for

[1] Because "Shen Wei" is the name of a relatively famous New York artist, it's likely that the transcription is in error and the accurate transcription is "way," not "Wei." Ie., Shen way rather than Shen Wei. In any event, the word choice/spelling is interesting but irrelevant to the appeal.

her. R. 1109. Following the assault, TS started talking to Blackwing every couple of days, and she increased the number of days she would train each week. *Id.* TS began to spend more time at the Blackwing home and got to know Blackwing's legal wife, Raven Blackwing, and his Shen wife, Theresa Baker. *Id.*

By the end of December, TS was spending a few hours a day, five days a week, at Blackwing's home. R. 1111. During this time, Blackwing began to teach her more about the Shen lifestyle, told her that he was a Shen Lord, R. 1112, and explained the practice of Shen men taking multiple wives, R. 1113. Around the same time, TS was contemplating moving out of her parents' house for reasons unrelated to Blackwing or this case. R. 1122. Blackwing let her know that a room in his home was available if she wanted to rent it. R. 1124. She thought this would be "cool" because she could train every day and the rent was only $200. R. 1125.

TS started to see the Blackwings more often and hung out with them as friends, instead of just for training. R. 1129. In early March, Blackwing told her that he knew she had feelings for him, and he had feelings for her too. R. 1132-33. He then kissed her. R. 1133. According to TS, this made her feel special and weird at the same time. R. 1133. She began to develop a crush on him, and he told her that he loved her. R. 1134. A few days after this, she brought Blackwing to a dinner with her parents. R. 1135. They discussed TS moving into the Blackwing home, *id.*, and that next weekend she moved in, R. 1136.

* * *

Testimony and Timeframes Relevant to Charges

March 9, 2018. TS moved into the Blackwing home on March 9, 2014. R. 1136. She was given an office room across the hall from Blackwing's bedroom. R. 1138. Instead of staying in her room that night, though, TS stayed with Blackwing in his bedroom (the other women were not present). R. 1139. TS testified that she went to bed with Blackwing around nine o'clock and that they had sex for the first time that night. R. 1139. According to her testimony, the encounter included penetration of her vagina with his fingers and his penis. R. 1140. The sexual activities lasted until about eleven o'clock, and TS never told Blackwing that she did not want these things to occur nor did she resist. R. 1140.

March 10, 2014. TS testified that the next day (March 10, 2014) she drove to the Blackwing residence, probably in between classes, to have sex with Blackwing. R. 1141. She testified that Blackwing penetrated her vagina with his penis. R. 1141. Later that day, Blackwing got upset with her and told her she would be sleeping in her own room that night. R. 1142.

March 17, 2014. On St. Patrick's Day, everyone in the house (TS, Blackwing, Ms. Baker, and Mrs. Blackwing) celebrated by drinking alcohol together in the basement. R. 1147. The group engaged in various sexual activities. R. 1147. TS testified that Blackwing had sex with his wives and also with her. R. 1148. Additionally, she stated that Blackwing put his fingers in her vagina. R. 1148.

March 31, 2014. Blackwing's birthday is March 31, and the group took him out that evening for dinner and to celebrate. R. 1149. TS explained that she wanted to make his birthday a good party because she loved him. R. 1149. After dinner, they rented a room at the Crystal Inn in Salt Lake City. R. 1149. Once at the motel the group sat in the hot tub together. R. 1152. TS testified that later, after the group "kind of just played around" for a while, Blackwing had intercourse with all three of the women, including her. R. 1153. She also testified that the sexual activities included Blackwing touching her body and vagina. R. 1153.

April 1 through May 13, 2014.[2] After the March 31 activities, TS's testimony was less specific. She testified simply that she had sex with Blackwing "[m]ore than one time" in April of 2014. R. 1157. She further testified, "I think in the month of May that we didn't have intercourse." R. 1164.

In terms of the "more than one" sexual encounters during April, TS testified that at least one of those encounters took place "[i]n Texas," *id.*, while she and Blackwing were there on a trip to visit his father, R. 1158.[3]

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[2] TS turned 18 on May 14, 2014. R. 1164. The State did not charge Blackwing based on any conduct after her birthday, R. 60–64, which is how the State arrived at the date ranges.

[3] The court instructed the jury that the "incident in Texas" was not relevant to any crimes charged by the State. R. 1165. "Here, these seven counts of rape and the three counts of forcible sexual abuse, and the one count of forcible sodomy, are all events that allegedly happened here in Salt Lake County. The one she described in Texas is not part of that." R. 1165–66.

TS did not testify to any other sexual contact with Blackwing, in Texas or in Utah, during this period of time.

2. Course of the proceedings.

The State charged Blackwing by information with 11 counts:

- seven counts of rape, a first-degree felony;
- three counts of forcible sexual abuse, a second-degree felony;
- one count of forcible sodomy, a first-degree felony.

R. 60–64.

The prosecution. The State's theory of the case was based on TS's age, not that she didn't consent in the traditional sense. Specifically, the State argued that TS lacked the legal capacity to consent due to Blackwing's position of special trust in TS's life and/or his enticement of her. *See* Utah Code § 76-5-406(10)–(11); R. 1342 (confirming that the State was relying on subsections 10 and 11 of the then-existing rape statute).

To prove the case, the State relied entirely on TS's testimony to establish the elements of each charge. To bolster her credibility, the State called four witnesses who each corroborated details of her testimony. For example, the State called Lana Buehller, a general manager at the Crystal Inn, to testify about business records showing that Theresa Baker had paid for a hotel room for four adults on March 31, 2014. R. 1173-77. The State also called TS's mother, Blackwing's son, and the son's fiancé to corroborate other minor details. *See* R. 1177–1200, 1201–17.

In addition to the testimony, the State offered audio of phone conversations between TS and Blackwing, *see* Exhibit 7, as well as a series

of letters between the two, *see* Exhibits 8–10. The State presented this evidence to establish the nature of the relationship between TS and Blackwing, ie. to show a special relationship and/or enticement. R. 1412.

The defense. The defense's theory of the case was that TS was legally capable of consent, and the State had not proved that any special trust relationship or enticement had occurred. To that end, the defense presented its case only through its cross, which attempted to undermine TS's credibility and to show that she had consented.

The defense moved for a directed verdict after the State's case in chief. R. 1355, 1358–59. Counsel argued that the State had not introduced evidence to show lack of consent as required for the charges of rape and forcible sodomy. *Id.* Specifically, counsel conceded that the State had put on adequate evidence to send the lesser included offense of unlawful sex with a minor to the jury, but that the Judge should only send the lesser included offenses to the jury. *Id.* The court denied the motion, and the defense rested without putting on a case in chief. R. 1362.

Outcome. The jury convicted Blackwing of all counts. R. 845–53. He timely appealed. R. 877.

* * *

SUMMARY OF THE ARGUMENT

This is a sufficiency of the evidence appeal, but not in the traditional sense. Usually, a sufficiency appeal involves asking whether the State put on enough evidence for a reasonable mind to conclude that each element of the offense was proven beyond a reasonable doubt. But here the State presented no evidence at all on two of the felonies charged, so the State's evidence was not so much insufficient as nonexistent. Additionally, the evidence supporting a third charge was too speculative to support a conviction, because no evidence tended to show that the alleged crime occurred in the State of Utah.

Because no evidence suggested that any of the three challenged felonies occurred wholly or partially in Utah, the district court did not have criminal jurisdiction over the charges. And because criminal jurisdiction is a species of subject matter jurisdiction (which can be raised at any time), this Court should vacate the three convictions on jurisdictional grounds.

In the alternative, the Court should vacate the convictions under ineffective assistance of counsel doctrine. That is because defense counsel didn't address the State's evidentiary failures in any way, either by moving for a directed verdict or by arresting the judgment. Because it's prejudicial for a defendant to be convicted in the absence of evidence, counsel's representation was ineffective under the Sixth Amendment. Either way, this Court should vacate the three convictions that were unsupported by

evidence. It should also remand with instructions to either dismiss the charges or enter judgments of acquittal.

Regarding the other eight charges, those should be reversed and retried. The basis for reversal is the prejudicial effect of an exhibit that the jury took with it to its deliberations. The exhibit was a CD marked “Blackwing jail calls,” which title likely prejudiced the jury against Blackwing and helped it reach its verdicts. While such an impermissibly marked exhibit might not be prejudicial in ever case, it was here because the record shows that the jury convicted Blackwing of at least three counts for which the State had presented no evidence.

That conclusion follows because the standard of proof is beyond a reasonable doubt. And because no reasonable juror can find that the burden is met in the absence of evidence, the jury necessarily convicted Blackwing based on factors other than the State’s evidence. The only likely source of the jury’s prejudice against Blackwing—the bias that led the jury to convict without evidence—was the improperly marked CD, the impermissible exhibit was prejudicial. A new trial on the remaining counts is the proper remedy to ensure that Blackwing receives due process of law.

* * *

ARGUMENT

I. The State presented no evidence going to two charges, and its evidence on a third charge was too speculative to support a conviction.

In this case, the State charged 11 counts in the amended information, R. 60–64, and all 11 counts were submitted to the jury, R. 802–04. For eight of the counts, the State presented sufficient evidence to submit the charges. But the State presented no evidence going to two counts, and the evidence of a third count was too speculative to support a conviction or even jurisdiction. The evidence supporting each count is marshalled below.[4]

* * *

Counts on Which the State Presented Sufficient Evidence

Count 1: rape, on or about March 9, 2014.

- TS testified that she moved in to Blackwing's home on March 9, 2014. R. 1136.
- TS testified that she had sexual intercourse with Blackwing that night. R. 1140.

Count 2: rape, on or about March 10, 2014.

- TS testified that she had sex with Blackwing on March 10. R. 1141.

Count 3: rape, on or about March 12–30, 2014.

[4] Jury instruction no. 25 includes all the charges and related dates. It is located at R. 802–04, and attached at App'x B.

- TS testified that there was a party at the Blackwing home on St. Patrick's Day, ie. March 17. R. 1146–47.

- TS testified that she had intercourse with Blackwing that night. R. 1148.

Count 4: rape, on or about March 12–31, 2014.

- TS testified that she celebrated Blackwing's birthday on March 31 by getting a room at the Crystal Inn in Salt Lake City. R. 1148–49.

- TS testified that she had sexual intercourse with Blackwing at the motel. R. 1153.

Count 8: forcible sexual abuse, on or about March 9, 2014.

- TS testified that Blackwing penetrated her vagina with his finger the night she moved into the Blackwing home. R. 1140.

Count 9: forcible sexual abuse, on or about March 12–30, 2014.

- TS testified that Blackwing penetrated her vagina with his fingers on St. Partrick's Day, March 17, 2014. R. 1148.

Count 10: forcible sexual abuse, on or about March 12–31, 2014.

- TS testified that Blackwing touched her vagina with his hands at the Crystal Inn on March 31, 2014. R. 1136.

Count 11: forcible sodomy, on or about March 12–31, 2014.

- TS testified that Blackwing performed oral sex on her at the Crystal Inn on March 31, 2014. R. 1136.

* * *

Counts on Which the State Presented Insufficient Evidence

Counts 5, 6, 7: each for rape, on or about April 1 through May 13, 2014.

- TS testified that she didn't have intercourse with Blackwing in the month of May. R. 1164 ("I think in the month of May that we didn't have intercourse.").
- TS testified that she had sex with Blackwing "[m]ore than one time" in April 2014. R. 1157.
- TS testified that she had intercourse with Blackwing in Texas an unspecified number of times in April. R. 1164; R. 11161–62.
- TS did not testify to having intercourse in Utah during April. *See* R. 1156–65.

* * *

Counts 5, 6, and 7 are the heart of the evidentiary problem in this case. In its case in chief, the State adduced testimony on TS's sexual contact with Blackwing through March 31, 2014. That testimony constituted sufficient evidence to submit counts 1, 2, 3, 4, 8, 9, 10, and 11 to the jury as shown above.

After examining TS about March, the State turned the jury's attention to April of that year. R. 1156 ("Now, I'm moving forward to April 2014."). TS explained that she continued to train with Blackwing, including both Shen training and other physical training. R. 1156. The State asked if TS "[had] any sexual intercourse with Kain [Blackwing] in the month of April of 2014?" R. 1156. She answered, "Yes." R. 1157. The State followed up:

Q. One time, or more than one time?

A. More than one time.

R. 1157.

Next, the State inquired about an incident involving DCFS, wherein DCFS contacted TS at school and interviewed her about her relationship with Blackwing. R. 1157–58. She lied and told DCFS that they weren't sleeping together. R. 1158. The State moved on from the DCFS testimony by asking if TS left the State of Utah with Blackwing following the DCFS interview. TS confirmed that she had. R. 1158 ("Yes, he took me to Texas.").

From there, the State questioned TS about events that took place in Texas, outside of Utah's jurisdiction. *See* R. 1158–61. Among other details like visiting a museum, TS explained that she "got really blistered, sunburned" while at the ocean in Texas. R. 1161. She then told the jury that, at a hotel on the way back to Utah, Blackwing got mad at her, and so she "calmed him down by having sex with him." R. 1162.

After that exchange, the State presented some evidence (bank statements showing "transactions in Texas," R. 1163), the relevance of which is unclear from the record. The court admitted the evidence, and then the State turned its attention to May. R. 1163 ("I'm going to move on to May."). That's when TS explained to the jury that "I think in the month of May that we didn't have intercourse." R. 1164.

The State followed up:

> Q. Did you have intercourse at any point after the
> DCFS [investigation]--
>
> A. In Texas.

Q. But after Texas, there was no intercourse?

A. Not that I can recall, no.

R. 1164.

And that was it. The State completed its examination by authenticating and admitting some recordings of TS's calls to Blackwing from jail (she was in jail as part of a separate criminal case), R. 1165–69, and some letters the two had exchanged while she was incarcerated, R. 1169–70. Finally, the State addressed TS's plea deal from the other case, a deal which included her agreement to testify against Blackwing in this case. R. 1172.

A. The evidence for two rape charges was nonexistent, and it was too speculative to support a third charge.

A jury cannot convict in the absence of evidence, but that's what happened here. That point—that the State must prove each element of each crime beyond a reasonable doubt—is fundamental to our law as matter of basic due process. *See Francis v. Franklin*, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). And although this Court defers to the jury's fact-finding on review, that deference is not unlimited—the State still must present "some evidence, including reasonable inferences, from which findings of all the requisite elements of the crime can reasonably be made." *See State v. Marquina*, 2018 UT App 219, ¶ 46, 437 P.3d 628 (simplified).

In short, speculation is not enough to support a conviction. *See State v. Cristobal*, 2010 UT App 228, ¶ 10, 238 P.3d 1096 ("[T]he jury's conclusion must be based upon reasonable inference and not mere speculation.") When the State fails to meet its evidentiary burden with nonspeculative evidence, this Court must reverse. *State v. Layman*, 1999 UT 79, ¶ 12, 985 P.2d 911 ("An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime.").

Here, the State charged Blackwing with seven counts of rape.[5] Three of them, counts 5, 6, and 7 (collectively, the remaining charges), were each alleged to have occurred between April 1 and May 13 of 2014. R. 802–03. But TS testified that she did not have sex with Blackwing in May, R. 1164, so the jury could only convict Blackwing for sex that occurred in April.

TS testified that she had sex with Blackwing "more than on time" in April, but she never stated how many more times. *See* R. 1157. The State's evidence thus could only support a finding that they had sex twice, at most—"more than one time" is too vague to draw any other conclusion. That follows because, while "more than one time" means at least twice, the phrase is completely unclear about whether the total number of times is two, or ten, or twenty-nine—it could mean anything. TS's testimony

[5] One of the elements of rape is an act of sexual intercourse. Utah Code § 76-5-402(1). Rape therefore cannot exist in the absence of sex.

about sex in April therefore supported at most two of the three remaining charges—her testimony did not and could not support a third charge as a matter of logic and math. One of the remaining charges (let's call it count 7) was therefore unsupported by any evidence whatsoever.

But TS also testified that at least one of the "more than one" sexual encounters during April took place in Texas. R. 1164. She further testified that no sex happened after the Texas trip. R. 1162; 1164. Because sex in Texas cannot support a rape conviction in Utah (on which point the court properly instructed the jury, *see* R. 1165), the jury couldn't convict Blackwing based on the Texas sex. Put differently: TS's testimony established at most two sexual encounters, and one of those two encounters occurred in Texas, so only one encounter even potentially took place in Utah. Thus a second remaining count (count 6) was completely unsupported by evidence.

That leaves the single remaining sexual encounter, the one that might have occurred in Utah. Under our law, a "person is subject to prosecution" only if, among other things not relevant here, "the offense is committed either wholly or partly within the state." Utah Code § 76-1-201(1)(a). Thus, for the jury to convict Blackwing of the one remaining charge, the evidence needed to establish that the sex took place in this state.

It's impossible to rule out Utah as a location for the sex because TS's testimony did not say one way or the other. But for the same reason it's impossible to conclude that the sex *did* happen in Utah—again, TS's testimony didn't say. The jury was thus left to guess at where the last

instance of sex took place, in Utah, in Texas, or somewhere on the road trip between. In the law we call guessing "speculation," which happens when "there is no underlying evidence to support the conclusion." *Heslop v. Bear River Mut. Ins. Co.*, 2017 UT 5, ¶ 22, 390 P.3d 314 (quoting Black's to define speculation as "the 'act or practice of theorizing about matters over which there is no certain knowledge.'").

Here, the conclusion that TS had sex with Blackwing in Utah during April is not supported by any evidence. The jury's supposition on that fundamental geographic point, which was necessary for the court's jurisdiction and the guilty verdict, was therefore wholly speculative. *See id.* And because "a verdict may not rest on mere speculation," *State v. Pullman*, 2013 UT App 168, ¶ 14, 306 P.3d 827, the final remaining rape charge is also unsupported by evidence, *see id.*

"An appellate court should overturn a conviction for insufficient evidence when it is apparent that there is not sufficient competent evidence as to each element of the crime charged for the fact-finder to find, beyond a reasonable doubt, that the defendant committed the crime," *Layman*, 1999 UT 79, ¶ 12, and that's what should happen here. The Court should vacate all three convictions.

B. The absence-of-evidence issues in the case were not preserved, but this Court can vacate the relevant convictions on jurisdictional grounds.

The easiest way to resolve this case is to treat the evidentiary problems as jurisdictional, because the evidence was insufficient to established it. To be convicted of crime in Utah, the defendant must have committed at

least some portion of the proscribed conduct in Utah. "Criminal jurisdiction is governed by Utah Code section 76–1–201." *State v. Mills*, 2012 UT App 367, ¶ 32, 293 P.3d 1129. Under the code, "[a] person is subject to prosecution in this state for an offense ... if: (a) the offense is committed either wholly or partly within the state ... ." Utah Code § 76-1-201(1). And because "[c]riminal jurisdiction is a form of subject matter jurisdiction," "a trial court or an appellate court may dismiss a criminal charge for lack of criminal jurisdiction at any time." *State v. Holm*, 2006 UT 31, ¶ 96, 137 P.3d 726.

That's what the Court should do here. As explained above, the State presented no evidence that the rapes alleged in counts 5, 6, and 7 occurred in Utah. Indeed, TS's testimony could only support two of the three charges, at most. Further, her testimony showed conclusively that at least one TS's two sexual encounters with Blackwing during April occurred entirely outside the state, in Texas. *See* R. 1164. Perhaps the other encounter happened in Utah, but TS didn't testify about where it happened. Any conclusion about the location of the sex act was thus mere speculation, and the State did not establish jurisdiction. *See supra* Part I.A.

Because "mere speculation" is not enough to establish any element of a crime, *see* Pullman, 2013 UT App 168, ¶ 14, and because "an appellate court may dismiss a criminal charge for lack of criminal jurisdiction at any time," *State v. Holm*, 2006 UT 31, ¶ 96, this Court should vacate the

three unsupported rape convictions on jurisdictional grounds and dismiss the relevant charges.

C. Alternatively, this Court can reach the evidentiary issues under ineffective assistance of counsel.

Ineffective assistance of counsel claims can be brought directly on appeal, and this Court can alternatively address the State's failure to present evidence under that framework. Ineffective assistance occurs when defense counsel "fail[s] to render adequate legal assistance." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The test for adequacy is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* To show that a lawyer's acts undermine confidence the verdict, a defendant must establish two elements: "(1) that counsel's performance was so deficient as to fall below an objective standard of reasonableness and (2) that but for counsel's deficient performance there is a reasonable probability that the outcome of the trial would have been different." *State v. Montoya*, 2004 UT 5, ¶ 23, 84 P.3d 1183.

Deficient performance. To show deficient performance under the first element, a defendant "must identify specific acts or omissions demonstrating that counsel's representation failed to meet an objective standard of reasonableness." *Id.* ¶ 24. While trial counsel's decisions enjoy the presumption that they fell within the broad range of acceptable choices, those decisions still must have been "objectively reasonable in

light of all of the circumstances," including "prevailing professional norms." *State v. Hales*, 2007 UT 14, ¶ 69, 152 P.3d 321.

In this case, Blackwing's defense did not recognize that the State failed to present the jury with evidence on three of the seven rape counts. *See supra* Part I. And because counsel didn't recognize the problem, counsel took no action to correct it. One way to do so would have been to move for a directed verdict on the three counts at the close of the State's case in chief. *See* Utah R. Crim. P. 17(*o*). The defense did not do so, however. Instead, counsel moved for a directed verdict on a different issue, namely whether the State had presented enough evidence to establish lack of consent. *See* R. 1355, 1358–59. Alternatively, counsel could have moved to arrest the judgment. *See* Utah R. Crim. P. 23; *State v. Robbins*, 2009 UT 23, ¶ 14, 210 P.3d 288 (recognizing that "a motion to arrest judgment" allows a trial court to "reverse a jury verdict when the evidence is sufficiently inconclusive ... that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted").

There can be no serious contention that counsel's failure to make either motion is objectively deficient performance. For the reasons explained above, such a motion would have been granted. Utah Code § 77-17-3 ("When it appears to the court that there is not sufficient evidence to put a defendant to his defense, it shall forthwith order him discharged."). It is not objectively reasonable to allow a client to be convicted of three first degree felonies that each carry a punishment of five years to life in

prison when the State has presented no evidence to support the verdict, so the first prong of *Strickland* is met here. Indeed, that conclusion is compelled by this Court's recent decision in *State v. Gonzales-Bejarano*, 2018 UT App 60, 427 P.3d 251. There, the Court concluded that "defense counsel's failure to move for a directed verdict on the relevant charges amounted to prejudicial deficient performance" "[b]ecause the State failed to present nonspeculative evidence of an essential element of the crime charged." *Id.* ¶ 45. The same reasoning controls here.

Prejudice. To establish prejudice under the second element of the *Strickland* test, a defendant must show that, "absent the deficiencies of counsel's performance, there is a reasonable likelihood that the defendant would have received a more favorable result at trial." *State v. Hards*, 2015 UT App 42, ¶ 18, 345 P.3d 769. A motion for directed verdict would have been granted if counsel had pursued one for the reasons explained above. Thus, the "result at trial" would have been different—Blackwing would have been convicted of four rather than seven counts of rape. *Cf. id.* As with the deficient performance prong of ineffective assistance, the outcome of the prejudice analysis is compelled by *Gonzales-Bejarano*. *See* 2018 UT App 60, ¶ 45 (concluding that "failure to move for a directed verdict on the relevant charges amounted to prejudicial deficient performance").

In sum, defense counsel's failure to address the State's failure to present evidence constituted deficient performance and prejudiced Blackwing. If this Court does not vacate the three unsupported

convictions on the jurisdictional grounds asserted above, it should do so under ineffective assistance of counsel.

II. One of the exhibits in the jury room was marked "Blackwing jail calls," the improper label prejudiced Blackwing, and a new trial is necessary.

Blackwing was prejudiced by an improperly marked exhibit that the jury took with it to deliberate. That exhibit was a CD of calls between Blackwing and TS, and it was labeled "Blackwing jail calls." R. 873, 886. The issue was discovered shortly after the verdict was rendered, and Blackwing moved for a new trial on that basis. *See id.* The court ultimately denied the motion. R. 2080.[6] This Court "review[s] a trial court's ruling on a motion for a new trial under an abuse of discretion standard." *State v. Billingsley*, 2013 UT 17, ¶ 9, 311 P.3d 995.

"Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Holbrook v. Flynn*, 475 U.S. 560, 567 (1986) (simplified). For that reason, the Supreme Court has "recognized that certain [court] practices pose such a threat to the fairness of the factfinding process that

[6] The court did not rule of the motion immediately. Instead, the case went up on appeal while the motion was pending. This Court remanded for disposition of the motion. R. 1548.

they must be subjected to close judicial scrutiny." *Id.* at 568. One of the practices prohibited to ensure due process has to do with clothing. For example, a defendant cannot be "forced to wear prison clothes when appearing before the jury." *Id.*

Here, the court took steps to ensure that the jury did not see Blackwing in prison garb. For example, Blackwing was in leg restraints during the trial. R. 979. The judge recognized that his normal practice was to have everyone in the courtroom stand for the jury, but he also recognized that prejudice would occur if Blackwing were not able to stand for the jury along with everyone else. He thus ordered that, contrary to his normal practice, the courtroom would remain seated for the jury. *Id.* The judge also made sure that non-prison clothing was available to Blackwing. *Id.*

Unfortunately, however, the court's efforts in this regard were sabotaged when the CD marked "Backwing jail calls" went to the jury room for deliberations. That improperly labeled CD, although perhaps not exactly akin to the wearing of prison garb, had the net effect of undermining the court's efforts to ensure that the jury determine Blackwing's "guilt or innocence" "solely on the basis of the evidence introduced at trial." *Holbrook*, 475 U.S. at 567 (simplified). That is, the jury had in its possession an item that indicated that Blackwing was currently incarcerated, which is the same net result as if he had been in prison clothing during trial.

And although such mislabeled evidence may not always prejudice a defense, it did in this case. The best evidence of that fact is the jury verdict

itself. The jury convicted Blackwing of all 11 counts, but there was insufficient evidence to support three of the convictions. That conclusion was explained above, *supra*, Part I.A.

One of two possible conclusions can be drawn from the fact that the jury convicted in the absence of evidence. One is that the jury did not follow instruction no. 19 regarding the standard of proof required—that the State must prove guilt beyond a reasonable doubt. *See* R. 794. That conclusion is possible because insufficient evidence occurs when "the evidence is sufficiently inconclusive or inherently improbable such that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime for which he or she was convicted." *State v. Holgate,* 2000 UT 74, ¶ 18, 10 P.3d 346 (simplified). Thus, because the jury convicted on three counts for which there was no evidence, we know it convicted even though "reasonable minds *must have* entertained a reasonable doubt" about Blackwing's guilt. *See id.* (emphasis added).

The other possible conclusion is that the jury was prejudiced against Blackwing and convicted him for reasons other than the evidence presented. *Cf. Holbrook,* 475 U.S. at 567–68.

Under Utah law, though, "[w]e generally presume that a jury will follow the instructions given it." *State v. Menzies,* 889 P.2d 393, 401 (Utah 1994) (cited approvingly by *State v. Wright,* 2013 UT App 142, ¶ 42, 304 P.3d 887). Here, there were no circumstances indicating that the jury would not follow instruction 19 to apply the beyond a reasonable doubt burden of proof. Thus the first possible conclusion—that the jury simply

didn't follow its instructions—is contrary to our law. *See id.* With that possibility ruled out by precedent, the remaining conclusion must hold: the jury was prejudiced against Blackwing in some way that was not based in evidence.

The source of that prejudice was likely the mislabeled CD. That follows because the court took steps to ensure that no other unfair prejudice accrued in the case, as discussed above. Given that the jury convicted Blackwing based on its prejudice, and given that the only likely source of that prejudice was a CD labeled "Blackwing jail calls," the trial court's decision to deny the new trial was an abuse of discretion.

Here, "the incident [ie., the mislabeled CD in the jury room] so likely influenced the jury that the defendant cannot be said to have had a fair trial." *See State v. Madsen*, 2002 UT App 345, ¶ 12, 57 P.3d 1134. The jury, instead of applying the burden of proof as directed by the judge, likely relied on "evidence" that was not evidence, an exhibit that showed conclusively that Blackwing was already incarcerated for some reason. Under such circumstances, a new trial was the only proper remedy, and the court erred by not granting one. This Court should reverse and remand for new trial on the eight remaining charges.

CONCLUSION

The State failed to present any evidence to establish two of the seven rape charges, and the evidence of a third was too speculative to support either jurisdiction or a conviction. This Court should vacate the three relevant convictions on jurisdictional grounds. In the alternative, if the

Court decides the case under ineffective assistance rather than jurisdiction, it should remand for entry of judgments of acquittal on the three challenged counts. The Court should also remand for a new trial on the remaining counts, because the improperly labeled CD conveyed information to the jury that prejudiced it against Blackwing.

Dated: July 23, 2019.

DEISS LAW PC

s/ *John Robinson*

Andrew G. Deiss
John Robinson Jr.
Corey Riley

Attorneys for the Appellant

* * *

CERTIFICATE OF COMPLIANCE

This brief complies with rules 21 and 24 of the Utah Rules of Appellate Procedure because: it contains 6797 words (as counted by Microsoft Word 2016), and because it contains no information except public information.

CERTIFICATE OF SERVICE

I certify that I filed the above brief with the Utah Court of Appeals and served it on counsel of record as follows.

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Dated: July 23, 2019

s/ *John Robinson*

Appendix A

The Order of the Court is stated below:
Dated: September 19, 2017 **/s/** BRUCE LUBECK
03:46:45 PM District Court Judge

3RD DIST. COURT - WEST JORDAN
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
	:	
	:	
vs.	:	Case No: 151401859 FS
KAIN BLACKWING,	:	Judge: BRUCE LUBECK
Defendant.	:	Date: September 19, 2017
Custody: Utah State Prison - Draper		

PRESENT
Clerk: krisff
Prosecutor: ETHAN P RAMPTON
RILEY J PLAYER
Defendant Present
The defendant is in the custody of the Department of Corrections Utah State Prison - Draper
Defendant's Attorney(s): KIMBERLY A CLARK

DEFENDANT INFORMATION
Date of birth: March 21, 1969
Sheriff Office#: 290842
Audio
Tape Number: CR 32 Tape Count: 3:08-3:30

CHARGES
1. RAPE - 1st Degree Felony
- Disposition: 08/03/2017 Guilty
2. RAPE - 1st Degree Felony
- Disposition: 08/03/2017 Guilty
3. RAPE - 1st Degree Felony
- Disposition: 08/03/2017 Guilty
4. RAPE - 1st Degree Felony
- Disposition: 08/03/2017 Guilty
5. RAPE - 1st Degree Felony

- Disposition: 08/03/2017 Guilty
6. RAPE - 1st Degree Felony
   - Disposition: 08/03/2017 Guilty
7. RAPE - 1st Degree Felony
   - Disposition: 08/03/2017 Guilty
8. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony
   - Disposition: 08/03/2017 Guilty
9. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony
   - Disposition: 08/03/2017 Guilty
10. FORCIBLE SEXUAL ABUSE - 2nd Degree Felony
    - Disposition: 08/03/2017 Guilty
11. FORCIBLE SODOMY - 1st Degree Felony
    - Disposition: 08/03/2017 Guilty

SENTENCE PRISON

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

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

Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

Based on the defendant's conviction of FORCIBLE SEXUAL ABUSE a 2nd Degree Felony, the defendant is sentenced to an indeterminate term of not less than one year nor more than fifteen years in the Utah State Prison.

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

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

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE
The Court orders count 1 through count 10 to run concurrent to each other. The Court orders count 11 to run consecutive to counts 1 through 10. The Court orders all counts to run consecutive to the Defendant's current prison sentence.

End Of Order - Signature at the Top of the First Page

Case No: 151401859 Date: Sep 19, 2017

Appendix B

INSTRUCTION NO. 25

You are instructed that the defendant is charged by an Information in eleven counts. The Information alleges:

COUNT 1: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about March 9, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 2: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about March 10, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 3: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about March 12 through March 30, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 4: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about March 12-31, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 5: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about April 1 through May 13, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 6: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about April 1 through May 13, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 7: RAPE, in violation of Utah Code 76-5-402, as follows, to wit: That on or about April 1 through May 13, 2014, in Salt Lake County, State of Utah, defendant did have sexual intercourse with another person without the other's consent.

COUNT 8: FORCIBLE SEXUAL ABUSE, in violation of Utah Code 76-5-404, to wit: That on or about March 9, 2014, in Salt Lake County, State of Utah, defendant did touch the anus, buttocks, or any part of the genitals of another, or touch the breasts of a female, or otherwise took indecent liberties with another or cause another to take indecent liberties with him, with intent to arouse or gratify the sexual desires of any person, without the consent of the other.

COUNT 9: FORCIBLE SEXUAL ABUSE, in violation of Utah Code 76-5-404, to wit: That on or about March 12 through March 30, 2014, in Salt Lake County, State of Utah, defendant did touch the anus, buttocks, or any part of the genitals of another, or touch the breasts of a female, or otherwise took indecent liberties with another or cause another to take indecent liberties with him, with intent to arouse or gratify the sexual desires of any person, without the consent of the other.

COUNT 10: FORCIBLE SEXUAL ABUSE, in violation of Utah Code

76-5-404, to wit: That on or about March 12 through March 31, 2014, in Salt Lake County, State of Utah, defendant did touch the anus, buttocks, or any part of the genitals of another, or touch the breasts of a female, or otherwise took indecent liberties with another or cause another to take indecent liberties with him, with intent to arouse or gratify the sexual desires of any person, without the consent of the other.

COUNT 11: FORCIBLE SODOMY, in violation of Utah Code 76-5-430(2), to wit, that on or about March 12 through March 31, 2014, in Salt Lake County, State of Utah, defendant did engage in any sexual act with another person without that person's consent involving the genitals of one person and the mouth or anus of another person, regardless of the sex of either participant.