

IN THE UTAH STATE COURT OF APPEALS

STATE OF UTAH

Plaintiff/Appellee,

v.

FRANK VAL MODES

Defendant/Appellant.

REPLY OF APPELLANT

Appellate Case No. 20180265

District Ct. No. 161912922

REPLY BRIEF OF APPELLANT FRANK VAL MODES

Appeal from the Third District Court- Salt Lake City, Salt Lake County, from a conviction of one First Degree Felony before the Honorable Judge Keith Kelly

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DETAIL OF THE ARGUMENT

I. THE DEFENDANT’S RIGHT TO A FAIR TRIAL WAS VIOLATED.

The right to a fair trial is a fundamental constitutional right secured by the due process and equal protection guarantees of the Sixth and Fourteenth Amendments. *State v. Daniels*, 2002 UT 2 (Utah 2002) (citing, e.g. *Holbrook v. Flynn*, 475 U.S. 560, 567, 89 L. Ed. 2d 525, 106 S. Ct. 1340 (1986); *Estelle v. Williams*, 425 U.S. 501, 502-03, 48 L. Ed. 2d 126, 96 S. Ct. 1691 (1976)). These rights are also protected under the Utah State Constitution. Utah Const. Art. I, §§7, 12. (See Addendum E). A defendant’s right to a fair trial is intended to assure access to the necessary tools and materials to mount an effective defense. *State v. Bakalov*, 1999 UT 45 ¶ 51 (Utah 1999) (citing *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)). The Defendant’s right to a fair trial was violated when the trial court improperly admitted testimony of alleged prior victim, his trial counsel was ineffective, his due process rights were violated, and the cumulative effect of those errors undermines confidence in the final outcome.

A. Appellant can show that the trial court plainly erred by allowing an alleged victim testify about a prior conviction.

The trial court plainly erred by allowing M.E. to testify because it was an error that should have been obvious to the trial court and the error was harmful.

As Appellant stated in his initial brief, the standard of review for the admission of evidence under these circumstances is a plain error analysis. *State v. Holgate*, 2000 UT 74, ¶ 11. Plain error analysis requires the Appellant to establish the following: (1) an error exists; (2) the error should have been obvious to the trial court; (3) the error was

harmful. *Id.* at ¶13. Prejudicial impact is inferred where there is a reasonable likelihood that but for the error the defendant would have had a more favorable outcome. *Id.*

Appellant does not rely on *State v. Cuttler*, 2015 UT 95 for the burden that he must prove on his unpreserved claim, but for “ ‘ . . . the text of rule 403 itself . . . ’ and whether the evidence’s ‘ probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury. . . . ’ ” *Id.* at ¶ 15 (citing to Utah R. Evid. 403).

It is understood that the intention of 404(c) is to admit propensity evidence and such does not *immediately* result in unduly prejudicial impact, but the trial court must still work to prevent the danger of unfair prejudice by limiting the details and facts of the prior conviction. *Id.* at ¶ 27. Presenting inflammatory details and evidence beyond what is necessary or appropriate to establish propensity is improper under 404(c). *Id.* In short, evidence admitted under 404(c) must still meet the requirements of Rule 403- the probative value must outweigh the prejudicial impact. Meeting Rule 403 requirements does not contradict the purpose of Rule 404(c) as stated by the Appellee.

In *Cuttler* the Court reasoned that specific details which go to a pattern of conduct may be necessary to establish a specific propensity. *Id.* at ¶ 29 (noting that a trial court could properly admit specific factual allegations from a prior offense because those factual allegations were similar in mode, method, or context to the instant allegations). The testimony proffered by M.E. does not meet this standard.

M.E. testified in graphic detail about the alleged sexual abuse perpetrated on her by the Appellant when she was between the ages of 6-7 years old. (R. at 392). None of the

statements were necessary to the admission of evidence under 404(c) or properly admissible under 404(c).

As the Appellee stated, there is nothing in the rule that requires similarity, but as explained in *Cuttler*, “. . . weighing the evidence under this rule, courts may consider many factors. . . .” *Id.* at ¶18. Contrary to the Appellee’s response, a court considering similarity between the two cases may be appropriate in assessing probative value. *Id.* at ¶19. Therefore, the error should have been obvious to the trial court. The similarities between the allegations of K.V. and M.E. are minimal. The differences between the testimony of K.V. and M.E. are significant. Specifically, M.E.’s testimony was not similar to K.V.’s in mode, method, or context of the offense. Due to the minimal similarities, the error should have been obvious to the trial court.

Contrary to what Appellee states, the minimal similarities do not corroborate K.V.’s testimony and that is why the admission resulted in great prejudice against the Appellant. The purpose of 404(c) is to establish propensity for committing the type of offense alleged, not to parade the extraneous and inflammatory facts of a prior offense before the Court. If M.E.’s testimony was probative to show corroboration, then there should be more than minimal similarities.

If the court finds that the similarities are significant, the prejudicial effect still needs to be taken into consideration. Like Appellee stated, this was a bench trial and the Judge was the fact finder who is presumed to be less prejudicial than a jury. Br. Apl. 26. Specifically it is recognized that the court will only consider admissible evidence and not inadmissible evidence, but the details provided by M.E. was admissible at trial resulting in the court

considering the evidence. The extraneous and inflammatory details undoubtedly lead the Court to give the testimony of M.E. unnecessary and improper weight in the ultimate determination as strictly forbidden by Rule 403. Rule 403 is designed to restrict the admission of relevant evidence where it become clear that the admission of such evidence would do more than good. Rule 404(c) does not work to subvert the prohibitions of Rule 403; instead, Rule 404(c) must still work within those confines. The admission of the detailed testimony under 404(c), which goes far beyond the scope of propensity, was improper and inherently prejudicial.

B. Appellant's counsel was ineffective because counsel performed deficiently, and it was prejudicial to Appellant.

Appellant's ineffective assistance of counsel does not fail because trial counsel's performance was objectively deficient and but for that deficiency Appellant would have obtained a more favorable outcome. Trial counsel failed to cross-examine the alleged prior victim in any manner regarding the facts and circumstances of the alleged prior abuse, failed to object to testimony of prior sexual abuse of a child under 404(c), and failed to present expert testimony on the issue of early childhood memory. There was no conceivable tactical basis for Appellant's trial counsel deficient actions.

"To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." *Menzies v. State*, 2014 UT 40, ¶ 75 (Utah 2014). "To satisfy the first part of the test, defendant must overcome the 'strong presumption that [his] trial counsel rendered adequate

assistance.”” *State v. Ott*, 2010 UT 1, ¶ 22, 247 P.3d 344 (Utah 2010) (quotations in original). Conversely, “whenever there is a legitimate exercise of professional judgment in the choice of trial strategy, the fact that it did not produce the expected result does not constitute ineffectiveness of counsel.” *Id.* (quoting *State v. Bullock*, 791 P.2d 155, 160 (Utah 1989)). The question to be examined then is whether, “the failure to raise the objections before the trial court [was] the result of a consciously chosen strategy of trial counsel rather than an oversight, and if it was a strategic decision, did the making of that choice constitute ineffective assistance of counsel?” *Id.*

The Sixth Amendment of the United States Constitution likewise requires counsel to make a reasonable investigation and inquiry into the factual underpinnings of the charges and any strategic choices made by trial counsel after a less than reasonable investigation are likely unreasonable. *Lynch v. State*, 2017 UT App. 86, ¶ 66; *See also, State v. Templin*. 805 P.2d 182, 187-188 (Utah 1990). The Utah Supreme Court noted, “when trial counsel fails to . . . present evidence that [is] crucial to the defense, it amounts to prejudice when this evidence would have affect[ed] the entire evidentiary picture.” *State v. Griffin*, 2015 UT 18, ¶ 34 (Utah 2015). “When no possible explanation or tactical reason exists for such a decision,” the first prong of the ineffective assistance of counsel analysis is presumed met. *State v. Finlayson*, 2000 UT 10, ¶ 24 (Utah 2000).

Appellant did not receive reasonable representation. Where trial counsel fails to adequately investigate the basic facts and underpinning of a case or fails to investigate the availability of prospective defense witnesses, counsel’s performance

does not comport with the “wide range of reasonable professional assistance.” *State v. Thompson*, 2014 UT App. 14 ¶ 36 (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). In determining whether trial counsel’s failure to investigate and present evidence amounts to prejudice against an Appellant, the Utah Supreme Court has instructed the appellate court to examine the totality of the evidence and determine whether the final outcome was in fact supported by the evidence presented. *Gregg v. State*, 2012 UT 32, ¶26. Importantly, though the Appellant carries a difficult burden under a claim of ineffective assistance of counsel, that burden is not impossible to overcome. *State v. Thompson*, 2014 UT App. 14 ¶ 36.

- i. *Competent counsel would have moved to admit interview videos to contradict the allegations.*

Trial Counsel’s failure to introduce the CJC interview of the alleged victim. Those interviews contained several inconsistencies.¹ Trial Counsel never addressed the issue of the K.V. telling investigators about being molested before or sought to address the CJC interviews in any manner despite the inconsistencies.

The CJC interview would have proven many inconsistencies in the alleged victim’s testimony. Inconsistencies about the allegations were crucial to the entirety of the evidentiary picture at the trial court level, especially given the passing of time and the lack of corroboration. Likewise, as discussed in *State v. Ott* and *State v. Bullock*, there does not

¹ Appellant recognizes the restrictions to the record on appeal under Rule 11 of the Utah Rules of Appellate Procedure with regard to evidence not addressed by Trial Counsel at the trial court level and thus does not examine the specific statements contained therein, which are inconsistent with testimony of witnesses at trial.

appear to be any sound strategy behind failing to inquire into these inconsistencies on the part of trial counsel and a failure to even address such is clearly ineffective. In short, there appears to be no tactical reason to ignore the CJC interviews where the inconsistencies are obvious, and nothing from the interview would have harmed the defense. Even though the videos showed K.V.'s emotions, Appellant would not have been worse off as stated by the Appellee because due to the judge only being provided with a summary, the inconsistencies were not able to be presented. As noted by the Utah Supreme Court, when no such strategic reason for a decision exists, it is presumed the first prong of the ineffective assistance of counsel test is satisfied.

- ii. *Trial Counsel's failure to cross-examine the alleged victim in the prior matter or object to the testimony of prior sexual abuse of a child under 404(c) was objectively deficient.*

Appellant has proven that competent counsel would have objected to M.E.'s testimony because there is no conceivable strategy to failing to object to the testimony of the alleged victim in the prior matter *and* failing to inquire into that testimony when it was proffered.

Trial Counsel's decision to ignore the testimony its entirety was not based in sound professional judgment as required by case law. Trial Counsel was aware of Appellant's theory of the case that he was in the home daycare when the K.V. was attending and would have been physically unable to commit the sexual abuse as alleged by M.E. due to a prior injury.² Yet trial Counsel makes no attempt to address this theory through cross

² Trial Counsel examined other witnesses about the timeline and contentions that Appellant was not living in the home during most of the time when K.V. alleged these

examination. As outlined above, the testimony of the prior alleged victim was inherently prejudicial to the Appellant's case, thus it was vital to cross-examine. In the alternative, if Trial Counsel strategically chose not to further inquire into the factual allegations of the prior matter in order to limit their impact, then Trial Counsel's failure to object to the detailed and graphic testimony was objectively deficient. As outlined, *State v. Ott* and *State v. Bullock*, it is unlikely that trial counsel made a strategic choice to not cross-examine the alleged prior victim *and* chose not to object to the admission of the testimony when it exceeded the scope of 404(c). As noted by the Utah Supreme Court, when no such strategic reason for a decision exists, it is presumed the first prong of the ineffective assistance of counsel test is satisfied.

iii. *Competent counsel would inquire into the faulty memory of a tender age witness when such witness was the sole basis of the conviction was objectively deficient.*

It is clear from the attempts to establish a timeline of the allegations, that Trial Counsel knew the information was crucial to the Appellant's defense. Proving that alleged victim was inherently unreliable given her young age and lack of specific recall would have abolished any basis for finding the State had met its burden. Trial Counsel makes several arguments and inquiries regarding the timeline, but no such timeline is ever established. This line of questioning supports a finding that Trial Counsel knew the recall and memory issue was important and yet no sufficient inquiry or argument regarding that issue is ever

offenses occurred. (R. at 374, 450, 453, 526). Similarly, Trial Counsel examined other parties about Appellant's workplace injury which limited his ability to lift and/or bend over during the time period in which M.E. alleged Appellant committed the prior offense. (R. at 374, 414, 416, 418, 448).

properly made by Trial Counsel.

An expert would have so materially added to this case because the facts of the instant matter made the alleged victim's testimony particularly susceptible to direct. Proving that alleged victim was inherently unreliable given her young age and lack of specific recall would have abolished any basis for finding the State had met its burden.

iv. *Appellant has proven prejudice.*

Trial Counsel's failure to present any evidence favorable to the Appellant or address the lack of evidence brought forth by the State resulted in an unfavorable outcome for Appellant. As outlined above, there were significant inconsistencies between trial testimony, preliminary hearing testimony, and prior statements, but no such evidence was brought before the Trial Court. The failure to provide this evidence or address it in manner allowed the Trial Court to find the testimony of those witnesses credible at trial and make findings based on their testimony without any contradiction from the defense. Given the lack of evidence presented by the State as to the actual elements of the offense, the failure to present any favorable evidence had a clear impact on the ultimate outcome.

Trial Counsel's failure to cross-examine the alleged prior victim, failure to make a 404(c) objection, and failure to present any evidence resulted in unfavorable outcome for Appellant. The Judge never heard the defense's theory of the case as to the prior allegations due to Trial Counsel's failure to cross-examine. The Judge was permitted to hear extraneous details of the alleged prior victim's and the Judge never heard any evidence from the defense that could have helped disprove the allegations against Appellant. As a

result of Trial Counsel's failure, the Judge was never able to consider the full weight of the Appellant's defense and the proper context of the testimony of M.E. in making the ultimate decision.

C. Appellant was not provided adequate notice of the alleged timeline of the charged offenses.

Due process requires that a criminal defendant be given sufficiently precise notification of the date of the alleged crime in order to prepare his defense. *State v. Nelson-Waggoner*, 2004 UT 29, ¶20. The adequacy of such notice is analyzed by weighing the completeness of the notice and whether it is adequate for defendant's purposes against the background of all of the information available to the prosecution. *State v. Taylor*, 2005 UT 40, ¶9.

Defendant was deprived of his right to due process because the charging information alleged the offense occurred at some point over a fifteen year period and failed to provide a specific timeline. (R. at 1-4). Every attempt to establish a timeline of the offense was met with a differing response. A three-and-a-half-year time period is not a specific enough notice to protect the Constitutional right to Due Process. While it is true that trial courts are afforded wide latitude as to the date of alleged sex offense involving a young child, no such wide latitude appears to apply to instances where the date of offense very clearly varies at every stage of the criminal proceeding. *See e.g., State v. Hattrich*, 2013 UT App 177 (noting that a change of dates/times in an amended information did not violate due process because the prosecution

provided defense counsel with the basis for those dates and times).

In the instant matter, the Defendant was incapable of preparing a defense with such a broad timeline as outlined in the charging information. Subsequent to the Preliminary Hearing, Trial Counsel would have properly narrowed the time frame down to 2004 given the unequivocal testimony of the alleged victim that the offense occurred in 2004. The victim's subsequent testimony at trial sufficiently changed the constitutionality of the previously provided notice as her testimony increased the date of the alleged offenses from 2004 to any time between 2000 and 2004.

Appellant's defense was severely and unconstitutionally hindered by this moving target. This lack of proper notice and lack of evidence as to the basis for any timeline provided by the State is in clear contravention to the requirements of Due Process.

D. Cumulative error does justify overturning the verdict.

Under the Doctrine of Cumulative Errors, the Court should reverse and remand for a new trial. The Doctrine of Cumulative Errors requires the Appellant establish three things: (1) an error occurred; (2) the error, standing alone, has conceivable potential for prejudicial impact; (3) the cumulative effect of the potential prejudicial impact undermines confidence in the ultimate outcome. *State v. Martinez-Castellanos*, 2018 UT 46, ¶42.

Appellant's defense consisted of only his testimony, no witnesses or evidence was presented by Trial Counsel. Trial counsel never cross-examined

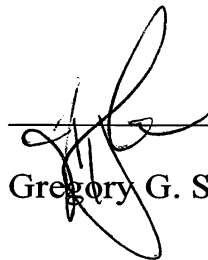
or countered significant testimony despite clear inconsistencies. Trial Counsel clearly failed to make adequate inquiry into the factual underpinnings of the allegations as well as the Appellant's theory of the defense. Trial Counsel's failure to object to the improper 404(c) evidence and the Trial Court's plain error in admitting the evidence was also a significant error. All of those errors, standing alone, had a significant impact on the Appellant's case and a prejudicial impact on the ultimate outcome. Under the Doctrine of Cumulative Errors, the Court should reverse and remand in the interests of justice.

CONCLUSION

Defendant was denied his Sixth and Fourteenth Amendment rights to a fair trial and due process of law, these rights are also protected under Article I, Sections 7 & 12 of the Utah State Constitution. The individual and cumulative effect of these errors requires a reversal of the trial courts. Wherefore, Defendant-Appellant, respectfully requests this court to reverse and remand accordingly.

SUBMITTED this 17th day of May, 2019.

I hereby certify that the contents and length of this brief comply with the requirements of Utah R. App. P. 24(g) and 21(g).

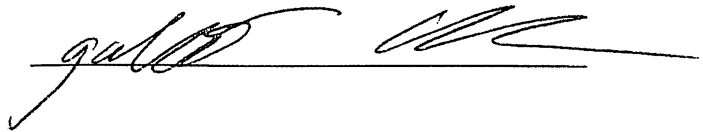


Gregory G. Skordas

CERTIFICATE OF COMPLIANCE

I hereby 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 the public access is restricted by statute, rule, order, or case law (non-public information).

SKORDAS & CASTON, LLC



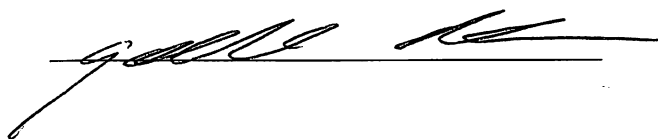
CERTIFICATE OF SERVICE

I hereby certify that on the 17TH May, 2019, I filed a true and correct copy of the foregoing, **REPLY BRIEF OF APPELLANT**, with the Utah Supreme Court, via email, pursuant to Utah Supreme Court Standing Order No. 11 and caused a copy to be served upon the following:

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Forthwith, pursuant to Utah Supreme Court Standing Order Nos.8 and 11, I shall provide the Utah Court of Appeals with one original, signed, unbound copy, CD Copy with searchable PDF, and six bound copies as well as provide opposing counsel with two bound copies.

SKORDAS, CASTON & HYDE, LLC



ADDENDUM 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI:

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

U.S. Const. Amend XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

Utah Const. Art. I Sec 7, 12:

Sec. 7. **[Due process of law.]** No person shall be deprived of life, liberty or property, without due process of law.

Sec. 12. **[Rights of accused persons.]** In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

ADDENDUM 2

RULES

404(c) Evidence of Similar Crimes in Child-Molestation Cases.

- (1) Permitted Uses.** In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.
- (2) Disclosure.** If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.
- (3)** For purposes of this rule “child molestation” means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.
- (4)** Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.