Case No. 20180810-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Petitioner,

v.

ANTHONY SOTO,
Defendant/Respondent.

Reply Brief of Petitioner

On Writ of Certiorari to the Utah Court of Appeals

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Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in reply to new matters raised in the respondent's brief. The State does not concede any matters not addressed in the reply, but believes those matters are adequately addressed in the State's opening brief.

ARGUMENT

I.

This Court should reaffirm that the rebuttable presumption of prejudice for unauthorized juror contact applies only when the court employee is a participant in the case the juror is deciding.

The court of appeals held that unauthorized juror contact with court personnel unassociated with the case the jurors were deciding triggered the rebuttable presumption of prejudice. *State v. Soto*, 2018 UT App 147, ¶¶19-20, 427 P.3d 1286. As shown in the opening brief, this was an insupportable

expansion of this Court's precedent. That precedent applies the presumption only when the court personnel are involved in the case the jurors will have to decide. The presumption exists because the contact may breed a sense of familiarity that may lead to the potential for improper influence or creating an appearance of impropriety.

As shown, however, those justifications do not apply when the court personnel have nothing to do with the case the jurors 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.

Defendant challenges the State's interpretation of the rebuttal presumption of prejudice. Br.Resp.13-32. Relying on the concurrence in the court of appeals' *State v. Larocco*, 742 P.2d 89,97-98 (Utah App 1987) decision, Defendant argues that whether the rebuttable presumption is triggered is determined by the "importance of who was talking" and "what was discussed." Br.Resp.24. Defendant argues that where, as here, the importance of the person as related to the case is low but the importance of the topic is high, the rebuttable presumption applies. Br.Resp.25-32. Defendant argues that this Court's precedent supports his interpretation. Br.Resp.25-32.

Defendant's delineation between high and low importance is not supported—or discussed—by any Utah case except the concurrence in *Larocco*. And this Court is not bound by a court of appeals decision, let alone, a concurrence in a court of appeals decision. *See Gonzalez v. Cullimore*, 2018 UT 9, ¶16, 417 P.3d 129 (this Court "is not, of course, bound by prior decisions of the court of appeals.").

For its part, this Court has never used the distinction of high and low importance when analyzing whether the rebuttable presumption of prejudice applies. Rather, this Court examines whether the unauthorized contact occurred during a trial between jurors and witnesses, attorneys, or court personnel associated with the case which goes beyond a mere incidental, unintended, and brief contact. Br.Pet.14-19; *State v. Pike*, 712 P.2d 277, 280 (Utah 1985). This Court examines whether that unauthorized contact bred a sense of familiarity with persons that jurors may perceive to have special knowledge of and authority over the case they must decide, which in turn poses a serious risk of unduly influencing the jury and creating 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).

Certainly, the comments were ill-advised. And the episode highlights the need for better training for court personnel about their contacts with jurors. But the brief encounter was unlikely to breed familiarity. And the jurors were unlikely to conclude that a court IT person and a highway patrolman unconnected to the case would have special knowledge that may sway their decision-making.

Defendant also contests the definition of court participant. Br. Resp.31. He argues that "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." *Id.*

But that is precisely the definition of court participant. In *State v. Pike*, 712 P.2d 277, 280 (Utah 1985), this Court discussed that the rebuttable presumption applies to "contacts between jurors and *others involved in trial*," then "reaffirm[ed] the proposition" that the rebuttable presumption "arises from any unauthorized contact during a trial between witnesses, attorneys or court personnel and jurors." This Court has exclusively applied the rebuttable presumption to unauthorized contact between jurors and individuals involved in the case the jurors were deciding. *See e.g., Pike*, 712 P.2d at 279-80 (presumption applied to unauthorized contact between key prosecution witness and jurors); *State v. Erikson*, 749 P.2d 620, 620-620 (Utah

1987) (rebuttable presumption applied to unauthorized contact between the key prosecution witness and a juror, who were acquaintances, conversed about work and family matters at a recess).

Defendant also argues that the definition of "court participant" should be expanded to include any court employee, whether or not that person is involved in a defendant's case, if that "employee creates an appearance of impropriety by talking about a sensitive case related issue," like guilt. Br.Resp.31-32. But court personnel—individuals employed by the court—are not synonymous with court participants—individuals participating in the trial. And again, unauthorized contact between court personnel not involved in the case and jurors does not have the same potential for the appearance of impropriety because it does not raise the same specter of jurors being led to believe that the non-participant has information bearing on their decision. Indeed, unauthorized contact between court personnel unassociated with the proceedings and jurors is akin to unauthorized contact with third-party outsiders. *Compare State v. Allen*, 2005 UT 11,¶51, 108 P.3d 730 (juror discussing case with spouse was third-party contact); *with Pike*, 712 P.2d at 279-280 (key witness explaining his injury to three jurors bred familiarity and created appearance of impropriety).

Moreover, equating anyone who works in the courthouse with a court participant is problematic. The courthouse does not just encompass individuals who understand the law and who are associated with the legal process. It also encompasses individuals with no connection to the legal process at all, including security staff, janitors, cafeteria workers, and IT technicians. Defining a court participant to include everyone who works in a courthouse defeats the purpose of distinguishing between court participant and third-party outsider. *See Pike,* 712 P.2d at 280 (specifying that the rule applies to unauthorized contact between jurors and trial participants); *Allen,* 2005 UT 11, ¶51 (distinguishing between court participants and third-parties unrelated to the proceedings).

Thus, this Court should not expand the rebuttable presumption of prejudice. This Court should reaffirm that the rebuttable presumption of prejudice applies to unauthorized contact between court participants associated with the proceedings and jurors. Because neither the patrolman nor the IT technician were court participants—witnesses, parties, or court personnel in Defendant's trial—the rebuttable presumption of prejudice does not apply.

II.

This Court should clarify that a trial court may find the presumption rebutted on the juror's unequivocal denial and a curative instruction.

When the rebuttable presumption applies, it may be rebutted by showing that the unauthorized contact did not influence the jury. *Pike*, 712 P.2d at 279-80. The trial court concluded that the presumption was rebutted because the jurors unequivocally denied that the contact influenced them. And the trial court further addressed the problem by giving a curative instruction.

The court of appeals held, however, that this was not enough. *See Soto*, 2018 UT App 174, P20. It gave no hint about what would have been enough. In effect, it created an irrebuttable presumption of prejudice any time some court employee has contact with a juror. And Defendant asks this Court to adopt that rule. Br.Resp.33-36.

But that rule conflicts with other law and good policy. The rule ignores the law that juries are presumed to follow the instructions they are given. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (the law assumes that jurors follow instructions); *State v. Menzies*, 889 P.2d 393, 401 (Utah 1994) (jurors presumed to follow instructions). The jury was instructed to ignore the encounter. Nothing in the record even hints that they did not. *See State v. Hodges*, 517 P.2d 1322, 1324 (Utah 1974) ("In the absence of the appearance of

something more persuasive to the contrary, we assume that the jurors were conscientious in performing [] their duty.").

Whether a juror's unequivocal denial should be credited is a matter properly left to the court that questioned them. The trial court heard the responses and observed the jurors' demeanor when they made them. Because of that vantage point, appellate courts should defer to the trial court's credibility determination. *State v. Calliham*, 2002 UT 86, ¶23, 55 P.3d 573.

And the trial court did everything possible to fully inform its findings. It interviewed each juror separately and asked each juror what they heard in the elevator and whether the comments would affect their decision. R1024-1032. For the jurors who could even remember 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. Moreover, each juror unequivocally informed the trial court that any comments would not influence their decisions. *Id.* The trial court credited those denials.

But the trial court did not stop there. The court gave a curative instruction, explaining that that neither the patrolman nor the IT technician knew anything about the case and directing the jury to disregard the comments and to rely on the evidence presented in court to make their

decision. R1038-1039. And throughout the trial—before and after the unauthorized contact—the jury was an engaged and attentive to the proceedings.

Still, the court of appeals found that credited unequivocal denials coupled with a curative instruction were not enough. When it did, it violated both the presumption that the jurors follow their instructions and the deference owed to the trial court's credibility determinations. If credited unequivocal denials and a curative instruction are not enough to rebut the presumption, it is difficult to conceive what would. And if nothing can rebut the presumption, then all juror contacts will result in a new trial even when it did not affect the trial's fairness.

Defendant also argues that but for the unauthorized contact between the juror and patrolman and IT technician he would have received a more favorable result. Br.Resp.36-40. But again, that argument runs up against the findings that should have been deferred to and the instruction that should have been presumed to have cured any problem.

Thus, Defendant has not shown that but for the unauthorized contact, he would have received a more favorable result.

In any event, Defendant's prejudice argument rests on the idea that this case was a close one. And that argument rests on his rendition of the facts,

ignoring the inculpatory evidence, including the victim's testimony that Defendant sexually assaulted and strangled her, R749-53; the victim's physical injuries, R979; St.Exh4,15-19,24; the photographs of the victim's injuries, St.Exh4,15-19,24; the expert witness testimony that the victim's injuries were consistent with the victim's testimony that she was stranguled, pinned down, and sexually assaulted, R913-915;972-979; Defendant's DNA found on the victim's breast, R1043-45; the 911 tape where Defendant is heard banging on the victim's bathroom door, St.Exh.1; and the officer's testimony that he found the victim hiding in her bathroom, distraught and upset, with a fist-size hole in the bathroom door. R824,843,1060, St.Exh.12-13.

Finally, Defendant's own admissions defeat his prejudice argument. At trial, Defendant refuted only that he acted without the victim's consent. Defendant agreed with the victim that he was in her apartment, that he was drinking, that he had an argument with his girlfriend on the victim's patio, that following that argument he returned to the victim's apartment, and that the victim encouraged him to stay in his relationship with his girlfriend. R1220-1229, 1255-1260,1288. Defendant also admitted that the victim was hesitant to engage in sexual contact with him and that she told him multiple times "to stop" and to "get off of her." R1280-1282,1287,1289-1290. Thus, when all of the evidence—both exculpatory and inculpatory—is examined,

Defendant cannot show that but for the unauthorized contact he would have been acquitted.

CONCLUSION

For the foregoing reasons and those set forth in the State's opening brief, the Court should reverse the judgment of the court of appeals.

Respectfully submitted on April 9, 2019.

SEAN D. REYES
Utah Attorney General

/s/ Lindsey Wheeler

Assistant Solicitor General
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this reply brief contains 11 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:

☑ does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

☐ contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

/s/ Lindsey Wheeler

Assistant Solicitor General

CERTIFICATE OF SERVICE

I certify that on April 9, 2019, the Reply Brief of Petitioner was served upon respondent's counsel of record by ☐ mail ☑ email ☐ hand-delivery at:

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I further certify that an electronic copy of the brief in searchable portable document format (pdf):

☑ was filed with the Court and served on respondent by email, and the appropriate number of hard copies have been or will be mailed or hand-delivered upon the Court and counsel within 7 days.

☐ was filed with the Court on a CD or by email and served on respondent.

☐ will be filed with the Court on a CD or by email and served on respondent within 14 days.

/s/ Melanie Kendrick