No. 20170851–CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellee,

vs.

KAIN BLACKWING,
Defendant/Appellant.

APPELLANT'S REPLY 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 charged Blackwing with 11 felonies, and the jury convicted on all counts. Blackwing showed in his opening brief, however, that three of charges should not have been submitted the jury because the State failed to establish jurisdiction over them—the State never adduced evidence that three of the acts took place within Utah. He further showed that the remaining convictions were likely based in part on improper exhibits in the jury room.

In response, the State argues that the jury could infer the jurisdictional facts from other evidence, like the fact that four sex acts took place in Utah. But testimony about sex that did take place in Utah cannot support a conclusion that the other three sex acts ipso facto took place in Utah, particularly when uncontroverted testimony established that at least one of those acts took place in Texas. The State's arguments fail on those

terms—the location of the sex acts (and the number of acts) were both speculative, and criminal convictions cannot rest on mere speculation.

The State also argues that this Court has no jurisdiction over Blackwing's second argument regarding his new trial motion, because his notice of appeal was technically deficient. But Utah law looks past technical deficiencies and instead concerns itself with the heart of the matter, namely whether the opposing party was fairly on notice about the nature of the appeal. There is no contention here that the State was somehow prejudiced by Blackwing's notice of appeal, so the Court should reach the merits of the argument.

This Court should therefore vacate three rape convictions for lack of jurisdiction and direct the district court to dismiss those counts. And because the trial court erred when it denied the motion for new trial, this Court should also remand for a new trial on the remaining counts.

* * *

ARGUMENT

I. The State did not establish criminal jurisdiction over three charges.

The State charged 7 counts of rape in its amended information, but it failed to establish that three of the acts happened in Utah. As explained in the opening brief, that failure left the district court without jurisdiction over those three counts, and they should not have been submitted the jury. *See* Opening Br. at 17–20. Because criminal jurisdiction is subject matter jurisdiction (and can thus be raised at any time), this Court should vacate the convictions.

In its response, the State makes two core arguments regarding jurisdiction. One, it asserts that that TS's testimony that she and Blackwing had sex "[m]ore than one time" in April is enough to support the conclusion that they had sex three times. *See* Response Br. at 25–30 ("[I]t could be readily inferred that [TS's] admission that the two had intercourse '[m]ore than one time' during April meant more than twice and that those incidents occurred between April 1 and the DCFS visit later that month."). Two, the State asserts that the evidence as a whole allowed the conclusion that the alleged sex acts took place in Utah, even though TS didn't testify that any of the three acts took place in Utah and even though she testified that at least one of the "[m]ore than one" took place outside

Utah. *See id.* at 30–32 ("[T]he evidence also permitted the reasonable inference that all three incidents occurred in Utah").[1]

There are several problems with the State's argument, and together they render it unsound. First, the State conflates speculation and conjecture with reasonable inference. Under Utah law, inferences are permissible, but speculation is not. *See State v. Cristobal*, 2010 UT App 228, ¶ 10, 238 P.3d 1096; *see also Heslop v. Bear River Mut. Ins. Co.*, 2017 UT 5, ¶ 22, 390 P.3d 314 (distinguishing between reasonable inference and speculation).

In contract to inference, speculation is "the act or practice of theorizing about matters over which there is no certain knowledge." *See Heslop*, 2017 UT 5, ¶ 22 (simplified). Here, TS testified only that she had sex with Blackwing more than once in April. R. 1156–57. She also placed the location of at least one of those encounters outside Utah's borders. R. 1164. TS did not ever place the other challenged encounter or encounters in Utah.

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[1] The prosecutor himself was unable to articulate the time or place of all seven counts of rape. Indeed, in closing argument, he stated: "I'm going to walk you through some of the offenses now. Let's talk about the rape." R. 1407. However, after recounting the specific evidence going to the first four counts, he was unable to explain the evidence going to the last three (the ones challenged here): "And I may be forgetting another count or two, based upon the testimony, right off hand, but we have those acts." R. 1408. On this record, it's not that he forgot the evidence—it's that there wasn't any offered.

It is thus speculative as to where the challenged encounters took place—they might have taken place in Utah, but they might have taken place in Texas—because there is no "certain knowledge" about the location. *See Heslop*, 2017 UT 5, ¶ 22. That is, the necessary fact to establish jurisdiction (ie., that the charged sex acts took place in Utah) is not a "logical consequence" of TS's testimony. *See Cristobal*, 2010 UT App 228, ¶ 16. Her testimony only established the location of one act (Texas), and it is not a reasonable inference that three other acts took place in Utah.

Further, TS's "more than one time" testimony is too vague to establish how many times the pair had sex, even setting aside the geographic problem. *See* Opening Br. at 18 (explaining that the phrase is unclear, it could mean twice, or five times, or anything more than twice). In response, the State asserts that "more than once" should be read to mean more than twice. Response Br. at 30 ("Given the evidence, ... [TS's] admission that the two had intercourse '[m]ore than one time' during April meant more than twice.").

The State's assertion suffers from the same flaw discussed above. Because TS offered no testimony about how many times more than once she had sex with Blackwing, there was no upper bound in the evidence. Given the lack of upper bound, there is no logical way to infer that the pair had sex three times as charged. *See Cristobal*, 2010 UT App 228, ¶ 16. The State could have followed up with clarifying questions about number of sex acts and location, but it didn't.

That failure is fatal. When someone says "more than once" it is pure speculation to conclude that they meant "more than twice." Or as Led Zeppelin put it, "Many is a word that only leaves you guessing / Guessing about a thing you really ought to know."[2]

Finally, the State's argument appears to rest on the unsupported contention that jurisdiction is a question of fact for the jury. Indeed, the State argues that "the evidence and reasonable inferences that established the district court's criminal jurisdiction over the three charges would permit a reasonable jury to find the challenged elements of the three rapes." Response Br. at 22.

That assertion, however, is contrary to law. "Whether a district court has jurisdiction to hear a criminal matter is a question of law for the court." *State v. Payne*, 892 P.2d 1032, 1033 (Utah 1995) (reversing a district court that deferred to a jury on jurisdictional facts).

This distinction matters because the State appears to rely on the deference to a jury's fact finding that applies to the usual appeal. *See* Response Br. at 32 (relying on the fact that "the trial court instructed the jury that Blackwing was not charged with the Texas intercourse."); *id.* at 35–36 (suggesting that counsel was not ineffective for failing to move to dismiss or arrest the judgment because of the deference given to a jury's

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[2] Led Zeppelin, *Over the Hills and Far Away*, Houses of the Holy (Atlantic Records, 1973). Here TS did not use the word "many," but the same reasoning applies. To convict someone on three counts of rape, the facts really ought to show three instances of sex beyond a reasonable doubt.

factfinding). Thus, to the extent the State suggests that the jury was in a position to weigh jurisdictional evidence, that contention fails. “If resolution of a factual dispute is necessary to settle the jurisdictional question, it is the court, not the jury, that must resolve the dispute.” *Payne*, 892 P.2d at 1033.

Jurisdiction is not a fact for the jury, and the State failed to establish jurisdiction over the three challenged counts. This Court should vacate the three convictions for lack of jurisdiction and direct the district court to dismiss the charges.

II. This Court has jurisdiction to reach the issue of whether the trial court erred when it denied the motion for new trial.

Although a deficient notice of appeal has jurisdictional import, the notice was sufficient to confer jurisdiction in this case. At its core, the notice of appeal is a creature of due process. “[T]he purpose of the notice of appeal is fundamentally to give notice that an appeal has been taken.” *Assocs. Fin. Servs. Co. of Utah v. Sevy*, 776 P.2d 650, 651 (Utah Ct. App. 1989), *overruled on other grounds in Salt Lake City Corp. v. Cahoon & Maxfield Irr. Co.*, 879 P.2d 248, 251 (Utah 1994); *see also Jensen v. Intermountain Power Agency*, 1999 UT 10, ¶ 7, 977 P.2d 474 (emphasizing that “the object of a notice of appeal is to advise the opposite party that an appeal has been taken from a specific judgment in a particular case” simplified)).

Because a notice of appeal’s sufficiency is a matter of fair notice to the opposing party, Utah law construes notices liberally. This is in accord

with the purpose underlying our system of justice. *See generally* Utah R. Civ. P. 1 (stating that civil rules "shall be liberally construed and applied"). Specifically, "[i]n determining whether the notification requirement has been met, [the supreme court] [has] long adhered to the policy that where the notice of appeal sufficiently identifies the final judgment at issue and the opposing party is not prejudiced, the notice of appeal is to be liberally construed." *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 14, 199 P.3d 957 (internal quotation marks omitted).

The *Kilpatrick* case distills into this rule: "Where the appealing party's intent is clear and the appellee suffers no prejudice, the notice of appeal is sufficient." *Id.* ¶ 15.

Here the State has identified a technical deficiency in the notice of appeal. But the State has not suffered prejudice, and Blackwing's intent to appeal his convictions has never been in doubt. Indeed, the motion for new trial was filed before the notice of appeal. *See* Record Index at 5. It was thus already pending when the notice was filed. In fact, it was the State (through its prosecutor, very much to his credit) that brought the problem to defense counsel's attention. R. 873 (explaining that the prosecutor was first to notice that a CD marked "Blackwing jail calls" had been given to the jury). Further, the State knew about the remand that took place in this case to resolve the new trial motion, and it engaged with that process throughout. *See, e.g.*, R. 885.

This case is thus like *Kilpatrick* because the "appealing party's intent is clear" and the State "suffer[ed] no prejudice." *See Kilpatrick*, 2008 UT 82,

¶ 15. It is also like *Kilpatrick* in that the State has "not claim[ed] that they were misled" by the technically deficient notice of appeal. *See id.* This Court thus has jurisdiction over this issue under the *Kilpatrick* rule, and it should reach the merits.[3]

The merits, stated in the opening brief at pages 25–28, show that the district court erred when it denied Blackwing's motion for new trial. The State has not responded to that argument, choosing instead to challenge only this Court's jurisdiction. The merits are unopposed and make a facial case for reversal. This court should reverse and remand for a new trial.

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. The Court should also

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[3] To be sure, the scope of the *Kilpatrick* rule is a difficult issue and somewhat of an open question. *See Pulham v. Kirsling*, 2019 UT 18, ¶ 29 n.8, 443 P.3d 1217 (declining to address *Kilpatrick*'s continued validity in light of more recent cases). For that reason, it may be prudent for this Court to assume, but not decide, that *Kilpatrick* applies. On that assumption, the Court can proceed to analyze the merits of the trial court's denial of the new trial motion without grappling with the jurisdictional question. Although Appellant believes that the court erred when it denied his motion for new trial, Appellant also recognizes that the burden of persuasion on appeal is a high one. If this Court is not persuaded, then it may pass on the Kilpatrick question and leave that determination for a different case.

remand for a new trial on the remaining counts, because the jury received an impermissibly labeled exhibit which prejudiced Blackwing.

Dated: December 23, 2019.

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CERTIFICATE OF COMPLIANCE

This brief complies with rules 21 and 24 of the Utah Rules of Appellate Procedure because: it contains 2236 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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