IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, v. SETH CLARK JOLLEY, Defendant/Appellee T.T., Appellant/Limited Purpose Party/Crime Victim	Case No. 20240290-SC District Court Case No. 221600125

PRINCIPAL BRIEF OF DEFENDANT/APPELLEE SETH CLARK JOLLEY

Appeal from the Fourth District Court, Juab County
The Honorable Anthony Howell, presiding

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PRINCIPAL BRIEF OF DEFENDANT/APPELLEE SETH JOLLEY

LIST OF PARTIES

The parties to this appeal include T.T., (Appellant/Limited-purpose Party/Alleged Victim), Seth Clark Jolley (Defendant/Appellee), and the State of Utah (Plaintiff/Appellee). There are no former parties who are not still participants in this matter.

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INTRODUCTION

This appeal presents the question of whether an alleged sexual assault victim may be subpoenaed to testify at an *in camera* hearing conducted pursuant to Utah Rule of Evidence 412 (Utah's "Rape Shield" law) for the purposes of determining the admissibility of evidence proposed to be admitted under an exception to Rule 412's general prohibition against evidence of an alleged sexual assault victim's past sexual conduct. The victim in this matter unduly relies on the "presumptive inadmissibility" of the proposed evidence to argue that she should not be required to testify in a closed, *in camera* under Utah Rule of Evidence 412 regarding her past sexual conduct with Defendant. In response, Defendant shows that the evidence is not prohibited by Rule 412, is relevant and admissible under applicable case law, and that the district court properly determined that it should hear the testimony proposed to be elicited from the alleged victim prior to making a final ruling on its admissibility. In declining to grant the alleged victim's motion to quash the subpoena issued for her testimony at the Rule 412 *in camera* admissibility hearing, the district court properly balanced the alleged victim's constitutional and privacy protections as a crime victim with the Defendant's right to present a defense.

STATEMENT OF THE ISSUES

T.T. raises two substantive issues in support of her argument that the district court erred when it declined to quash a subpoena for her testimony at an *in camera* admissibility hearing to be conducted pursuant to Utah Rule of Evidence 412(c)(3): First, whether the district court erred "... in interpreting Rule 412 of the Utah Rules of Evidence to permit a defendant charged with rape to subpoena the victim and force her to testify about her prior

sexual behavior and disposition before making a showing that the testimony he seeks to elicit is admissible at trial," and second, whether the district court erred in "holding that the defense subpoena to T.T. did not violate her rights to (among other things) be "treated with fairness, respect, and dignity" and to be "free from harassment and abuse" under the Utah Constitution, art. I, § 28(1)(a)." Appellant correctly states that both issues, which involve matters of law involving questions of statutory or constitutional interpretation, are reviewed for "correctness." Brief of Appellant, pp. 2-3 (citing *State v. Salt*, 2015 UT App 72, ¶11, 347 P.3d 414; *State v. Lopez,* 2020 UT 61, ¶¶32-33, 474 P.3d 949; *State v. Bravo,* 2015 UT App 17, ¶10, 343 P.3d 306).

PRESERVATION OF THE ISSUES

Defendant/Appellee does not dispute that the issues raised on appeal were properly preserved in the district court, and Appellant has accurately represented the means by which the issues were preserved in the district court.

STATEMENT OF THE CASE

FACTUAL AND PROCEDURAL BACKGROUND

On August 1, 2023, the State of Utah filed a three-count Information against Defendant charging him with one count of Rape, a first-degree felony, under Utah Code § 76-5-402, and two counts of Tampering with a Witness, both third-degree felonies, under Utah Code § 76-8-508(1). Both counts of Tampering with a Witness were subsequently dismissed by the State. R. 110, 113.

The alleged victim, T.T., executed a statement under Utah Rule of Evidence 1102 that was admitted at Defendant's preliminary hearing held on August 22, 2023. R. 213. At

the time of the alleged assault, both T.T. and Defendant were juveniles. R. 1. In that 1102 statement, T.T. alleged that Defendant "raped" her at his parents' home on May 1, 2017. *Id.*[1] She stated that, after getting drunk, Defendant carried her to a downstairs bedroom, and that he tried to get her to perform oral sex on him but she "…kept telling him no and pushed him away." *Id.* She further stated that she was "drunk and weak and in and out of consciousness," and alleged that Defendant removed her pants, pulled his own pants down, moved on top of her, and "shushed" her when she said "no" again. *Id.* She went on to state that she did not remember "much after that" but that when she "came to" again, Defendant was "pulling his penis out of [her]" and ejaculating. *Id.* The district court made a finding of probable cause, and Defendant was bound over for trial. R. 112, 113.

Subsequent to his arraignment, Defendant filed a *Motion to Offer Evidence of the Victim's Prior Sexual Conduct and Incorporated Statement of Evidence* pursuant to Utah Rule of Evidence 412 in which he sought the admission of specific instances of T.T.'s prior, consensual sexual conduct with him. R. 123-126. In that motion, Defendant noted that the proposed evidence is admissible as an exception to Rule 412(a)'s general prohibition on evidence "that a victim engaged in other sexual behavior" or "evidence

[1] As a threshold factual matter, Defendant notes that T.T. argues on appeal that the charge against Defendant is founded on the allegation that T.T. was "too intoxicated" to consent to sexual activity with him on the night in question. Brief of Appellant, p .1 ("The underlying facts in the criminal case involve a rape charge alleging that fifteen-year-old T.T. was too intoxicated to consent to intercourse."); p. 25 ("The dispositive issue in this case revolves around T.T.'s impairment and Defendant's understanding of her inability to consent."). This is simply incorrect. A review of T.T.'s 1102 statement shows that she resisted Defendant's advances, pushed him away from her, refused to consent, and told him "no" repeatedly, but that he had intercourse with her anyway while she was "drunk and weak" and "in and out of consciousness." R. 213.

offered to prove a victim's sexual predisposition." Utah R. Evid. 412(a); Utash R. Evid. 412(b)(2)(providing for the admission of "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor").

In that motion, Defendant represented that he "may" testify regarding his past sexual conduct with T.T. at the trial of this matter, but that he intended to elicit testimony from T.T. herself regarding their past sexual encounters. R. 125. Defendant further explained that the "[t]estimony from the Defendant and from the alleged victim will be for the purpose of showing that Defendant did not have sex with the victim without her consent, and that the incident that forms the basis of the allegation against him was typical and indistinguishable from their past sexual encounters." *Id.* Defendant then requested that the district court set the matter for an *in camera* hearing as required by subparagraph (c)(3) of Rule 412. R. 126.

After the filing of Defendant's motion, T.T., through her own counsel, filed a memorandum opposing the admission of Defendant's proposed evidence. R. 131-38. In that motion, T.T. argued, *inter alia*, that Defendant's motion lacked sufficient detail to justify the admission of the proposed evidence, and that it should further be excluded under Utah Rules of Evidence 401, 402, and 403. In response to T.T.'s opposition, Defendant filed a supplemental motion which included a more detailed statement of the proposed evidence and advanced additional arguments regarding the relevance and admissibility of the proposed evidence. R. 139-145. In that supplemental filing, Defendant stated the following:

1. In the past, either Defendant or T.T. would initiate “hanging out” with each other; Defendant will testify that she initiated it with the same frequency that he did.
2. They would often hang out when they had become single again after a period of dating other people.
3. They *always* engaged in sexual activity with each other when they would hang out.
4. On the night in question, T.T. and her [female friend] contacted Defendant and proposed that they all hang out together on a “double date” because [the female friend] was hanging out with [another male].
5. Defendant was given to understand that T.T. may have been seeing someone at the time, but that he was in jail.
6. When the group arrived at Seth’s house, T.T. began drinking.
7. She acted flirtatiously with him throughout the night, including:
    a. laying on him;
    b. rubbing his chest and arms and other parts of his body with her hands;
    c. calling him a “cutie” repeatedly and verbally expressing her attraction to him;
    d. putting her arms around his neck;
    e. putting her arms around his waist;
    f. telling him how much she liked him;

g. getting right up close to his face and directly asking him "why won't you kiss me" when he was engaged in conversation with [another person who was present];

h. "loving" on him and cuddling with him;

i. inviting him to "come cuddle her" in bed when she decided to go downstairs;

j. laying down with her head on his chest and on top of him when they got in the bed together;

k. kissing him passionately (i.e. "French" kissing);

l. helping him undo his pants;

m. performing oral sex on him;

n. moving onto her back and opening her legs to invite him to have vaginal intercourse while continuing to kiss him passionately; and,

o. moaning and making other passionate sounds during all of the foregoing activity.

R. 141-142.

Defendant's supplemental filing then stated that the "evidence will show that the sexual encounter for which Defendant has been charged was but one of numerous consensual sexual encounters between these two individuals over the course of several years, and that the alleged victim's conduct and verbal expressions on the night in question were indistinguishably similar to their past sexual encounters." Demonstrating both the relevance of the evidence and its critical importance to his defense of consent, Defendant

explained that "[i]n terms of preceding flirtation, initiation of kissing and touching, and progressively intensifying sexual activity, T.T. acted in precisely the same manner that night as she had in the past," and stated that they had engaged in sexual activity on every occasion that they had spent time together in the past, and that during their past sexual encounters, similar to the night of the alleged assault, T.T. had:

(1) contacted him to hang out late in the evening or at night;

(2) cuddled and "spooned" with him;

(3) kissed his neck;

(4) told him he was "cute" and "attractive;"

(5) touched him all over his body with her hands;

(6) performed oral sex on him;

(7) helped him undress and removed her own clothing with or without his help;

(8) invited him to have sex with her by opening her legs while completely undressed and pulling him on top of her;

(9) moaned during sexual activity.

R. 143.

Defendant then noted that "[t]he only substantive requirement applicable to evidence of previous sexual activity with Defendant for the purpose of proving consent is that the evidence be sufficiently similar to the type at issue in order to make a deduction of consent reasonable," citing to *State v. Richardson*, 2013 UT 50 ¶ 26, 308 P.3d 526 and *State v. Bravo*, 2015 UT App 17 ¶ 37-38. Finally, Defendant explained that the proposed evidence was being offered for the purpose of showing that, on the night in question,

"[T.T.], after consuming alcohol, acted in a sexually flirtatious manner that was indistinguishable from their previous encounters during which they both flirted, kissed, touched each other, engaged in oral sex, and had sexual intercourse." R. 144.

Through his initial motion and supplemental filing, Defendant "... specifically describe[d] the evidence and state[d] the purpose for which it is to be offered…" as required by Utah Rule of Evidence 412(c)(1)(A). Together, Defendant's filings demonstrated that T.T. had engaged in numerous instances of prior, consensual sexual conduct with Defendant, described the similarities between her prior conduct and her conduct on the night she alleges Defendant sexually assaulted her, and requested the setting of the *in camera* hearing mandated by Utah Rule of Evidence 412(c)(3). Under Rule 412, such a hearing must be conducted prior to a final determination of the admissibility of the proposed evidence. *See* Utah R. Evid. 412(c)(3) ("*Before* admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard…")(emphasis added).

At the initial setting of the Rule 412 *in camera* hearing on February 6, 2024, the district court had found that the subject areas proposed by Defendant were "proper questions to be asked in an in-camera hearing on 412." R. 334. The district court then explained that it intended to hear the evidence from T.T. so that it could make an admissibility determination, stating: "[u]ltimately, their admissibility at trial is something that we will decide later. But as far as proceeding at the 412 hearing, I will allow the defendant to inquire [from T.T.] as to those specific issues raised in the motion." R. 334.

Counsel for T.T. noted that T.T. had not been subpoenaed to testify at that initial hearing and indicated that she would have objected to any subpoena issued for T.T.'s testimony at the *in camera* admissibility hearing. R. 334. In response, the district court stated: "[w]hat I'm saying is that the defendant met his burden in his motion by addressing specific instances that are, for which 412 contemplates the defendant to be able to at least inquire at a 412 hearing." R. 335. The matter was reset, and Defendant then issued a subpoena for T.T's testimony so that the court could evaluate the evidence that Defendant proposed to elicit from her and issue a ruling on its admissibility. T.T. subsequently moved to quash the subpoena. R. 164-71.

On March 5, 2024, the district court issued an oral ruling denying T.T.'s motion to quash the subpoena issued for her testimony at the *in camera* evidentiary hearing after previously finding that Defendant had made a sufficient "threshold" showing supporting the admissibility of the proposed evidence. R. 195-96. Ultimately, the district court determined that it needed to hear T.T.'s testimony before it could decide the question of the admissibility of the evidence proposed to be elicited from her at trial. R. 348.

SUMMARY OF THE ARGUMENT

The district court did not err when it declined to grant T.T.'s motion to quash the subpoena issued for her testimony in a private, *in camera* admissibility hearing to be conducted pursuant Utah Rule of Evidence 412(c)(3). The district court properly concluded that, in order to make an ultimate determination regarding the admissibility of evidence proposed to be elicited from T.T., it needed to hear the evidence first. T.T.'s argument relies principally on the position that this evidence is "presumptively admissible" or "inadmissible," but the evidence falls within a specific exception to Rule 412's general prohibition against admitting evidence of an alleged sexual assault victim's past sexual conduct. The applicable exception permits the admission of "[e]vidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor." Utah R. Evid. 412(b)(2).

T.T. further questions the relevance and admissibility of the proposed evidence based on the incorrect argument that the charge against Defendant is founded upon an allegation that she was "too intoxicated to consent" to sexual activity. To the contrary, rather than alleging that her intoxication somehow impacted her capacity to consent, T.T. actually alleged that she *refused* to consent, pushed Defendant away from her, and told Defendant "no" repeatedly, but that he had sexual intercourse with her anyway while she was "drunk and weak" and "in and out of consciousness." R. 213. As such, evidence of her past, consensual sexual conduct with Defendant—which Defendant's filings demonstrated was indistinguishably similar to her conduct on the night in question— is highly probative

of, and therefore directly relevant to, the disputed issue of her consent at the time of the alleged assault, is not prohibited by Rule 412, and is admissible pursuant to *State v. Richardson*, 2013 UT 50.

Accordingly, Rule 412 does not "shield" T.T. against the admission of this form of evidence. The district court appropriately considered her privacy interests when it declined to quash the subpoena for her testimony in a private, *in camera* proceeding prior to her being subjected to cross-examination about her past sexual conduct with Defendant in a public trial.

Further, this Court should reject T.T.'s argument that being required to testify about evidence that is not prohibited by Rule 412 violates T.T.'s state constitutional rights under Utah's Victim Rights Amendment to be "to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process." Utah Const. art. I, § 28(1)(a). The subpoena issued for her testimony was not "unreasonable" under Utah Rule of Criminal Procedure 14(a)(2), and this Court should affirm the district court's denial of T.T.'s motion to quash.

ARGUMENT

In challenging the district court's denial of her motion to quash, T.T. raises two substantive issues for this Court's consideration: first, whether the subpoena issued for her testimony at a closed, pre-trial admissibility hearing under Utah Rule of Evidence 412 is "unreasonable" under Utah Rule of Criminal Procedure 14(a)(2); and second, whether being required to testify at the *in camera* hearing violates her right to be "treated with fairness, dignity, and respect" and be "free from harassment and abuse" under the Victim Rights Amendment in Utah Constitution art. I, § 28(1)(a). Defendant submits that the district court properly applied the law when it declined to quash the subpoena for T.T.'s testimony.

I. THE SUBPOENA ISSUED FOR THE TESTIMONY OF T.T. IN A CLOSED, *IN CAMERA* HEARING—REGARDING EVIDENCE THAT IS ADMISSIBLE PURSUANT TO AN EXCEPTION TO UTAH RULE OF EVIDENCE 412'S GENERAL PROHIBITION AGAINST EVIDENCE OF THE ALLEGED VICTIM'S PAST SEXUAL CONDUCT—WAS NOT "UNREASONABLE."

T.T. first argues that the subpoena issued for her testimony in a closed, *in camera* admissibility hearing is "unreasonable" under Utah Rule of Criminal Procedure 14(a)(2). As the primary basis for her objection to Defendant's subpoena, T.T. argues that the subpoena is "unreasonable" because the proposed evidence is "inadmissible" or "presumptively inadmissible." But T.T. fails to acknowledge that the particular category of evidence proposed to be admitted by Defendant is specifically authorized as an exception to Rule 412's general prohibition on the admission of evidence of her prior sexual history. As such, Rule 412 does not accord T.T. protection from being examined about her past, consensual sexual conduct with Defendant at any trial of this matter. The

district court correctly held that she was subject to being examined about the incidents set forth in Defendant's filings, and that an evidentiary hearing under Rule 412 was the appropriate procedural vehicle to enable the court to decide the admissibility of Defendant's proposed evidence, stating:

> "I agree with [Defendant] that the purpose of the 412 hearing is so that the Court can identify the evidence that, the evidence that the Court needs to consider for presentation to a jury.
>
> I agree that there is an imposition to the alleged victim to that, but that is why 412 hearings are intended to be in-camera or in a closed session and that the rules of evidence under 412 and the procedure set in place for that hearing do not give an alleged victim a right to refuse to testify … or do not provide a basis to quash a subpoena. So I will order that the alleged victim must be present to testify at the upcoming 412 hearing." R. 348.

Throughout T.T.'s brief on appeal, the evidence proposed to be elicited from her regarding her past sexual conduct with Defendant is described as "inadmissible" or "presumptively inadmissible." *See* Brief of Appellant, P. 17 ("Preventing victims from having to testify at all about private matters that are inadmissible in the trial is the goal of the rape shield rule—a shield the district court's ruling destroys"); P. 19 ("In forcing the victim to testify about her prior sexual history for which 'there is a presumption of inadmissibility,' *State v. Beverly*, 2018 UT 60, ¶ 56 n.58 (quoting *State v. Boyd*, 2001 UT 30, ¶ 41), the district court acted unreasonably").

Contrary to T.T's position, under the plain language of Rule 412, the opposite is true. The particular category of evidence proposed to be admitted by Defendant constitutes an exception to any of the general evidentiary prohibitions contained in Rule 412. The exception that applies in this case permits the introduction of "[e]vidence of specific

instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor." Utah R. Evid. 412(b)(2). The Commentary to Federal Rule of Evidence 412, upon which Utah's Rule 412 is patterned, explains that:

> "[u]nder the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused."

Further, Defendant has a constitutional right to present a defense, and as such, "evidence whose exclusion would violate the defendant's constitutional rights" is also admissible as an exception to the general rule of exclusion found in Rule 412. *See* Utah R. Evid. 412(b)(3).

As she does on appeal, T.T. below suggested that the proposed evidence is also subject to exclusion based on Utah Rules of Evidence 401, 402, and 403. *See Motion to Quash*, R. 168-9 (stating that "[t]he specific interests protected by rule 403 encompass the inherent danger of unfair prejudice to the victim, including the potential to embarrass the victim, and unwarranted invasion of the complainant's privacy."). Defendant points out that T.T.'s argument that her past sexual behavior with Defendant is irrelevant either irrelevant or inadmissible under Utah Rule of Evidence 412 has been squarely rejected by this Court.

In *State v. Richardson,* 2013 UT 50, 84 P.3d 1134 (2013), this Court reversed a rape conviction where a district court did not permit the defendant to present evidence under Rule 412(b)(2)'s "past consensual sex with the accused" exception—consisting of details about specific instances of his past sexual activity with his accuser. In that case, the defendant sought to admit the sexual history evidence to support his defense of consent pursuant to Rule 412(b)(2). As in this case, the Defendant in *Richardson* sought to admit evidence that the victim had engaged in the same particular forms of sexual activity in the past as she did at the time of the alleged assault. In light of this purpose, this Court concluded that the evidence fell "squarely within" the Rule 412(b)(2) exception. As such, "the only remaining question [was] whether [the] evidence was 'otherwise admissible' under the rules of evidence." *Id.*

The trial court in *Richardson* had excluded the evidence because it erroneously determined that it was "not sufficiently relevant to be admissible." *Id.* at ¶ 22. However, this Court agreed with the defendant that "there is no heightened relevancy test for evidence of specific instances of sexual activity between an alleged victim and the accused" and that the evidence "was relevant under the lenient standards of rules 401 and 402 [of the Utah Rules of Evidence]." This Court stated that, together, Utah Rules of Evidence 401 and 402 "establish a *very low bar* that deems even evidence with the slightest probative value relevant and presumptively admissible." *Id. at* ¶ 24. (emphasis added). This Court further explained that those rules straightforwardly "define relevance in binary terms: either evidence is relevant because it makes a fact of consequence more or less probable, or it is not because it does not." *Id.* Reviewing the sexual history evidence at issue in that case,

this Court concluded that the evidence was relevant to the issue of the victim's consent because it made consent "more probable" by "contextualiz[ing] the victim's sexual relationship with [the defendant]." *Id.* at ¶ 25.

As in that case, T.T. has conceded that she has engaged in sexual conduct with Defendant in the past. Similarly, and relying on the State's concession that "evidence that the two had a sexual relationship" was admissible, this Court in *Richardson* explained that "[t]he excluded evidence merely added detail to that knowledge. If the general evidence of a sexual relationship was relevant, the more detailed evidence was as well." *Id.* This Court further reasoned that "[i]f a person is more likely to consent to sex with a past sexual partner, she is also more likely to consent to the kind of sexual relations she has had with a partner in the past." *Id.* at ¶ 26. Most germane to the question of admissibility of the proposed evidence in this case, this Court noted that "[k]nowing that the victim had previously engaged in [particular forms of sexual conduct with a defendant] makes it easier to accept his version of what transpired on the night in question." *Id*. at ¶ 42. That is precisely what Defendant set forth in his motion and supplemental response; that the victim had previously participated in many of the same forms of sexual conduct that Defendant proffered that she engaged in on the night of the alleged assault. Although T.T. states in her brief that the allegation against Defendant is based upon the fact that she was "too intoxicated to consent" to sexual activity, this inaccurately represents the factual allegations in her 1102 statement. *See* Brief of Appellant, p. 1; R. 213. Rather than alleging that her impairment somehow impacted her capacity to consent, T.T. alleged that she resisted Defendant's advances, told him "no" repeatedly, and pushed him away from her,

but that he had intercourse with her anyway while she was "drunk and weak" and "in and out of consciousness." R. 213. As such, T.T. has alleged that she refused to consent to sexual activity, not that her impairment had any impact on her ability to meaningfully consent to that activity. Accordingly, the evidence proposed by Defendant regarding her past, consensual activity with him—and the similarity between her past conduct and her conduct on the night of the alleged assault— falls "squarely within" Rule 412(b)(2)'s "past sexual conduct with the accused" exception in the same manner as the evidence at issue in *Richardson.*

It may well be that "Rape Shield" rules "were adopted in response to anachronistic and sexist views that a woman who had consented to sexual activity in the past was more likely to have consented to sexual relations with an alleged rapist." *State v. Eddington,* 2023 UT App 19, ¶36 n.12. Nevertheless, the admissibility of evidence of T.T.'s past sexual conduct with Defendant is not "shielded" by Rule 412. To the contrary, it is specifically exempted from the general evidentiary prohibitions found in Rule 412. Her argument that the issuance of a subpoena for her testimony is "unreasonable" under Utah Rule of Criminal Procedure 14(a)(2)—especially to the extent that it is founded upon the incorrect legal position that the proposed evidence is inadmissible—was properly rejected by the district court.

II. T.T.'S STATE CONSTITUTIONAL RIGHTS UNDER UTAH'S VICTIM RIGHTS AMENDMENT ARE NOT VIOLATED BY REQUIRING HER TO TESTIFY PRIOR TO ADMITTING EVIDENCE THAT IS NOT PROHIBITED UNDER UTAH RULE OF EVIDENCE 412.

T.T. argues that requiring her to testify about her past sexual history with Defendant in a closed, *in camera* proceeding violates her state constitutional rights under Utah's Victim Rights Amendment, and asserts that "[i]t would be harassing and abusive to force [her] to testify about sensitive subjects involving her prior sexual history for no substantial reason." Brief of Appellant, p. 23. But the district court determined that the only way for it to properly exercise its gatekeeping function regarding the admissibility of Defendant's proposed evidence was to actually hear the evidence. The district court's conclusion properly balanced the constitutional right of the Defendant to present a defense with the privacy interests of T.T. under Rule 412. The argument that T.T. is constitutionally protected from being cross-examined about the subject areas outlined in Defendant's filings because it would be "harassing" or "abusive" is simply without merit. Surely, testifying in a private hearing is less of an imposition to T.T. than being cross-examined at trial, in open court, about her sexual history with Defendant, but no provision of law prevents her from being cross-examined regarding her prior sexual history with Defendant at trial. *Cf. State v. Bravo*, 2015 UT App 17, 343 P.3d 306, 313, n.6. (observing that "[t]he intrusion into a victim's privacy interests is somewhat ameliorated by the confidential nature of a rule 412 hearing, which mandates that allegations of prior sex acts be contained in sealed motions and heard only in closed court unless they are ultimately deemed admissible" and citing Utah R. Evid. 412(c)(3)). The reality is that ours is an adversarial criminal justice system, and Defendant's constitutional rights to present a defense and

confront his accuser must prevail. *State v. Valdez,* 2006 UT App 290, ¶ 8, 141 P.3d 614, 616 ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.") (quoting *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)).

Defendant acknowledges that crime victims have been granted certain rights by the Utah Constitution and the Rights of Crime Victims Act contained in Utah Code §77-38-2 *et seq*. But Defendant submits that nothing in the Rights of Crime Victims Act supports the argument advanced by T.T. that being required to testify in a private, *in camera* hearing—regarding evidence that is categorically admissible under the plain language of Rule 412(b)(2)—violates her right "to be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process." Utah Const. art. I, § 28(1)(a). This Court should hesitate to rule that adducing testimony from an alleged victim in an *in camera* setting, regarding evidence whose admission is not prohibited under Rule 412, equates to "harassment" or "abuse," and should reject T.T.'s argument that her state constitutional rights would be violated if she is required to testify at the *in camera* Rule 412 admissibility hearing.

CONCLUSION

The district court properly declined to grant T.T.'s motion to quash. This Court should reject T.T.'s argument that being subjected to examination regarding her past sexual history with Defendant in a private, *in camera* Rule 412 admissibility hearing is "unreasonable." The district court appropriately determined that it should hear the testimony of T.T. prior to ruling on the admissibility of evidence regarding her past sexual conduct with Defendant. Nor should this Court find that T.T. has any constitutional

protection from being required to testify about evidence that is categorically admissible under Utah Rule of Evidence 412.

Respectfully submitted on this 9th day of September 2024.

Esplin | Weight
Attorney for Defendant/Appellee Seth Clark Jolley

/s/ Scott Weight
Scott Weight
ATTORNEY AT LAW

CERTIFICATE OF COMPLIANCE

I certify that in compliance with Utah Rule of Appellate Procedure 24, this brief contains 5,186 words, excluding all tables and certificates of counsel. I further certify that in compliance with rule 21, Utah R. App. P., this brief does not contain any information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

Pursuant to Supreme Court Standing Order No. 11, paper copies will be filed with the Clerk of Court and served upon counsel of record within 7 days.

Dated this 9th day of September 2024.

Esplin | Weight
Attorney for Defendant/Appellee Seth Clark Jolley

/s/ Scott Weight
Scott Weight
ATTORNEY AT LAW

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2024, I served the foregoing on the below-listed counsel of record via electronic mail.

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ADDENDA

Utah Rule Evidence 412. Admissibility of Victim's Sexual Behavior or Predisposition.

(a) Prohibited Uses. The following evidence is not admissible in a criminal proceeding involving alleged sexual misconduct:
(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. The court may admit the following evidence if the evidence is otherwise admissible under these rules:
(1) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(2) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; or
(3) evidence whose exclusion would violate the defendant's constitutional rights.

(c) Procedure to Determine Admissibility.
(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:
(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
(B) do so at least 14 days before trial unless the court, for good cause, sets a different time; and
(C) serve the motion on all parties.
(2) Notice to the Victim. The prosecutor shall timely notify the victim or, when appropriate, the victim's guardian or representative.
(3) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing are classified as protected.
(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Utah Constitution, Article I, Section 28. [Declaration of the Rights of Crime Victims.]

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.