Case No. 20240290-SC

IN THE

UTAH SUPREME COURT

STATE OF UTAH,
Plaintiff/Appellee,

v.

SETH CLARK JOLLEY,
Defendant/Appellee,

T.T.,
Victim/Appellant.

Brief of Appellee State of Utah

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CURRENT AND FORMER PARTIES

Parties to the Petition

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- Appellee Seth Clark Jolley, represented by Scott Weight
- Appellee State of Utah, represented by Sean D. Reyes and Hwa Sung Doucette

Parties to Proceedings Under Review

No additional parties were party to the proceedings under review.

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Brief of Appellee

INTRODUCTION

This case is about whether an alleged rapist may force his victim to submit to questioning in court at a rape shield hearing—a hearing meant to give his victim one final opportunity, if she chooses, to keep her sexual history from being discussed in open court. The State agrees with Appellant T.T. that the district court erred in refusing to quash the subpoena requiring her testimony at the rape shield hearing in this case.

T.T. accused defendant Seth Clark Jolley of raping her while she was unconscious. Jolley however claims it was consensual and sought to admit evidence of his and his victim's consensual sex history.

Despite the district court determining that Jolley had offered enough evidence to warrant a rape shield hearing under rule 412, Utah Rules of Evidence, Jolley subpoenaed T.T. to testify at the hearing. Through counsel, T.T. moved to quash the subpoena, but the district court denied the motion, ruling that T.T. had to testify so it could identify the evidence Jolley wanted to admit at trial and because rule 412 did not give the victim the right to refuse to testify.

But the limited purpose of the rape shield hearing is to give the victim a final opportunity to challenge admissibility of her sexual history. The hearing is not a discovery tool. This Court has previously held that holding the hearing to question the victim is inappropriate. Forcing T.T. to testify so that Jolley could find out whether she disagreed with his account essentially amounts to taking a deposition. And even though the hearing would be closed, it still violates T.T.'s constitutional rights to be treated with fairness and be free from harassment and abuse, while Jolley's rights to confront and compel witnesses would not be violated. The district court erred in denying T.T.'s motion to quash and this Court should reverse.

STATEMENT OF THE ISSUES

1. Did the district court erroneously require the victim to testify under the defendant's subpoena at a rape shield hearing?

Standard of Review. The interpretation and application of constitutional provisions, statutes, and procedural rules are questions of law reviewed for correctness. *State v. Casey*, 2002 UT 29, ¶19, 44 P.3d 756; *State v. Phong Nguyen*, 2012 UT 80, ¶8, 293 P.3d 236.

STATEMENT OF THE CASE

A. Summary of relevant facts.[1]

Defendant Seth Clark Jolley had a party at his house where T.T. and others consumed alcohol and marijuana. R11. At some point, Jolley carried T.T. to a separate room and tried to get T.T. to perform oral sex. R11. T.T. said no, but Jolley grabbed her hair and tried to force her. R11.

Afterward, Jolley moved next to T.T. and started undoing his pants. R11. T.T. again told Jolley no. R11. At that point T.T. lost consciousness but later became aware of snippets of events that she at first thought were a dream. R11. She saw Jolley hovering over her, heard him shushing and reassuring her everything will be okay. R11. T.T. also recalled Jolley "coming out of her" and that he "finish[ed] himself off" and ejaculated on her stomach

[1] Because this is an interlocutory appeal, the facts are taken from the information, affidavit in support of arrest warrant, and pleadings. Jolley, of course, is not yet convicted and maintains the presumption of innocence. While the State does not use the word "alleged" in its brief, it recognizes that the following factual assertions are unproved.

or a blanket. R11. When T.T awoke the next morning, she knew it wasn't a dream because her leggings were inside out and backwards. R11.

T.T. texted Jolley to confront him. R11. Jolley first denied any rape and said they only made out and that he felt bad because T.T. had a boyfriend. R11. But Jolley also said that T.T. had been "all over him all night," so, in his view, it couldn't be rape. R11. Jolley then acknowledged they did more than just make out, but he said it wasn't rape because they were both intoxicated and T.T. "was telling him she wanted it." R11. And Jolley said that he stopped when T.T. passed out. R12.

B. Summary of proceedings and disposition of the court.

The State charged Jolley with one count of rape after T.T. alleged that he had sex with her "when she was heavily intoxicated and after she had said no at least twice." R174. Jolley moved to compel T.T. to testify at the preliminary hearing, arguing that such testimony could be allowed under *State v. Lopez*, 2020 UT 61, ¶¶50-56, 474 P.3d 949 (identifying circumstances where subpoenaing victim to testify at preliminary hearing is *per se* unreasonable). R57-60. However, the court denied the motion. R110.

Jolley later moved under evidence rule 412 to admit evidence of prior sexual behavior between Jolley and T.T. R123-26. Jolley argued that the sexual

behavior qualified under an exception to rule 412 that made such evidence admissible to prove consent. R124 (citing Utah R. Evid. 412(b)(2)).

Through counsel, T.T. objected, arguing in part that Jolley had failed to proffer "evidence of specific instances" as required by rule 412. R131-37. Jolley replied with a more detailed proffer of the specific instances he wanted to present evidence of at trial. He proffered that whenever T.T. and Jolley had become single they would hang out and equally initiated "engag[ing] in sexual activity." R141. Jolley also proffered that in the past, T.T. kissed his neck, touched his body, performed oral sex, helped him undress, and would open her legs to "invite[]"intercourse. R143. Jolley asserted that in the events leading to the alleged rape, T.T. did those same things. R141-42. But Jolley omitted whether T.T. had diminished capacity those previous times. R141.

The district court ruled that Jolley had proffered enough information to obtain a rule 412 hearing at which Jolley could "inquire … [f]rom the alleged victim." R334. Jolley then subpoenaed T.T. R153-161. T.T. moved to quash the subpoena, arguing that it was unreasonable to make a victim testify at a hearing authorized under a rule "which was established for the protection of victims." R167. T.T. also argued that forcing her testimony violated her constitutional rights to be treated with fairness and be free from harassment and abuse. R170.

Jolley responded that, in this context, his constitutional rights—the right to subpoena, to confront his accuser, and to remain silent—carry more weight than the victim's rights, particularly for a closed hearing. R177-78. He also contended that the court needed to hear the evidence from T.T. to determine admissibility, even though the court had already determined that Jolley and T.T.'s consensual sex history fell within an exception to obtain a hearing. R179.

The district court denied T.T.'s motion to quash, reasoning that "the purpose of the rule 412 hearing is so that the Court can identify the evidence" the defendant wishes to present the jury and determine its admissibility. R348. The Court also ruled that rule 412 and the relevant procedural rules "do not give an alleged victim a right to refuse to testify" and "do not provide a basis to quash a subpoena." R348. With respect to the imposition placed on the victim, the court ruled that the closed nature of the hearing was enough protection. R348.

T.T. then petitioned this Court for permission to appeal from that interlocutory order, which the Court granted. *See* Order Granting Pet. Interloc. Appeal, May 24, 2024.

SUMMARY OF ARGUMENT

The district court, after already finding that Jolley had shown that his and T.T.'s consensual sex history fell within an exception under rule 412, ruled that Jolley could compel T.T. to testify at the rape shield hearing so that it could identify the evidence Jolley wanted to admit. That ruling is erroneous for four reasons.

First, allowing Jolley to examine T.T. directly conflicts with this Court's previous holding that conducting a rape shield hearing to question the victim to discover evidence is inappropriate.

Second, the district court erroneously concluded that the relevant rules did not provide T.T. a basis to quash the subpoena. By rule, subpoenas may always be quashed if compliance would be unreasonable. And reasonableness must account for a range of limitations on a defendant's ability to compel an alleged victim to testify. This Court held in an analogous situation that such limitations are informed by the purpose of the proceeding and a victim's constitutional right to be treated with fairness, respect, and dignity, and be free from harassment and abuse throughout the criminal justice process. The same reasonableness inquiry should apply to defendants seeking to force victims of sexual assault to testify at a rule 412 rape shield

hearing—a hearing that serves a limited purpose. Forcing a victim to testify at a rape shield hearing would infringe on a victim's constitutional rights.

Third, the district court erroneously ruled that T.T. had to testify for it to determine admissibility. But forcing T.T. to testify was not reasonable because the rape shield hearing has a limited purpose, which this Court has clarified does not include using it as a discovery tool. In any event, T.T.'s testimony was unnecessary. Jolley was a party to the alleged prior sexual interactions, and he could proffer all the court needed to know to make its ruling. Discovering whether T.T. disagreed with Jolley's version of events was unnecessary for the court to decide admissibility because that boils down to credibility questions that are a matter for the jury if this evidence is ever admitted.

Fourth, the district court erroneously determined that conducting a closed hearing was sufficient to protect T.T.'s constitutional rights as a victim. Forcing T.T. to recount her sexual history with her alleged rapist pretrial, when her testimony is not necessary to determine admissibility, violates her constitutional right to be treated with fairness and be free from harassment and abuse. And her testimony is unnecessary to protect Jolley's constitutional rights.

As a result, nothing short of quashing T.T.'s subpoena was appropriate. The Court should reverse with instructions for the district court to quash T.T.'s subpoena.

ARGUMENT

The district court erroneously allowed Jolley to compel T.T. to testify at the rape shield hearing.

The district court ruled that Jolley could compel T.T. to testify at the rape shield hearing so that it could identify the evidence Jolley wanted to admit. R348. The district court's ruling was wrong for four reasons.

First, allowing Jolley to question T.T. conflicts with this Court's holding that conducting a rape shield hearing to question the victim is inappropriate. Second, considering the limited purpose of a rape shield hearing, Jolley's limited constitutional rights in pretrial proceedings, and T.T. rights as a victim, Jolley's subpoena was unreasonable. Third, T.T.'s testimony was unnecessary to determine admissibility. And fourth, the district court erroneously determined that conducting a closed hearing was sufficient to protect T.T.'s constitutional rights as a victim to be treated with fairness and be free from harassment and abuse.

A. Allowing Jolley to question T.T. at a rape shield hearing directly conflicts with this Court's precedent.

Jolley, in responding to T.T.'s motion to quash his subpoena compelling her to testify at the rape shield hearing, argued that the court needed to hear the evidence from T.T. to determine admissibility. R179. The district court agreed, ruling that Jolley could compel T.T. to testify at the rape shield hearing because "the purpose of the rule 412 hearing is so that the Court can identify the evidence" the defendant wishes to present the jury and determine its admissibility. R348. But that ruling directly conflicts with this Court's previous holding that a rule 412 hearing is not a discovery tool. *State v. Blake*, 2002 UT 113, ¶7, 63 P.3d 56.

But before discussing the limits of a rule 412 hearing, it makes sense to start with the purpose of the rule and the hearing it provides.

The Court adopted rule 412 of the Utah Rules of Evidence after recognizing that an alleged victim's prior sexual conduct "is simply not relevant to any issue in the rape prosecution including consent" and "is ordinarily of no probative value on the issue of whether a rape or sexual assault occurred." *State v. Tarrats*, 2005 UT 50, ¶¶20,21, 122 P.3d 581. The rule, modeled after the federal rape shield rule, was meant to "ensure that sexual assault victims are not deterred from participating in prosecutions because of the fear of unwarranted inquiries into [their] sexual behavior." *Id.* ¶20

(cleaned up). By design, the rule set out to protect victims and avoid "humiliating the accuser, discouraging victims from reporting sexual crimes against them, and introducing irrelevant and collateral issues that may confuse or distract the jury." *Id.* ¶24.

Rule 412, however, also recognizes exceptions where a victim's prior sexual history may be admissible, such as using prior consent to establish consent to the allegations at issue in the criminal case. *See* Utah R. Evid. 412(b)(2). But a defendant intending to introduce such evidence has the burden to provide specifics of what he wants to introduce, not just general descriptions. Utah R. Evid. 412(c)(1)(A) (requiring movant to "specifically describe[] the evidence and state[] the purpose for which it is to be offered"); *State v. Bravo*, 2015 UT App 17, ¶¶30-32, 343 P.3d 306. Those specifics "permit the court to weigh the probative value of the sexual history" by assessing "the similarity between the sexual history and the charged acts." *Bravo*, 2015 UT App 17, ¶¶27 n.6, 29.

The reason for requiring such specificity in a rule 412 motion is that "the plain language of rule 412 … provides for a hearing 'only if the court sees the applicability of one of the limited exceptions and intends to admit such evidence.'" *Blake*, 2002 UT 113, ¶7 (quoting *State v. Quinonez-Gaiton*, 2002 UT App 273, ¶12, 54 P.3d 139); *see also* 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."). Such a hearing "provides the victim with a final opportunity to be heard prior to having his or her sexual history discussed in open court." *Quinonez-Gaiton*, 2002 UT App 273, ¶12.

One thing the hearing, however, is not meant to be is a discovery tool. A defendant cannot use a rape shield hearing "to attempt discovery of evidence." *Blake*, 2002 UT 113, ¶7. Thus, the Court held in *Blake* that a defendant cannot use a hearing to "question [the] alleged victim about prior false allegations and prior sexual abuse." *Id.* As another court explained regarding a nearly identical rule, the hearing is not "designed to be used as a subterfuge to obtain a discovery deposition from the alleged victim." *State v. Joyner*, 303 S.W.3d 54, 58 (Ark. 2009).

Here, functionally, the district court permitted Jolley to use the hearing to do what *Blake* concluded is not allowed—questioning T.T. to discover evidence. Jolley's responses to T.T.'s motion to quash and interlocutory petition make clear that he wants to question T.T. to essentially take a deposition. He said that without T.T.'s testimony he "has no way of knowing whether T.T. agrees with [his] written summary of evidence or plans to deny the extent of her past sexual conduct with [him]." R179; Jolley's Interloc. Opp.

7-8. In other words, Jolley's stated purpose for the hearing is to question the alleged victim—a prohibited discovery attempt that is akin to taking a deposition—because Jolley wants to know, in advance, T.T.'s response to questions he would ask during cross-examination at trial. *Blake*, 2002 UT 113, ¶7; *Joyner*, 303 S.W.3d at 58.

The district court's ruling thus conflicts with this Court's precedent and the subpoena should be quashed.

B. The district court should have quashed the subpoena because compliance is unreasonable.

Not only did the district court's ruling conflict with *Blake*, but the reasoning the district court gave was erroneous. The district court reasoned that it could not quash the subpoena because rule 412 and the procedure it envisions "do not give an alleged victim a right to refuse to testify" or "provide a basis to quash a subpoena." R348. The district court's reasoning missed the mark.

Though a defendant has the right to compel the appearance of a witness through a subpoena, that right is not unfettered. *See* Utah Const. art. I, § 12. As T.T. argued below, rule 14 of the Utah Rules of Criminal Procedure authorizes a court to quash a subpoena "if compliance would be unreasonable." Utah R. Crim. P. 14(a)(2). The district court's reasoning posits an absolute prohibition that does not exist. While there is no explicit ban on

compelling a victim's testimony at a rape shield hearing, reasonableness always places a limit on a party's ability to subpoena a witness to testify in court. The district court, however, undertook no reasonableness analysis.

A "reasonableness inquiry must account for a range of limitations on a defendant's ability to compel an alleged victim to testify." *State v. Lopez*, 2020 UT 61, ¶32, 474 P.3d 949. In *Lopez*, an analogous case addressing pretrial testimony by a victim, the Court held that the reasonableness of requiring a victim to testify is informed by the purpose of the proceeding, the defendant's constitutional rights at issue, and the victim's constitutional right "'[t]o be treated with fairness, respect, and dignity,' and … to 'be free from harassment and abuse throughout the criminal justice process.'" *Id.* ¶49 (alteration in original) (quoting Utah Const. art. I, § 28(1)(a)); *see also id.* ¶¶43-49 (addressing preliminary hearings). Those factors favor quashing the subpoena here.

1. Rape shield hearings have a limited purpose—giving the victim a final opportunity to be heard before their sexual history is discussed in open court.

As discussed, a rule 412 hearing is designed to protect the victim's interests, not the defendant's. *See supra* Part A. It serves a limited purpose to "provide[] the victim with a final opportunity to be heard prior to having his or her sexual history discussed in open court." *Quinonez-Gaiton*, 2002 UT App

273, ¶12. This factor thus weighs even more heavily in favor of finding unreasonableness than it does when a preliminary hearing is at issue—a hearing designed to protect a defendant's right to be free from groundless prosecutions. *See State v. Virgin*, 2006 UT 29, ¶20, 137 P.3d 787; *see also Lopez*, 2020 UT 61, ¶¶53-55 (concluding that requiring victim to testify at preliminary hearing will generally be unreasonable).

True, the court of appeals has recognized that a defendant is entitled to a hearing to establish that rule 412 does *not* apply. *See State v. Clark*, 2009 UT App 252, ¶¶26-28, 219 P.3d 631 (holding defendant entitled to limited "opportunity to meet his burden of proving the prior allegation is false [and that rule 412 therefore does not apply] where there is a legitimate question as to its truthfulness"). But everyone agrees rule 412 applies here, as there are no allegations of prior false accusations. And the purpose of a rule 412 hearing is to protect the victim's right to privacy.[2]

[2] The court of appeals' ruling in *Clark* appears to be at odds with this Court's ruling in *Blake*, which involved a request to "question the alleged victim about prior false allegations." *Blake*, 2002 UT 113, ¶7 (cleaned up). But the Court need not resolve that discrepancy here.

2. Defendants' constitutional rights are not violated by preventing victims' testimony at rape shield hearings.

A defendant does not have an unfettered right to subpoena victims, nor does he have a limitless right to confront his victim at a rape shield hearing—that right is reserved for trial.

Utah's constitution provides that in "criminal prosecutions," defendants have the rights "to have compulsory process to compel the attendance of witnesses in his own behalf" and "to be confronted by the witnesses against him." Utah Const. art. I, § 12. But neither right is unlimited.

For a defendant's right to compulsory process, the Court held in *Lopez* that right is not "categorical or unlimited." 2020 UT 61, ¶42. And it held that rule 14's "'unreasonableness' limitation" did not infringe that right. *Id.* In other words, the existence of the right to compulsory process is not enough to defeat a victim's motion to quash a subpoena seeking to compel her to testify at a pretrial hearing.

For a defendant's right to confront a witness, Utah has traditionally interpreted that right in parallel with the Sixth Amendment right. The Supreme Court has long recognized that the Sixth Amendment right to confront witnesses applies only at trial. *See Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."); *California v. Green*, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness

at the time of trial that forms the core of the values furthered by the Confrontation Clause."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (stating nothing supported "transform[ing] the Confrontation Clause into a constitutionally compelled rule of pretrial discovery" and emphasizing "that the right to confrontation is a *trial* right") (plurality opinion) (emphasis in the original); *see also State v. Timmerman*, 2009 UT 58, ¶11, 218 P.3d 590 (acknowledging defendant's right to confrontation is a trial right and does not apply to preliminary hearings).

Thus, unlike a preliminary hearing, to which a defendant has a constitutional right, Utah Const. art. I, § 13, fewer constitutional rights are at stake for a defendant in a rape shield hearing. This factor therefore weighs in favor of quashing the subpoena.

3. Forcing victims to testify at rape shield hearings would violate their constitutional rights to be free from harassment and abuse and to be treated with fairness.

When a defendant seeks to compel and confront his victim, the victim's constitutional rights must be considered. *Lopez*, 2020 UT 61, ¶49; *State v. Marks*, 2011 UT App 262, ¶14, 262 P.3d 13 (recognizing confrontation right may "bow to accommodate other legitimate interests in the criminal trial process").

As T.T. explains, the Victims' Rights Amendment guarantees victims the 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. The Rights of Crime Victims Act, passed contemporaneously with the Victims' Rights Amendment and intended to implement the Amendment, *see* Act of Mar. 2, 1994, ch. 198 § 16, 1994 Utah Laws 886, 892,[3] defines "fairness" as "treating the crime victim reasonably, even-handedly, and impartially"; "abuse" as "treating the crime victim in a manner so as to injure, damage, or disparage"; and "harassment" as "treating the crime victim in a persistently annoying manner." Utah Code Ann. § 77-38-2(1), (3) & (4) (West 2024). And by statute, the Legislature declared its intent to ensure that all crime victims "are treated with dignity, respect, courtesy, and sensitivity," and that victims' rights "are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants." Utah Code Ann. § 77-37-1 (West 2024).

Such rights are implicated to a high degree when dealing with a victim's prior sexual behavior. Presenting evidence in court of such acts

[3] The Rights of Crime Victims Act proclaims, the "Legislature intends this bill to serve as the implementing legislation of the amendments to the Utah Constitution, Article I, Section 12, and Article I, Section 28." Act of Mar. 2, 1994, ch. 198 § 16, 1994 Utah Laws 886, 892.

"bears a high potential for humiliating the accuser." *Tarrats*, 2005 UT 50, ¶24. And requiring the victim to testify about her prior sexual behavior amplifies that humiliation. *Cf. Lopez*, 2020 UT 61, ¶52 ("The social science literature also establishes that the experience of testifying about past abuse may cause substantial emotional trauma for victims of child sex abuse."). Indeed, the same concerns that weighed in favor of quashing the subpoena in a preliminary hearing context—protecting a victim of sexual abuse from having to testify at a pretrial hearing that had a narrow purpose—are present here and weigh in favor of quashing the subpoena. *See id.* ¶¶50-53.

* * *

In sum, the limited purpose of a rape shield hearing—to give the victim a final opportunity to object to her sexual history being discussed at trial—coupled with a victim's constitutional rights and no violation of the defendant's rights, makes it unreasonable for a defendant to compel his victim to attend and testify.

Yet here the district court ruled that Jolley could compel T.T. to appear and give unnecessary testimony to identify—essentially discovery akin to a deposition—the evidence the defense wanted to present at trial. R348. This was error. Requiring T.T. to testify was unreasonable and violated T.T.'s constitutional rights to fairness and be free from harassment and abuse.

C. The district court erroneously ruled that T.T.'s testimony was necessary to determine admissibility.

The district court ruled that T.T. had to testify because it needed to identify the evidence Jolley intended to present to the jury to decide admissibility. R348. But as discussed, that is an erroneous understanding of the hearing's limited purpose. *See supra* Parts A & B.1. And forcing T.T. to testify for nothing more than a discovery endeavor directly conflicts with *Blake* which expressly prohibits such an attempt. *Blake*, 2002 UT 113, ¶7. In any event, the district court was wrong because T.T.'s testimony is unnecessary to determine admissibility.

Whether T.T. agrees or disagrees with Jolley's version has no bearing on admissibility. It may bear on how Jolley presents his defense (as with all discovery). And it may present a factual dispute for the jury to resolve based on its credibility assessments. But it is not relevant to the court's admissibility determination under rule 412. *See State v. Stricklan*, 2020 UT 65, ¶100, 477 P.3d 1251 ("[T]he jury serves as *the exclusive judge* of both the credibility of the witnesses and the weight to be given particular evidence." (emphasis in original) (cleaned up)).

Ultimately, any evidence the district court thinks it needs before deciding admissibility should have been received before the hearing was granted. "[T]he plain language of rule 412 … provides for a hearing 'only if

the court sees the applicability of one of the limited exceptions and intends to admit such evidence.'" *Blake*, 2002 UT 113, ¶7. And Jolley can—and did—provide it through a proffer rather than testifying himself. R141-43.

The unreasonableness of the subpoena becomes even more poignant when one recognizes that Jolley is in as good a position to supply the district court with the evidence it needs to determine admissibility as T.T. Unlike sexual behavior to which the defendant is not a party, the only rule 412 evidence Jolley wants to admit is evidence of prior alleged sexual activity between T.T. and himself. There is no reason T.T. must be the one to present such evidence at this stage unless Jolley's real purpose is discovery. As noted, that is not the purpose of a rule 412 hearing. *Blake*, 2002 UT 113, ¶7 (upholding denial of hearing when defendant's "stated purpose" was "to question the alleged victim" (cleaned up)).

T.T.'s testimony is thus unnecessary in determining admissibility. It was therefore error for the district court to allow Jolley to compel T.T. to testify.

D. The district court erroneously determined that conducting a closed hearing was sufficient to protect T.T.'s constitutional and statutory victims' rights.

Relying on the rule 412 hearing being "in-camera or in a closed session," the district court compelled T.T. to testify at the rape shield hearing,

even though it was an "imposition" on her privacy. R348. In other words, the district court determined that because the hearing was closed, that was enough to protect T.T.'s constitutional right to be treated with fairness, respect, and dignity, and to be free from harassment and abuse.

This was likewise error. True, a closed hearing may have lessened some potential exposure to public embarrassment. But as T.T. emphasizes, the hearing will still take place in front of more than just the judge. T.T.Br.18. And even testifying in front of a smaller number of people about such sensitive, personal matters places an emotional toll on victims that they should not have to endure before the admissibility of the testimony has been established—especially when her testimony is *unnecessary* to determine admissibility.

Again, Jolley has firsthand knowledge of their past sexual encounters. And Jolley has the burden of proffering the specifics in his motion. *See* Utah R. Evid. 412(c)(1). His proffer may well fall short of showing that the evidence is admissible under rule 403. He left out—even after supplementation—whether T.T. was impaired during their past encounters, or whether she was unconscious but told him she was okay with Jolley having sex with her while she was unconscious. Jolley did, however, admit they hooked up whenever they became single, R141, whereas T.T. had a boyfriend when the rape

occurred. R11, 141.[4] But if Jolley's proffer falls short, he has only himself to blame.

Forcing T.T. to come face to face with Jolley—someone she once trusted and who violated that trust—to give superfluous testimony violates her right to be treated fairly and to be free from harassment and abuse. *See* Utah Const. art. I, § 28 (guaranteeing victims the right to be "treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process"). On the other hand, Jolley's constitutional rights are not violated. His right to compel T.T.'s appearance must be reasonable, which it is not. Utah R. Crim. P. 14(a)(2). And his right to confront his accuser—a trial right—does not apply to a pretrial hearing. *See Timmerman*, 2009 UT 58, ¶11. As a result, unnecessarily forcing T.T. to testify violates her rights and nothing short of quashing T.T.'s subpoena was appropriate.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court and remand with instructions for the district court to quash T.T.'s subpoena.

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[4] Those facts are material in deciding ultimate admissibility through comparison of the charged acts with the prior acts. *See Bravo*, 2015 UT App 17, ¶¶29-30 (assessing similarity of charged acts and prior acts was dispositive in determining the probative value and admissibility of victim's and defendant's prior sexual history). But the question of whether the proffered evidence is admissible is not before the Court in this appeal.

Dated August 26, 2024.

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/s/ *Hwa Sung Doucette*
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CERTIFICATE OF COMPLIANCE

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/s/ *Hwa Sung Doucette*
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CERTIFICATE OF SERVICE

I certify that on August 26, 2024, I electronically filed the foregoing Brief of Appellee with the Clerk of the Court by using the Utah Court's eFlex system to appellant T.T.'s counsel of record and Seth Clark Jolley's counsel of record at:

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/s/ *Melanie Kendrick*

* No more than 7 days after filing by email, the State will file with this Court the required number of paper copies of the brief and any addenda (six to Court of Appeals or 8 to Supreme Court). Upon request, the State will serve two paper copies thereof to the appellant's counsel of record. *See* Utah R. App. P. 26(b).