No. 20161070-CA

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff and Appellee,
v.
ASHTEN NUNES,
Defendant and Appellant.

BRIEF OF APPELLANT

On appeal from the Third Judicial District Court, Salt Lake County,
Honorable Vernice Trease, District Court No. 151903010

Mr. Nunes is incarcerated.

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Oral Argument Requested

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Parties Below Not Parties to the Appeal

Victim representative: Cindy Wasek

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Jurisdictional Statement

This court has jurisdiction under section 78A-4-103(2)(j) of the Utah Code.

Introduction

Teenagers MB and Ashten met at a concert in the fall of 2013. She was fourteen and he was seventeen. They soon become close friends who communicated daily using text messages and social media. Their messages became graphic and sexual in nature, and they expressed their love for each other. But they both dated other people as well.

Despite a protective order put in place by MB's father, the two teenagers continued to have contact. MB lied to her parents and came up with schemes to cover up time she spent with Ashten.

As their relationship progressed, Ashten often indicated a desire to have sex with MB, but he always respected MB's wishes when she said she did not want to have sex. MB decided she wanted to have sex with Ashten in December of 2014. By that time, MB was fifteen and Ashten was eighteen. MB sent Ashten Twitter messages saying, "I'm excited to see you and give u somethin," and "it's shrooms and birth control."

On December 6, 2014, MB came to Ashten's home, kissed Ashten, let him take her shirt off, and went freely with him to his bedroom. The two then engaged in sexual intercourse, which MB described as Ashten sticking his penis in her anus and vagina. She also testified that she told him to stop, but that he

persisted. Later, after Ashten's mother picked her and Ashten up to take her home, MB hugged and kissed Ashten good night. Once she got home that night, she sent Ashten messages saying, "thank you lovely," "I LOVE YOU SO FUCKING MUCH I CAN'T BEGIN TO PUT INTO WORDS," and "you're amazing. sleep well."

The next day, Ashten and MB exchanged more messages. Ashten expressed anger about how AG, another girl he was seeing, had cheated on him. MB reminded him that he had cheated on AG, too—by having sexual intercourse with MB. As Ashten continued to talk about AG, MB messaged Ashten that "it hurts that you want other girls more than I." MB eventually messaged, "I gave everything away to you and you don't even fucking care. that kills me." After several more messages that included more talk from Ashten about AG, MB messaged, "I lost my virginity to you last night and you mean everything to me, but I won't take you treating me like that." The next day, MB was admitted to the hospital for suicidal ideation and a previously unknown heart condition.

In January, MB told her counselor, Monica Dixon ("Counselor"), she had lost her virginity to Ashten. After hearing the details, Counselor told MB she needed to report the encounter as a rape. Counselor, with MB's permission, told MB's parents. MB was interviewed by a detective at the Children's Justice Center ("Detective") and was examined by a doctor.

Ashten was charged with rape, forcible sodomy, and violating the protective order. At the ensuing trial, there was no clear evidence of forcible sodomy or rape. In fact, experts for both the State and the defense testified that the evidence was consistent with consensual sex. The jury was forced to decide the case based on MB's credibility. MB gave inconsistent accounts of the sexual encounter at different times, and her allegations of rape and forcible sodomy were inconsistent with the forensic evidence and her conduct and text messages following the encounter. It is evident that the jury did not wholly except MB's account of the sexual encounter—the jury convicted Ashten of rape, but acquitted him on the forcible sodomy charge.

At trial, Ashten's counsel either did not object or objected and then withdrew the objection when MB's mother ("Mother"), Counselor, and Detective gave inadmissible testimony regarding MB's out-of-court statements, When Mother vouched for MB's truthfulness, trial counsel did not object. And when MB twice referred to Ashten having been in jail during key moments in her testimony, trial counsel said nothing. Because the central issue in the trial was MB's credibility, the inadmissible evidence improperly bolstered her testimony and gave greater credence to her claims.

Without this inadmissible evidence bolstering MB's testimony, there is a reasonable probability that the result of the trial would have been different. It is likely the jury would have rejected MB's account of rape, just as it rejected her

account of forcible sodomy. Ashten was prejudiced as a result of trial counsel's ineffective assistance. Ashten asks this court to vacate the rape conviction and remand the case for a new trial.

Statement of the Issues

Issue 1: Whether trial counsel was ineffective for failing to object to inadmissible hearsay testimony that bolstered the truthfulness of MB's allegations.

Issue 2: Whether trial counsel was ineffective for failing to object to inadmissible vouching which bolstered MB's testimony.

Issue 3: Whether trial counsel was ineffective for failing to object when MB made references to Ashten's having previously been in jail.

Standard of Review: Claims for ineffective assistance of counsel present questions of law. *State v. Ott*, 2010 UT 1, ¶ 16, 247 P.3d 344. An appellant must show that counsel's performance was deficient and prejudicial. *State v. Larrabee*, 2013 UT 70, ¶ 18, 321 P.3d 1136.

Preservation: The issues were not preserved. Ashten has raised these issues under the doctrine of ineffective assistance of counsel.

Statement of the Case

Ashten Nunes appeals his conviction for rape.[1]

[1] Ashten was also found guilty of ten counts of violating a protective order, but does not appeal that conviction. [R.575-77.] He was found not guilty of forcible sodomy. [R.575-77.]

MB and Ashten begin a romantic relationship

In September 2013, MB and Ashten met at a concert. [R.1061] She was fourteen, and he was seventeen. [R.1,1033] MB was "intrigued" with Ashten and thought he "seemed like a really cool person." [R.1062,1079.] The next day, MB told her mother ("Mother") she had met a boy at the concert, and she showed Mother a rock he had given her. [R.1281.]

MB and Ashten began communicating daily by text message social media, including Twitter, Tumblr, and SnapChat. [R.1061-63,1155.] MB felt a connection with Ashten because she felt like they had something in common—"a troubled home life" and a "hard upbringing." [R.1169.]

Their messages soon became sexual in nature. [R.1062-63,1147.] The two also started meeting in person. [R.1063-64.] From the time they started seeing each other, Ashten frequently expressed interest in having sex with MB, but MB consistently declined and Ashten acquiesced. [R.1070,1080.] MB said, "he begged me pretty much every time I saw him, to have sex with him and I just never did." [R.1080.] MB testified that she would "just push him off" and just thought it was "horny teenage boys or whatever," so she "didn't really think anything of it." [R.1080.]

Eventually, Ashten and MB told each other that they loved each other. [R.1073.] As MB put it, "I think that's why I stayed with him because he told me that he loved me and I believed him." [R.1073.]

MB hides the relationship from her parents

MB did not tell her parents about Ashten because she knew they would not approve. [R.1067.] MB had schemes to hide her communications with Ashten from her parents. [R.1155-56.] Despite these efforts, MB's parents found her text messages with Ashten on her phone. [R.1068.]

After reading the couple's texts, MB's dad obtained a protective order against Ashten. [R.1072.] MB testified that her dad did this "against [her] will," and that she did not want the protective order. [R.1072.] Her dad also forbade her to continue her relationship with Ashten. [R.1072.]

MB nonetheless continued to see Ashten. [R.1072-73.] Despite the protective order and her dad's instructions, MB had contact with Ashten "[e]very day." [R.10873.] The couple kept their relationship "very secretive" and stopped using text messaging. [R.1073.] The couple instead communicated through other apps on their phones and "anonymously" on social media. [R.1073.]

MB would also sneak out of the house to meet Ashten. [R.1063-65.] One morning, when she returned home after her parents had discovered she was missing, she lied to them and told them she had a nightmare, felt suicidal, and went for a walk. [R.1064.] On another occasion, she wrote a letter excusing herself from school and lacrosse practice to meet with Ashten. [R.1068-69.]

Ashten was also dating other people, however, including a girl named AG. [R.1081-82,R.1171.] MB was jealous of Ashten's relationship with AG, but she seemed to accept it. [R.1081,1171.] MB sent a message to Ashten saying that if he

"wanted to be with [AG], that was fine, but [MB] would still [be] with him 'cause [she] loved him." [R.1173.] MB also dated other people, including a fellow student named Devin with whom she went to homecoming. [R.1075,1252, 1273,1311.]

MB and Ashten have sex

On December 5, 2014, MB visited Ashten at a home he had recently moved into. [R.1078,1596.] By that time, MB was fifteen and Ashten was eighteen. [R.1,1033] The first time MB went to Ashten's home in December, she kissed Ashten while on his bed, and he tried to remove her clothing. [R.1078-79.] But they did not have sex. [R.1078-79.]

The allegations in this case arose out of the encounter that occurred the next day, December 6, 2014. [R.1080,1083,1133.] Before seeing Ashten the next day, MB sent Twitter messages to him saying, "I'm excited to see you and give u somethin somethin," and "it's shrooms and birth control." [R.1102,1135; Def.Ex.6-pg.3.] Ashten replied, "Oh my word" and "Baby please save yourself for one day." [Def.Ex.6-pg.3.]

MB arrived at Ashten's home in the evening. [R.1083.] Ashten started kissing MB, and she kissed him back. [R.1244.] Ashten took off her shirt, and she freely went with him into the bedroom. [R.1244-45.] In her interview with Detective Huntington ("Detective"), she said that at that point, Ashten asked if she wanted to have sex, and she said yes. [R.1244-45.]

At trial, MB testified that while she was kneeling up against the bed, with her head on the bed and Ashten's hand on the back of her neck, Ashten inserted his penis first into her anus and then into her vagina. [R.1084-86.] But she admitted that at the preliminary hearing she had testified that Ashten inserted his penis first into her vagina and then her anus. [R.670-71,1245-46.] She also admitted that she had told Detective she initially was kneeling, but turned around to ask Ashten if they could cuddle instead, and he agreed. [R.1249-50.] She laid down on her side on the bed and Ashten started penetrating her again. [R.1249-50.]

At trial, MB testified that she screamed, cried, and told him to stop, but he persisted. [R.1085.] But she admitted that at the preliminary hearing she had testified that her eyes were watering, but she was not really crying. [R.670,1248.]

MB said that Ashten ejaculated on her back, and she got up and went to the bathroom. [R.1085.] She reported that there was blood on her hands and all over her. [R.1085.] She cleaned herself up and told Ashten she wanted to go home. [R.1085.]

Ashten called his mom to pick up MB and take her home. [R.1085.] MB got into the car with Ashten, his mom, his brother, and maybe his sister. [R.1088.] She did not say anything about what had happened. [R.1088.] During the car ride, she sat next to Ashten, and she hugged him before she got out of the car.

[R.1089.] MB admitted at trial that at the preliminary hearing she had said she kissed Ashten good night. [R.679,1251.]

After being dropped off at home that night, MB sent Ashten Twitter messages saying, "thank you lovely," "I LOVE YOU SO FUCKING MUCH I CAN'T BEGIN TO PUT INTO WORDS," and "you're amazing. sleep well." [Def.Ex.7-pg.1-2.] MB and Ashten also discussed meeting up the next day to go snowboarding. [R.1101,1145.]

MB is jealous of Ashten's other girlfriend and eventually cuts off contact with Ashten

The next day, two exchanged more messages, including messages where Ashten spoke about AG (the other person he was seeing) and asked MB to kiss AG. [St.Ex.14-pg.8.] At trial, MB testified that it upset her when Ashten asked her to kiss AG. [R.1251-52.]

During the exchange, Ashten expressed anger that AG had "cheated" on him, and MB reminded Ashten that he had had sex with someone else (meaning MB herself) the night before as well. [R.1171-72.] MB messaged, "you cheated on her yesterday too," and later, "remember you fucked someone else last night too." [Def.Ex.8-pg.2, Def.Ex.9-pg.2, St.Ex.14-pg.5.] In these messages, she did not complain about what happened during their sexual encounter or say anything about being raped, injured, crying, or telling him to stop. [R.1172-73.]

At one point in the exchange, MB messaged Ashten that "it hurts that you want other girls more than I." [St.Ex.13-pg.9.] As the exchange continued, MB

eventually messaged, "I gave everything away to you and you don't even fucking care. that kills me." [Def.Ex.5-pg.2.] After several more messages that included more talk from Ashten about AG, MB messaged, "I lost my virginity to you last night and you mean everything to me, but I won't take you treating me like that." [Def.Ex.4-pg.1.]

The next day, December 8, 2014, MB's school counselor, Monica Dixon ("Counselor") called Mother and told her to come to the school. [R.1293-94.] At the school, Counselor told Mother MB was suicidal and needed to go to the hospital. [R.1293-94.] MB was admitted and spent several days being treated for both suicidal ideation and a previously unknown heart condition. [R.1295-96.]

When MB left the hospital, she sent Ashten a message telling him that she loved him and that he was "the only thing keeping [her] here on this earth." [R.1168-69.] MB continued communicating with Ashten and telling him that she loved him into late December. [R.1266-67.]

But in late December, Ashten sent messages to MB talking about AG and asking her to contact AG for him. [R.1264; St.Ex.17.] On January 3, he sent messages to MB asking if she was dating someone else, accusing her of cheating, and talking about committing suicide. [R.1267-68;St.Ex.18.] In response, MB told Ashten, "I can't do this" and "[g]oodbye." [R.1267-68;St.Ex.18.] Ashten continued to try to contact her, so she soon blocked him on all her social media accounts.

[R.1268-70.] On January 6, MB responded to messages Ashten had sent her on Tumblr by telling him not to contact her anymore. [R.1270;St.Ex.12-pg.7.]

MB alleges sexual assault

Right around the time MB decided to block Ashten on all her social media accounts, MB reported the sexual encounter with Ashten to Counselor on January 6, 2015. [R.1524.] MB was very emotional and Counselor thought she was having a panic attack. [R.1105,1526-27.] MB told Counselor that she had been having nightmares about it. [R.1105.] Counselor told MB that she needed to report the incident, and MB begged her not to. [R.1107-08,1533-35.] Counselor and MB discussed the matter and agreed to bring Mother in. [R.1108,1533-35.] On January 14, 2015, Mother met with Counselor and MB, and Counselor conveyed to Mother what MB had said. [R.1108,1300,1304.] The next day, Counselor and Mother told MB's father what MB had said. [R.1110,1300,1329-30.]

On January 29, 2015, MB had an interview with Detective at the Children's Justice Center. [R.1118,1121.] In the interview, MB vacillated about whether the alleged sexual assault took place in December or January. [R.1120-24,1132-33.]

The results of MB's physical exam are consistent with consensual sex

On February 5, 2015, Dr. Karen Hansen examined MB at the Safe & Healthy Families Clinic. [R.1429-32.] Dr. Hansen testified that MB's anal-genital exam did not reveal any sign of injury to MB's anus. [R.1435.] But the exam did reveal a healed transection of her hymen at the 6 o'clock position. [R.1432.]

Dr. Hansen described a transection as "like a cut or a laceration." [R.1432.] She testified that the transection was caused by "penetrating trauma," meaning "something was inserted into the vagina." [R.1437.] Dr. Hansen reported there was no way to know when the transection occurred, other than that it was not within the last 72 hours, because it had healed. [R.1442.] Dr. Hansen testified that MB's account of being raped by Ashten was "entirely consistent" with the transection. [R.1433-34.] But she admitted that a transection could result from consensual sexual intercourse, and might even result from a finger being inserted into the vagina. [R.1437-39.]

Dr. Patricia Speck testified for the defense. [R.1606.] She said that both consensual sexual intercourse and rape can cause a transection of the hymen. [R.1619.] She explained that MB's transection did not go into the vestibular tissue, and a 6 o'clock transection of the hymen that does not go into the vestibular tissue typically results from a consensual sex act. [R.1620.] Rape injuries are typically more severe. [R.1621,1623.] Moreover, with rapes, it is typical to see injuries and scarring in certain locations (posterior fourchette, labia), and there was no evidence of that in MB's exam. [R.1627.]

The forensic results conflict with MB's account of the sexual encounter

On March 5, 2015, the police executed a search warrant of Ashten's home, collected bedding from his bed, and submitted it for forensic analysis. [R.1346,1352,1372-76.] Analysts examined a fitted sheet, blue blanket, and gray

blanket looking for blood and sent four stains to the DNA lab for analysis. [R.1391-97.]. Only one stain indicated female DNA. [R.1417.] DNA testing on the epithelial (skin cell) fraction "matched" MB, and DNA testing on the sperm fraction "matched" Ashten. [R.1420,1424.]

MB's said after the sexual encounter "there was blood on my hands and there was blood all over me." [R.1085.] But the only spot MB's DNA was found was a "faint brown staining" that tested positive on the presumptive test for blood, but was too small for a confirmatory test. [R.1392,1399.]

The trial and verdict

At trial, MB testified that she had stayed with Ashten, because she was "scared" of him. [R.1071,1073.] She testified that Ashten "got inside [her] head" by using "black magic" and threats. [R.1067,1071,1078.] She said that when she threatened to leave Ashten, he responded by threatening to kill himself, MB, or MB's dad. [R.1071.]

MB also testified that she believed Ashten was responsible for the death of her friend, Devin. [R.1078.] Devin had committed suicide shortly after he had gone to homecoming with MB. [R.1076-77.] But MB testified that Ashten had claimed responsibility for the suicide, telling MB that he "put a curse on [Devin] to make him want to kill . . . himself because he went to a dance with [MB]." [R.1078.] MB testified that she believed Ashten. [R.1078.]

During her testimony MB mentioned, twice, that Ashten had previously been in jail. Specifically, while she was explaining that she and Ashten discussed him supposedly causing Devin's death, MB stated, twice, that these conversations happened "after [Ashten] got out of jail," in the beginning of December, right before their sexual encounter. [R.1077-79,1083-84.]

In a bench conference during MB's testimony, defense counsel stated that he had noticed MB's comments about Ashten being in jail, but did not object because he "didn't want to draw attention to it." [R.1091.] The prosecutor explained that the references to Ashten's jail time had been deliberate to show the "timing" of the allegations. [R.1094.] The court asked the prosecutor to prevent any further references, noting that "I don't know that in this case, [timing] was that critical." [R.1094.]

At trial, Mother related that she attended a therapy session with MB and Counselor. [R.1297.] Mother related that Counselor told her most of the details about what had happened to MB, and that MB cried and told Mother it was true and that she wanted to tell her. [R.1300.] The prosecution asked Mother, "[w]hen you were sitting there talking to her and she was talking to you about what happened, did it appear that she was faking?" Mother responded, "Not at all, no." [R.1299.] Defense counsel did not object.

Mother was also asked what MB told her when she met with Counselor and MB. [R.1298.] Defense counsel made a hearsay objection, but the court

allowed the testimony on grounds that it was a consistent statement rebutting a prior inconsistent statement. [R.1298-99.] Mother went on to testify that MB said she was very sorry and that she was afraid to tell her because she did not want to hurt Mother. [R.1299,1313.]

During Counselor's testimony, she went into detail about what MB told her about losing her virginity and not wanting to tell her parents. [R.1521-22,1526-35.] Defense counsel made two hearsay objections, but withdrew one and did not follow up on the other. [R.1527-31.] During Detective's testimony, he was asked what MB said occurred on December 6, and he replied, "That she had been raped." [R.1369.] Defense counsel did not object.

The jury convicted Ashten of rape but acquitted him of forcible sodomy. [R.575.] It also convicted him of ten counts of violating a protective order. [R.575-77.] Ashten was sentenced to an indeterminate term of not less than five years and up to life in prison for the rape charge. [R.611.] He was sentenced to 0-365 days for each of the protective order violations. [R.611-12.]

Summary of the Argument

Ashten argues that his trial counsel was ineffective when he allowed the State to present impermissible evidence without objection.

First, counsel either withdrew or failed to object to hearsay testimony from Mother, Counselor, and Detective, all of which resulted in the bolstering of MB's testimony. In a case with no direct evidence of the crime, the credibility of the complaining witness was key. This impermissible bolstering of MB's testimony was prejudicial.

Second, counsel was ineffective when he failed to object when Mother vouched for MB's credibility when MB made the allegations concerning Ashten. Again, because the case hinged entirely on MB's credibility, this vouching bolstered MB's testimony and was prejudicial.

Third, counsel was ineffective when he failed to object, ask for a curative instruction, or move for a mistrial, when MB twice mentioned that Ashten had been in jail. References to time in jail are impermissible and clearly prejudicial in the context of testimony seeking to portray Ashten as a dangerous criminal.

Finally, the cumulative nature of all the errors should undermine this court's confidence in the outcome and support the entry of an order to vacate the rape conviction and grant Ashten a new trial.

Argument

The Sixth Amendment to the federal constitution provides a criminal defendant with the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). If a defendant raises a claim of ineffective assistance, he must show that counsel's performance fell "below an objective standard of reasonableness," and "but for" the deficient performance, "there is a reasonable probability that the outcome of the trial would have been different." *State v. Hales*, 2007 UT 14, ¶ 68, 152 P.3d 321; *see State v. Johnson*, 2007 UT App 184, ¶ 38, 163 P.3d 695 (defendant must overcome a presumption that counsel rendered adequate assistance).

In this case, Ashten's counsel provided ineffective assistance by failing to object to inadmissible hearsay, failing to object to impermissible vouching, and failing to object and move for a mistrial when MB referred to Ashten's being in jail prior to their sexual encounter.

1. Trial counsel failed to object to hearsay testimony, and Ashten was prejudiced as a result

The prosecution also presented evidence of out-of-court statements from Mother, Counselor, and Detective corroborating MB's allegation of rape. As detailed below, these witnesses testified that MB stated that Ashten raped her or related what she said about the sexual encounter. In some instances, defense counsel did not object, and other times defense counsel objected that the testimony was hearsay. The court upheld one statement as a prior inconsistent

statement and counsel withdrew the other objection when the prosecution argued it was a consistent statement made prior to a motive to fabricate.

Below, this brief sets forth when prior inconsistent statements and prior consistent statements are admissible. It then explains why the out-of-court statements at issue here are not admissible under either exception. Finally, it demonstrates that counsel provided ineffective assistance, and Ashten was prejudiced as a result.

1.1 Prior inconsistent statements

Rule 613 permits a party to present extrinsic evidence of a prior *inconsistent* statement if the original witness "is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires." Utah R. Evid. 613(b). If those prerequisites are satisfied, extrinsic evidence of a prior inconsistent statement is admissible. The rule contemplates that the evidence will serve to impeach the credibility of the original testifying witness. R.C. Mangrum & D. Benson, *Mangrum & Benson on Utah Evidence* 459 (2011-12 ed.). The evidence is *not* admissible, however, if the witness is questioned about the inconsistent statement and "admits making it." *Id.* at 457. Likewise, if the out-of-court statement is *consistent* with trial statements, the rules governing prior inconsistent statements have "no application." *State v. Harrison*, 805 P.2d 769, 782 (Utah Ct. App. 1991).

Next, rule 801(d)(1)(A) permits the admission of a prior *inconsistent* statement if "[t]he declarant testifies" at trial and "is subject to cross-examination about a prior statement, and the statement . . . is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten." Utah R. Evid. 801(d)(1)(A). If a statement "cannot fairly be characterized as inconsistent, [it is] not properly admissible under rule 801(d)(1)(A) or for impeachment." *State v. King*, 2012 UT App 203, ¶ 43, 283 P.3d 980.

If a witness has denied making a prior statement, including because she forgot making it, the rules allow a party to present the statement under the prior-inconsistent-statement rule. Courts have held that a statement is inconsistent if it contradicts the witness's in-court testimony or if it provides "some indication that the fact [is] different from the testimony of the witness." *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir. 1988). In *State v. Whittle*, the Utah Supreme Court stated an inconsistent statement may be found "in evasive answers, inability to recall, silence, or changes of position." 1999 UT 96, ¶ 21 n.4, 989 P.2d 52 (internal quotation marks omitted).

If a witness recalls making a statement—as happened here—and she recalls that her statement was similar to trial testimony but she does not recall precisely what she said, that statement is in harmony with and therefore consistent with trial testimony. In that instance, the rules governing prior

inconsistent statements have "no application" because "the prior statement is not inconsistent with trial testimony." *Harrison*, 805 P.2d at 782.

1.2 Prior consistent statements

A prior consistent statement is one that does not contradict and instead is in harmony with the witness's trial testimony. Under the "general rule," evidence that a witness made "a prior statement consistent with his trial testimony is inadmissible for the purpose of corroborating the trial testimony." *People v. Terry*, 728 N.E.2d 669, 678 (Ill. App. Ct. 2000). This is because it "serves to unfairly enhance the credibility of a witness; a jury is more apt to believe something that is repeated." *Id*; *State v. Bujan*, 2008 UT 47, ¶ 11, 190 P.3d 1255.

An exception to the general rule exists under rule 801(d)(1)(B), which states that a prior consistent statement is admissible if the statement is offered to rebut an express or implied charge of fabrication or improper influence. For the exception to apply, the proponent of evidence must demonstrate that the original witness—MB—made statements, which *predated* the motive or influence. Utah R. Evid. 801(d)(1)(B);. *Bujan*, 2008 UT 47, ¶11 ("Rule 801(d)(1)(B) applies only to premotive, consistent, out-of-court statements").

In *Bujan*, the Utah Supreme Court held that even though KB testified to abuse, an officer's testimony about KB's *prior consistent statements* was inadmissible hearsay. 2008 UT 47, ¶¶ 8-9. KB was angry at defendant and had motive to fabricate when she made statements of abuse to the officer.

Consequently, rule 801(d)(1)(B) did not support admissibility of the prior consistent statements. *Id.* In addition, because the State offered "[n]o limiting instruction" to the jury to support admissibility of the out-of-court statements, "the testimony was inappropriate hearsay and its admission improper." *Id.* ¶ 9. The court held that the rule serves to permit "statements that rebut a charge of recent fabrication or improper influence or motive, *not to bolster the believability of a statement already uttered at trial*." *Id.* ¶ 11 (emphasis added). It reversed the convictions and ordered a new trial. *Id.* ¶ 13.

As in *Bujan*, MB's out-of-court statements do not a predate a motive to fabricate. MB had a motive to fabricate almost immediately after her sexual encounter with Ashten. The day after the sexual encounter, MB and Ashten were exchanging messages and Ashten asked MB to kiss AG (another girl he was seeing). [St.Ex. 14, pg. 8.] At trial, MB testified that it upset her when Ashten asked her to kiss AG. [R.1251-52.]

During the exchange of messages, Ashten expressed anger that AG had "cheated" on him, and MB reminded Ashten that he had had sex with someone else (meaning her) the night before as well. [R.1171-72.] MB messaged, "you cheated on her yesterday too," and later, "remember you fucked someone else last night too." [Def.Ex.8-pg.2, Def.Ex.9-pg.2, St.Ex.14-pg.5.]

At one point in the exchange, MB messaged Ashten that "it hurts that you want other girls more than I." [St.Ex.13-pg.9.] As the exchange continued, MB

eventually messaged, "I gave everything away to you and you don't even fucking care. that kills me." [Def.Ex.5-pg.2.] After several more messages that included Ashten talking more about AG, MB messaged, "I lost my virginity to you last night and you mean everything to me, but I won't take you treating me like that." [Def.Ex.4-pg.1.]

This exchange demonstrates MB's jealousy and motive to lie about the sexual encounter in order to get revenge on Ashten. As further discussed below, because MB had not told anyone about the sexual encounter prior to this, none of her out-of-court statements admitted at trial predate her motive to fabricate. Thus, they are not admissible. *Bujan*, 2008 UT 47, ¶ 11.

1.3 The out-of-court statements were not admissible as prior inconsistent statements or prior consistent statements

During Mother's testimony regarding the session in which Counselor told Mother about MB's sexual encounter, the prosecutor asked, "And what did [MB] tell you?" [R.1298.] Defense counsel objected, but Mother was eventually allowed to answer: "She just said I'm so sorry, mom, I'm so sorry, I make you so sad and she told me she wanted to tell me but she was afraid to tell me and she didn't want to hurt me. And she said she was ready to report it." [R.1299-1300.]

Defense counsel objected that the statement was hearsay, but the prosecution argued that "the witness was examined about it previously." [R.1298.] At the ensuing side bar conference, the prosecution argued it was a prior inconsistent statement. [R.1298.] Some portions of the record are inaudible,

but it appears the court admitted the statement as a prior inconsistent statement or a prior consistent statement. [R.1298-99.]

But there was no prior inconsistent statement made by MB. Nowhere in the cross-examination of MB did defense counsel ask what she *told* her mother during the session with Counselor. Moreover, when asked about how she *felt* when her mother was there in the room with her while Counselor told about the sexual encounter, MB testified: "Felt really sad 'cause I knew it would hurt her. And I felt really bad for making her feel like that and I'm sure she probably thought it was her fault because I had snuck around and like—like it just—at the time, I just wished I had never said anything." [R.1108.]

Additionally, Mother's testimony regarding MB's statement was not a pre-motive, consistent, out-of-court statement, as allowed under Rule 801(d)(1)(B). The statement came after the motive to fabricate, which developed the night after the sexual encounter, as discussed above. Mother's statement was pure bolstering of MB's earlier testimony and should not have been admitted.

The second improperly admitted hearsay was Counselor's testimony regarding MB's out-of-court statements to her about the sexual encounter. Counselor was discussing MB's emotional reaction to losing her virginity, and then the prosecutor asked, "So after that 20 minutes, what words was she able to tell you?" [R.1527-28.]

Defense counsel objected on hearsay grounds, and the prosecution argued that it was a prior consistent statement, because "[i]t's the first statement that she made when there's [sic] not under the influence to make anything up and then counsel has specifically cross-examined" MB about the differing statements she made at the CJC, the preliminary hearing, and at trial. [R.1528.] Defense counsel withdrew its objection.

But the prosecutor was incorrect. As discussed above, MB had a motive to fabricate the day after the sexual encounter; thus, all of the subsequent statements, including what she told Counselor, were made *after* the she developed a motive to fabricate. The prosecutor's theory that this was a consistent *statement* was without basis and defense counsel should not have withdrawn its objection.

Counselor went on to testify as follows: "She told me he hit her . . . that he was scratching her as hard as he could. . . . That he had held her down, that she had begged him to stop. That when she was screaming for him to stop, he would do it harder. She told me that he entered her vaginally, she told me that he entered her anally, she told me that there was blood everywhere. She told me that she was begging and begging and begging and begging for him to stop. She told me that he was chanting some sort of bizarre satanic crazy chant over and over and over and over with like his eyes rolled back in his head and that . . . he

had drawn a symbol on her back and told her that she was part of his whorehouse now and that's what she told me." [R.1530-31.]

Like the witness in *Bujan*, MB's prior out-of-court statements were inadmissible hearsay. 2008 UT 47, ¶¶ 8-9. Like KB in *Bujan*, MB was angry at defendant and had motive to fabricate when she made statements to Counselor regarding the sexual encounter with Ashten. As the *Bujan* court stated, rule 801(d)(1)(B) serves to permit "statements that rebut a charge of recent fabrication or improper motive, not to bolster the believability of a statement already uttered at trial." *Id*. ¶ 11. Counselor's statement did nothing but bolster MB's prior trial testimony. As discussed above, such evidence is inadmissible because it "serves to unfairly enhance the credibility of a witness; a jury is more apt to believe something that is repeated." *Terry*, 728 N.E.2d at 678.

Finally, Detective repeated a statement made to him by MB and defense counsel made no objection. The prosecutor was asking about Detective's interview with MB and asked, "And did she say what occurred?" Detective answered, "That she had been raped." [R.1369.] As discussed above, MB's interview was after she had a motive to fabricate and so no hearsay exception applied. Instead, Detective's testimony impermissibly bolstered MB's testimony and enhanced her credibility and the jury was more likely to believe her story. *Terry*, 728 N.E.2d at 678.

In sum, MB's out-of-court statements to Mother, Counselor, and Detective were inadmissible.

1.4 Trial counsel's performance was deficient

Counsel has a duty to make timely objections and motions in a defendant's case. ABA Standards for Criminal Justice: Prosecution and Defense Function §§ 4-3.6, 4-7.5(c), 4-7.9 (3d ed. 1993) ("ABA Stds."); *Larrabee*, 2013 UT 70, ¶¶ 36-37 (ineffective assistance is found in the failure to object). Counsel must stay current on the law. *State v. Moritzsky*, 771 P.2d 688, 692 (Utah Ct. App. 1989). He must consider those procedural steps which may be taken in good faith, including the "obvious step[]" to suppress evidence when the law renders the evidence inadmissible. ABA Stds. § 4-3.6 & cmt.

Here, counsel was well aware of the need to make timely hearsay objections, and he made such timely objections from time to time. Counsel, however, failed to make timely objections each time the prosecution asked questions to elicit a hearsay answer, or defense counsel withdrew or failed to follow up on his objections. Counsel's failure to make timely objections constitutes deficient performance. *Larrabee*, 2013 UT 70, ¶¶ 36-37.

Counsel objected during Mother's testimony about what MB said to her during the session, but the prosecution argued, incorrectly, that it was merely rebutting a previously inconsistent statement. [R.1298-99.] Though there was no inconsistent statement, the objection was apparently withdrawn and the question

asked. [R.1298-99.] Counsel again objected during Counselor's testimony about what MB told her during the session when they discussed MB losing her virginity, but withdrew the objection after the prosecution argued it was a statement made prior to MB's having a motive to fabricate. [R.1527-28.] Because MB's motive to fabricate arose the day after the sexual encounter and before she told anyone, the prosecution's explanation did not justify the admission of the hearsay. Defense counsel should not have withdrawn the objection. [R.1527-28.] And finally, when Detective testified that MB told him the Ashten raped her, defense counsel did not object at all. [R.1369.]

Counsel should not have withdrawn his objections and should have objected during Detective's testimony. Counsel knew how to object and attempted to object on the grounds that the out-of-court statements were hearsay. There was no strategic reason for failing to object to the inadmissible evidence, which did nothing to help the defense and only bolstered MB's credibility.

1.5 Ashten was prejudiced by counsel's deficient performance

Ashten was prejudiced by this deficient performance. The prejudice analysis generally asks whether "there is a reasonable probability that the outcome of the trial would have been different." *Hales*, 2007 UT 14, ¶ 68. The answer here is yes. The pivotal issue for the jury was credibility and inadmissible hearsay went to that central issue.

MB's testimony supported rape while the remaining evidence supported consent. The evidence in this case is thin. "Just as [this court is] more ready to view errors as harmless when confronted with overwhelming evidence of a defendant's guilt, [it is] more willing to reverse when a conviction is based on comparatively thin evidence." *State v. Charles*, 2011 UT App 291, ¶ 8 n.14, 263 P.3d 469, 479 (citations omitted)).

Indeed, Utah courts have ordered a new trial in cases where the verdict depended on the credibility of the alleged victim and where errors unfairly bolster the alleged victim's testimony or the State's case. *Larrabee*, 2013 UT 70, ¶ 36 (stating the prosecutor's improper references to excluded credibility evidence were "highly prejudicial" because "they went to the heart of what the jury was being asked to decide"); *State v. Rimmasch*, 775 P.2d 388, 407-08 (Utah 1989) (finding prejudice where the inadmissible evidence unfairly bolstered the victim's testimony regarding sexual assault); *State v. Sibert*, 310 P.2d 388, 392-93 (Utah 1957) (finding prejudice where inadmissible testimony from an officer gave credence to victim's story); *State v. Bujan*, 2006 UT App 322, ¶¶ 30-32, 142 P.3d 581 (finding prejudice where inadmissible hearsay was used to corroborate KB's account of the rape), *aff'd*, 2008 UT 47, 190 P.3d 1255.

In this case, the inadmissible hearsay testimony from Mother, Counselor, and Detective bolstered MB's credibility, while the remaining evidence supported reasonable doubt. The prosecution had no corroborative evidence, no

witnesses to support that Ashten raped and forcibly sodomized MB, and no physical or forensic evidence to establish lack of consent. Instead, the evidence was consistent with consent.

MB testified that over the course of their relationship until the alleged rape, Ashten consistently "begged" MB to "have sex with him," but when she declined, they did not have sex. [R.1070,1080.] In December, they kissed on Ashten's bed one night, and he tried to remove her clothing, but they did not have sex. [R.1078-79.] Instead, they had their first sexual encounter the next night—following MB's text that she was "excited to see [Ashten] and give [him] somethin somethin"—"birth control." [R.1102,1135.] MB went freely with Ashten into the bedroom and told Detective that when Ashten asked if she wanted to have sex, she said yes. [R.1244-45.] Afterword, she sat next to Ashten in the car on the ride home and hugged him at the end of the car ride. [R.1088-89.] Her first texts to Ashten upon returning home that night were "thank you lovely" and "you're amazing, sleep well," and she talked about seeing him again the next day. [Def.Ex.7-pg.2-3; R.1101,1145.]

With each telling, MB's accounts of the alleged rape were inconsistent. She differed on whether it took place in December or January [R.1120-24,1132-33], whether Ashten first penetrated her anally or vaginally [R.1084-86,1245-46], what position she was in during the sexual encounter and whether Ashten held her down [R.1084-86,1249-50], whether she cried [R.1085,1248], whether Ashten

stopped penetrating her when she requested [R.1249-50], and whether they paused during the sexual encounter to cuddle together on the bed [R.1249-50].

MB's accounts of the sexual encounter were likewise inconsistent with the physical evidence. There was no anal injury to indicate that she had been forcibly sodomized as she claimed. [R.1435.] The healed transection to her hymen was consistent with consensual sex, and she did not have the more severe injuries typical of rape or the scarring that would be expected in certain locations with rape. [R.1437-39,1619-23,1627.] MB stated that after the sexual encounter "there was blood on my hands and there was blood all over me." [R.1085.] But on Ashten's bedding, analysts found only one small "faint brown staining" that tested positive on the presumptive test for blood and contained DNA (from epithelial/skin cells) that "matched" MB. [R.1392,1620.]

Moreover, the evidence supported that MB had a reason to fabricate allegations against Ashten. MB's messages indicate she viewed the sexual encounter between them as significant and that she felt jealous, hurt, and betrayed when Ashten did not share her feelings and instead continued to harbor an interest in AG. The night after having a sexual encounter with MB, Ashten asked MB to kiss AG in front of him, complained AG had been cheating on him, and asked MB to find out who AG had been cheating with. [R.1171-72; Def.Ex.8-pg.2; St.Ex.14-pg.8.] At one point in the exchange, MB messaged Ashten that "it hurts that you want other girls more than I." [St.Ex.13-pg.9.] As the exchange

continued, MB eventually messaged, "I gave everything away to you and you don't even fucking care. that kills me." [Def.Ex.5-pg.2.] After several more messages that included more talk from Ashten about AG, MB messaged, "I lost my virginity to you last night and you mean everything to me, but I won't take you treating me like that." [Def.Ex.4-pg.1.]

While Mother, Counselor, and Detective did not witness the sexual encounter, their testimony corroborated MB's claims. The testimony turned the matter of MB's credibility into a matter of credibility for three adults, two of whom (Detective and Counselor) had positions of trust and authority. Prejudice exists because "[t]he jury may well have regarded [evidence from the other witnesses] as more persuasive than that of [the original complaining witness]." *Sibert*, 310 P.2d at 392.

While it may be "a delicate task" for a court "to appraise what weight [the hearsay witnesses'] evidence may have had with the jury," the court should *not* "discount the possibility that [the evidence of out-of-court statements] had some effect upon [jury] deliberations" for prejudice. *Id.* As the Utah Supreme Court has held, even if it is "unclear what would have happened" in the case absent the inadmissible evidence, that uncertainty is enough to support prejudice for a new trial. *State v. Moore*, 2012 UT 62, ¶ 21, 289 P.3d 487. The court in that instance must "decline to uphold [the] conviction[s]." *Id.* On this basis, this court should vacate Ashten's conviction for rape and order a new trial.

2. Trial counsel failed to object to vouching, and Ashten was prejudiced

At trial, Mother related that she attended a therapy session with MB and Counselor. [R.1297.] Mother related that Counselor told her most of the details about what had happened to MB, and that MB cried and told Mother it was true and that she wanted to tell her. [R.1300.] The prosecution asked Mother, "[w]hen you were sitting there talking to her and she was talking to you about what happened, did it appear that she was faking?" Mother responded, "Not at all, no." [R.1300.] Defense counsel did not object. In failing to object, trial counsel's performance was deficient and Ashten was prejudiced as a result.

Rule 608(b) makes "extrinsic evidence" inadmissible "to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness." Utah R. Evid. 608(b). Under the rule, "[a]ttack upon a witness's credibility by specific instances of character other than conviction of a crime is inadmissible." *Id.* advisory committee's note to 2004 amendment.

In *State v. Stefaniak*, the prosecution improperly elicited testimony from a witness that the victim's demeanor was "open" and "quite candid." 900 P.2d 1094, 1095 (Utah Ct. App. 1995). The testimony in *Stefaniak* suggested that "C.C. was an open, honest, and credible witness." *Id.* The testimony "as part of the State's case-in-chief constitute[d] error because the witness improperly vouched for the victim's credibility." *Id.* More recently, in *State v. Bragg*, the Utah Court of Appeals concluded that a witness's statement that "B.M. appeared to be genuine,

consistent, and not coached clearly violated rule 608." 2013 UT App 282, ¶ 31 n.8, 317 P.3d 452.

In this case, Mother improperly vouched for MB's credibility. The prosecution asked Mother, "[w]hen you were sitting there talking to her and she was talking to you about what happened, did it appear that she was faking?" Mother responded, "Not at all, no." [R.1299.] Because counsel failed to object to mother's inadmissible vouching, the jury was at liberty to consider it. [R.544.]

Counsel was ineffective in failing to object to the inadmissible evidence. The inadmissible nature of the evidence was plain and obvious, and the law is well-established. Utah R. Evid. 608(a); *Stefaniak*, 900 P.2d at 1095; *Bragg*, 2013 UT App, 282, ¶ 31 n.8. Under the circumstances, counsel had a duty to timely object. ABA Stds. §§ 4-3.6, 4-7.5. There was no strategic reason for counsel to forego objecting. Mother's testimony at trial that MB was not faking when she reported rape had no beneficial value to the defense, and her inadmissible testimony went to the central point for the jury to decide. Indeed, counsel's failure to object was inexplicable given that credibility was the central issue in the case. Because counsel failed to timely object to Mother's impermissible vouching, he provided deficient performance.

The prejudice analysis asks whether "there is a reasonable probability that the outcome of the trial would have been different." *Hales*, 2007 UT 14, ¶ 68. If "[t]he State's case against [defendant] hinged entirely on the credibility of the

victim," evidence of impermissible vouching results in reversible error. *Stefaniak*, 900 P.2d at 1096.

The evidence in this case is thin, meaning that errors are more likely to be harmful. *Charles*, 2011 UT App 291, ¶ 8 n.14. As discussed, *supra* §1.5, this case hinged on credibility—the sole issue was whether to believe MB's claim that she did not consent. "There was no physical evidence introduced, nor was there testimony" from other witnesses to support lack of consent. *Stefaniak*, 900 P.2d at 1096. "Because [t]his case depended on the jury's assessment of the victim's credibility versus the defendant's, and there is not 'other evidence'" to support the convictions, there is a reasonable likelihood that absent the improper evidence, the result would have been more favorable to Ashten. *Id*. This court should therefore vacate Ashten's conviction for rape and order a new trial.

3. Trial counsel failed to object when MB made references to Ashten having been in jail, and Ashten was prejudiced

Trial counsel was ineffective for failing to object when MB mentioned, twice, that Ashten had been in jail. Evidence of a defendant's prior conviction is inadmissible because violates the presumption of innocence, much like requiring a defendant to appear in prison clothes or informing the jury about prior unrelated convictions. The prejudice here was amplified by the fact that the improper references came from the alleged victim herself, in the only testimony that supports the verdict. Making matters worse, the references came as she claimed Ashten supposedly used black magic to get her friend to commit suicide.

Because counsel did not object, ask for a curative instruction, or move for a mistrial, counsel was ineffective.

It is well-settled that a defendant is prejudiced when a jury hears that the defendant was previously convicted. *E.g.*, *State v. Emmett*, 839 P.2d 781, 786 (Utah 1992) ("It is to be observed that we have previously held improper comments concerning prior convictions to be harmful."). As the Utah Supreme Court has recognized, a reference to a prior conviction creates a "risk that the jury will infer that the defendant has a reprehensible character, that he probably acted in conformity with it, and that he should be punished for his immoral character." *State v. Thornton*, 2017 UT 9, ¶ 35, 391 P.3d 1016 (quotation simplified). For this reason, evidence of a prior crime is inadmissible under rule 404 of the Utah Rules of Evidence. Utah R. Evid. 404(b)(1).

A defendant is similarly prejudiced when he is forced to appear at trial in prison- or jail-issued clothing. Although the actual impact on juries "cannot always be fully determined," such clothing suggests to the jury that the defendant is a "lawbreaker," and creates a risk "of the possible impairment of the presumption so basic to the adversary system." *Chess v. Smith*, 617 P.2d 341, 344–45 (Utah 1980). The effect is therefore "inherently prejudicial." *State v. Daniels*, 2002 UT 2, ¶ 21, 40 P.3d 611.

For similar reasons, references to a defendant's prior conviction can be prejudicial. Indeed, the Utah Supreme Court has recognized that "there is little

doubt that some prejudice might result from the jury's being informed, however briefly, that a defendant had formerly been in jail." *State v. Velarde*, 734 P.2d 440, 448 (Utah 1986). Thus, an improper jail reference is prejudicial if the defendant can show that "the verdict was substantially influenced" by it. *Id.*

A jury is unlikely to be influenced by an improper jail reference if it is brief and unconnected to the allegations against him. In *Velarde*, a witness testified that he had known the defendant "[s]ince May of '83 '82, in jail." *Id.* The court rejected the argument that the "single phrase, clearly elicited inadvertently, made during a three-day trial" could have caused unfair prejudice. *Id.*

Thus, a curative instruction can cure any prejudice that could be caused by an improper jail reference, if the reference is brief and unconnected to the allegations. *People v. Rayon*, No. H035629, 2011 WL 6400679, at *8 (Cal. Ct. App. Dec. 21, 2011); *People v. Taylor*, No. 287144, 2009 WL 3757453, at *2 (Mich. Ct. App. Nov. 10, 2009); *State v. Matthews*, No. 2012AP2515–CR, 2013 WL 4516215, at *3-4 (Wis. Ct. App. Aug. 27, 2013).

A jury also is unlikely to be influenced by an improper jail reference if other evidence establishing the prior conviction has already been admitted. In *State v. Madsen*, this court affirmed the district court's ruling that a police officer's improper jail reference did not prejudice the defendant. 2002 UT App 345, ¶¶ 11-12, 57 P.3d 1134. In that case, the jury had already heard that police found in the defendant's possession a missing camera engraved with the words "San

Juan County Jail," and that, after the jail had flooded, the toilet in the defendant's cell had been plugged. *Id.* ¶ 11 n.3. As the district court put it, "the additional prejudice to these defendants from this coming out on top of everything else this jury's heard today is like tossing a—another shovel of manure in a great big cattle truck. I mean it is minimal, in comparison with what the rest of the things that the jury's heard." *Id.* (quotation simplified).

And a jury is unlikely to be influenced by an improper jail reference in cases where there is significant evidence of the defendant's guilt. For example, in *State v. Butterfield*, a detective improperly testified that he had obtained the defendant's photograph "from the Salt Lake County Jail." 2001 UT 59, ¶ 45, 27 P.3d 1133 (quotation simplified). The Supreme Court agreed that the "fleeting" remark was not prejudicial. *Id.* As the court put it, "given the totality of the evidence against [the defendant]—the DNA evidence and the eyewitness identifications—[the defendant] has failed to show that there is a substantial likelihood that the jury would have found him not guilty had the improper statement not been made." *Id.*; *see also Matthews*, 2013 WL 4516215, at *3 (explaining that "because [the defendant] took the stand, . . . the jury learned that [he] had been convicted of a crime nine times" and the brief references to jail did not cause prejudice).

But in the absence of significant evidence of the defendant's guilt, a single jail reference is prejudicial when it comes from the alleged victim. In *People v.*

Cruz, the defendant's estranged wife and alleged victim was asked at trial how long she had been on welfare. 72 A.D.2d 748, 748 (N.Y. App. Div. 1979). She replied, "Ever since my husband went to jail the first time." *Id.* The improper reference occurred on a Friday, and the court gave a curative instruction on Monday. *Id.* at 748-49. But the appellate court held that the curative instruction was insufficient to "dissipate the prejudice" because the evidence of guilt was not "overwhelming" and the jury "had a whole weekend to think about the damaging testimony before receiving the curative instructions." *Id.* at 749.

Here, MB mentioned, twice, that Ashten had previously been in jail. [R.1077-78.] And she did so while explaining that Ashten had used black magic to make her friend Devin commit suicide and just prior to describing the sexual encounter that she claimed was rape. [R.1077-78.] Specifically, while MB was explaining that she and Ashten discussed him supposedly causing Devin's death, MB stated, twice, that these conversations happened "after [Ashten] got out of jail," in the beginning of December, right before their sexual encounter. [R.1077-79,1083-84.]

The nature of MB's improper references shows why they were prejudicial under Utah law. Unlike in *Madsen*, no other admitted evidence suggested that Ashten had any prior conviction or had spent time in jail, so the jury would not have otherwise known about it. And far from being brief and unconnected to the allegations, MB's improper jail references were intertwined with the testimony

seeking to establish Ashten as a dangerous criminal. Like the witness in *Cruz*, the allegations came from the alleged victim herself, making their impact more prejudicial.

Most important, there was no other evidence of Ashten's guilt other than MB's testimony. The references to jail were therefore significant, not "another shovel of manure in a great big cattle truck." *Madsen*, 2002 UT App 345, ¶ 11 n.3 (quotation simplified).

Yet defense counsel did not object, ask for a curative instruction, or move for a mistrial. During the bench conference, defense counsel acknowledged the improper jail comments but stated that he did not object because he "didn't want to draw attention to it." [R.1091.] Under the circumstances and in light of the law set forth in this section, counsel's conduct was not reasonable.

Counsel was ineffective in failing to object, ask for a curative instruction, or move for a mistrial in regards to the improper jail reference. Because counsel did none of these things, the jury *twice* heard that Ashten had been in jail, while they learned that MB believed Ashten had caused the death of her friend and right before they heard the allegations of rape. The jury was not instructed to disregard MB's statements about Ashten having been in jail and was therefore free to credit and rely on these statements in determining whether or not MB's allegation of rape was credible.

The inadmissible nature of the evidence was plain and obvious, and the law is well-established. Under the circumstances, counsel had a duty to timely object. ABA Stds §§ 4-3.6, 4-7.5(c), 4-7.9. Counsel's failure to object was inexplicable given that credibility was the central issue in the case.

The prejudice analysis asks whether "there is a reasonable probability that the outcome of the trial would have been different." *Hales*, 2007 UT 14, ¶ 68. The answer here is yes. As discussed, *supra* § 1.5, the evidence against Ashten is thin, and the pivotal issue for the jury was MB's credibility. MB's inadmissible references to Ashten being in jail went to the central issue of credibility. This was no longer a he said/she said case between two troubled teenagers, instead the jury made its determination to credit MB's claim that she did not consent where she described the alleged rape after giving testimony that Ashten was not just another teen—he had been in jail, and their sexual encounter took place right after he got out. Ashten was therefore prejudiced by trial counsel's deficient performance in failing to object to the improper jail references. This court should vacate Ashten's conviction for rape and order a new trial.

4. Cumulative Error

In the event this court is not convinced that individual errors warrant a new trial, this court may aggregate the errors under the cumulative-error analysis and order a new trial. The cumulative error doctrine allows this court to "consider all the identified errors, as well as any errors [it] assume[s] may have

occurred." *State v. Jones*, 2015 UT 19, ¶ 74, 345 P.3d 1195. The court then may vacate the convictions and order a new trial if "the cumulative effect of the several errors undermines [its] confidence . . . that a fair trial was had." *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (omission in original); see also *State v. Martinez-Castellanos*, 2017 UT App 13, ¶ 79, 389 P.3d 432 (aggregating errors and reversing because counsel was ineffective in several respects).

Where the State's case relied on the credibility of MB, counsel needed to be vigilant in enforcing evidentiary and procedural rules. *State v. Saunders*, 1999 UT 59, ¶ 12, 992 P.2d 951. Yet in this case, evidentiary errors were compounded. Inadmissible evidence served to unjustifiably bolster the State's case and MB's credibility. The irregularities prevented the jury from properly "sort[ing] out truth from falsehood." *Saunders*, 1999 UT 59, ¶ 14. While the individual errors are sufficient to compel this court to vacate the conviction for a new trial, the cumulative effect of the errors should undermine this court's confidence in the outcome. The errors in the aggregate, support prejudice and they support the entry of an order to vacate the rape conviction and to grant Ashten a new trial.

Conclusion

For the reasons set forth above, this court should vacate Ashten's conviction for rape and remand for a new trial.

DATED this 28th day of June, 2018.

ZIMMERMAN BOOHER

/s/ Freyja R. Johnson
Troy L. Booher
Freyja R. Johnson
Attorneys for Appellant Ashten Nunes

Certificate of Compliance

I hereby certify that:

1. This brief complies with the word limits set forth in Utah R. App. P. 24(g)(1) because this brief contains 9,852 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2. This brief complies with Utah R. App. P. 21(g) regarding public and non-public filings.

DATED this 28th day of June, 2018.

/s/ Freyja R. Johnson

Certificate of Service

This is to certify that on the 28th day of June, 2018, I caused two true and correct copies of the Brief of Appellant to be served via first-class mail, postage prepaid, with a copy by email, on:

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/s/ Freyja R. Johnson

Addendum A

The Order of the Court is stated below:
Dated: December 12, 2016 09:56:36 AM
At the direction of:
/s/ Vernice Trease
District Court Judge
by
/s/ REBECCA FAATAU
District Court Clerk

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 151903010 FS
ASHTEN NUNES,	:	Judge: VERNICE TREASE
Defendant.	:	Date: December 12, 2016

Custody: Salt Lake County Jail

PRESENT
Clerk: rebeccaf
Prosecutor: JOHNSON, SANDI
Defendant
Defendant's Attorney(s): BAUTISTA, RUDY J

DEFENDANT INFORMATION
Date of birth: January 10, 1996
Sheriff Office#: 374375
Audio
Tape Number: W45 Tape Count: 8.26-9.39

CHARGES
1. RAPE - 1st Degree Felony
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
3. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
4. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
5. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
6. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
7. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
8. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty

9. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
10. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
11. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty
12. VIOLATION OF PROTECTIVE ORDER - Class A Misdemeanor
Plea: Not Guilty - Disposition: 09/15/2016 Guilty

HEARING

Defense counsel motions to continue. The State objects. All counsel enters arguments for and against the continuance.

The Court denies the motion to continue. The State will provide the Board of Pardons with any necessary recordings or transcripts.

Defendant addresses the Court and requests the Court to reconsider the continuance. The Court denies the request.

Defense counsel motions to redact portions of the letters filed by Ms. Buttars. The State objects. The Court grants the motion and redacts portions of the letters in regards to the defendant.

Counsel addresses the Court and puts recommendations on the record.

Ms. Miller (2014) victim addresses the Court. Ms. Buttars (2015) victim addresses the Court. Mr. Buttars (victims's father) addresses the Court. Ms. Buttars (victims's mother) addresses the Court.

The State addresses the Court with recommendations.

Defendant addresses the Court.

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.

COMMITMENT is to begin immediately.

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
Charge 1 in this case will run consecutive to all other charges in this case and consecutive case#141908623. The Board of Pardons may consider any time previously served at the ADC and grant credit for such time.

SENTENCE RECOMMENDATION NOTE
Defendant is ordered to pay full and complete restitution in this case on all charges. The State should submit an order to the Court. The Court recommends the defendant serve sentence on all charges at the Utah State Prison.

SENTENCE JAIL

Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 0-365 day(s)
Based on the defendant's conviction of VIOLATION OF PROTECTIVE ORDER a Class A Misdemeanor, the defendant is sentenced to a term of 0-365 day(s)
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CUSTODY

The defendant is present in the custody of the Salt Lake County jail.

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

Addendum B

Utah Rules of Evidence, Rule 404

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

Currentness

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(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.

Credits

[Amended effective October 1, 1992; February 11, 1998; November 1, 2001; April 1, 2008; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

Notes of Decisions (829)

Rules of Evid., Rule 404, UT R REV Rule 404
Current with amendments received through May 15, 2018

End of Document

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Utah Rules of Evidence, Rule 608

RULE 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

Currentness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

(c) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by other evidence.

Credits
[Amended effective October 1, 1992; November 1, 2004; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE
The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE
[The 2004] amendment [to (b)] is in order to be consistent with changes made to the Federal Rule.

Subdivisions (a) and (b) are the federal rule, verbatim, and are comparable to Rules 22 and 6, Utah Rules of Evidence (1971), except to the extent that Subdivision (a) limits such evidence to credibility for truthfulness or untruthfulness. Rule 22(c), Utah Rules of Evidence (1971) allowed a broader attack on the character of a witness as to truth, honesty and integrity.

This rule should be read in conjunction with Rule 405. Subdivision (b) allows, in the discretion of the court on cross-examination, inquiry into specific instances of the witness's conduct relative to his character for truthfulness or untruthfulness or specific instances of conduct of a person as to whom the witness has provided character testimony. See, *State v. Adams,* 26 Utah 2d 377, 489 P.2d 1191 (1971). Attack upon a witness's credibility by specific instances of character other than conviction of a crime is inadmissible under current Utah law. Cf. *Bullock v. Ungricht,* 538 P.2d 190 (Utah 1975); Rule 47, Utah Rules of Evidence (1971). Allowing cross-examination of a witness as to specific instances affecting character for truthfulness is new to Utah practice and in accord with the decision in *Michelson v. United States,* 335 U.S. 469 (1948). The cross-examination of a character witness as to specific instances of conduct which the character witness may have heard about concerning the person whose character is placed in evidence has been sanctioned by a prior decision, *State v. Watts,* 639 P.2d 158 (Utah 1981).

The rule is subject to a witness invoking the statutory privilege against degradation contained in Utah Code Annotated, Section 78-24-9 (1953). See, *In re Peterson,* 15 Utah 2d 27, 386 P.2d 726 (1963). The privilege, however, may be subject to limitation to accommodate an accused's right of confrontation. Cf. *Davis v. Alaska,* 415 U.S. 308 (1974).

Subdivision (c) is Rule 608(c), Military Rules of Evidence, verbatim.

Notes of Decisions (125)

Rules of Evid., Rule 608, UT R REV Rule 608
Current with amendments received through May 15, 2018

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West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VI. Witnesses

Utah Rules of Evidence, Rule 613

RULE 613. WITNESS'S PRIOR STATEMENT

Currentness

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Credits
[Amended effective October 1, 1992; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE
The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility. This rule is the federal rule, verbatim.

ADVISORY COMMITTEE NOTE
This rule is the federal rule, verbatim. Subsection (a) abandons the position in Queens Case, 129 English Reports 976 (1820), requiring that the cross-examiner, prior to examining a witness about his written statement, must first show the statement to the witness and is comparable to the substance of Rule 22(a), Utah Rules of Evidence (1971). The substance of Subsection (b) was formerly in Rule 22(b), Utah Rules of Evidence (1971).

Notes of Decisions (8)

Rules of Evid., Rule 613, UT R REV Rule 613
Current with amendments received through May 15, 2018

West's Utah Code Annotated
State Court Rules
Utah Rules of Evidence (Refs & Annos)
Article VIII. Hearsay

Utah Rules of Evidence, Rule 801

RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

Currentness

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten, or

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Credits

[Amended effective October 1, 1992; December 1, 2011.]

Editors' Notes

2011 ADVISORY COMMITTEE NOTE

The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

ADVISORY COMMITTEE NOTE

Subsection (a) is in accord with Rule 62(1), Utah Rules of Evidence (1971).

Subsection (b) is in accord with Rule 62(2), Utah Rules of Evidence (1971). The hearsay rule is not applicable in declarations of devices and machines, e.g., radar. The definition of "hearsay" in subdivision (c) is substantially the same as Rule 63, Utah Rules of Evidence (1971).

Subdivision (d)(1) is similar to Rule 63(1), Utah Rules of Evidence (1971). It deviates from the federal rule in that it allows use of prior statements as substantive evidence if (1) inconsistent or (2) the witness has forgotten, and does not require the prior statement to have been given under oath or subject to perjury. The former Utah rules admitted such statements as an exception to the hearsay rule. See *California v. Green,* 399 U.S. 149 (1970), with respect to confrontation problems under the Sixth Amendment to the United States Constitution. Subdivision (d)(1) is as originally promulgated by the United States Supreme Court with the addition of the language "or the witness denies having made the statement or has forgotten" and is in keeping with the prior Utah rule and the actual effect on most juries.

Subdivision (d)(1)(B) is in substance the same as Rule 63(1), Utah Rules of Evidence (1971). The Utah court has been liberal in its interpretation of the applicable rule in this general area. *State v. Sibert,* 6 Utah 2d 198, 310 P.2d 388 (1957).

Subdivision (d)(1)(C) comports with prior Utah case law. *State v. Owens,* 15 Utah 2d 123, 388 P.2d 797 (1964); *State v. Vasquez,* 22 Utah 2d 277, 451 P.2d 786 (1969).

The substance of subdivision (d)(2)(A) was contained in Rules 63(6) and (7), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Similar provisions to subdivisions (d)(2)(B) and (C) were contained in Rule 63(8), Utah Rules of Evidence (1971), as an exception to the hearsay rule.

Rule 63(9), Utah Rules of Evidence (1971), was of similar substance and scope to subdivision (d)(2)(D), except that Rule 63(9) required that the declarant be unavailable before such admissions are received. Adoptive and vicarious admissions have been recognized as admissible in criminal as well as civil cases. *State v. Kerekes,* 622 P.2d 1161 (Utah 1980).

Statements by a coconspirator of a party made during the course and in furtherance of the conspiracy, admissible as non-hearsay under subdivision (d)(2)(E), have traditionally been admitted as exceptions to the hearsay rule. *State v. Erwin,* 101 Utah 365, 120 P.2d 285 (1941). Rule 63(9)(b), Utah Rules of Evidence (1971), was broader than this rule in that it provided for the admission of statements made while the party and declarant were participating in a plan to commit a crime or a civil wrong if the statement was relevant to the plan or its subject matter and made while the plan was in existence and before its complete execution or other termination.

Notes of Decisions (133)

Rules of Evid., Rule 801, UT R REV Rule 801
Current with amendments received through May 15, 2018

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