Case No. 20180810-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ANTHONY SOTO,
Defendant/Respondent.

Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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INTRODUCTION

Defendant—angry that his girlfriend had kicked him out of her apartment and that Victim had rebuffed his sexual advances—held Victim down, smothered her, strangled her, and forced his fingers inside her vagina and rectum.

On day two of Defendant's trial, a highway patrolman and a court IT technician—neither of whom had any involvement in Defendant's trial—interacted with the jury in a courthouse elevator. During the interaction, both the highway patrolman and the IT technician made comments to the jury that included the word "guilty." Upon learning of the interaction, the trial court asked each juror separately if the comments would affect their decision. Each

juror said the comments would not. The trial court also gave a curative instruction, instructing jurors to disregard the comments and to base their decision on the evidence presented during trial.

On appeal, Defendant argued that the rebuttable presumption of prejudice applied because both the highway patrolman and the IT technician were court participants. He also argued that the State did not rebut that presumption.

The court of appeals agreed, holding for the first time in Utah that the rebuttable presumption applies not only to unauthorized contact between jurors and in-court participants, but also to unauthorized contact between jurors and non-trial-participant persons who also happen to be employed by the Utah court system. The court of appeals also held that the jurors' assurances that the comments would not affect their impartiality and the trial court's curative instruction were insufficient to rebut the presumption of prejudice.

This Court should reverse. First, the Court created the rebuttable presumption for unauthorized contact between jurors and court personnel involved in the case the jurors would have to decide. The Court believed that the contact risked breeding familiarity, thus, risked unduly influencing the jury and creating an appearance of impropriety. The court of appeals

erroneously extended the rebuttable presumption of prejudice to unauthorized juror contact with court personnel unassociated with the proceedings. Because the underlying justifications for the rebuttable presumption of prejudice does not exist when the unauthorized contact is with court personnel unassociated with the proceedings, the rebuttable presumption should not apply.

The court of appeals also erroneously concluded that the State failed to rebut the presumption of prejudice. In contravention of this Court's precedent, the court of appeals ignored the trial court's factual findings, impermissibly speculated that the trial court's curative instruction was harmful, and too narrowly considered the jurors denials of improper influence.

STATEMENT OF THE ISSUES

1. This Court has established that inappropriate contact between jurors and the personnel of the court in which the relevant case is proceeding creates a rebuttable presumption of prejudice. This is so, this Court has said, because such contact breeds familiarity, thus creating a risk of unduly influencing the jury and an appearance of impropriety. Did the court of appeals erroneously extend the rebuttable presumption of prejudice to inappropriate juror contact

between jurors and persons who are not involved in the proceeding, but who are employees of the Utah court system?

2. The trial court questioned every juror about the contact with the non-trial-participant court personnel. Each unequivocally denied that it would affect their verdict. And the trial court gave a curative instruction. Did the court of appeals improperly hold that this was insufficient to rebut the presumption of prejudice?

Standard of Review for Issues 1 and 2. On certiorari, this Court reviews a court of appeals' decision for correctness. *State v. Shipp*, 2005 UT 35, ¶8, 116 P.3d 317.

STATEMENT OF THE CASE

A. Summary of relevant facts.

Against Victim's will, Defendant held her down, smothered her, strangled her, and digitally penetrated her vagina and rectum. R749-752, 1282-1283.

B. Summary of proceedings and disposition of the court.

Defendant was charged with aggravated sexual assault, a first degree felony, and providing false personal information to a peace officer, a class A misdemeanor. R332-333.

On the second day of trial, the jury had contact with persons who worked for the courts—a highway patrolman and a court IT technician—who were not associated with Defendant's case. R1020. Before releasing the jury for lunch, the trial court reminded the jurors to "remember the admonitions, please don't talk to each other about the case, don't talk to anybody about the case, [d]on't talk to anybody involved in the trial and don't do any outside research." R1018. Accompanied by the bailiff, the jury then boarded the courthouse's employee elevator. R1020.

When the jury entered, a highway patrolman was already on the elevator. *Id.* The highway patrolman said something like, "[O]h looks like a jury, do you want me to tell you how this ends?" *Id.* The elevator then went down two floors, and a court IT technician entered. *Id.* He said something like, "[O]h you guys look like a jury." R1020. One juror replied, "Do we look that obvious?" R1020. The IT technician responded, "[C]an you say guilty[?]" *Id.*

After lunch, the bailiff reported the contact to the trial court. *Id.* At defense counsel's suggestion, the court interviewed each juror separately in chambers with the parties present, asking each juror: "I understand that when everybody was loading into the elevator to go down to the first floor to go to lunch that some comments were made by folks that were on or got on

the elevator. Did you hear any of those comments?" R1022, 1025. The court next asked, "[W]hat did you hear[?]," and "[W]ill that comment have any effect at all with how you see this case[?]." R1025-1032.

All of the jurors agreed that when they boarded the elevator, the patrolman was already on it and that the IT technician boarded later. R1024-1032. Each juror heard something a little different, but all agreed that at least one of the men on the elevator made a comment to them. *Id.*

One juror heard the patrolman say, "[L]et me tell you how this ends." R1026. Another heard "Just say he's guilty." R1028-1029. Yet another heard the patrolman ask, "Are they guilty?" R1030. And some jurors either could not remember what the patrolman said or did not hear what he said. R1024,1027-1028,1031-1032.

As for the IT technician, some jurors heard him say, "[h]ello jury, and then a juror responded either: "[I]s [it] that noticeable that we are a jury[?]," or "[D]o we have that look[?]," and the IT technician reply, "[Y]es," or "[G]uilty." R1024, 1026. Another juror heard the IT technician say, "This must be the jury, I know because of your faces, (sic) can tell you're the jury, and [] [y]ou can already tell he's guilty." R1027. One juror heard the IT technician say, "[I]t looks like a jury," and a juror respond, "Do we all have that look?" R1031. Yet another juror heard the IT technician say, "You're jurors," and

heard a juror respond, "How can you tell[?]," and the IT technician reply, "[L]ooks guilty" or something to that effect. R1032. One juror did not hear the IT technician at all. R1029. And another heard the IT technician say only, "Oh, you all are jurors." R1030.

Each juror also unequivocally told the court that any comment heard would not affect his or her judgment on the case. R1025-1032. One juror said he thought the comments were a joke. R1025.

Following the juror interviews, Defendant moved for a mistrial, arguing that because each juror heard the word "guilty," the gist of the comments were that Defendant should be found guilty. R1033. Defendant further argued that where the comments were made by people using the internal courthouse elevator, there was a presumption that the jury "might be influenced." *Id.*

The trial court denied Defendant's motion. R1034. The court found that the jurors heard the comments as light banter or off-the-cuff jokes. *Id.* The court found that none of the jurors indicated that either the patrolman or the IT technician "had any knowledge of this trial or what's going on inside of the trial." *Id.* Finally, the court found that each of the jurors "were asked point blank if this will affect" their verdict in any way and each of the jurors stated

with "absolute certainty" that the comments "would have absolutely no [e]ffect on them." R1034-1035.

The trial court also gave a curative instruction. R1038. The court told the jury that the "two folks that joined you folks inside of the elevator, one was a Utah Bailiff and the Bailiff . . . usually comes when the Supreme Court is in session because they have to guard those judges out there" and "[h]e 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 the trial." R1038.

The trial court continued that the "second person that got on was an IT guy" and that "we know what IT guys know about trials and that's pretty much nothing" because they only fix the court's equipment. *Id.* The court explained that neither the patrolman nor the IT technician knew anything about the case, that they did not have "any inside information or talk or any gossip," and that "[t]hey 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." R1038-1038.

Finally, the trial court reminded the jurors that nothing about the case could come from "outside the courtroom,"; "So as per the rules, we won't take that into account." R1039.

The jury found Defendant guilty as charged. R1382. Defendant timely appealed. R430-31.

Court of Appeals. On appeal, Defendant argued that a rebuttable presumption of prejudice applied because the patrolman and IT technician were court participants. He also argued that the State did not rebut that presumption. *State v. Soto*, 2018 UT App 147, ¶¶9,11, 427 P.3d 1286.

The Court of Appeals agreed, concluding that the rebuttable presumption applies to inappropriate contact between jurors and both trial-participant court personnel and court personnel who have nothing to do with the case the jurors will have to decide. *Id.* ¶¶12-15

The Court of Appeals also rejected the State's argument that if the rebuttable presumption applied, it was rebutted by the trial court's jury voir dire where each juror stated that the contact would not affect their judgment and the curative instruction. *Id.*¶21. The Court of Appeals reasoned that a juror's denial that he or she was influenced is "not enough to rebut the presumption of prejudice." *Id.*¶¶21-22. The court also explained that the curative instruction "may have done as much harm as good" because it did

not "eliminate the possibility" that the patrolman knew about the case. *Id.* The court did not, however, elaborate on what evidence would rebut the presumption if the jurors' unequivocal denials that the trial court believed was not enough.

SUMMARY OF ARGUMENT

Point I. The court of appeals held that unauthorized juror contact with anyone employed by the courts, even if they are not participants in the case the jurors will decide, triggers the rebuttable presumption of prejudice. This was error.

This Court has decided that unauthorized juror interaction with an in-court participant triggers a rebuttable presumption of prejudice because that contact breeds a sense of familiarity, which may lead to both undue influence on the jury's decision and an appearance of impropriety. But unauthorized juror interaction with court personnel who are unassociated with the case the jurors must decide should not trigger the same presumption. Jurors are unlikely to be influenced by persons who work for the courts, but have nothing to do with the case they are deciding. Jurors would not likely perceive those persons to have any special knowledge or expertise on the matter before them. For the same reasons, there is a far less risk of an appearance of impropriety. Court personnel who are unassociated with the

proceedings have a relationship to the jury akin to third party outsiders. As such, the rebuttable presumption of prejudice should not apply.

Point II. The court of appeals held that the State did not rebut the presumption of prejudice. But ample evidence rebutted the presumption.

Each juror unequivocally denied that the unauthorized contact would affect his or her judgment. The trial court found that the unauthorized contact would have absolutely no effect on the jurors and that the jurors did not believe that either the patrolman or IT technician had any knowledge about the trial. The trial court then gave a curative instruction. The instruction informed the jury that the patrolman and IT technician were court personnel and their role in the courthouse. Then, the trial court instructed the jury to only consider the evidence presented during the proceedings. Given the totality of the evidence, the State rebutted any presumption of prejudice.

In concluding otherwise, the court of appeals effectively created an irrebuttable presumption. The court of appeals too narrowly interpreted the rule that juror's denial of improper influence is not enough to rebut the presumption. That rule applies when no other evidence is presented and the contact is between a juror and a witness in the case the jurors will decide—neither is the case here. The court of appeals also impermissibly speculated that the curative instruction was more harmful than helpful because it did

not "eliminate the possibility" that one of the two non-trial-participants knew nothing about the case. But the trial court specifically told the jurors that neither of the non-trial-participants knew anything about the case and reminded the jurors to look only to the in-court evidence to reach its decision. Finally, the court of appeals ignored the trial court's factual findings. Traditionally, appellate courts give deference to the trial court's findings because the trial judge, having personally observed the quality of the evidence, the tenor of the proceedings, and the demeanor of the parties, is in a better position to perceive the subtleties that an appellate that only has the cold record. Because the State rebutted the presumption, this Court should reverse the court of appeals and restore Defendant's convictions.

ARGUMENT

I.

The rebuttable presumption of prejudice should not apply to contact between jurors and court personnel who are unassociated with the case the jurors must decide

Defendant argued in the court of appeals that the brief contact between the jury and the two courthouse employees—a patrolman assigned to guard this Court and an IT technician—was presumptively prejudicial and warranted a new trial. *State v. Soto*, 2018 UT App 147, ¶9, 427 P.3d 1286.

Citing to this Court's precedent, the court of appeals agreed, holding that juror interaction with court personnel who had nothing to do with the case the jurors would have to decided triggered the rebuttable presumption of prejudice. *Id.* ¶¶19-20.

But the precedent the court of appeals relied on has never extended the rebuttable presumption of prejudice that far. And the reasons this Court gave for a rebuttable presumption of prejudice when in-court participants improperly interact with jurors are not implicated by improper contact between jurors and court employees who have nothing to do with the case jurors must decide. Extending the presumption to situations where it will not ameliorate a threat to due process imposes an undue burden on crime victims and the State's scarce resources.

The Due Process Clause of the Fourteenth Amendment guarantees a defendant in a state criminal trial the right to an impartial jury. The United States Supreme Court has held that, in certain circumstances, unauthorized contact with a jury during trial is presumptively prejudicial to the defendant and warrants a new trial. *Remmer v. United States*, 347 U.S. 227, 229 (1954) (1954) (evidence of jury tampering raises rebuttable presumption of prejudice). The Supreme Court has also recognized, however, that "due process does not require a new trial every time a juror has been placed in a

potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Rather, the "remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215 (where juror applied to work at prosecutor's office who was prosecuting defendant in juror's trial was not entitled to a new trial, rather, only to a hearing where he could prove bias).

This Court has propounded a broader rule for unauthorized juror contact. "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). This Court reasoned that unauthorized juror contact may breed a sense of familiarity, thus, unduly influence the jury and create the appearance of impropriety. *See State v. Anderson*, 237 P. 941, 943-44 (Utah 1925); *see e.g., Pike*, 712 P.2d at 279-80; (presumption applied where during a trial recess, the key prosecution witness, who was the arresting officer, explained to three jurors how he sustained an injury to his leg); *But see State v. Shipp*, 2005 UT 35, ¶17, 116 P.3d 317 (rebuttable presumption did not apply where juror and witness had pre-voir dire contact because any prejudice or bias could be ferreted out during voir dire).

Following that reasoning, this Court has only applied the rebuttable presumption of prejudice to unauthorized contact between jurors and other court participants in the case the jurors must decide—witnesses, attorneys, parties, or courtroom personnel involved in the case. For example, in *Pike*, 712 P.2d at 279-80, this Court applied the rebuttable presumption where during a trial recess, the key prosecution witness, who was the arresting officer, explained to three jurors how he sustained a leg injury. And in *State v. Erikson*, 749 P.2d 620, 620-620 (Utah 1987), this Court applied the rebuttable presumption of prejudice where the key prosecution witness and a juror, who were acquaintances, conversed about work and family matters at a recess.

But this Court has never applied the rebuttable presumption to unauthorized juror contact with persons unassociated with the proceedings. *See e.g., State v. Allen*, 2005 UT 11, ¶¶51-53, 108 P.3d 730 (holding rebuttable presumption of prejudice did not attach where unauthorized contact occurred between a juror and her spouse). And for good reason. Such contact does not breed a sense of familiarity with persons that jurors may perceive have special knowledge of and authority over the case they must decide. Thus, that contact does not present the critical risk of undue influence or the appearance of impropriety.

Unauthorized contact between jurors and court personnel unassociated with the proceedings is akin to unauthorized juror contact with third-party outsiders. Indeed, court personnel—individuals employed by the court—are not synonymous with court participants—individuals participating in the proceedings. An in-court participant, as the label denotes, participates in some way in the proceedings, and through that participation develops a familiarity with the jurors. Thus, when unauthorized contact occurs between an in-court participant and a person charged with deciding the case, that contact has the potential to influence the jury's deliberations and create the appearance of impropriety. Jurors' ability to decide the case dispassionately may be compromised by contact with participants associated with one side or the other. Jurors would be more inclined to heed even perceived suggestions from court-employee participants about how the case should be decided. And jurors would more naturally conclude that even all participants may have knowledge outside the evidence that bears on the case.

But unauthorized contact between a juror and court employees unassociated with the case the jurors must decide generally lack any of those attributes that justify applying a rebuttable presumption. IT technicians, bailiffs assigned to other courtrooms, law clerks, janitors, and even cafeteria workers who have nothing to do with the case do not participate in the

proceedings, know about the proceedings, or have a relationship with the jury like that of in-court participants. Jurors deciding the case are not sufficiently susceptible to influence by persons who have no knowledge of the case and who the jurors will never see again—even those who work for the Utah court system—to warrant presuming that they were.

For similar reasons, unauthorized contact between a courthouse employee unassociated with the proceedings and a juror does not have the same potential for the appearance of impropriety. Unauthorized contact between a juror and a person who has no connection to the proceedings except that the proceedings occurred at his workplace does not garner the same level of public concern as unauthorized juror contact with a person officiating the same proceedings that the juror is participating in.

Because of the lack of a relationship or any familiarity between the juror and court personnel unassociated with the proceedings, there is little potential for improper influence or creating an appearance of impropriety. *Cf. Pike*, 712 P.2d at 279-280 (key witness explaining his injury to three jurors bred familiarity, and created risk of undue influence and appearance of impropriety). Thus, the underlying justification for the rebuttable presumption of prejudice does not exist when such contact occurs.

Here, the court of appeals disregarded these reasons for the presumption of prejudice and applied it to circumstances where its justifications do not apply. The contact here was contact between the jury and the patrolman assigned to guard this Court and an IT technician. Neither the patrolman nor the IT technician participated in Defendant's trial. There was nothing that would have led the jury to believe that they knew anything about the trial.

The patrolman was at the courthouse that day solely to guard this Court. R1038. He thus was not assigned to the courtroom where Defendant's trial was heard. R1038. The patrolman did not enter Defendant's trial courtroom, he did not act as a bailiff in that courtroom, and he was not a witness or party in Defendant's trial. Indeed, other than guarding the supreme court, the patrolman had "no connection to the court system at all." R1038.

Likewise, although the IT technician worked in the courthouse, his job was to fix broken electronic equipment. R1038. He was not assigned to the courtroom where Defendant's trial was heard, was not a witness or party in the trial, and did not even set foot in the courtroom that day. R1038.

But neither the patrolman nor the IT technician were the kind of court employees this Court has applied the presumption to—court participants

such as witnesses, parties, attorneys, or personnel in the courtroom where the trial occurred. *See Pike*, 712 P.2d at 280 (court participants are witnesses, parties, court personnel in the courtroom); *accord Allen*, 2005 UT 11,¶¶51-53.

The risks justifying the presumption—the potential for undue influence or the appearance of impropriety by breeding familiarity between jurors and those who have a stake in the outcome or whom the jury defer to as being in a position of superior knowledge or authority—do not exist when the jurors come into contact with persons unassociated with the case the jury must decide. And here, contact in the elevator was brief and occurred solely with two persons that were otherwise unknown to the jury and whom the jury never saw again. This contact was much more akin to unauthorized juror contact with third-party outsiders, where the presumption does not apply

By applying the rebuttable presumption to unauthorized juror contact with court personnel unassociated with the case the jurors were charged with deciding, the court of appeals improperly expanded scope of the rebuttable presumption beyond the evil it was adopted to protect against. And that expansion imposes a burden on victims and the State that any minimal risk of unfairness does not justify.

II.

The State rebutted the presumption of prejudice where each juror unequivocally stated they were unaffected by the interaction and the trial court gave a curative instruction

To rebut the presumption, the State must show that the unauthorized contact did not influence the jury. *Pike*, 712 P.2d at 279-280. Here, the State met that burden. Each juror unequivocally told the trial court that the contact would not influence them, the court gave a curative instruction, and the jury was an engaged and attentive to the proceedings.

As set out in greater detail in the Statement of the Case, the court interviewed each juror separately, asking each juror what they heard in the elevator and if the comments would affect their decision. R1024-1032. For the jurors who remembered the conversation, their memories about what was said were vague and inconsistent. Several either did not hear it or could not remember anything about what was said. And each juror unequivocally informed the trial court that any comments would not influence their decisions. *Id.*

Based on the individual juror interviews, the trial court found that the jurors heard the comments as light banter or off-the-cuff jokes. R1034. The court found that none of the jurors believed that either the patrolman or the IT technician "had any knowledge of this trial or what's going on inside of

the trial." *Id.* Finally, the court found that each of the jurors "were asked point blank if this will affect" their verdict in any way and each of the jurors stated with "absolute certainty" that the comments "would have absolutely no [e]ffect on them." R1034-1035.

Then, the trial court gave a curative instruction to the jury, informing them that neither the patrolman nor the IT technician knew anything about the case and directing them to disregard the comments and to rely on the evidence presented in court to make their decision. R1038-1039.

Finally, the record shows only an engaged and attentive jury. Indeed, the jury asked questions to almost every witness—even after the contact occurred. R735-1291. Nothing in those questions suggested that the jury was influenced by the unauthorized contacts. And nothing else in the record suggests that the jury did anything other than what it was presumed to do—follow the instructions, including the instruction to disregard the comments and decide the case solely on the law given to them by the judge and the in-court evidence. *See State v. Menzies*, 889 P.2d 393, 401 (Utah 1994) (jurors "generally presume[d]" to "follow the instructions" they are given). Given the totality of the evidence, the State thus rebutted the presumption of prejudice.

Despite this evidence, the court of appeals disagreed. *Soto*, 2018 UT App 147, ¶20. The court of appeals believed that a "juror's denial that they were influenced by inappropriate contact 'is not enough to rebut the presumption of prejudice.'" *Id.*¶21. The court also dismissed the trial court's curative instruction as unhelpful and did not even acknowledge the trial court's findings. *Id.* ¶22. This was error. And the court of appeals applied the rebuttable presumption in a way that effectively made it an irrebuttable presumption.

It is true that this Court once held that a juror's bare denial that they were influenced by an unauthorized contact may not be enough by itself to rebut the rebuttable presumption of prejudice. But the Court reached that conclusion where the contact was between a juror and a witness, and there was no other evidence to rebut the presumption. *See Pike*, 712 P.2d at 281 (presumption not rebutted where key witness explained his injury to three jurors); *Erikson*, 749 P.2d at 620 (presumption not rebutted where juror and key witness conversed about family members). But this Court has never held that that an unequivocal and believed denial by the juror is insufficient to rebut the presumption of prejudice when the contact is with a non-witness who has no involvement in the case at all. Nor should it.

Due process "does not require a new trial every time a juror has been placed in a potentially compromising situation." *United States v. Olano*, 507 U.S. 715, 739 (1993) (quoting *Phillips*, 455 U.S. at 217). "Were that the rule, few trials would be constitutionally acceptable" because "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *Id.* Due process requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.*

Defendant got that here. As explained, the trial judge interviewed each juror and found that the jury was able to decide the case on the evidence presented. R1034-35. The trial court then carefully considered whether the unauthorized contact prejudiced Defendant, ultimately finding that it did not. *Id.*

Because the trial court is in the best position to assess the impact of the unauthorized juror contact, the court of appeals should have given deference to the trial court's findings. *Cf. State v. Maestas*, 2012 UT 46, ¶325, 299 P.3d 892 (in the context of a mistrial motion, appellate courts examine a trial court's determination under an abuse of discretion standard "because of the advantaged position of the trial judge to determine the impact of events

occurring in the courtroom on the total proceedings.") (internal quotation and citation omitted); *State v. Harmon*, 956 P.2d 262, 276 (Utah 1998) ("because a trial court is in the best position to determine an alleged error's impact on the proceedings," appellate courts "will not reverse a trial court's denial of a mistrial motion based on prosecutorial misconduct absent an abuse of discretion."). It is long-held precedence that appellate courts "review most evidentiary rulings and questions of fact with deference to the trial court based on the presumption that the trial judge, having personally observed the quality of the evidence, the tenor of the proceedings, and the demeanor of the parties, is in a better position to perceive the subtleties at issue than we can looking only at the cold record." *State v. Calliham*, 2002 UT 86, ¶23, 55 P.3d 573. The court of appeals should have reviewed the trial court's determination that the State rebutted the presumption of prejudice with such deference. By not, the court of appeals ignored evidence that supported that the State rebutted the presumption.

The court of appeals also ignored that "the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987); *see Menzies*, 889 P.2d at 401 (jurors "generally presume[d]" to "follow the instructions" they are given). Instead, the court of appeals held that the curative instruction "may have done as much harm

as good." *Soto*, 2018 UT App 147, ¶22. This was so, the court posited, because the instruction did not eliminate the possibility that the patrolman did not know about the case.

But it did. The instruction explained to the jury that neither the patrolman nor IT technician knew anything about Defendant's trial. Such an explanation does not poison the jury's impartiality, but explains the trial court's instruction to ignore the encounter.

The court of appeals also ignored the rest of the trial court's instruction, which directed the jury's decision-making process away from the exchange. The trial court also instructed the jury not to take into account the elevator encounter and nothing about the case could come from "outside the courtroom." R1039. And the court of appeals was duty-bound to presume that the jury followed those instructions absent some clear indication that it did not. *See State v. Hodges*, 517 P.2d 1322, 1324 (Utah 1974) ("In the absence of the appearance of something persuasive to the contrary, we assume that the jurors were conscientious in performing to their duty, and that they followed the instructions of the court."). Instead, the court disregarded that presumption altogether.

Pike, on which the court of appeals relied, did not justify disregarding the jurors' denials and the instructions in favor of speculating that the

possible subconscious effect of juror contact. As explained in Point I, juror contact with a stake-holder in the litigation the jury must decide raises a much greater risk to a defendant's fair trial right. Even if that situation justifies taking a more jaundiced view of a jurors' denials, the risk is dissipated to point of near non-existence when the contact it between a non-stakeholder person who knows nothing about the case.

And if there were something more that the State or trial court could have done to ensure that Defendant received a fair and impartial trial, the court of appeals did not say what it was. In effect, the court of appeals held that Defendant should have been granted a mistrial based on the unauthorized juror contact alone. That outcome is insupportable. *See Olano*, 507 U.S. at 739 (quoting *Phillips*, 455 U.S. at 217) ("it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."). "In a court of law, where we are dealing with a multitude of human factors, perfection is unattainable," thus, a defendant is not entitled to a perfect trial but to a fair and impartial one. *State v. Maestas*, 560 P.2d 343, 346 (Utah 1977). A mistrial is only granted when it is "the only reasonable alternative to insure justice under the circumstances." *See State v. Harris*, 2004 UT 103, ¶¶25-27, 104 P.3d 1250 (internal quotation omitted). If a trial court determines, as the trial court did here, that a defendant can still receive a fair

and impartial trial despite the unauthorized juror contact, then the trial court's determination is given deference. *Cf. State v. Maestas*, 2012 UT 46, ¶325, 299 P.2d 892 (trial court in the best position to determine whether to grant mistrial). Thus, the question should be whether, after examining the totality of the evidence, including the juror's statements, whether the State rebutted the presumption of prejudice. And here, it did.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeals' holdings that the rebuttable presumption of prejudice applies when unauthorized juror contact occurs with court personnel unassociated with the proceedings and that the State did not rebut the presumption. This Court should then reinstate Defendant's convictions.

Respectfully submitted on January 28, 2019.

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/s/ Lindsey Wheeler
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Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains 27 pages, excluding the table of contents, table of authorities, addenda, and certificate of counsel. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

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/s/ Lindsey Wheeler

Assistant Solicitor General

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I certify that on January 28, 2019, the Brief of Petitioner was served upon respondent's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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/s/ Melanie Kendrick

Addenda

Addendum A

427 P.3d 1286
Court of Appeals of Utah.

STATE of Utah, Appellee,
v.
Anthony SOTO, Appellant.

No. 20160087-CA
|
Filed August 9, 2018

Synopsis

Background: Following denial of motion for mistrial based on inappropriate comments of uniformed highway patrol officer and court information technology (IT) technician made to jury members inside non-public, court-employee elevator, defendant was convicted in the Third District Court, Salt Lake Department, No. 151902137, Mark S. Kouris, J., of aggravated sexual assault. Defendant appealed.

[Holding:] The Court of Appeals, Orme, J., held that comments made by patrol officer and IT technician to jury members inside non-public, court-employee elevator concerning whether defendant was guilty, amounted to more than brief, incidental contact, and thus, were sufficient to warrant presumption of prejudice on the part of jurors justifying reversal of conviction.

Reversed and remanded.

West Headnotes (3)

[1] **Criminal Law**
New Trial

When reviewing a trial court's denial of a motion for a new trial, the court of appeals will not reverse absent a clear abuse of discretion.

Cases that cite this headnote

[2] **Criminal Law**
Motion for new trial

When reviewing a trial court's denial of a motion for a new trial, appellate court reviews legal standards applied by the trial court in denying motion for correctness.

Cases that cite this headnote

[3] **Criminal Law**
Misconduct of or affecting jurors

Comments made by uniformed highway patrol officer and court information technology (IT) technician to jury members inside non-public, court-employee elevator concerning whether defendant was guilty, amounted to more than brief, incidental contact, and thus, were sufficient to warrant presumption of prejudice on the part of jurors justifying reversal of aggravated sexual assault conviction, even though trial judge gave curative instruction and jurors denied during meeting with judge that they were influenced by encounter; patrol officer and IT technician intentionally spoke to jurors about whether defendant was guilty, and curative instruction did not eliminate possibility that patrol officer or IT technician knew about the case. U.S. Const. Amend. 6; Utah Const. art. 1, § 12.

Cases that cite this headnote

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

Attorneys and Law Firms

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Sean D. Reyes, Salt Lake City, 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.

Opinion

ORME, Judge:

***1287** ¶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, ***1288** "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

[1] **[2]** ¶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

[3] ¶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 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*, 65 Utah 415, 237 P. 941, 944 (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, ***1289** 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, 108 P.3d 730 (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.

¶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 ***1290** 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 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.

All Citations

427 P.3d 1286, 871 Utah Adv. Rep. 48, 2018 UT App 147

Footnotes

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.

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 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.

End of Document

Addendum B

THE COURT: Thank you. We will be adjourned.

(Whereupon a noon recess was taken)

THE COURT: All right, are we back on the record? We've had a bit of a development during lunch that I need to run by all of you and figure out what we want to do today. As you know, because you work in this courthouse, I happen to have the very best bailiff in this courthouse, I think you'll agree with me with that but that said, he took the jurors and put them on the elevator to go to lunch and he went down one floor and another officer got on -

BAILIFF: No, the officer was already on.

THE COURT: I apologize, the officer was already on.

BAILIFF: Supreme Court Highway Patrol.

THE COURT: Okay, Highway patrolman and he said, oh, looks like a jury, do you want me to tell you how this ends? And nothing else was said. The elevator then drops down to a floor, two floors and a guy from IT gets on and says, oh, you guys look like a jury and one of the jurors said, Do we look that obvious? And he goes well, you look kind of guilty.

BAILIFF: No, he says can you say guilty?

THE COURT: Oh, can you say guilty? And that was it.

BAILIFF: I couldn't address it. I just had to

take (inaudible).

THE COURT: That's right. So let me tell you what I propose and then obviously I want to hear from you. I know we run into the problem that if they saw it as what it was, was a moron talking off the cuff, that I don't see it should be a problem and if we make a bigger deal of it than it is, then maybe we're going to make a bigger deal of it. That said, my solution would be as proposed - and I certainly want to hear both of your sides on it - I think we should bring them in one at a time, sit in the jury box and I'll ask them, there was a conversation that took place on the elevator when you were going down today to go to lunch, did you hear what was said? If they say, no I didn't, we'll say okay. If they say yes, I did. Say, Okay, does that affect your opinion and would you be able to put that opinion aside? And if they say no, it's off-the-cuff or whatever and then if all eight give me that answer, then when all eight come out again as a group. I will then tell them, Well, one last time I want to tell you the two people that were on the elevator with you, not that it makes a difference but they know nothing about this case, they know nothing about this evidence, so anything that was heard is completely off-the-cuff; and second of all, getting back to my admonitions from before, you're not to consider anything that you've learned or heard outside of this courtroom and that certainly would qualify. That's my

plan.

Ms. Remal?

MS. REMAL: I wasn't very troubled up until the point when somebody said the IT person said, Can you say guilty?

THE COURT: I know.

MS. REMAL: That's the part that -

BAILIFF: I don't know what else he said, but all I know is he said guilty.

MS. REMAL: He said something else besides that?

BAILIFF: He said - I wasn't listening until he said guilty and that's when, that's why I thought I had to bring it up.

MS. REMAL: Well, I agree we start by bringing the jurors in one-by-one and asking -

THE COURT: Okay.

MS. REMAL: - them did you hear anybody say anything in the elevator and if so what did you hear?

THE COURT: Okay.

MS. REMAL: And then I think we hear what their answers are. If nobody heard anything then it's probably not a problem. If they heard something, then I guess I agree that you do say, Do you feel as though that would influence you in any way?

THE COURT: Okay.

MS. REMAL: And not admonish them at that time one-by-one, just find out what they say and then we come back to it later on if we need to.

THE COURT: Very good.

Ms. Zimmerman?

MS. ZIMMERMAN: I think we're in agreement. If I understood what the Court said, going to bring them one-by-one to see if they heard anything or are you going to ask them as a group?

THE COURT: No.

MS. ZIMMERMAN: I think asking them as a group is a problem.

THE COURT: I'm going to bring them one-by-one.

MS. ZIMMERMAN: Yeah. I think, I mean, I guess the comment could cut both ways, as far as prejudice the State as kind of being a stupid thing to say but certainly is a problem with defense. So I'll go with what Ms. Remal (inaudible).

THE COURT: Okay, very good.

MS. ZIMMERMAN: Support her resolution.

THE COURT: Okay. Thank you. If that's the case then, Scott, why don't you - I don't know if you know their numbers or not.

BAILIFF: I'll bring them in as they're seated.

THE COURT: Okay, so No. 1, so the first one will

be Ms. Stone? Okay, 'cause I need to identify them on the record.

BAILIFF: I'll bring them in as...

MS. ZIMMERMAN: And just for the Court's information, Your Honor, the DNA person had missed her connection. She got another flight. She's out here so I'm going to have one more witness than I anticipated.

THE COURT: All right.

Hi, Ms. Stone. You can sit right there if you'd like. That would be fine. I need to ask you just a couple of questions if that's okay.

MS. STONE: Sure.

THE COURT: I understand that when everybody was getting loaded onto the elevator and the elevator was traveling down to the first floor for you all to go to lunch, there was some comments made on that elevator and I wonder if you heard any of them?

MS. STONE: Yes, I did.

THE COURT: And what is that you heard?

MS. STONE: Someone came in and said, Hello jury. There was a sheriff or a police officer who was already on the elevator and then there was someone who joined about halfway down from another level and said hello jury and we mentioned something like, Oh is that noticeable that we're a jury or whatever. And he said yes or words to that effect

and they indicated, he said something jokingly like convict him or hang him or it was something like that.

THE COURT: Okay.

MS. STONE: I took it as a joke.

THE COURT: Okay. Do you believe that that will have any effect on what you'll, any effect in your decision with regard to this case?

MS. STONE: Absolutely not.

THE COURT: Okay. I appreciate that. Thank you very much.

BAILIFF: Just have a seat anywhere right there.

THE COURT: Hi, Ms. Ochoa-Figuroa. How are you?

MS. FIGUROA: Good.

THE COURT: Good. I just want to ask you a couple of questions if that's okay.

MS. FIGUROA: Okay.

THE COURT: I understand that when everybody was loading into the elevator to go down to the first floor to go to lunch that some comments were made by folks that were on or got on the elevator. Did you hear any of those comments?

MS. FIGUROA: When we were leaving to lunch?

THE COURT: Yes.

MS. FIGUROA: Yes, I did.

THE COURT: Okay, what did you hear?

MS. FIGUROA: Ummm, nothing. Someone came into the

- okay, there was a police officer in there and he said - so he was kind of making just a joke saying, Oh, let me tell you how this ends. And we're like - we just stood there and he's like, Just kidding. It ends, like ohhh, you know, kind of like that?

THE COURT: Right.

MS. FIGUROA: That's all he said and then another gentleman walked in and said, Hello jury. And someone made a comment, Oh we have to look and that was it and they're like, Yeah, the guilty look. That's it.

THE COURT: Okay. Well, let me ask you, that comment obviously is we've talked about that in terms of the admonitions with what goes on in the courtroom. Will that comment have any effect at all with how you see this case?

MS. FIGUROA: No.

THE COURT: Okay. Thank you very much. I appreciate that.

BAILIFF: Go on in.

THE COURT: Hi, Ms. Epperson. How are you?

MS. EPPERSON: Good.

THE COURT: Good. I just want to ask you a quick question if that would be okay. You can sit down if you'd like. I understand that when you folks were on your way to lunch today and you all got on the elevator, there was already a patrolman inside of the elevator and some other

people got on at another point and there was a conversation. Did you hear what was said?

MS. EPPERSON: When he came in the elevator he said something like, he said, This must be the jury, I know because of your faces, can tell you're the jury, and he said, You can already tell he's guilty.

THE COURT: Will that comment influence you in any way with regard to this case?

MS. EPPERSON: Oh, no, no.

THE COURT: Okay. All right, thank you.

BAILIFF: Have a seat.

THE COURT: Hi, Mr. McAffee.

MR. MCAFFEE: Hello.

THE COURT: How are you, sir?

MR. MCAFFEE: Good, how are you?

THE COURT: Good. Can I just ask you one quick question? When all the jurors were boarding the elevator to go to lunch today I understand there was an officer already on the elevator and then somebody else got on later on and there was a conversation before you hit the ground. Did you hear the conversation, what went on there?

MR. MCAFFEE: Ummm, between, just what the guy said when he got on?

THE COURT: Yeah.

MR. MCAFFEE: Someone said, he said, Hello jury,

and something, you know, someone in the jury said, Do we have that look? And he said guilty? And that was about it.

THE COURT: All right. Will that comment affect you any way in terms of what you're seeing in this courtroom?

MR. MCAFFEE: No.

THE COURT: Okay. Thank you, sir, I appreciate that.

MR. MCAFFEE: No problem.

BAILIFF: Just have a seat over there, anywhere.

THE COURT: Hi, Ms. Christensen.

MS. CHRISTENSEN: Hello.

THE COURT: How are you?

MS. CHRISTENSEN: Fine, thanks.

THE COURT: Good. I'm just going to ask you one question if that's okay.

MS. CHRISTENSEN: Okay.

THE COURT: I know that you folks all loaded the elevator there on your way to lunch and you went down a floor and there were two other people that were on, one joined you and one was already on the elevator and some comments were made. Do you know what I'm talking about, when you were leaving for lunch today?

MS. CHRISTENSEN: When we were leaving for lunch today?

THE COURT: Right.

MS. CHRISTENSEN: Okay.

THE COURT: And you got on the elevator and I understand there as a patrolman already on the elevator coming from the fifth and somebody else joined you.

MS. CHRISTENSEN: Yes, yes. Okay.

THE COURT: Apparently there was a conversation or at least some comments were made involving those folks. Did you hear, did you hear any part of that?

MS. CHRISTENSEN: Yes, I did.

THE COURT: You did. What did you hear?

MS. CHRISTENSEN: I heard the patrolman, the Highway Patrolman say, Just say he's guilty.

THE COURT: Okay. Anything else?

MS. CHRISTENSEN: No.

THE COURT: Okay. Will that affect your decision in this case on any level?

MS. CHRISTENSEN: No.

THE COURT: It won't?

MS. CHRISTENSEN: No, not at all.

THE COURT: All right. Thank you very much. I appreciate that.

MS. CHRISTENSEN: Sure.

BAILIFF: You can just have a seat on that front row, just (inaudible).

THE COURT: Hi, Ms. Rogers.

MS. ROGERS: Hi.

THE COURT: How are you?

MS. ROGERS: Okay. How are you?

THE COURT: Good. I just want to ask you one question if that's okay.

MS. ROGERS: Sure.

THE COURT: Today when you folks were all leaving for lunch, you all boarded the elevator down the hall here and two other people got on at some point and there was some comments made or a conversation. Did you hear anything that went on?

MS. ROGERS: Yes.

THE COURT: Okay, what did you hear?

MS. ROGERS: I heard a police officer basically say, Are they guilty? And then another man came onto the elevator and then I believe he said, Oh, you all are jurors.

THE COURT: Okay. All right. Based on that comment, will that affect anything that you do in your decision making process with regard to this trial?

MS. ROGERS: No.

THE COURT: Okay. Thank you very much.

BAILIFF: You can just sit in that first seat there.

THE COURT: Hi, Ms. Hess. How are you?

MS. HESS: Fine.

THE COURT: Good, I just want to ask you a quick

question if that would be okay. When all the jurors today were boarding the elevator to go to lunch, and go downstairs, apparently there were two other people that were on the elevator at some point with them and I guess they made some comments and there was some sort of conversation. Did you hear what they were talking about?

MS. HESS: One guy came in and said, Oh, it looks like a jury. And I said, Do we all have that look?

THE COURT: Okay. Anything else that you heard?

MS. HESS: A policeman made some comment but I can't remember what it was.

THE COURT: Okay. Based on those comments you heard there, will that affect you in any way with regard to this trial?

MS. HESS: No.

THE COURT: Okay. Thank you very much.

BAILIFF: Just have a seat on the front row.

THE COURT: Hi, Mr. Carter.

MR. CARTER: Hello.

THE COURT: How are you, sir?

MR. CARTER: Good.

THE COURT: I just want to ask you a quick question if that would be okay.

MR. CARTER: Sure.

THE COURT: Today when all the jurors were leaving

to go to lunch, they went down the hallway and boarded the elevator and at some point two other people ended up on the elevator with you guys, I understand. There was a conversation or some comments were made while the elevator was traveling down, did you hear any of those comments?

MR. CARTER: I did.

THE COURT: What did you hear?

MR. CARTER: There was a comment about us being jurors and one guy got on and he said, You're jurors and somebody, one of the gals said, How can you tell? And he something to the effect of (inaudible) looks guilty or something.

THE COURT: Okay, was anything else said?

MR. CARTER: Huh-uh (negative).

THE COURT: All right. Will that comment affect your decision making process or anything about the role of a juror in this trial?

MR. CARTER: No.

THE COURT: Okay, thank you very much.

All right. I'm going to bring them in in one minute and we'll talk and again the admonition that I talked about, is there anything else that anyone else would like to put on the record at this point?

MS. REMAL: Your Honor, we feel like we need to move for a mistrial. I know that each of the jurors said

they didn't feel like it affected them but I think the particular problem is the source of the comment about, I mean it varies a little bit, but they almost all say they heard the word guilty. It seems like 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 he's guilty, that sort of thing. My concern is that - are we talking about the internal elevator? Not the public elevator but the elevator that's used by, primarily by employees of the court?

THE COURT: That's correct.

MS. REMAL: So the jurors would have already come in when they initially started as members of the jury panel, they would have come up the public elevator like all the rest of us and they were using that internal elevator that they would likely know is reserved for people who work in the building, it's not the public elevator. My concern is that a comment by somebody, particularly who uses that elevator, somebody who is more likely part of the court staff or somebody with a much deeper knowledge of the criminal justice system to be trusted to use that special elevator, might know something that they don't know and I'm concerned that, particularly if it gets to a point where they're sort of wrestling between a verdict of guilty or not guilty, that they might be influenced by that. I think we all know that

we're all influenced by things and don't even realize it sometimes and so my concern is is that very thing and so I feel like based on what we're heard that I need to move for a mistrial and I do.

THE COURT: All right, very good.

Ms. Zimmerman?

MS. ZIMMERMAN: Your Honor, in order to do that there would have to be a legal defect not caused by the state that would make any judgment reversible or prejudicial conduct not attributable to the State, making it impossible to proceed without injustice to the defendant or the State. It's kind of like a jury questionnaire, they all indicated that they were willing and able to not be biased and to go forward. The comments did make me whence. I'm not undermining the seriousness of it but I don't think it meets the burden for a mistrial.

THE COURT: All right. Well, I find that I felt with all eight of the jurors, I thought they saw this in kind of a joking off-the-cuff manner. I didn't feel that any of them took it seriously. I don't think that anyone indicated that they felt that any of those folks had any knowledge of this trial or what's going on inside of the trial and none of them indicated they had. As well, all of them were asked point blank if this will affect in any way and there was not even a person that hedged when they answered the question

They were all with absolute certainty that, in fact, this would have absolutely no affect on them. So for that reasons I'm going to deny the motion as well. I'm going to add a curative instruction when they walk in again and at that point then the issue will be sent to bed.

Now, let's talk about your DNA. What is your DNA expert going to bring?

MS. ZIMMERMAN: Well, and I have asked for a stipulation that defense didn't feel comfortable regarding that. She's the - the information she's going to bring is that Mr. Soto's DNA was found, matched the DNA that was found on the sample that was collected from Ms. Bremer's breast. That is what she's going to testify to.

THE COURT: All right.

Ms. Remal, you're obviously not stipulating to that?

MS. REMAL: That's what I understand, yes. Could I just while we're here.

THE COURT: Please.

MS. REMAL: I went through over the lunch of the exhibits just because I hadn't been keeping up with the numbers and I, it looks to me like there's two State's Exhibit No. 4.

MS. ZIMMERMAN: There are and I would move to make the picture of Ms. Bremer on scene, 4A.

MS. REMAL: Okay. I think - thank you.

THE COURT: And just to -

MS. REMAL: Can she write it on that?

THE COURT: Yes. Let's do that. And just while we're doing this in terms of housekeeping, the State also has yet to ask for the body cam or the 911 tape being admitted. Do you plan to do that?

MS. ZIMMERMAN: I would move to have the 911 tape admitted, Your Honor. I would like the body cam admitted but I would ask that it not be, that it not move back with the jury because there are multiple tracks on it. The 911 tape is all by its lonesome and they could play that, if there's equipment to play it, they could play it.

THE COURT: All right, Ms. Remal?

MS. REMAL: I guess I would object to the body cam being admitted because only small portion of it were shown.

THE COURT: I think that's right.

MS. REMAL: So that's the difficulty is I don't know how you'd be able to keep track of what part was actually shown to the jury and therefore is the relevant part versus the parts that were on the recording but were not shown.

THE COURT: Okay, how about with respect to the 911 tape?

MS. REMAL: I guess I would object on this basis.

It's really verbal testimony in a sense. It's what was said by two people during this conversation which I would say is akin to the testimony of a witness in court and that we tell the jurors they have to rely on their recollections of that and so I would object on that basis and just give them the same instructions, that they will rely on their collective memories to remember the specifics of the 911 call.

THE COURT: Ms. Zimmerman?

MS. ZIMMERMAN: I would ask that it be admitted, Your Honor. I was planning on playing it through. It's evidence. I'm planning on playing it during my closing. It was - the foundation was laid for it, they're excited utterances so they're clearly exceptions to the hearsay rules, so I would ask that it be admitted into evidence.

THE COURT: And I'm not sure Ms. Remal's argument was that it was non-proffer - or not hearsay. I think her objection was that it's actually similar to live testimony, they would be unable to pull the court record and listen to it back there again. They would have to rely on what they saw here. But I think that the 911 tape has a little bit different character and for that reason I'm going to allow it in. Okay?

Very good. Are we ready for the next witness?

(State's Exhibit ? received)

MS. ZIMMERMAN: Yes, Ms. Gault.

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.

MS. ZIMMERMAN: Thank you. I call Ms. Gault.

THE COURT: Ma'am, if you'll come right up here please.

SANDRA GAULT

having been first duly sworn, testified

upon her oath as follows:

THE COURT: Ma'am, if you'll be seated right at this witness stand. Once you are comfortably seated, go ahead and pull your chair up. And that microphone is flexible, so you can grab it and bend it however it's comfortable for you. If you'd please state your name and spell your last name for the record.

THE WITNESS: It's Sandra Gault, G-A-U-L-T.

THE COURT: Thank you, Ms. Gault.