No. 20180810-SC

IN THE UTAH SUPREME COURT

THE STATE OF UTAH,
Plaintiff/Petitioner,

v.

ANTHONY SOTO,
Defendant/Respondent.

Defendant/Respondent is incarcerated

BRIEF OF RESPONDENT ON CERTIORARI REVIEW

The certiorari review of this case arises from a court of appeals decision reversing convictions for one count of Aggravated Sexual Assault, a first degree felony, in violation of Utah Code §76-5-405, and one count of False Personal Information to a Peace Officer, a class A misdemeanor, in violation of Utah Code §76-8-507(2), in the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Mark Kouris presiding.

LINDSEY WHEELER (14519)
Assistant Attorney General
SEAN D. REYES (7969)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorneys for Plaintiff/Petitioner

TERESA L. WELCH (9554)
LISA J. REMAL (2722)
RICHARD SORENSON (12240)
Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
(801) 532-5444

Attorneys for Defendant/Respondent

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Salt Lake Legal Defender Assoc.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111
(801) 532-5444

Attorneys for Defendant/Respondent

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BRIEF OF RESPONDENT ON CERTIORARI REVIEW

INTRODUCTION

A unanimous panel of the court of appeals correctly reversed Anthony Soto's convictions and remanded for a new trial because Soto's constitutional right to an impartial jury was violated when a uniformed highway patrol officer (Patrolman) and court information technology technician (Technician) made inappropriate comments to the jury in a nonpublic, court-employee elevator inside the courthouse before the jury heard all of the trial evidence and returned their guilty verdict. Specifically, Patrolman, who is tasked with guarding the Utah Supreme Court Justices, told the jury "do you want me to tell you how this ends?" and "just say he's guilty." Additionally, Technician, who is tasked with fixing the court's computers, told the jury to "convict him" and "can you say guilty?" A bailiff for the trial court who escorted the jury to the elevator and rode with them did not comment on or correct the "guilty" statements that were told to the jury.

Although the jurors told the trial court that they were not impacted by Patrolman and Technician's comments, defense counsel moved for a mistrial because almost all of the jurors heard the word "guilty" in course of the elevator ride. Counsel highlighted that the gist of Patrolman and Technician's comments were that they should find Soto guilty, or Soto must look guilty, or the way the jurors looked indicated that they thought that Soto was guilty. The trial court denied the mistrial motion and instead gave a curative instruction. The curative instruction informed the jurors that Patrolman was tasked with guarding the Utah Supreme Court Justices, that Technician was tasked with fixing the court's computer equipment, that Patrolman and Technician did not have any "inside information," and that they were just trying to be funny. The jurors subsequently found Soto guilty, in part, of first degree felony aggravated sexual assault. Regarding the incident, Soto and the complainant (Complainant) testified at trial and provided differing accounts of the events that transpired between them: Soto testified that he and Complainant had consensual sexual contact, the Complainant testified that the contact was not consensual.

On appeal, the court of appeals held that the improper juror contact from Patrolman and Technician triggered a rebuttable presumption of prejudice that the prosecution did not rebut. This Court should affirm the court of appeals decision and reverse and remand this case to the district court. First, the court of appeals applied well-settled Utah law in deciding that a rebuttable presumption of prejudice applied because of improper juror contact from Patrolman and

Technician. Specifically, the rebuttable presumption applied because the improper juror contacts (1) were offered by court personnel, and (2) were more than brief and incidental. Importantly, Utah case law indicates that the rebuttable presumption applied because of the importance of *who* spoke and *what* they said: an appearance of impropriety triggered when Patrolman and Technician improperly inserted themselves into Soto's case by discussing the sensitive issue of guilt with the jurors. Second, the court of appeals applied well-settled Utah law in deciding that the prosecution did not successfully rebut the presumption of prejudice. Specifically, the appearance of impropriety in the proceedings was not negated by the trial court's curative instruction or by the jurors' statements that they were not impacted by the contact. Third, even if the rebuttable presumption of prejudice did not apply, reversal is still required where Soto proved, at a minimum, that there was a reasonable likelihood of a more favorable result had the improper juror contact not occurred. Specifically, the improper juror contact that highlighted the sensitive subject of guilt distracted the jury (consciously or unconsciously) from focusing on the weaknesses in the State's case.

In sum, the court of appeals correctly decided to reverse and remand because improper juror contact denied Soto his constitutional right to a fair and impartial jury.

QUESTION PRESENTED FOR REVIEW

Issue I: This Court granted certiorari to review: "Whether the court of

appeals erred in concluding that a rebuttable presumption of prejudice occurs when there is inappropriate contact between jurors and court personnel, regardless of whether the personnel are participants in the case to be decided by the jurors." Order dated December 8, 2018, attached in Addendum B.

Issue II: This Court granted certiorari to review: "If the answer to [Issue I] is no, whether the court of appeals erred in concluding that Petitioner failed to rebut the presumption." Order dated December 8, 2018; Addendum B.

Standard of Review: On certiorari, this Court reviews "the decision of the court of appeals and not that of the [trial] court." *State v. Hansen*, 2002 UT 125, ¶25, 63 P.3d 650 (citation omitted). It reviews "the decision of the court of appeals for correctness." *Id.*

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The texts of the following provisions are in Addendum C: U.S. Const. amend. VI and XIV; Utah Const. art. I §12, Utah Code §76-5-405, Utah Code §76-8-507(2).

OPINION BELOW/JURISDICTION

On August 9, 2018, the court of appeals issued *State v. Soto*, 2018 UT App 147, attached as Addendum A. Jurisdiction is conferred on this Court under Utah Code §§78A-3-102(3)(a),(5), and 78A-4-105.

STATEMENT OF THE CASE

a. Pertinent facts.

Soto and Complainant provide different accounts of the events.

On February 13, 2015, Soto and his girlfriend (Girlfriend) were living in an apartment in Murray in the same complex as Complainant. R.736,759,852,1069-70,1210-12. That evening, Girlfriend left her apartment to run an errand, and when she returned, she noticed Soto talking to Complainant on the patio of one of the neighboring apartments. R.1071-74,1077. Girlfriend did not know Complainant. R.1070. Girlfriend noticed that Soto and Complainant were "holding each other." R.1077-78. Soto was standing behind Complainant with his hands around her waist and his chin was resting on her shoulders. R.1078-79, 1090. Soto took a step back from Complainant when Girlfriend angrily approached them. R.1080-81. Complainant did not push Soto away or tell him to stop. R.1081,1089. Complainant "did nothing." R.1081,1084-85. Girlfriend was yelling loudly, calling Complainant "a bitch, a whore, [and] a home wrecker." R.1083,1077,1081-82. Girlfriend knocked over their beer bottles and threw a pack of cigarettes at Soto. R.746,784,1084. Complainant stayed silent. R.1084-85, 1087,1256-57. Complainant did not push Soto away, and she did not look uncomfortable. R.1087.[1]

At trial, Soto and Complainant provided different accounts about the events that occurred next on February 13, 2015. According to Soto, he and Complainant flirted with each other, shared hugs and kisses, and engaged in

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1 After this incident, Girlfriend maintained a "boyfriend/girlfriend" relationship with Soto, but by the time of trial, they were no longer romantically involved. R.1088-89,1091,1095.

consensual sexual contact in Complainant's apartment. R.1229-46,1263-84. Soto testified that he did not insert his fingers into Complainant's vagina, and he did not touch Complainant's anus or rectal area. R.1235.

According to Complainant, Soto forced Complainant to engage in nonconsensual sexual activity and he threatened to kill her. R.749-57,789-99, 861-62,917,924,1061. Complainant testified that even though she repeatedly allowed Soto into her apartment on the evening of the alleged incident, she also repeatedly rebuked his romantic advances, and that she pushed Soto away while on the balcony "about a minute and a half" before Girlfriend arrived. R.782,745-47,768-75,780-86,1222-23,1260-62. Complainant also testified that she told Girlfriend that Girlfriend had the "wrong idea[,]" and that nothing was happening between her and Soto. R.785,746. Nevertheless, Complainant was worried that Girlfriend "was going to kick her ass." R.1263.

Although Complainant testified that Soto had "penetrated her vagina with his fingers[,]" the pertinent vaginal swab did not reveal any male DNA. R.1043-44,751-52,799,1054-55. And, when Complainant spoke to officers and a detective shortly after the alleged incident, Complainant did not tell them that Soto had penetrated her vagina or anus with his fingers. R.806-07,828,863. Complainant testified that Soto threatened her life, yet Complainant did not tell this to the responding officers. R.803,826-29. Complainant also testified that Soto hurt her, yet when a responding officer asked Complainant whether Soto had hurt her, Complainant "initially said no[,]" she denied having any marks, and she declined

an offer for medical attention. R.829,803,826-30. Complaint testified that Soto had pulled down his pants, yet she told a nurse shortly after the alleged incident that Soto had unzipped his pants but did not take them off. R.751,770-71, 799,804-05,827,903,940. Complainant also initially told a detective that Soto had pulled down her pants, but later said that Soto had "unbuttoned her pants and put his hand down her pants." R.861,803-04. Complaint testified that she only consumed "probably one and a half" beers the evening of the alleged incident, yet she told a nurse shortly after the alleged incident that she had consumed two and a half beers. R.800,771,778-79,941,960,1245-46. Although Complainant admitted to the officers that she had been drinking, she did not tell them that she had taken Klonopin, an anti-anxiety medication, that day around noon. R.770-71,827. Klonopin enhances the side effects of alcohol, which include "confusion, difficulty with balance, dizziness, and amnesia." R.1116-18. And although not all sexual assault or strangulation cases show signs of physical injuries, a nurse practitioner testified at trial that according to Complainant's version of events, Complainant should have had injuries to her nose or chin, yet she did not. R.1134-35,904-56,979,1195,1205.

The jurors take an elevator ride.

During a lunch break on the second day of trial, the trial court bailiff escorted the jurors to an elevator where a "Supreme Court Highway Patrol[man]" was present. R.1020,1038. The duties of Patrolman included guarding the Utah Supreme Court Justices. R.1038. The elevator that the jurors entered was not a

public elevator, like the one each juror rode before being selected to be a juror, but one that is primarily used by court employees. R.1033. At one point, Patrolman said, "oh, looks like a jury, do you want me to tell you how this ends?" R.1020. After a few seconds, Technician also entered the elevator and said, "you guys look like a jury," to which a juror responded "[d]o we look that obvious?" R.1020. Moments later, the bailiff heard Technician say, "can you say guilty?" R.1020,1022. The bailiff did not address the statement but informed the trial court about the encounter. R.1020-21. After lunch, the trial court questioned each juror individually about what they heard on the elevator. R.1021-22.

The first juror said that "a sheriff or a police officer" was with them on the elevator when someone else got on the elevator and "jokingly" said "convict him or hang him or it was something like that." R.1024-25.[2] The second juror said that a police officer was with them on the elevator and that the officer made "just a joke saying, Oh, let me tell you how this ends." R.1025-26. Someone else then got onto the elevator and said "[h]ello jury" and that they had "the guilty look." R.1026. The third juror said that an individual came into the elevator and said "[t]his must be the jury, I know because of your faces . . . You can already tell he's guilty." R.1026-27. The fourth juror said that someone got onto the elevator and said "[h]ello jury, [and] someone in the jury said, Do we have that look? And he

[2] It is reasonable to assume that Patrolman was in uniform because, before the first juror was told anything by the trial court about who was on the elevator with the jurors, the juror noted that there was a "sheriff or police officer" on the elevator with them. R.1024,1038.

said guilty." R.1027-28. The fifth juror said "I heard the patrolman, the Highway Patrolman say, Just say he's guilty." R.1029. The sixth juror said that a police officer in the elevator asked "[a]re they guilty?" and then someone else got onto the elevator and said "Oh, you all are jurors." R.1030. The seventh juror said that a male joined them in the elevator and said "Oh, it looks like a jury," to which the seventh juror responded "Do we all have that look?" R.1031. This juror remembered that a policeman in the elevator made a comment, but could not remember what was said. R.1031. The eighth juror stated that while on the elevator, there was a comment about them being jurors and "one guy got on and he said, [y]ou're jurors." R.1032. A juror then responded "[h]ow can you tell," to which the individual responded "something to the effect of [inaudible] looks guilty or something." R.1032.

None of the jurors believed that any of these comments impacted them. R.1024-32. Defense counsel moved for a mistrial because almost all of the jurors had heard the word "guilty" in course of the elevator ride. R.1032-34. Counsel also highlighted that "the gist of that comment was that they should find the defendant guilty[,] or he must look guilty[,] or the way you look makes me think you think that he's guilty." R.1033.

The trial court denied the mistrial motion and instead gave a curative instruction. R.1034-35,1038-39; *see also* curative instruction, attached as Addendum D. As part of the curative instruction, the trial court informed the jurors that Patrolman was tasked with guarding the Utah Supreme Court

Justices, and that "he has really no connection to the court system at all." R.1038. "He's not a bailiff, he's nothing like that." R.1038. Regarding Technician, the trial court explained that when "our [computer] equipment dies off . . . he comes in and fixes it." R.1038. And "we know what IT guys know about trials and that's pretty much nothing." R.1038. The trial court's curative instruction further told the jurors that:

> I don't want you to think that those folks have any inside information or any talk or gossip or anything about what's going on. They know absolutely nothing about this case and every comment they made was completely off the cuff, they were trying to be funny. Quite frankly, they weren't.

R.1038-39.

b. Procedural history.

The State filed an Amended Information charging Anthony Soto with one count of aggravated sexual assault, a first degree felony, in violation of Utah Code §76-5-405, and one count of false personal information to a peace officer, a class A misdemeanor, in violation of Utah Code §76-8-507(2). R.332-34. At the close of a three-day jury trial, Soto was convicted of these two charges. [3] R.394-421,1395-97. For the first degree felony aggravated sexual assault conviction, Soto was sentenced to an indeterminate prison term of not less than six years to life. R.424-27. For the class A misdemeanor false personal information to a peace

[3] At the start of the trial, and again in closing arguments, Soto conceded guilt to the class A misdemeanor false information charge. R.730,1334; *see also* R.730 (where, in opening arguments, defense counsel says "[Soto's] guilty of something, he gave false information to a police officer, so feel free to find him guilty on that.").

officer conviction, Soto was given credit for the time that he had already served at the jail and no additional jail time. R.425-27. Soto appealed. R.430-31.

On appeal, Soto argued that (1) he was denied his constitutional right to an impartial jury because of improper juror contact, *see Soto*, 2018 UT App 147, ¶¶1,9, and (2) insufficient evidence supported his conviction for aggravated sexual assault. *See id.* ¶8, n. 1; *see also* Utah Code §76-5-405. In a unanimous decision, the court of appeals held that improper juror contact from Patrolman and Technician triggered a rebuttable presumption of prejudice, and that this presumption was not rebutted. *Id.* ¶¶11-23. Consequently, the court of appeals reversed Soto's convictions and remanded for a new trial.[4] *Id.* ¶¶1,9. The State subsequently requested that this Court grant certiorari review. This Court granted certiorari review on December 8, 2018. *See* Addendum B.

SUMMARY OF ARGUMENT

Anthony Soto was denied his constitutional right to a fair and impartial jury when Patrolman and Technician made impermissible and improper contact with the jurors while riding in a non-public, court-employee elevator. Without notice to or in the presence of counsel, Patrolman, who is tasked with guarding the Utah Supreme Court Justices, told the jury "do you want me to tell you how this ends?" and "just say he's guilty." Additionally, Technician, who is tasked with

[4] The court of appeals did not decide in favor of Soto's insufficient evidence argument because (1) remand was necessary on the juror contact issue, and (2) there were "deficiencies in the briefing [on the] second [insufficiency of the evidence] issue." *Id.* ¶8, n. 1.

fixing the courts' computers, told the jury to "convict him" and "can you say guilty?" A bailiff for the trial court who escorted the jury to the elevator and rode with them did not comment on or correct the "guilty" statements that were told to the jury.

Under Utah law, a rebuttable presumption of prejudice applies whenever a juror's interaction with court personnel goes beyond mere incidental, unintended, and brief. Importantly, Utah law indicates that in determining whether the rebuttable presumption applies, the pertinent inquiry looks at the importance of *who* spoke and *what* they said. In addition, to rebut the presumption, the prosecution must prove that the unauthorized contact did not influence the juror. Utah case law highlights that the presumption cannot be rebutted by merely showing that the jurors stated that they were not impacted by the comments. Importantly, the presumption of prejudice is not rebutted if the prosecution does not negate the appearance of impropriety in the proceedings. Utah law also indicates that in cases where juror contact does not invoke the rebuttable presumption of prejudice, it is the defendant's burden to prove that there was a reasonable likelihood of a more favorable result had the improper juror contact not occurred.

Applying Utah law, the statements conveyed to the jurors from Patrolman and Technician triggered a rebuttable presumption of prejudice that the State did not rebut. First, the improper juror contacts (1) were offered by court personnel, and (2) were more than brief and incidental. Specifically, an appearance of

impropriety triggered when Patrolman and Technician improperly inserted themselves into Soto's case by discussing the sensitive issue guilt with the jurors. Second, the presumption of prejudice was not rebutted. Specifically, the appearance of impropriety in the proceedings was not negated by the trial court's curative instruction or by the jurors' statements that they were not impacted by the improper contact.

Third, even if the rebuttable presumption of prejudice did not apply, reversal is still required where Soto proved, at a minimum, that there was a reasonable likelihood of a more favorable result had the improper juror contact not occurred. Specifically, the improper juror conduct that highlighted the sensitive subject of guilt distracted the jury (consciously or unconsciously) from focusing on the weaknesses in the State's case.

In sum, the court of appeals correctly decided that Soto's convictions should be reversed because improper juror contact denied Soto his constitutional right to an impartial jury.

ARGUMENT

I. The court of appeals correctly reversed Soto's convictions because improper juror contact denied Soto his constitutional right to an impartial jury.

The court of appeals correctly reversed Soto's convictions because improper juror contact denied Soto his constitutional right to an impartial jury; specifically, the improper juror contact from Patrolman and Technician triggered a rebuttable presumption of prejudice that the prosecution did not rebut. *State v.*

Soto, 2018 UT App 147, ¶¶1,9,17,18. Both the Utah and United States constitutions guarantee trial by an impartial jury. U.S. Const. amend. VI and XIV; Utah Const. art. I §12; *State v. Pike*, 712 P.2d 277, 279 (Utah 1985); *Soto*, 2018 UT App 147, ¶10. Utah courts have "long taken a strict approach in assuring that the constitutional guarantee of a fair trial not be compromised" by unauthorized jury communication. *Pike*, 712 P.2d at 279. To that end, Utah courts employ a rebuttable presumption of prejudice when improper contacts "between witnesses, attorneys or *court personnel* and jurors" go "beyond [] mere incidental, unintended, and brief contact." *Id.* at 280 (emphasis added). Moreover, when the rebuttable presumption applies, "the burden is on the prosecution to prove that the unauthorized contact did not influence the juror."[5] *Id.* In cases where the rebuttable presumption does not apply, the defendant must prove that there was a reasonable likelihood of a more favorable result had the juror contact not occurred. *See State v. Allen*, 2005 UT 11, ¶¶51-53, 108 P.3d 730.

Utah case law identifies two reasons for the rebuttable presumption regarding improper juror contact. *State v. Swain*, 835 P.2d 1009, 1011 (Utah Ct. App. 1992). First, "it is difficult, if not impossible, to prove how an improper contact may have influenced a juror." *Id.*; *see also Pike*, 712 P.2d at 280; *Logan City v. Carlsen*, 799 P.2d 224, 226 (Utah Ct. App. 1990) (stating that "it is nearly

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[5] The rebuttable presumption of prejudice applies to improper juror contact that occurs after, not before, the jury is empaneled. *See State v. Shipp*, 2005 UT 35, ¶23, 116 P.3d 317.

impossible to prove a taint: [I]mproper contacts may influence a juror in ways he or she may not even be able to recognize" (internal citations and quotations omitted)). "Because of the possible subconscious effect on the juror[,]" a juror's stance that he or she was not impacted by the improper contact is not sufficient to rebut the presumption of prejudice. *Swain*, 835 P.2d at 1011. Second, the "improper juror contact creates an appearance of collusion or impropriety in the proceedings . . . [and] a doubt may exist in the mind of the losing party, and the public as a whole, as to whether the defendant was given a fair trial." *Id.* Thus, when it appears that the defendant did not receive a fair trial as a result of improper juror contact, Utah courts will impose a rebuttable presumption of prejudice; moreover, the presumption is rebutted only if the appearance of impropriety is sufficiently negated so that the verdict will be "above suspicion." *Id*; *see also Soto*, 2018 UT App 147, ¶16.

In *Soto*, the court of appeals held that Patrolman and Technician's comments to the jurors in the court-employee elevator triggered a rebuttable presumption of prejudice that the prosecution did not rebut. *Soto*, 2018 UT App 147, ¶¶17,18. In doing so, the court of appeals noted that the rebuttable presumption of prejudice can apply to court personnel who are not directly involved in a defendant's trial. *Id.* ¶15. The court of appeals noted:

> [T]he rebuttable presumption of prejudice applies both to inappropriate contacts between jurors and court participants and to inappropriate contacts between jurors and court personnel . . . [Moreover, the Utah Supreme Court] has not cordoned off inappropriate contacts between jurors and court personnel who are not directly involved in a defendant's trial from the reach of the rebuttable presumption of prejudice.

Id. ¶15.

The court of appeals noted that "[a] conclusion that the rebuttable presumption of prejudice does not apply to inappropriate contacts with court personnel in general would . . . dilute the right to an impartial jury." *Id.* ¶16. "[S]uch a conclusion would preclude a court from applying the rebuttable presumption of prejudice to comments made by a judge not assigned to the defendant's case, even though one can readily envision circumstances where such comments would be highly inappropriate." *Id.* The court noted that "the overarching principle underpinning the rebuttable presumption analysis is whether, despite the inappropriate contact, the verdict remains 'above suspicion.'" *Id.* (citation omitted).

On certiorari review, the State argues that this Court has never applied the rebuttable presumption to unauthorized juror contact with persons unassociated with the proceedings; consequently, the court of appeals has "improperly expanded the scope of the rebuttable presumption beyond the evil it was adopted to protect against." Br. of Petitioner at 19,11,13. The State also argues that the court of appeals applied the rebuttable presumption of prejudice in a manner that effectively makes it irrebuttable, and that if the presumption did apply to this

case, the circumstances indicated that the prosecution successfully rebutted the presumption. Br. of Petitioner at 11,20-27.

The State is mistaken. First, the court of appeals applied well-settled Utah law in deciding that a rebuttable presumption of prejudice applied because of improper juror contact from Patrolman and Technician. Second, the court of appeals applied well-settled Utah law in deciding that the prosecution did not successfully rebut the presumption of prejudice that was triggered by the improper juror contact in the elevator. Third, even if this Court decides that the rebuttable presumption of prejudice for juror contact did not apply, reversal is necessary because, at a minimum, Soto proved prejudice.

A. The court of appeals applied well-settled Utah law in deciding that a rebuttable presumption of prejudice applied because of improper juror contact from Patrolman and Technician.

Utah case law indicates that the court of appeals correctly decided that a presumption of prejudice applied when Patrolman and Technician inserted themselves into Soto's case by discussing the sensitive issue of guilt. In 1925, in *Anderson*, this Court reversed and remanded because of improper juror contact. *State v. Anderson*, 237 P. 941, 942 (Utah 1925). In *Anderson*, the jury found the defendant guilty of stealing sheep. Nevertheless, when the jury was polled about their verdict, the trial court learned that during the multi-week trial, a prosecution witness and a juror drove to court together almost every day. *Id.* The juror and witness both maintained that they did not discuss the case during their car rides. *Id.* The trial court denied defense counsel's request for a new trial

because "there was no intention on the part of [the witness] to influence the verdict of the juror, and that the act of carrying the juror to and from his home was one of generosity and courtesy only." *Id.* This Court, however, reversed and remanded. *Id.* In doing so, this Court noted that the Utah Constitution "guarantees to every one accused of a public offense a trial by an impartial jury." *Id.*; *see also* Utah Const. art. I §12. This Court also noted that even though the juror said that he was not influenced by the contact with the witness, reversal was nevertheless required because the defendant "was denied a constitutional right to be tried and convicted, [and] if convicted, by an impartial jury, as that term is used in the Constitution and is construed by courts." *Id.* at 944. Importantly, a juror must "in no way [be] influenced except by the evidence and the instructions of the court relative to the law applicable to the facts in the case." *Id.* at 943.

Later, in *Pike*, this Court held that contact between a police officer, who was both a witness and the arresting officer in a case, and jurors triggered a presumption of prejudice that warranted a reversal. *Pike*, 712 P.2d at 279-81. Jurors asked the officer why he was limping, and the officer responded that he had "bunged [his] toe" by slipping on water. *Id.* at 278-80. *Pike* held that this "conversation amounted to more than a brief, incidental contact and no doubt had the effect of breeding a sense of familiarity that could clearly affect the jurors judgment as to credibility." *Id.* at 281. Moreover, "even if the jurors had denied that they were influenced by the encounter . . . that [was] not enough to rebut the presumption of prejudice." *Id.*

Likewise, in *Erickson*, this Court held that a four-to-five minute conversation between a prosecution witness and a juror about "family members and the witness's job" triggered a presumption of prejudice that warranted a reversal. *State v. Erickson*, 749 P.2d 620, 621 (Utah 1987). Although the witness and the juror did not discuss the case, this "conversation was more than a brief, incidental contact where only remarks of civility were exchanged." *Id.* at 620-21.

In *Swain*, the Utah Court of Appeals held that a conversation between a prosecution witness and a juror triggered a rebuttable presumption of prejudice warranting a reversal where the juror and witness engaged in a discussion about their upcoming high school reunion. *Swain*, 835 P.2d at 1011. In deciding that the presumption of prejudice attached, *Swain* noted that this conversation went "clearly beyond the mere exchange of civility[,]" and that it invoked a sense of familiarity that could have affected the juror's verdict. *Id.* And although the juror stated that her judgment would not be impacted by her discussion with the witness, *Swain* held that "mere denial of prejudice by the tainted juror is, however, insufficient to overcome the presumption of prejudice." *Id.* Importantly, the improper conversation "likely created an appearance of collusion or impropriety in the minds of defendant, other participants, and observers of the trial . . . and [they] are left to question whether . . . defendant received a fair trial." *Id.*

In *Carlsen*, the court of appeals held that an unauthorized conversation between a bailiff and jurors during a recess warranted a presumption of prejudice

that was not successfully rebutted where the bailiff did not discuss the pending case, but he educated the jurors about "the difference between circuit and district court jurisdiction, and the sentences for misdemeanors and felonies." *Carlsen*, 799 P.2d at 226. *Carlsen* noted that even "a seemingly innocent response by the bailiff to a juror's questions opens a Pandora's box of possibilities of improper juror influence and the *appearance of impropriety*." *Id.* (emphasis added). Moreover, the bailiff's comments "touched on the extremely sensitive issue of sentencing." *Id.* The concurring opinion emphasized the following:

> [A]ny contact more than a brief, incidental contact where only remarks of civility [are] exchanged, gives rise to a presumption of prejudice, and therefore to an order of reversal, which cannot be overcome even with the testimony by the 'tainted' juror that he or she was not influenced by the encounter. Whether the juror contact is by witnesses, attorneys, or court personnel is irrelevant. The scope and subject matter of the conversations, so long as more than mere pleasantries, and, in the case of witnesses, the relative importance of the witness to the prosecution, are also irrelevant. The utmost care is required on the part of trial judges to ensure that contacts with jurors do not occur. To do otherwise is to risk reversal and a duplicative new trial.

Carlsen, 799 P.2d at 227-28 (Orme, J., concurring) (internal citations and quotations omitted).

By contrast, in *Allen*, this Court held that there was no presumption of prejudice where unauthorized contact occurred between a juror and her spouse, and not between a juror and "other court participants." *State v. Allen*, 2005 UT 11, ¶¶52-53. *Allen* noted that the "rebuttable presumption only applies when the contact is between a juror and *other court participants,* not jurors and third

parties unrelated to the proceedings." (emphasis in original). *Id.* ¶¶51,53; *see also State v. Cardell*, 1999 UT 51 ¶¶12,13,21, 982 P.2d 79 (no presumption of prejudice where jurors witnessed the victim's mother embrace and comfort the victim and a curative instruction could remedy any improper influence that the incident may have caused.); *State v. Tenney*, 913 P.2d 750, 756-58 (Utah Ct. App. 1996) (no presumption of prejudice where a juror briefly told his coworker that the defendant appeared to be a "really bad guy" or a "slick operator."). Moreover, when contact occurs between a juror and a non-court participant, the defendant bears the burden of proving that the contact prejudiced the defendant. *Allen*, 2005 UT 11, ¶51.

In *Durand*, this Court also held that there was no presumption of prejudice where jurors had coffee in a sheriff's office when officers who were witnesses in the defendant's trial were present. *State v. Durand*, 569 P.2d 1107, 1109 (Utah 1977). Importantly, there was no evidence that the jurors and officer-witnesses engaged in any conversation about the case.[6] *Id.* This Court noted that "[t]he right to a trial by a fair and impartial jury is an important one which should be *scrupulously safeguarded.*" *Id.* (emphasis added). Moreover, this right applies "to actual fairness and impartiality, [so] any conduct that may seem to give an

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6 It appears from the facts as described in *Durand* that there may have been no conversation between the jurors and officer-witnesses about any matter whatsoever. *Durand*, 569 P.2d at 1109. The jurors got coffee at the sheriff's office for about five minutes. *Id.* Moreover, when the jurors went to get coffee there the next day, the court reporter told them to leave and that they should not be there. *Id.*

appearance to the contrary should be avoided." *Id.* Nevertheless, the trial court and this Court decided that no presumption of prejudice applied because there was no appearance of impropriety where there was no discussion between the jurors and officer-witnesses that pertained to the case.

The Utah Court of Appeals has also determined that there was no presumption of prejudice in a few cases involving juror contact. For instance, there was no presumption of prejudice where there was no direct evidence of improper contact between a bailiff, a detective, and the jury, and where the bailiff and detective denied engaging in any improper contact. *State v. Bossert*, 2015 UT App 275, ¶¶41-42, 362 P.3d 1258; *see also State v. Simmons*, 2000 UT App 190, ¶7, 5 P.3d 1288 ("Because the court found that no improper contact occurred, no presumption of prejudice attached"). The court of appeals also held that a presumption of prejudice did not apply where a bailiff and a deputy, who was also a prosecution witness, drove a juror to a café to meet up for lunch with other jurors, and during this drive, they did not speak to each other. *State v. Day*, 815 P.2d 1345, 1349-50 (Utah Ct. App. 1991). *Day* held that the contact was "incidental and brief[,] [t]he parties were together for only a few minutes, and '[n]o conversation took place, in the normal sense of an oral exchange of sentiments, observations, opinions or ideas." *Id.* at 1350 (third alteration in original) (citation omitted).

The court of appeals also held that there was no presumption of prejudice where a bailiff told the jurors the reasons why one of the jurors had been excused

and replaced by an alternate, but the "bailiff did not mingle with the jurors or converse with them about the trial itself; *nor did he interrupt their deliberations*." *State v. Jonas*, 793 P.2d 902, 908-10 (Utah Ct. App. 1990) (emphasis added). *Jonas* held that the bailiff's contact with the jurors amounted to "incidental contact raising no presumption of prejudice" and because the jurors said nothing in response to the bailiff, "no 'conversation' took place, in the normal sense of an oral exchange of sentiments, observations, opinions, [or] ideas." *Id.* at 908-09 (internal quotations omitted). Moreover, "verbal contacts beyond mere civilities between jurors and a bailiff . . . are expected and unavoidable since the bailiff is assigned to minister to the jurors' needs and to be the contact person." *Id.* at 909.

Importantly, Utah cases discussing the rebuttable presumption of prejudice in juror contact cases examine *who* was talking (i.e. whether the importance of the person who made contact with the juror was *high* or *low*), as well as *what* was said (i.e. whether the importance of the subject matter as related to the case and discussed with the jurors was *high* or *low*). *See State v. Larocco*, 742 P.2d 89, 97 (Utah Ct. App. 1987) (Orme, J., concurring), *aff'd in part, rev'd in part*, 794 P.2d 460 (Utah 1990). In other words, whether the rebuttable presumption is triggered, or rebutted, is determined by the importance of *who* spoke to the jurors, and by the importance of *what* they said:

> The [] substantive inquiries [in determining whether the rebuttable presumption of prejudice applies] are (1) whether the witness is "an important prosecution witness," [i.e. *who* was talking] and 2) "the scope and subject matter of the conversation." [i.e. *what* was discussed] *See id.* Moreover, there is interplay between these two inquiries: The more important the witness, the less relevant the subjects discussed by the witness and juror. Thus, in *Pike,* the subject discussed, namely a backyard slip-and-fall sustained off-duty, was itself quite harmless [i.e. *low* importance]. Nonetheless, because of the importance of the witness [i.e. *high* importance], as "both the arresting officer and a witness at the scene of the altercation," *id.,* Pike's conviction was reversed... [By contrast] [i]n the instant case, the witness [] was quite unimportant [i.e. *low* importance].... [Moreover] the subjects discussed by the juror and witness were inconsequential [i.e. *low* importance].

State v. Larocco, 742 P.2d 89, 97-98 (Utah Ct. App. 1987) (Orme, J., concurring).

In *Larocco*, the court of appeals held that the presumption of prejudice for improper juror contact was rebutted where (1) the juror said that he was not influenced by a trial witness who told the juror that he hoped that the trial would not last long because he had planned a trip to Eureka, Utah, and that the witness was surprised when none of the jurors indicated to the trial court that police officers were more believable than others, (2) the witness who made the contact was not key to whether the defendant was guilty of theft and possession of a stolen vehicle, and (3) the witness's testimony in the trial was uncontroverted (i.e. it was confined to mundane and undisputed matters). *Id.* at 95. Thus, the presumption of prejudice was rebutted in *Larocco* because the improper juror contact involved an unimportant witness (i.e. *low*) and an unimportant topic (i.e. *low*). *Id.* at 97 (Orme, J., concurring).

To summarize Utah case law regarding the rebuttable presumption of

prejudice in juror contact cases, when the importance of the person as related to the case is *high*, the rebuttable presumption applies, even if the importance of the topic as related to the case was *low*. *See Pike*, 712 P.2d at 279-81 (presumption of prejudice applied and not rebutted where an officer-witness discussed his injured toe with the jury as this bred a sense of familiarity); *Erickson*, 749 P.2d 620, 621 (presumption of prejudice applied and not rebutted when a juror and witness discussed family member and job issues); *Swain*, 835 P.2d at 1011 (presumption applied and not rebutted when a juror and witness discussed their upcoming high school reunion). By contrast, when the importance of the subject matter and importance of the person who made the juror contact is *low*, the rebuttable presumption does not apply. *See Allen*, 2005 UT 11, ¶¶52-53 (no presumption of prejudice when a juror and her spouse discussed a procedural event in the case); *Tenney*, 913 P.2d at 756-58 (no presumption of prejudice where a juror briefly told his coworker that the defendant appeared to be a "really bad guy" or a "slick operator."); *Day*, 815 P.2d at 1349-50 (no presumption of prejudice where a bailiff and juror did not converse with each other during a car ride to a café for the juror to meet up with other jurors); *Cardell*, 1999 UT 51, ¶¶12,13,21 (no presumption of prejudice where jurors witnessed the victim's mother embrace the victim and a curative instruction could remedy this); *Larocco*, 742 P.2d 89, 97 (presumption rebutted where the juror contact involved an unimportant witness and unimportant topic).

Importantly, Utah case law indicates that when the importance of the topic

of conversation is *high*, but the importance of the person who made the contact is *arguably low*, (i.e. lower than a witness directly involved in the trial, but higher than a non-court employee) the rebuttable presumption applies. *See Carlsen*, 799 P.2d at 226 (rebuttable presumption applied when a bailiff educated jurors about the differences between circuit and district court jurisdiction and the sensitive subject of sentencing). **Table 1** illustrates how Utah law has applied the rebuttable presumption of prejudice when assessing the importance of the person *who* spoke to the juror and the importance of the topic (i.e. *what* was discussed) in terms of highs and lows:

Table 1: How Utah cases have applied the rebuttable presumption of prejudice in juror contact cases.

Utah Cases: (*= Utah Supreme Court Case)	*Pike**, *Erickson**, *Swain*	*Durand**	*Allen**, *Cardell**, *Tenney*, *Day*, *Larocco*, *Jonas*	*Carlson*
Importance of Person (i.e. *Who* spoke)	**High**	**High**	**Low**	**Low** (arguably)
Importance of Topic (i.e. *What* was said)	**Low**	**Low** (If contact occurred)	**Low**	**High**
Rebuttable Presumption of Prejudice (Yes or No)	**Yes: Presumption Applied**	**No: Presumption NOT Applied**	**No: Presumption NOT applied** (**The presumption in *Larocco* was rebutted)	**Yes: Presumption Applied**

The application of Utah case law regarding the rebuttable presumption of prejudice to this case.

In this case, the court of appeals properly decided that under Utah case law, a rebuttable presumption of prejudice arose as a result of Patrolman and Technician's improper contact with the jurors. *See Soto*, 2018 UT App 147, ¶¶17-19. The court of appeals held that "we cannot say that [the contact was] merely incidental and unintended." *Id.* ¶18. The court emphasized the sensitive nature of the comments as follows:

> The comments made in the present case were even more inappropriate than those made by the bailiff in *Carlsen*. Here, the highway patrol officer and the IT technician intentionally spoke to the jurors about the most sensitive issue of a criminal case: whether the defendant is guilty. *We cannot think of another topic that would create a stronger appearance of impropriety*. Accordingly, we conclude that the contacts, while brief, were neither incidental nor unintended and that they therefore triggered a rebuttable presumption of prejudice.

Soto, 2018 UT App 147, ¶19 (emphasis added).

Thus, even if Patrolman and Technician's importance to Soto's case were *arguably low*, the court of appeals held that rebuttable presumption applied because the importance of the topic discussed was *high* (i.e. the topic centered on the sensitive topic of Soto's guilt). *See id*; *see also Carlsen*, 799 P.2d at 226. Moreover, the importance of the topic of Soto's guilt was so high that it invoked an *appearance of impropriety* when this topic was discussed by court employees who were initially unassociated with the proceedings of Soto's trial. *See Soto*, 2018 UT App 147, ¶¶15-19. The following two reasons support why, under Utah

case law, the court of appeals properly decided that the rebuttable presumption of prejudice applied in this case.

First, like in *Pike*, *Erickson*, *Swain*, and *Carlsen*, but unlike in *Allen*, *Cardell*, and *Tenney*, the improper juror contact occurred with individuals who were "court personnel" or "court participants." *See Allen*, 2005 UT 11, ¶¶51-53; *Pike*, 712 P.2d at 279-80; *Erickson*, 749 P.2d at 621; *Swain*, 835 P.2d at 1011; *Carlsen*, 799 P.2d at 225-27; *Cardell*, 1999 UT 51, ¶21; *Tenney*, 913 P.2d at 757-58. Although the trial judge told the jurors that Patrolman "has really no connection to the court system at all" and that Technician knew "pretty much nothing" about trials, the jurors would have perceived Patrolman and Technician to be "court participants" or "court personnel." R.1038-39; *see also Allen*, 2005 UT 11, ¶¶51-53; *Pike*, 712 P.2d at 279. Specifically, the jurors were informed that Patrolman was tasked with guarding the Utah Supreme Court Justices, and that Technician was tasked with fixing the court's computers. R.1038-39,1020. In addition, because these court employees were allowed to use the court-employee elevator, as opposed to the public elevator, the jurors would have reasonably assumed that court personnel/participants were riding with them on the court-employee elevator. R.1033; *see also Allen*, 2005 UT 11, ¶51. In other words, unlike a juror's spouse, friend, or coworker, Patrolman and Technician had privileged access to court areas that the general public could not access.

Moreover, the jurors would have also reasonably assumed that Patrolman and Technician had specialized insight about court processes because of their

access to and communications with various court personnel who regularly attended and understood court hearings. *See Soto*, 2018 UT App 147, ¶22 ("highway patrol officers are regularly involved in criminal trials as witnesses and are seen as authoritative figures—perhaps all the more so in the case of one assigned to protect the justices of the State's highest court."). Importantly, "[a]ny comments made by a highway patrol officer about a defendant's guilt could influence a juror, consciously or not." *Id.* ¶22. Thus, the rebuttable presumption of prejudice properly applied to the juror contact from Patrolman and Technician because these individuals were unlike a juror's spouse, co-worker, or friend who is completely unrelated to the court process; rather, Patrolman and Technician were "*court participants*, [and not] third parties unrelated to the proceedings" because of the tasks they performed at the court and the privileged access they had to court personnel and court processes that the general public is not given. *Allen*, 2005 UT 11, ¶¶51-53 (emphasis in original); *see also Tenney*, 913 P.2d at 757-58; *Pike*, 712 P.2d at 280.

Second, like in *Pike*, *Erickson*, and *Swain*, but unlike in *Day* and *Jonas*, the improper juror contact was more than brief, incidental contact. *See Pike*, 712 P.2d at 280-81; *Erickson*, 749 P.2d at 620-21; *Swain*, 835 P.2d at 1011; *Day*, 815 P.2d at 1349-50; *Jonas*, 793 P.2d at 908-09. Without counsel present, Patrolman and Technician shared an unrecorded conversation with the jurors where the bailiff understood Technician to say "can you say guilty?" R.1020,1022. One of the jurors understood Technician to say "convict him or hang him or []

something like that." R.1024-26. Another juror heard Patrolman say, "Just say he's guilty" and another juror heard the officer say "let me tell you how this ends." R.1029,1025-26, 1020. Most of the jurors heard the word "guilty" uttered to them while riding in the elevator. R.1024-34. Importantly, Patrolman did not correct Technician when Technician suggested that Soto was guilty. *Soto*, 2018 UT App 147, ¶22. By not correcting Technician, Patrolman "implied either that he knew something about Soto's case or that criminal defendants are invariably guilty." *Id.* Moreover, the bailiff that escorted the jury into the elevator did not address or correct Patrolman and Technician's statements. *See* R.1020-21. Because the bailiff remained silent during the elevator conversation, it would have been reasonable for the jurors to believe that the bailiff also agreed with Patrolman and Technician. R.1020-21. Ultimately, this improper juror contact was "more than a brief, incidental contact" because it bred "a sense of familiarity" and was more egregious than a prosecution witness telling jurors that he was limping because of a "'bunged [] toe,'" and more egregious than a witness having a conversation about family and job matters. *Pike*, 712 P.2d at 278,281; *Erickson*, 749 P.2d at 621.

In addition, the improper juror contact was more than incidental because it constituted an "exchange of sentiments, observations, opinions or ideas" that Patrolman and Technician shared with the jurors. *Day*, 815 P.2d at 1349-50; *see also Jonas*, 793 P.2d at 908-09. The jurors would have reasonably believed that Patrolman and Technician were sharing their opinions, observations, and ideas

that the jurors "should find [Soto] guilty[,] or [Soto] must look guilty[,] or the way you look makes me think you think that [Soto's] guilty." R.1032-34. The improper comments also suggested that everyone who is on trial is guilty. Furthermore, in talking about guilt and in alluding to the ultimate verdict that the jury could decide, Patrolman and Technician "touched on [an] extremely sensitive issue" as opposed to having just a "mere exchange of civility." *Carlsen*, 799 P.2d at 226-27; *Swain*, 835 P.2d at 1011.

Importantly, the State is mistaken in arguing that under Utah case law, the presumption of prejudice for improper juror contact does not apply to court personnel unassociated with the proceedings. *See* Br. Of Petitioner at 2-3,15-19. Rather, Utah case law supports the court of appeals' holding that the presumption of prejudice is not limited to only court personnel who are trial participants (i.e. witnesses or attorneys in the defendant's case). *See Soto*, 2018 UT App 147, ¶16. First, Utah case law does not define "court participant" as being only those persons who were on the witness list or those who were inside the four walls of the court room during the trial proceedings. *See Pike*, 712 P.2d at 280-81; *Erickson*, 749 P.2d at 620-21; *Swain*, 835 P.2d at 1011; *Day*, 815 P.2d at 1349-50; *Jonas*, 793 P.2d at 908-09.

Second, court employees improperly insert themselves into the defendant's case—even if they were not initially involved in the defendant's case—when they discuss a sensitive case related issue with jurors (e.g. the defendant's guilt). *See Carlsen*, 799 P.2d at 225-27; *cf. Durand*, 569 P.2d at 1109. Under these

circumstances, a court employee is a "court participant" for purposes of the presumption because the court employee creates an appearance of impropriety by talking about a sensitive case related issue. Importantly, a non-court employee talking about the defendant's guilt would not create this same appearance of impropriety. *See Allen*, 2005 UT 11, ¶¶51-53; *Tenney*, 913 P.2d at 757-58.

Third, under Utah case law, the pertinent inquiry for whether the presumption applies looks at both the importance of *who* is talking, and *what* the conversation is about. When Patrolman and Technician talk about the guilt of the defendant to jurors who have not yet returned their verdict, Patrolman and Technician are effectively court participants for purposes of the presumption because an *appearance of impropriety* is triggered when these court employees insert themselves into the defendant's case by discussing the sensitive subject of the defendant's guilt. *See Carlsen*, 799 P.2d at 225-27; *Swain*, 835 P.2d at 1011; *cf. Durand*, 569 P.2d at 1109; *cf. Allen*, 2005 UT 11, ¶¶52-53; *cf. Tenney*, 913 P.2d at 757-58. Under these circumstances, both the importance of the court employees and topic of conversation is *high*. *See Carlsen*, 799 P.2d at 226. Thus, the court of appeals properly applied the presumption consistent with Utah case law because Patrolman and Technician became court participants when they improperly inserted themselves into Soto's case by discussing the very sensitive subject of Soto's guilt. *See id*; *see also Soto*, 2018 UT App 147, ¶19.

In sum, the court of appeals applied well-settled Utah law in deciding that a rebuttable presumption of prejudice applied because of improper juror contact

from Patrolman and Technician.

B. The court of appeals applied well-settled Utah law in deciding that the prosecution did not successfully rebut the presumption of prejudice that was triggered by the improper juror contact in the elevator.

The court of appeals correctly decided that the prosecution did not successfully rebut the presumption of prejudice that was triggered by the improper juror contact in the elevator. *Soto*, 2018 UT App 147, ¶¶20-23. Here, even though the jurors stated that their decision would not be impacted by the improper contact, a juror's denial that he or she was influenced by the contact is not sufficient to rebut the presumption of prejudice. *Id.* at ¶21. Utah case law recognizes the possible subconscious and negative impacts that improper juror contact has on jurors even when the jurors themselves do not recognize it. *Id.* at ¶21; *see also Pike*, 712 P.2d at 281; *Swain*, 835 P.2d at 1011; *Erickson*, 749 P.2d at 621; *Anderson*, 237 P. at 944; *Carlsen*, 799 P.2d at 227-28 (Orme, J., concurring).

Furthermore, the curative instruction failed to remedy the harm done by the improper juror contact. As noted by the court of appeals, the curative instruction "may have done as much harm as good." *Soto*, 2018 UT App 147, ¶21. First, by telling the jurors that Patrolman and Technician had "really no connection to the court system at all" and that they "know [nothing] about trials[,]" the trial court minimized the court related tasks, responsibilities, privileges, and court access that these individuals had. R.1038. It would be reasonable for the jurors to assume that Patrolman and Technician routinely

interacted and communicated with court personnel who regularly attend trials and who knew the intricacies of the court processes and criminal justice system. *See Soto*, 2018 UT App 147, ¶22; *see also supra*, Part IA. It is also reasonable that the jurors would have believed that Patrolman and Technician were sharing their special insights and information about the inner workings of the court system when they told the jurors, in part, "let me tell you how this ends" and "just say guilty." R.1029,1025-26,1020; *see also supra*, Part IA. These improper comments suggested to the jury that everyone who is on trial, including Soto, is guilty. *See Soto*, 2018 UT App 147, ¶22 ("the highway patrol officer implied either that he knew something about Soto's case or that criminal defendants are invariably guilty.").

Second, telling the jurors that Patrolman and Technician were merely "trying to be funny" does not alleviate the "appearance of collusion or impropriety in the proceedings . . . as to whether [Soto] was given a fair trial" where it is inappropriate to discuss, and especially joke about, an extremely sensitive and serious topic such as whether Soto or any other defendant is guilty. R.1038; *Swain*, 835 P.2d at 1011; *Carlsen*, 799 P.2d at 226-27. It is a commonly held view that "there's a grain of truth in every joke" so that "[w]henever a person is joking, he or she is actually disguising thoughts and emotions, either subconsciously or deliberately." *See* https://en.wiktionary.org/wiki/there's_a_grain_of_truth_in_every_joke (accessed 2/12/2019). Thus, even if the jurors believed that Patrolman and Technician were joking about Soto's guilt, the

jurors could have also reasonably believed that these court employees really did believe (consciously or subconsciously) that Soto should be found guilty. *See Carlsen*, 799 P.2d at 226-27; *Swain*, 835 P.2d at 1011. Consequently, "[t]he curative instruction and the jurors' responses that they could remain impartial were not enough to dispel the taint of impropriety." *Soto*, 2018 UT App 147, ¶22.

The State argues that the court of appeals applied the rebuttable presumption of prejudice in a manner that effectively makes it irrebuttable. Br. of Petitioner at 11,26. But the court of appeals did not decide that the presumption could never be rebutted by a curative instruction or by jurors' denials of improper contact. *See Larocco*, 742 P.2d 89, 97 (the court of appeals held that the presumption of prejudice was rebutted where, in part, the juror said that he was not impacted by the juror contact). Rather, the court decided that based upon the details of this case, as described above, the presumption was not rebutted. *Soto*, 2018 UT App 147, ¶22. Specifically, the presumption was not rebutted where the juror contact involved the extremely sensitive subject of guilt, and the jurors' denials of improper contact and the trial court's curative instruction did not dispel the taint of impropriety (i.e., that Patrolman and Technician were sharing their special insights and information about the inner workings of the court system and beliefs about Soto's guilt). *See id; cf. Larocco*, 742 P.2d 89, 97 (the presumption of prejudice was rebutted where in addition to the juror's claim that he was not impacted by the comments, the topic of conversation was about mundane, unimportant, and undisputed matters).

Thus, the court of appeals correctly held that a new trial in this case was warranted because "it is better[] that the inconvenience of a new trial should be incurred, than that just principles should be disregarded, and a suspicion remain, that a citizen has been convicted without a fair and impartial trial." *State v. Cartright*, 20 W. Va. 32, 44-45 (W. Va. 1882) (holding that a new trial was warranted where a witness did not improperly talk to the jurors about the case, but he "play[ed] the fiddle" for them while they deliberated their verdict).

In sum, the court of appeals applied well-settled Utah law in deciding that the prosecution did not successfully rebut the presumption of prejudice that arose from the improper juror contact.

C. Even if this Court decides that the rebuttable presumption of prejudice for juror contact did not apply, reversal is necessary because, at a minimum, Soto proved prejudice.

Even if this Court decides that the rebuttable presumption of prejudice for juror contact did not apply, reversal is still required because, at a minimum, Soto proved prejudice. *See Allen*, 2005 UT 11, ¶51 (if "alleged contact occurs between a juror and a non-court participant, the defendant must prove that the [improper contact] prejudiced the defendant."). Specifically, under a traditional prejudice analysis, there was a reasonable likelihood of a more favorable outcome for Soto had the improper juror contact not occurred; moreover, the impact of the improper contact was pervasive. S*ee State v. Kohl*, 2000 UT 35, ¶17, 999 P.2d 7 (a "reasonable likelihood of a more favorable outcome exists when the appellate court's confidence in the verdict actually reached is undermined") (internal

citations and quotations omitted); *see also State v. Hales*, 2007 UT 14, ¶86, 152 P.3d 321 (prejudicial error occurs when the error's effect on the trial is "pervasive.").

Importantly, Utah case law indicates that prejudice more likely occurs in credibility cases (i.e. "he said"/"she said" cases). *See State v. Barela*, 2015 UT 22, ¶32, 349 P.3d 676 ("A reasonable jury could have found the truth to lie somewhere between [the defendant's] and [the complainant's] accounts. And a reasonable jury viewing the evidence [] could have acquitted [the defendant] if correctly instructed."); *see also Gregg v. State*, 2012 UT 32, ¶37, 279 P.3d 396 (improperly excluded evidence "would have affected the entire evidentiary picture [and] would have undermined [the complainant's] overall credibility, which is particularly important because her testimony provided the only direct evidence of [the defendant's] guilt.").

In this case, Soto testified that he shared consensual sexual contact with Complainant. R.1229-46,1263-84. And although Complainant testified that the sexual contact was not consensual, R.749-57,789-99,861-62,917,924,1061, Complainant's various accounts of the alleged incident (1) contained material inconsistencies, (2) indicated a motivation to fabricate, (3) were contradicted by the physical evidence, and (4) were contradicted by the witness testimony.

First, Complainant's accounts contained material inconsistencies as Complainant changed her story over time when describing the incident. For example, although Complainant testified that Soto had penetrated her vagina and

had inserted his fingers into her rectum, she did not tell this to the responding officers or to the detective. R.806-07,828,863. In addition, Complainant testified that Soto threatened her life, yet Complainant did not tell this to the responding officers. R.803,826-29. Complainant also testified that Soto hurt her, yet when a responding officer asked Complainant whether Soto had hurt her, Complainant "initially said no[,]" she denied having any marks, and she declined an offer for medical attention. R.829,803,826-30. Complaint testified that Soto had pulled down his pants, yet she previously told a nurse that Soto had unzipped his pants but did not take them off. R.751,770-71,799,804-05,827,903,940. Complainant also initially told a detective that Soto had pulled down her pants, but later said that Soto had "unbuttoned her pants and put his hand down her pants." R.861,803-04. Complaint also testified that she only consumed "probably one and a half" beers the evening of the alleged incident, yet she previously told a nurse that she had consumed two and a half beers. R.800,771,778-79,941,960, 1245-46.

Second, Complainant was motivated to fabricate her account of the incident because Complainant did not want Girlfriend to believe that she had consensual sexual contact with Soto. Complainant feared that Girlfriend might harm her or "kick her ass." R.1262-63. Complainant's fears were supported by the fact that when Complainant and Soto were on the porch, Girlfriend accused Complainant of being "a bitch, a whore, [and] a home wrecker." R.1083,1077, 1081-82.

Third, the physical evidence contravened Complainant's testimony. Specifically, the DNA evidence contradicted, not corroborated, Complainant's version of the alleged incident because although Complainant said that Soto had "penetrated her vagina with his fingers[,]" the vaginal swab did not reveal any male DNA. R.1043-44,751-52,799,1054-55. And although not all sexual assault or strangulation cases show signs of physical injuries, a nurse practitioner testified at trial that according to Complainant's version of events, Complainant should have had injuries to her nose or chin, yet she did not. R.1134-35,904-56, 979, 1134,1195,1205.

Fourth, witness testimony belied Complainant's testimony. Specifically, Girlfriend's testimony contradicted Complainant's testimony about what transpired on the porch between Complainant and Soto. Complainant testified that she repeatedly rebuked Soto's romantic advances, and that while on the balcony, she pushed Soto away "about a minute and a half" before Girlfriend arrived. R.782,745-47,768-72,773-75,780-86,1222-23,1260-62. Complainant also testified that she told Girlfriend that Girlfriend had the "wrong idea" and that nothing was happening between her and Soto. R.785,746. Girlfriend, however, testified that she witnessed Soto and Complainant "holding each other" in a romantic embrace, that Complainant never pushed Soto away nor told him to stop, that Complainant did not look uncomfortable, and that Complainant remained silent and "did nothing" when Girlfriend confronted them. R.1077-79, 1081,1084-87,1087-90.

These weaknesses in the State's case indicate that there was a reasonable likelihood of a more favorable outcome for Soto had the improper juror contact not occurred because the negative impact of the contact was "pervasive" where it distracted the jury (consciously or unconsciously) from focusing on the weaknesses in the State's case. *See Hales*, 2007 UT 14, ¶86. In other words, the improper juror contact that emphasized the sensitive subject of guilt became a lens through which the jurors filtered the trial evidence. This lens excluded or diminished the State's weak evidence, and it overly emphasized any evidence that suggested Soto's guilt. Thus, the improper juror contact affected the entire evidentiary picture and improperly influenced a credibility "he said" vs. "she said" determination where it unfairly undermined Soto's credibility in favor of Complainant's. *See Barela*, 2015 UT 22, ¶32; *Gregg v. State*, 2012 UT 32, ¶37.

Importantly, the State's trial evidence included important weaknesses *after* the improper juror contact took place. For example, it was shortly *after* the improper jury contact occurred that the jury heard the trial evidence regarding the DNA findings—that the vaginal swab did not reveal any male DNA. R.1038,1043,1054. In addition, it was *after* the improper jury contact occurred that Girlfriend testified and presented testimony that contradicted Complaint's testimony. R.1068-1099. And it was *after* the improper jury contact occurred that a nurse practitioner testified that according to Complainant's version of events, Complainant should have had injuries to her nose or chin, yet she did not. R.1134-35,904-56,979,1134,1195,1205. Thus, the impact of the improper juror

contact was "pervasive" where the sensitive subject of guilt distracted the jury (consciously or unconsciously) from focusing on the weaknesses in the State's case. *See Hales*, 2007 UT 14, ¶86.

In sum, the court of appeals correctly decided to reverse and remand this case because, even if the rebuttable presumption of prejudice did not apply, Soto proved that he was prejudiced by the improper juror contact.

CONCLUSION

For the foregoing reasons, Anthony Soto respectfully asks this Court to affirm the court of appeals decision to reverse and remand this case for a new trial because improper juror contact denied Soto his constitutional right to an impartial jury.

SUBMITTED this 21st day of February, 2019.

Teresa Welch

TERESA L. WELCH
Attorney for Defendant/Respondent

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 10,159 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Georgia 13 point.

In compliance with rule 21(g), Utah Rules of Appellate Procedure, and rule 4-202.09(9)(A), Utah Code of Judicial Administration, I certify that, upon information and belief, all non-public information has been omitted or redacted from the foregoing petition for writ of certiorari of defendant/petitioner.

TERESA WELCH

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Supreme Court, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and two copies to the Utah Attorney General's Office, 160 East 300 South, 6th Floor, PO Box 140854, Salt Lake City, Utah 84114, this 21st day of February 2019. A searchable pdf will be emailed to the Utah Supreme Court at supremecourt@utcourts.gov and to the Utah Attorney General's Office at criminalappeals@agutah.gov within 14 days, pursuant to Utah Supreme Court Standing Order No. 8.

TERESA L. WELCH

DELIVERED this 21st day of February, 2019.

ADDENDUM A

2018 UT App 147

THE UTAH COURT OF APPEALS

STATE OF UTAH,
Appellee,
v.
ANTHONY SOTO,
Appellant.

Opinion
No. 20160087-CA
Filed August 9, 2018

Third District Court, Salt Lake Department
The Honorable Mark S. Kouris
No. 151902137

Teresa L. Welch and Lisa J. Remal, Attorneys
for Appellant

Sean D. Reyes and Lindsey L. Wheeler, Attorneys
for Appellee

JUDGE GREGORY K. ORME authored this Opinion, in which
JUDGES DAVID N. MORTENSEN and JILL M. POHLMAN concurred.

ORME, Judge:

¶1 Anthony Soto was convicted of one count of aggravated sexual assault, a first degree felony. Soto appeals, contending that he was denied his constitutional right to an impartial jury when a uniformed highway patrol officer and a court information technology (IT) technician made inappropriate comments to the jury in a nonpublic, court-employee elevator inside the courthouse. We agree and therefore remand for a new trial.

BACKGROUND

¶2 During a lunch break on the second day of trial, the bailiff assigned to the trial escorted the jury to a nonpublic, court-employee elevator inside the courthouse. When they entered, a uniformed highway patrol officer was inside. According to the bailiff, while they were in the elevator, the highway patrol officer remarked, "[L]ooks like a jury, do you want me to tell you how this ends?" As they descended, the elevator stopped, and a court IT technician got on. The IT technician then began to speak with the jury. The bailiff paid little attention to the conversation but then heard the IT technician ask, "[C]an you say guilty?" Understandably concerned by what he had heard, the bailiff brought the comments to the trial court's attention.

¶3 After lunch, and outside the presence of the jury, the trial court relayed to the parties what had happened. The court explained that it would speak to the jurors individually to find out if any of them had heard what was said, and if they did, whether the jurors thought they could remain impartial. If the jurors answered that they had heard the comments but that the comments did not affect their judgment, the court suggested it would provide a curative instruction, explaining that the highway patrol officer and IT technician were merely speaking "off-the-cuff," that they knew nothing about the case, and that the jurors should not consider anything that they had heard in the elevator.

¶4 The court brought the jurors in one-by-one and asked them to report what they had heard. Juror 1 said that she heard the IT technician say, "[C]onvict him or hang him or it was something like that." Juror 2 reported that the highway patrol officer remarked, "[L]et me tell you how this ends." Juror 3 stated that the IT technician said, "You can already tell he's guilty." Juror 4 related the following: "[The IT technician] said, Hello jury, and . . . someone in the jury said, Do we have that

look? And [the IT technician] said guilty?" Juror 5 stated that the highway patrol officer said, "Just say he's guilty." According to Juror 6, the highway patrol officer asked the jury, "Are they guilty?" Juror 7 stated that the highway patrol officer made a comment but that she could not remember what it was. She also related the following: "[The IT technician] came in and said, Oh, it looks like a jury. And I said, Do we all have that look?" Juror 8's report was nearly identical to Juror 7's, but he added that when one of the jurors asked the IT technician how he could tell that they were on a jury, the IT technician said "something to the effect of . . . looks guilty or something."

¶5 Although each juror remembered hearing something slightly different, all but one juror said that either the highway patrol officer or the IT technician used the word "guilty" or something similar. Jurors 1 and 2 offered that they took the comments as jokes, and each of the jurors insisted that the comments had no impact on their judgment. Nevertheless, Soto moved for a mistrial, stressing that the gist of what the jurors had heard touched on the sensitive subject of guilt and that the comments were made by court staff in a nonpublic, court-employee elevator. The court denied the motion because it believed that the jurors took the comments as jokes and because no juror hesitated in saying that they would remain impartial. As a precaution, the court stated that it would provide a curative instruction.

¶6 When the jury returned, the court offered the curative instruction. The court explained that the highway patrol officer's role at the court is to guard the Utah Supreme Court when it is in session. The court added, "He has really no connection to the court system at all. He's not a bailiff, he's nothing like that. He drives his police car, parks downstairs where we park and he goes up to guard [the Court]. So he would have absolutely no knowledge of any part of this trial." The court told the jury that the other person who entered the elevator was an IT technician. Concerning the IT technician, the court stated, "Now we know

what IT guys know about trials and that's pretty much nothing. We know that our equipment dies off on occasion and he comes in and fixes it." The court finished the instruction by reiterating that the highway patrol officer and the IT technician knew nothing about the case and stated that they were just trying to be funny, which they were not.

¶7 At the close of trial, the jury found Soto guilty of aggravated sexual assault. Soto appeals.

ISSUE AND STANDARDS OF REVIEW

¶8 Soto contends that the trial court erred in denying his motion for a new trial. "When reviewing a [trial] court's denial of a motion for a new trial, we will not reverse absent a clear abuse of discretion[.]" *State v. Allen*, 2005 UT 11, ¶ 50, 108 P.3d 730 (quotation simplified). "At the same time, however, we review the legal standards applied by the [trial] court in denying the motion for correctness." *Id.* (quotation simplified).[1]

ANALYSIS

¶9 Soto contends that he was denied his constitutional right to an impartial jury when the trial court denied his motion for a mistrial after a highway patrol officer and a court IT technician

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1. Soto also contends that his conviction was not supported by sufficient evidence. But this contention is largely unpreserved, and although he asserts that we can reach it under the rubric of plain error, his plain error analysis is inadequately briefed. In addition, the remnants of his argument that were preserved lack merit. Because of the deficiencies in the briefing of this second issue and because we remand for a new trial on the first issue in any event, we do not further address the second issue.

made inappropriate comments to the jury while in a nonpublic, court-employee elevator. We agree.

¶10 The United States Constitution and the Utah Constitution guarantee a criminal defendant the right to an impartial jury. U.S. Const. amend. VI; Utah Const. art. 1, § 12. These guarantees require that verdicts be "above suspicion" as to whether any juror might have been influenced by any inappropriate contact. *See State v. Anderson*, 237 P. 941, 944 (Utah 1925). Because it is difficult to show that a juror has been tainted by improper contact, and because improper contact "may influence a juror in ways he or she may not even be able to recognize," our Supreme Court has stated that "a rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors which goes beyond a mere incidental, unintended, and brief contact." *State v. Pike*, 712 P.2d 277, 280 (Utah 1985).

¶11 The parties disagree whether the rebuttable presumption of prejudice applies to the unique set of facts before us. According to the State, our Supreme Court has drawn a hard line between court participants and court personnel, applying the rebuttable presumption only if the contact was between a juror and a participant in the defendant's trial. Soto argues that the rebuttable presumption of prejudice applies more broadly and includes all court personnel, even if they are not directly involved in the case.

¶12 To be sure, in addressing the rebuttable presumption of prejudice, the Court has at times made reference to court participants and at times to court personnel. Indeed, it used both terms in *State v. Allen*, 2005 UT 11, 108 P.3d 730. There, the Court addressed whether Allen's constitutional right to an impartial jury had been violated where a juror's spouse had told the juror about the defense's intention to move for a mistrial based on a witness's testimony and where the juror had relayed that information to the other jurors. *Id.* ¶ 47.

¶13 In discussing the rebuttable presumption, the Court articulated the following:

> Allen correctly observes that when any unauthorized contact during a trial *between witnesses, attorneys or court personnel and jurors* goes beyond a mere incidental, unintended, and brief contact, there is a rebuttable presumption of prejudice, and that to counteract this presumption the prosecution must prove that the unauthorized contact did not influence the juror. However, the State also correctly notes that this rebuttable presumption only applies when the contact is between a juror and *other court participants*, not jurors and third parties unrelated to the proceedings.

Id. ¶ 51 (emphases in original) (quotation simplified). The Court concluded that the unauthorized contact between the juror and the juror's spouse did not trigger the rebuttable presumption of prejudice because the contact did not occur "between a juror and *court personnel*." *Id.* ¶ 53 (emphasis added).

¶14 In our view, the Court's references in *Allen* to "court participants" were not meant to mark the boundaries of the rebuttable presumption. Rather, the Court was highlighting a key difference between the facts of *Allen*, where the conduct was between a juror and a third party—the juror's spouse—and other cases in which our courts have applied a rebuttable presumption of prejudice. *See, e.g.*, *State v. Erickson*, 749 P.2d 620, 620–21 (Utah 1987) (contact between a juror and a witness); *Pike*, 712 P.2d at 279–80 (same); *Anderson*, 237 P. at 942–44 (same); *Logan City v. Carlsen*, 799 P.2d 224, 225–26 (Utah Ct. App. 1990) (contact between the jury and the bailiff assigned to the trial).

¶15 We conclude that the rebuttable presumption of prejudice applies both to inappropriate contacts between jurors and court

participants and to inappropriate contacts between jurors and court personnel. Indeed, our Supreme Court has stated as much. *See Allen*, 2005 UT 11, ¶¶ 51, 53 (stating that the rebuttable presumption of prejudice "applies when the contact is between a juror and other court participants, not jurors and third parties unrelated to the proceedings," but later noting the contact in question was not "between a juror and court personnel") (quotation simplified); *Pike*, 712 P.2d at 280 ("[A] rebuttable presumption of prejudice arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors."). And the Court's references to "court personnel" should not be interpreted to mean in-court participants only. There can, of course, be some overlap between the two terms, but in our view, the Court has not cordoned off inappropriate contacts between jurors and court personnel who are not directly involved in a defendant's trial from the reach of the rebuttable presumption of prejudice.

¶16 We stress that the overarching principle underpinning the rebuttable presumption analysis is whether, despite the inappropriate contact, the verdict remains "above suspicion." *See Anderson*, 237 P. at 944. A conclusion that the rebuttable presumption does not apply to inappropriate contacts with court personnel in general would be at odds with this overarching principle and would dilute the right to an impartial jury. For example, such a conclusion would preclude a court from applying the rebuttable presumption of prejudice to comments made by a judge not assigned to the defendant's case, even though one can readily envision circumstances where such comments would be highly inappropriate.[2] The right to an impartial jury is not so limited.

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2. Consider a hypothetical encounter where another trial court judge enters a nonpublic, court-employee elevator with the jury and urges the jury to convict the defendant because, in the (continued...)

¶17 Having clarified the scope of the rebuttable presumption of prejudice, we now address whether the highway patrol officer's and the IT technician's comments triggered the presumption. The State does not dispute that the highway patrol officer and the IT technician are court personnel, but our analysis does not end there. As our Supreme Court has stated, the presumption is not triggered unless the encounter "goes beyond a mere incidental, unintended, and brief contact." *Pike*, 712 P.2d at 280.

¶18 Although the contacts between the jury and the highway patrol officer and the IT technician were relatively brief encounters in an elevator, we cannot say that they were merely incidental and unintended. In *Carlsen*, we held that a bailiff's brief remarks to the jury about the sentencing differences between misdemeanors and felonies triggered a rebuttable presumption of prejudice. 799 P.2d at 225–26. In reaching that conclusion, we stressed that, although the bailiff's comments did not specifically relate to the defendant's case, they "touched on the extremely sensitive issue of sentencing." *Id.* at 226.

¶19 The comments made in the present case were even more inappropriate than those made by the bailiff in *Carlsen*. Here, the highway patrol officer and the IT technician intentionally spoke to the jurors about the most sensitive issue of a criminal case: whether the defendant is guilty. We cannot think of another topic that would create a stronger appearance of impropriety. Accordingly, we conclude that the contacts, while brief, were

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(...continued)
judge's experience, criminal defendants are "almost always" guilty and deserve to be convicted "99 times out of 100." Although it is unlikely that such an encounter would ever happen, it would surely violate the right to an impartial jury and trigger the rebuttable presumption of prejudice even though the wayward judge was not a participant in the defendant's trial.

neither incidental nor unintended and that they therefore triggered a rebuttable presumption of prejudice.

¶20 We now consider whether the State rebutted the presumption of prejudice. We conclude that it did not.

¶21 The State insists that because each juror told the trial court that the comments did not affect his or her impartiality and because the court provided a curative instruction, the State successfully rebutted the presumption of prejudice. But our Supreme Court has stated that a juror's denial that they were influenced by an inappropriate contact "is not enough to rebut the presumption of prejudice." *Pike*, 712 P.2d at 281. *Accord Erickson*, 749 P.2d at 621; *Anderson*, 237 P. at 944. As for the curative instruction, it may have done as much harm as good.

¶22 Regarding the highway patrol officer, the court stated that he

> usually comes when the Supreme Court is in session because they have to guard those judges [up] there. . . . He has really no connection to the court system at all. He's not a bailiff, he's nothing like that. He drives his police car, parks downstairs where we park and he goes up to guard those folks. So he would have absolutely no knowledge of any part of this trial.

Telling the jury that the highway patrol officer works with the Supreme Court and that he parks downstairs where court personnel and judges park does not eliminate the possibility that the highway patrol officer knew about Soto's case or at least the propriety of a guilty verdict. But more importantly, highway patrol officers are regularly involved in criminal trials as witnesses and are seen as authoritative figures—perhaps all the more so in the case of one assigned to protect the justices of the State's highest court. Any comments made by a highway patrol officer about a defendant's guilt could influence a juror,

consciously or not. Moreover, the bailiff assigned to Soto's case was rightly concerned about the highway patrol officer's comments and stated that the highway patrol officer remarked, "[L]ooks like a jury, do you want me to tell you how this ends?" By making that statement and then, moments later, not correcting the IT technician when he suggested that Soto was guilty, the highway patrol officer implied either that he knew something about Soto's case or that criminal defendants are invariably guilty. The curative instruction and the jurors' responses that they could remain impartial were not enough to dispel the taint of impropriety.

¶23 A rebuttable presumption of prejudice was triggered, and it was not rebutted. The comments made by court personnel leave us with no choice but to conclude that Soto's right to an impartial jury was violated.

CONCLUSION

¶24 We conclude that Soto's constitutional right to an impartial jury was violated when the highway patrol officer and the IT technician made inappropriate comments to the jury in a nonpublic, court-employee elevator. Accordingly, we reverse Soto's conviction and remand for a new trial.

ADDENDUM B

The Order of the Court is stated below:
Dated: December 08, 2018 10:04:40 AM /s/ Thomas R. Lee
Associate Chief Justice

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah, Petitioner, v. Anthony Soto, Respondent.	ORDER Supreme Court Case No. 20180810-SC Court of Appeals Case No. 20160087-CA Trial Court Case No. 151902137

This matter is before the court upon a Petition for Writ of Certiorari, filed on October 9, 2018.

The Petition for Writ of Certiorari is granted as to the following issues:

1. Whether the court of appeals erred in concluding that a rebuttable presumption of prejudice occurs when there is inappropriate contact between jurors and court personnel, regardless of whether the personnel are participants in the case to be decided by the jurors.

2. If the answer to the first question is no, whether the court of appeals erred in concluding that Petitioner failed to rebut the presumption.

A briefing schedule will be established hereafter. Pursuant to Rule 2 of the Rules of Appellate Procedure, the Court suspends the provision of Rule 26(a) that permits the parties to stipulate to an extension of time to submit their briefs on the merits. The parties shall not be permitted to stipulate to an extension. The parties shall comply with the briefing schedule upon its issuance.

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

ADDENDUM C

U.S. Const. amend VI

Amendment 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 defence.

U. S. Constitution Amendment XIV

1. 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.

2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Const. art. I, § 12

Article I, Section 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.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Utah Code § 76-5-405

§ 76-5-405. Aggravated sexual assault--Penalty

(1) A person commits aggravated sexual assault if:

(a) in the course of a rape, object rape, forcible sodomy, or forcible sexual abuse, the actor:

(i) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(ii) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iii) is aided or abetted by one or more persons;

(b) in the course of an attempted rape, attempted object rape, or attempted forcible sodomy, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to rape, object rape, or forcible sodomy, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons; or

(c) in the course of an attempted forcible sexual abuse, the actor:

(i) causes serious bodily injury to any person;

(ii) uses, or threatens the victim with the use of, a dangerous weapon as defined in Section 76-1-601;

(iii) attempts to compel the victim to submit to forcible sexual abuse, by threat of kidnaping, death, or serious bodily injury to be inflicted imminently on any person; or

(iv) is aided or abetted by one or more persons.

(2) Aggravated sexual assault is a first degree felony, punishable by a term of imprisonment of:

(a) for an aggravated sexual assault described in Subsection (1)(a):

(i) except as provided in Subsection (2)(a)(ii) or (3)(a), not less than 15 years and which may be for life; or

(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous sexual offense;

(b) for an aggravated sexual assault described in Subsection (1)(b):

(i) except as provided in Subsection (2)(b)(ii) or (4)(a), not less than 10 years and which may be for life; or

(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous

sexual offense; or

(c) for an aggravated sexual assault described in Subsection (1)(c):

(i) except as provided in Subsection (2)(c)(ii) or (5)(a), not less than six years and which may be for life; or

(ii) life without parole, if the trier of fact finds that at the time of the commission of the aggravated sexual assault, the defendant was previously convicted of a grievous sexual offense.

(3)(a) If, when imposing a sentence under Subsection (2)(a)(i), a court finds that a lesser term than the term described in Subsection (2)(a)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than:

(i) 10 years and which may be for life; or

(ii) six years and which may be for life.

(b) The provisions of Subsection (3)(a) do not apply when a person is sentenced under Subsection (2)(a)(ii).

(4)(a) If, when imposing a sentence under Subsection (2)(b)(i), a court finds that a lesser term than the term described in Subsection (2)(b)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than six years and which may be for life.

(b) The provisions of Subsection (4)(a) do not apply when a person is sentenced under Subsection (2)(b)(ii).

(5)(a) If, when imposing a sentence under Subsection (2)(c)(i), a court finds that a lesser term than the term described in Subsection (2)(c)(i) is in the interests of justice and states the reasons for this finding on the record, the court may impose a term of imprisonment of not less than three years and which may be for life.

(b) The provisions of Subsection (5)(a) do not apply when a person is sentenced under Subsection (2)(c)(ii).

(6) Subsections (2)(a)(ii), (2)(b)(ii), and (2)(c)(ii) do not apply if the defendant was younger than 18 years of age at the time of the offense.

(7) Imprisonment under this section is mandatory in accordance with Section 76-3-406.

Credits

Laws 1973, c. 196, § 76-5-405; Laws 1977, c. 86, § 4; Laws 1983, c. 88, § 25; Laws 1986, c. 31, § 1; Laws 1989, c. 170, § 5; Laws 1995, c. 337, § 9, eff. May 1, 1995; Laws 1995, 1st Sp.Sess., c. 10, § 10, eff. April 29, 1996; Laws 1996, c. 40, § 11, eff. April 29, 1996; Laws 1997, c. 289, § 7, eff. May 5, 1997; Laws 2007, c. 339, § 20, eff. April 30, 2007; Laws 2009, c. 176, § 1, eff. May 12, 2009; Laws 2013, c. 81, § 11, eff. May 14, 2013.

Utah Code § 76-8-507

§ 76-8-507. False personal information to peace officer

(1) A person commits a class C misdemeanor if, with intent of misleading a peace officer as to the person's identity, birth date, or place of residence, the person knowingly gives a false name, birth date, or address to a peace officer in the lawful discharge of the peace officer's official duties.

(2) A person commits a class A misdemeanor if, with the intent of leading a peace officer to believe that the person is another actual person, he gives the name, birth date, or address of another person to a peace officer acting in the lawful discharge of the peace officer's official duties.

Credits

Laws 1973, c. 196, § 76-8-507; Laws 1983, c. 97, § 4; Laws 2002, c. 42, § 1, eff. May 6, 2002.

ADDENDUM D

THE COURT: Let's bring the jury back and you can get your witness in here if she's not here yet.

(Whereupon the jury entered the courtroom)

THE COURT: Please be seated. Thank you. Ladies and gentlemen, sorry for a late start. You obviously understood because we brought you all in and asked you the same questions what the issue was. Let me just say one more thing about that and then we'll let that drop. The two folks that joined you folks inside of the elevator, one was a Utah Highway Patrolman and the Highway Patrolman, I didn't know this, maybe you already know it, the Highway Patrolman usually comes when the Supreme Court is in session because they have to guard those judges out there. You notice nobody guards me, right? That's by design. So he's upstairs by that. He has really no connection to the court system at all. He's not a bailiff, he's nothing like that. He drives his police car, parks downstairs where we park and he goes up to guard those folks. So he would have absolutely no knowledge of any part of this trial.

The second person that got on was an IT guy. Now we know what IT guys know about trials and that's pretty much nothing. We know that our equipment dies off on occasionally and he comes in and fixes it but that said, so I guess my point is I don't want you to think that those folks have any inside information or any talk or any gossip or anything

about what's going on. They know absolutely nothing about this case and every comment they made was completely off the cuff, they were trying to be funny. Quite frankly, they weren't.

And lastly of course, one of our instructions as I mentioned a number of times is we, everything we know about this case won't be learned about outside of this courtroom. So as per the rules, we won't take that into account. I don't think you would but nonetheless that's a the rule. So, thank you and thank you for indulging us here a second.

You may call your next witness.

[Remainder of page redacted]