

2005

Utah v. McClellan : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
CARL MCCLELLAN,	:	Case No. 20051048-CA
	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM A CONVICTION FOR RAPE, A FIRST DEGREE
FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-5-402 (1988).
THE HONORABLE RAY M. HARDING, PRESIDING

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UTAH APPELLATE COURTS
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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction for rape, a first degree felony. This Court has jurisdiction of the appeal under UTAH CODE ANN. § 78-2a-3(2)(j) (West 2004).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Issue 1(A). Was trial counsel constitutionally ineffective for not moving to disqualify the entire Utah County Attorney's Office after defendant's pre-trial attorney took a position with that office?

Issue 1(B). Did the trial court commit plain error in not sua sponte disqualifying the entire county attorney's office?

Issue 2(A). Was trial counsel constitutionally ineffective for not challenging or removing a juror who worked as a court employee, and who had also previously worked with the prosecutor?

Issue 2(B). Did the trial court commit plain error in not sua sponte removing the juror?

Standard of review. All of the above claims are unpreserved. Defendant thus raises them under the doctrines of plain error and ineffective assistance of counsel. *See* Aplt. Br. at 1-2. “When an ineffective assistance of counsel claim is raised for the first time on appeal without a prior evidentiary hearing, it presents a question of law.” *State v. Alfatlawi*, 2006 UT App 511, ¶ 11, 153 P.3d 804 (quotation and citations omitted). However, “appellate review of counsel’s performance [is] highly deferential.” *State v. Holbert*, 2002 UT App 426, ¶26, 61 P.3d 21 (quotation and citation omitted). To show plain error, defendant must show “that the trial court committed an error that was both obvious and prejudicial.” *State v. Cruz*, 2005 UT 45, ¶ 24, 122 P.3d 543.

Issue 3. Is defendant entitled to a new trial based on his claim that he was surprised by admissible evidence—a recording of his police interview—where he never sought a continuance in the trial court?

Standard of review. “[A] trial court’s decision to admit or bar [evidence] for failure to adhere to discovery obligations lies within the trial court’s discretion.” *State v. Perez*, 2002 UT App 211, ¶ 24, 52 P.3d 451 (first brackets in original) (quoting *State v. Begishe*, 937 P.2d 527, 530 (Utah App. 1997)). However, a defendant confronted with unanticipated evidence, “essentially waive[s] his right to later claim error if [he] fails to

request a continuance or seek other appropriate relief.” *Id.* at ¶ 37 (case citation and quotation omitted) (first brackets in original).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

“In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense.” U.S. CONST. Amend. VI.

Other pertinent rules include Utah R. Prof'l Conduct 1.7, 1.9, 1.10, and 1.11, copies of which are attached in the addendum.

STATEMENT OF THE CASE

Charge. Defendant was charged with first-degree rape in 1988. R21.

Representation. Defendant was represented by the law firm of Aldrich, Nelson, Weight, and Esplin, and Phil Hadfield appeared with defendant at his 21 July 1988 preliminary hearing and his subsequent arraignment. R1-2, 19, 24-25, 293, 316-15. Trial was set for August 2, but continued to August 29. R293, 315.

On August 26—three days before trial—defendant appeared for a hearing on a defense motion to continue the trial again. R315, 293, 26-27. Defendant was represented at the hearing by another attorney from the same firm, James Rupper, because Hadfield had left the law firm to accept employment with the Utah County Attorney's Office, without telling defendant or seeking permission from the trial court to withdraw. R1, 26, 64, 293-92 & n.2, 315; R138:2, 7. Rupper sought the continuance “in order for defendant to have adequate representation.” R315, 26. When the trial court explained to defendant

when the next available trial date might be and that he would need to waive his speedy trial right, defendant refused. R26-27, 292, 315; R138:1.

Conviction. Trial went forth as scheduled, and the jury convicted defendant as charged. R67, 92-93, 112, 291, 315; R388:64.

Sentence. The trial court imposed the statutory indeterminate term of five years to life. R90-93, 291, 315.

New trial motion denied. On 3 October 1988, the trial court received a letter from defendant requesting a rehearing and listing alleged improprieties in his trial and sentencing, including his belief that trial counsel Rupper had not represented him “to his full extent[,]” that Hadfield left, and that Rupper had only a short time to prepare for trial. R94, 104, 291, 315. The trial court treated the letter as a Motion for a New Trial, and Rupper filed a formal memorandum in support of the motion. R117-23, 291, 315. Rupper’s memorandum additionally alleged that the trial court erred in admitting a tape recording of defendant’s police interview because, although it was relevant, the probative value of the recording was outweighed by the danger of unfair prejudice, the recording was not disclosed before trial and was therefore a surprise to defendant, and finally, the recording did not reflect that defendant was fully advised of his *Miranda* rights.¹ R117-123. The parties’ oral arguments were heard on 28 October 1988. R104-05. For the first time, Rupper raised the issue of a possible conflict of interest regarding Hadfield’s

¹See *Miranda v. Arizona*, 384 U.S. 436 (1966).

association with both parties to the case, but defendant “stated for the record that he waive[d] any appearance of conflict.” *Id.* The prosecutor thereafter filed a response addressing these and additional allegations that defendant was prejudiced by having women serve on the jury panel, and by having a female prosecutor and a female probation officer, and finally, that defendant was prejudiced because the jury was biased against him due to his race. *See* 113-115.

An evidentiary hearing was held on 3 February 1989, where both defendant and Hadfield testified. R126, 290. The trial court filed its memorandum decision on February 6 denying defendant’s motion on several grounds: 1) defendant had the same notice as the prosecution of the existence of a tape recording of his police interrogation, introduction of the tape at trial was not prejudicial, and defendant’s *Miranda* rights were not violated by the interrogation; 2) when Hadfield left, defendant was given counsel who was “relatively new to the case[,]” and defendant was offered and rejected a continuance of the trial; 3) there was no error in the presentence report, and the fact that it was prepared by a woman was irrelevant; 4) the jury panel was impartial and represented a fair cross-section of the community; and 5) in any event, if error existed, it was harmless. R127-28.

Notice of appeal. Defendant filed a timely notice of appeal on 22 February 1989. R130. Rupper withdrew as appellate counsel on 12 July 1990, Kent O. Willis appeared as defense counsel on 25 July 1990, and Don Elkins filed a substitution of counsel on 14 August 1991. R289, 315.

Dismissal for failure to prosecute. Following a delay in getting the record, this Court dismissed the appeal on 30 January 1992, because defendant failed to file a brief. R315, 289, 145.

Stipulation that defendant be re-sentenced. Pursuant to defendant's pursuit of post-conviction relief, the parties entered into a stipulation to have defendant re-sentenced nunc pro tunc. R314, 289-88. The district court issued an order on 24 May 1994, directing that defendant be re-sentenced. R288; R392:17. Re-sentencing, however, did not occur, and the order was never filed in the district court. R314, 288.

Destruction of exhibits. Two years later, on 7 May 1996, the lower court issued a Notice of Intent to Dispose of Exhibits and Order. R314, 157-58. Because no objection was lodged, the court disposed of the evidence on or after 10 June 1996. R314, 289-288, 157.

Re-sentencing. Defendant eventually became aware of the re-sentencing order, and, in 2004, sought to enforce it. R314, 287. The district court appointed a public defender and ultimately ordered defendant re-sentenced in order to permit him to file a direct appeal. R 372-73, 314, 287; R392; *passim*. Re-sentencing occurred on 4 October 2005, with the court continuing the original sentence and denying all the post-trial motions defendant had filed. R373.

Notice of appeal. Defendant filed a timely notice of appeal from his re-sentencing on 3 November 2005. R378-75, and an amended notice of appeal on 10 November 2005. R380-79.

Pour over order. The Utah Supreme Court poured the matter over to this Court on 13 December 2005. R586.

Rule 23B remand denied. Defendant thereafter filed a motion for remand under rule 23B, Utah Rules of Appellate Procedure, to conduct an evidentiary hearing to develop a record in support of his ineffective assistance of counsel allegations, among others, that pre-trial counsel Hadfield and trial counsel Rupper rendered constitutionally deficient performance in numerous respects. *See* Rule 23B Motion For Remand filed 15 December 2006. The State opposed the motion. *See* State's Response in Opposition to Defendant's 23B Motion to Remand filed 20 February 2007. This Court denied the motion on the grounds that it was "based largely on the assertion of facts already of record," and also "fails to set forth any nonspeculative facts that establish ineffective assistance and resulting prejudice." *See* Order filed 5 March 2007.

STATEMENT OF THE FACTS

Defendant raped Judy Tidwell, a "profoundly deaf" nineteen-year-old woman while she was home on her lunch break from her job at the American Fork Library. R317-16.

* * *

On 5 July 1988, defendant was working as a salesman and sold cleaning products in Judy's neighborhood. R138:188-189. Defendant employed a sales pitch that included flattering comments to potential female customers. R138:142-43, 147, 200-01. Defendant approached two women who lived within a few houses of Judy. R138:141, 146. Defendant asked Gwen Kegerreis if she was "'a model or something,'" and said, "'You look like you might be in Hollywood.'" R138:142. Defendant's flattery made Gwen feel "weird." R138:142-43. Similarly, when Verna Stockwell answered the door, defendant exclaimed, "'Oh, you can't be the mother. You must be one of the daughters.'" R138:147.

Defendant visited Judy twice that day, first between 1:00 and 1:30 p.m., and a second time at about 4:30 p.m. R138:70, 116, 189, 196. The first time, Judy was home alone; her family was on vacation in California. R138:55. Judy called her friend, Richard Scott, ate lunch, and went to her room. R38:66-67. While in her room, she heard someone come in the front door, but she did not hear a knock. R138:67, 82. Although she had impaired hearing, she could hear loud noises from room to room, and the front door had a metal security door that banged loudly. R138:53-54, 83. Judy thought her brother had come home for lunch, but when she came out of her room, defendant was standing in the house. R138:67. Judy was scared. *Id.*

Defendant was wearing a gray, button-down shirt and gray pants with white lines. R138:69. He wore a nametag, which Judy did not read. R138:85. He had a bag of what

looked like cleaning supplies. R138:70-71. Defendant's voice was low and Judy had difficulty understanding him, and in reading his lips. R138:86. The first thing she understood was that defendant wanted her "to have sex with him." R138:67, 86. When she refused, defendant gave her a choice, "have sex now" or "[h]e [would] kill [her.]" R138:67.

Judy just stood there, scared. *Id.* Defendant "grabbed . . . [her] arm, and he threw [her] into the living room." *Id.* He laid her on the couch, and "started to take off [her] clothes." *Id.* Defendant "took off his clothes" and Judy "closed [her] eyes after that because [she] didn't want to see him do it." R138:68. Defendant penetrated Judy twice, and liquid came out of his penis. R138:68-69, 95-96. Judy screamed, struggled, hit defendant in the stomach, and pushed him away. R138:68-69, 91. Judy dressed in the same clothes without cleaning herself and ran to her room. R138:70, 96. Defendant came to her door and tried to get her to come out. R138:70. She grabbed a baseball bat, came out of her room, and drove him off. R138:70. After the assault, Judy went to work. R138:72.

Judy got off work at 4:00 p.m. and returned home. R138:72. She "locked the door behind [herself], and then [she] just went and sat down and watched TV . . . to do something." R138:72. "Then [she] heard a door knock, and [she] thought that it could be [her] brother Dennis knocking on the door" R138:72, 119-20. Judy opened the door, but instead of her brother, it was defendant. R138:73. Just then, the phone rang and Judy

answered it. R138:73. When she finished, she “turned around and he was standing right by [her].” *Id.* Defendant asked for a drink of water (R138:196), and Judy gave him one. R138:73, 120. Then defendant “picked [her] up” and “squeezed [her] hard.” R138:73. Fortunately, Judy told defendant her brother was coming and he “dropped [her] on the floor and then . . . left.” Judy locked the door and “was just scared to talk to anyone.” R138:73.

Judy reported the rape that evening, and was examined for sexual assault. R138:126, 168. There was, thus, a twelve-hour delay in taking physical samples for testing. R138:128-29, 139. The examining physician found no evidence of external injuries other than a bruise on her inner right thigh that appeared to be several days old. R138:126. The doctor also noted that the inner lip of the labium minora was slightly reddened, but that the hymen was not torn. R138:126-28. The doctor determined that fluid from Judy’s vagina was negative for sperm. R138:128. Although the physical evidence was inconclusive, including a lack of seminal fluid, nothing the doctor observed was inconsistent with Judy’s history. R138:128-29. Moreover, a criminalist at the Utah State Crime Lab testified that approximately 40% of rape cases are negative for seminal fluid; therefore, the results in this case were not unusual. R138:137-38.

The next morning, 6 July 1989, Judy was interviewed by police. R138:168. She was “[s]omewhat confused,” and “unsure of herself.” *Id.* at 169. Judy told police that her

attacker did not ejaculate, but the police “doubted whether she even knew the definition.” *Id.* at 181-82. Judy also doubted she could identify her attacker. *Id.* at 182.

However, when officers met with her the next morning, on 7 July 1989, they showed Judy pictures of individuals who had applied for sales licenses in American Fork. Although she could not positively identify defendant, Judy “made some indications” that defendant’s picture “was similar.” R138:75, 170-71. One of the officers noticed some redness on Judy’s upper arm. *Id.* at 172.

During a follow-up interview later that day, Lieutenant Tarry Fox noticed four finger-shaped bruises on Judy’s upper left arm. *Id.* at 114. Judy told Lieutenant Fox that defendant did not ejaculate, but that he penetrated her twice. *Id.* at 119.

On 8 July 1989, police showed Judy a photo lineup of salesmen working in American Fork on the day of the rape. *Id.* at 171. Judy picked out defendant’s picture. *Id.* at 172. Sergeant Cornia noted that the redness on Judy’s upper arm had turned into a bruise. *Id.*

Later that day, Detective Ron Allen worked with Judy to prepare a composite drawing of the rapist. *Id.* at 159-60. Detective Allen observed that Judy “was visibly shaken at the composite . . .” *Id.* at 161. Detective Allen also testified that Judy had a good recollection of what her assailant looked like and gave specific descriptions. *Id.* In his opinion, Detective Allen felt something had happened, and that when found the assailant “would look very much like the composite.”

That same day, the police picked up defendant in Orem and transferred him to American Fork. *Id.* at 163-64. Lieutenant Fox interviewed defendant in the presence of Officer Eckersley. *Id.* at 114-15; R388:9. Defendant initially stated that he had been to Judy's house only once at around 1:15 p.m. R138:116. When challenged, defendant admitted to lying. *Id.* at 116; R388:29-30.

Defendant's version. At trial, defendant denied ever telling Lieutenant Fox that he had only been to Judy's house one time. R138:200. However, after the State played sections of his recorded police interview for the jury, defendant acknowledged that he had admitted lying during the police interview. R388:29.

Defendant also testified that he did not enter Judy's house on his first visit. R138:192. Rather, he claimed only to have given his sales pitch, and asked if anyone else had been around trying to sell the cleaning product, and otherwise conversed with Judy. R138:190, 193. Specifically, defendant asked Judy if she had a boyfriend. R138:198. According to defendant, he meant the question as a compliment. R138:202. He claimed that Judy offered him her telephone number, and that he thought she just wanted attention. R138: 193, 198. At some point during the conversation, defendant learned that Judy's parents were on vacation. R138: 197-98. Defendant also noticed that Judy was wearing a hearing aid, but claimed that they had no problem communicating. R138:198.

On his second visit, defendant claimed to have entered Judy's house "because she was going to give [him] a glass of water." R138:199. According to defendant, he was

“walking past” and “just asked her for a glass of water.” R138:196. He claimed his supervisor instructed him to go back down Judy’s street to cover ground that another salesman, who was inexperienced, had worked. R138:194.

Although defendant told police that he and Judy were “fooling around,” at trial, he denied touching Judy in any manner. R138:117, 193, 197; R388:18.

SUMMARY OF THE ARGUMENT

Point I. Defendant asserts that because pre-trial counsel Hadfield had a conflict of interest, the entire Utah County Attorney’s Office had a conflict of interest when he became employed there and should have been disqualified from this case. Defendant argues that his trial counsel was therefore ineffective for not moving to disqualify the county attorney’s office and that the trial court plainly erred in not doing so sua sponte. The majority of jurisdictions recognize that, unlike attorneys in a civil firm, an entire county attorney’s office is not disqualified merely because one of its members formerly represented the defendant, so long as the prosecutor with the conflict of interest is screened. Here, the record suggests that Hadfield was in fact screened from this case after he accepted employment with the county attorney’s office. Thus, absent any contrary evidence, defendant’s assertion that Hadfield’s conflict of interest should be imputed to the entire county attorney’s office lacks merit. Accordingly, trial counsel Rupper was not constitutionally ineffective for not moving to disqualify the entire Utah

County Attorney's Office, and the trial court did not plainly err in failing to do so sua sponte.

Point II. Defendant asserts that trial counsel was constitutionally ineffective for not using a peremptory challenge to remove a juror who was the court administrator's secretary and had also previously worked with the prosecutor. He alternatively asserts that the trial court plainly erred in not sua sponte removing the juror for cause. A trial counsel's retention of a particular juror is presumed to be a conscious choice or preference. Because the process of jury selection is highly subjective, it is further presumed that counsel performed effectively in selecting the jurors. These presumptions can be rebutted only by evidence that trial counsel was inattentive or indifferent during the selection process, or that a prospective juror expressed bias so strong that no plausible countervailing subjective preference could justify the juror's retention. Here, defendant has not pointed to any such evidence or deficiency in trial counsel's performance. Nor can he. The potential juror expressed no strong bias, and trial counsel actively participated in the selection process. For instance, he unsuccessfully challenged and ultimately used a peremptory challenge on another juror who was also a court employee. It is thus reasonable to infer that trial counsel discerned some qualitative difference between the two jurors.

Additionally, in this context, defendant can only demonstrate prejudice if he can show that counsel's alleged deficiency resulted in a biased juror sitting. Defendant

provides no authority that jurors who are court employees, or jurors that have previously worked with the prosecutor, are biased as a matter of law. He therefore fails to demonstrate that the disputed juror was biased or that any prejudice occurred. He thus fails to show that trial counsel was constitutionally ineffective.

For essentially the same reasons, defendant also fails to show that the trial court plainly erred in not sua sponte removing the juror. Indeed, it is generally inappropriate for a trial court to interfere with counsel's conscious choices in the jury selection process. Because neither the juror's current nor past employment gave rise to a bias or conflict so strong or unequivocal as to inevitably taint the trial process, and because the juror assured the court that nothing in her work experience would make it difficult to be fair or impartial in this case, the trial court properly refrained from overruling trial counsel's strategy.

Point III. Defendant asserts that the trial court erred in admitting a recording of his police interview on rebuttal because the prosecution team had not disclosed before trial that the interview had in fact been recorded. Defendant, however, also agreed that the recording was admissible for rebuttal purposes, but did not ask for a continuance to meet the claimed surprise. His allegation of error due to surprise on appeal is thus foreclosed. In any event, defendant suffered no prejudice. Defendant and trial counsel were fully aware before trial that defendant was interviewed and the substance of his statements. The recording was admitted only to rebut or impeach defendant's trial

testimony wherein he disagreed with the earlier testimony of the interviewing officer regarding his recollection of the interview. Rebuttal evidence is not the kind of surprise testimony that justifies a new trial. Moreover, defendant does not assert that he would have conducted his defense differently if he had known of the recording before trial. Defendant thus fails to show that he is entitled to a reversal on appeal.

ARGUMENT

POINT I

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT MOVING TO DISQUALIFY THE ENTIRE UTAH COUNTY ATTORNEY'S OFFICE AFTER DEFENDANT'S PRE-TRIAL ATTORNEY TOOK A POSITION WITH THAT OFFICE; NOR DID THE TRIAL COURT COMMIT PLAIN ERROR IN NOT SUA SPONTE DISQUALIFYING THE ENTIRE COUNTY ATTORNEY'S OFFICE

In Point I of his brief, defendant asserts that “his right to due process and competent counsel were violated by his [pre-trial] attorney’s (Hadfield’s) abandonment of his representation for employment with the prosecuting agency immediately prior to trial.” Aplt. Br. at 20-21. Defendant thus asserts that trial counsel Rupper, “was ineffective in failing to move the court to disqualify the Utah County Attorney’s Office due to Hadfield’s conflict of interest,” and that the trial court plainly erred by not sua sponte moving “to disqualify the Utah County Attorney’s office.” Aplt. Br. at 21.

The State does not dispute defendant’s assertion that pre-trial counsel Hadfield had a conflict of interest in this case, given his prior representation of defendant. *See* Aplt. Br. at 24 (citing Utah Rules of Professional Conduct). However, because it is pre-trial

counsel Hadfield and not trial counsel Rupper who had the conflict of interest, defendant must do more than merely assert that Hadfield had a conflict of interest. Rather, the only way defendant can prevail is to show that Hadfield was not screened from the instant prosecution when he took a position with the county attorney's office. The record, however, suggests that Hadfield was in fact screened. To the extent it does not, record gaps are resolved in favor of trial counsel's effectiveness. Defendant thus cannot show that his trial counsel performed ineffectively or that the trial court plainly erred.

A. Defendant has not proven either *Strickland* prong.

To prevail on a Sixth Amendment ineffectiveness claim, defendant must "show that counsel's performance was deficient" *and* that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A failure to establish either prong defeats the defendant's claim. *See id.* at 687, 697.

1. Defendant has not shown that his trial counsel performed deficiently.

To satisfy the first *Strickland* prong, defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "Nonetheless, this court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect." *State v. Tennyson*, 850 P.2d 461, 465 (Utah App. 1993). Rather, a defendant must "overcome the strong presumption that counsel's performance fell 'within the wide range of reasonable professional assistance' and that 'under the circumstances, the challenged action "might

be considered sound trial strategy.””” *Id.* (quoting *Strickland*, 466 U.S. at 689). Because of *Strickland*’s “strong” presumption, this Court “need not come to a conclusion that counsel, in fact, had a specific strategy in mind.” *Id.* at 468. There need only be “some plausible strategic explanation for counsel’s behavior.” *Id.* Indeed, “an ineffective assistance claim succeeds only when *no* conceivable legitimate tactic or strategy can be surmised from counsel’s actions.” *Id.* (Emphasis added). Finally, counsel need not make futile objections. *See State v. Kelly*, 2000 UT 41, ¶ 26, 1 P.3d 546.

Contrary to defendant’s assertion on appeal, the record does not support that trial counsel was deficient for not moving to disqualify the entire county attorney’s office. Rather, as will be shown below, the record suggests that Hadfield was in fact screened from the instant prosecution after he took a position with the county attorney’s office. Therefore, any such motion would have been futile.

As a general rule, a lawyer who has formerly represented a client in a matter may not represent another client in the same or substantially related matter. *See, e.g., Utah R. Prof’l. Conduct* 1.7, 1.9, 1.10, and 1.11.² Moreover, in a criminal context, due process is violated when, “subsequent to the establishment of an attorney-client relationship, the attorney participates in the prosecution of his former client.” *Lux v. Commonwealth*, 484

²Copies of these rules are attached in the addendum. Although rule 11.1 governs “special conflicts of interest for former and current government employees,” the rule is focused more on the circumstance of where a government lawyer enters private practice, rather than where a defense attorney accepts a position with a government agency.

S.E.2d 145, 150 (Va. App. 1997). There is no due process violation, however, “when the defendant’s lawyer-turned prosecutor has knowledge of relevant client confidences but is screened from participating in the defendant’s prosecution.” *Id.* Although Utah has not decided this specific issue, “[t]he majority of jurisdictions do not *per se* disqualify the entire prosecutor’s office solely because one member of the staff had represented the defendant in a related matter.” *Id.* at 151 (collecting cases). *See also* Wendy A. Reece, *Professional Responsibility Switching Sides: Analyzing Lux v. Commonwealth—Does the Presence of a Criminal Defendant’s Former Counsel in a Prosecutor’s Office Require Disqualification of the Entire Office?*, 21 Am. J. Trial Advoc. 431 (1997) (same). Rather, the majority of jurisdictions “permit another prosecutor to handle the case if the defendant’s former counsel has been effectively screened from participating in the prosecution.” *Lux*, 484 S.E.2d at 150-51. The policy undergirding the majority view is that “a prosecutor’s public duty to seek justice rather than profits in combination with an effective ‘chinese wall’ provides an adequate safeguard against the improper disclosure of a defendant’s confidences. *Id.* at 151. *Accord State v. Stenger*, 760 P.2d 357, 361 (Wa. 1988) (recognizing that when there is effective screening “then the disqualification of the entire prosecuting attorney’s office is neither necessary nor wise”). Further, “a *per se* rule results in the unnecessary disqualification of prosecutors in cases where the risk of a breach of confidentiality is slight and inhibits the ability of prosecuting attorney’s offices to hire the best possible employees.” *Lux*, 484 S.E.2d at 151 (citation omitted).

Accordingly, the Virginia Court of Appeals adopted a “case-by-case approach” that allows for the protection of a defendant’s due process concern or “the disclosure of confidences revealed to his attorney during the attorney-client relationship—while avoiding unnecessary disqualifications and other disruptive effects that a *per se* rule would have on [county attorney’s] offices.” *Id.* While ethical rules should strive to “avoid the appearance of impropriety,” the Virginia court correctly recognized that “a criminal defendant’s constitutional right to due process does not entitle him to a prosecution free of such appearances.” *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). Rather, “a criminal defendant is denied due process only when his former counsel joins a [county attorney’s] office and is not effectively screened from contact with the [county’s] attorneys who are handling the defendant’s case on a related matter.” *Id.*

Here, there is no nonspeculative evidence—and defendant makes no assertion—that Hadfield was not effectively screened. *See* Aplt. Br. at 20-25. Indeed, defendant does not assert, and there is no indication, that Hadfield disclosed any confidences of defendant’s to the trial prosecutor. *Id.* Moreover, the record supports that the trial judge and both parties were aware of the situation and were satisfied that everything was done appropriately so as to avoid any due process concern. All were fully aware of Hadfield’s withdrawal prior to trial, and all acted appropriately to ensure that defendant would not be prejudiced by Hadfield’s withdrawal so close to trial: the

prosecutor did not object to a continuance, the trial court was willing to grant one, and Rupper actively pursued one. R26-27, 112. Days later, the prosecutor properly took the precaution of mentioning Hadfield to the jury to identify and resolve any potential problem which might have arisen from Hadfield's prior involvement in the case. R138:7. The absence of any follow-up or objection by the trial court or Rupper speaks volumes of the fact that the situation was not a surprise to them and that it had been dealt with in a way that warranted no reaction at that point. As noted previously, nothing indicated that Hadfield had any continued involvement in the case, and defendant presents nothing. *See* Aplt. Br. at 20-25. *See also State v. Brown*, 853 P.2d 851, 858 (Utah 1992) (emphasizing it is "simultaneous" or "dual representation" that "erodes public confidence in the criminal justice system").

Finally, both defendant and Hadfield testified under oath at a post-trial hearing on defendant's motion for new trial. R126 (minute entry of 3 February 1989 hearing); R290 (excerpt from defendant's new trial motion). Although the recordings of this hearing were apparently destroyed, defendant did not support his failed motion for a rule 23B remand with an affidavit from either trial counsel Rupper, who represented him at the hearing, or pre-trial counsel Hadfield, concerning the substance of Hadfield's testimony at that hearing. *See* Rule 23B Motion for Remand dated 15 December 2006, and Order dated 5 March 2007. In this ineffectiveness context, gaps in the record are defendant's burden. *See State v. Litherland*, 2000 UT 76, ¶ 16, 12 P.3d 92 ("[W]e now hold as

follows: where, on direct appeal, defendant raises a claim that trial counsel was ineffective . . . defendant bears the burden of assuring the record is adequate”). “The necessary consequence of this burden is that an appellate court will presume that any argument of ineffectiveness”—or as in this case, ineffectiveness *and* plain error—“presented to it is supported by all the relevant evidence of which [the] defendant is aware.” *Id.* at ¶ 17. Thus, any “ambiguities or deficiencies . . . simply will be construed in favor of a finding that counsel performed effectively.” *Id.* This presumption accords with the “fundamental policies dictated by *Strickland*,” that ““court[s] must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,”” *Id.* (quoting *Strickland*, 466 U.S. at 689), “and with the general rule that record inadequacies result in an assumption of regularity on appeal.” *Id.* (citation omitted).

Based on the above, defendant has not established that Hadfield was not screened here, or that any due process violation occurred. Accordingly, defendant cannot show that a motion to disqualify the entire county attorney’s office would have been successful, or that trial counsel Rupper rendered constitutionally deficient performance in not so moving. *See Kelly*, 2000 UT 41, ¶ 26.

2. Defendant has not shown any prejudice.

Defendant likewise has not proven that trial counsel Rupper’s alleged deficient performance prejudiced him. *Strickland*’s prejudice prong can be met “only by showing

there is a reasonable probability that ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Tennyson*, 850 P.2d at 466 (quoting *Strickland*, 466 U.S. at 694). If defendant could show that Hadfield was not screened from the instant prosecution after he joined the county attorney’s office, presumably he could also establish prejudice. *Cf. Lux*, 484 S.E.2d at 576 (holding, in a case *not* involving a claim of ineffectiveness, that commonwealth failed to meet its burden of proving that it had implemented effective screening procedures to prevent the disclosure of Lux’s confidences; therefore, trial court abused its discretion when it denied Lux’s motion to disqualify the commonwealth’s attorney); *Reaves v. State*, 574 So.2d 105, 107 (Fla. 1991) (per curiam) (stating that failure to properly screen a prosecutor who is disqualified may require disqualification of the entire state attorney’s office). However, for the same reasons defendant has not shown deficient performance, he has not shown prejudice. As set forth above, the record suggests that Hadfield was screened from the instant prosecution. Defendant has not carried his burden of proving otherwise.

B. Defendant has not shown plain error.

Defendant alternatively claims that the trial court plainly erred in not sua sponte disqualifying the entire Utah County Attorney’s Office. Aplt. Br. at 21. To show plain error, a defendant must show “that the trial court committed an error that was both obvious and prejudicial.” *State v. Cruz*, 2005 UT 45, ¶ 24, 122 P.3d 543. “The prejudice test for ineffective assistance of counsel claims is equivalent to the harmfulness test

applied in assessing plain error.” *State v. Parker*, 2000 UT 51, ¶ 10, 4 P.3d 778. If any one prong is unmet, the others need not be addressed. *See State v. Germonto*, 868 P.2d 50, 61 (Utah 1993).

For the same reasons that defendant has not shown that trial counsel Rupper was constitutionally ineffective, he has not shown that the trial court plainly erred in not sua sponte disqualifying the entire county attorney’s office. As set forth in Point I(A), *supra*, the record suggests that Hadfield was in fact screened from the instant prosecution after he joined the county attorney’s office. No evidence to the contrary has been presented. Therefore, no error occurred here, let alone an obvious and prejudicial due process violation. Defendant’s plain error claim may be rejected on any one of these grounds. *Id.*

* * *

In sum, defendant’s mere assertion, without more, that because pre-trial counsel Hadfield had a conflict of interest, “the Utah County Attorney’s Office also had a conflict of interest and should have been disqualified from this case,” is unavailing. Aplt. Br. at 24. First, as set out above, the majority of jurisdictions recognize that unlike attorneys in a civil firm, an entire county attorney’s office is not disqualified merely because one of its members formerly represented the defendant, so long as the prosecutor with a conflict of interest is screened. Second, the record suggests that Hadfield was in fact screened here. Thus, absent any contrary evidence, defendant’s assertion that Hadfield’s conflict of interest should be imputed to the entire county attorney’s office lacks merit. Trial counsel

Rupper was not constitutionally ineffective for not moving to disqualify the entire Utah County Attorney's Office, and the trial court did not plainly err in failing to do so sua sponte.

POINT II

TRIAL COUNSEL WAS NOT CONSTITUTIONALLY INEFFECTIVE FOR NOT FURTHER QUESTIONING, CHALLENGING, OR USING A PEREMPTORY CHALLENGE ON A JUROR WHO WAS A COURT EMPLOYEE AND HAD ALSO PREVIOUSLY WORKED WITH THE PROSECUTOR; NOR DID THE TRIAL COURT PLAINLY ERR IN NOT SUA SPONTE REMOVING THE JUROR

In Point II of his brief, defendant asserts that Juror Williams, a court employee who had also worked with the prosecutor, was biased and had a per se conflict of interest. Aplt. Br. at 26 (characterizing Juror Williams as “an individual who had a conflict of interest”); *see also* Aplt. Br. at 29-30. Accordingly, defendant asserts that his trial counsel rendered ineffective assistance of counsel in not further questioning, challenging, or using a peremptory challenge on Juror Williams, and that the trial court committed plain error in not sua sponte removing the juror. Aplt. Br. at 26, 30.

Proceedings below. During voir dire, the trial court asked the venire panel if they knew any of the attorneys or witnesses associated with the prosecutor. R138:8; *see also id.* at 7. Juror Johnson lived next door to Officer Cornia, who would be testifying for the prosecution. *Id.* at 8. He expressed that “[i]t might be a problem,” when asked if his relationship to the officer would make it difficult to be fair and impartial. *Id.* at 8-9.

Juror Douglas knew the prosecutor through her work as a clerk at the Spanish Fork Circuit Court. *Id.* at 9. She denied that her relationship with the prosecutor would “create a problem for [her] in acting fairly and impartially as a juror.” *Id.* Juror Powell knew a prosecution witness, but expressed that it would not affect her ability to be fair and impartial. *Id.* at 10. Juror Williams had worked with the prosecutor “for a few months a few years ago.” *Id.* She responded negatively when asked if there was “anything in that relationship which would make it difficult for [her] to act fairly and impartially as a juror.” *Id.* Finally, Juror Mulenstein knew the County Attorney, Steven Killpack, but denied that the acquaintance would impede her ability to be fair and impartial. *Id.* at 11.

Next, the trial court asked the jury venire if they knew any of the attorneys or witnesses associated with the defense. Juror Douglas was familiar with defendant through her work as a court clerk, but again denied that it would make it difficult for her to be fair and impartial. *Id.* at 12. No other jurors indicated that they knew the defense attorneys or witnesses.

The trial court also asked the venire panel if they had close family members who worked as police officers, or if they had close friends who worked in law enforcement. Only Juror Johnson responded, again expressing that he was friendly with Officer Cornia. *Id.* at 14.

Finally, several jurors expressed that they were acquainted with each other, but no juror expressed that it would impede their ability to be fair and impartial. *Id.* at 14-17.

Several jurors indicated that they had read and heard about the rape charge from various media sources, but none of them thought it would affect their ability to be fair and impartial. *Id.* at 18-20. All jurors responded negatively when asked if defendant's race would affect their impartiality. *Id.* at 20.

When the jurors introduced themselves to the parties, Juror Douglas again indicated that she was a clerk at the Spanish Fork Circuit Court. *Id.* at 23. Juror Williams said she was "a secretary to the court administrator here in the district court." *Id.* at 26.

At the conclusion of the trial court's voir dire, the trial court asked if the parties had any additional questions for the venire panel. *Id.* at 29. Defendant's trial counsel asked to probe Juror Johnson about his friendship with Officer Cornia. *Id.* In response, the trial court stated, "You won't need to counsel." *Id.*

Trial counsel indicated that he also had additional questions for Juror Douglas concerning her position as a court clerk. *Id.* Trial counsel was concerned that given Juror Douglas's experience in the "court area," the other jurors "may look more to her for leadership." *Id.* at 31.

Trial counsel also asked Jurors Edwards and Hazlett, who were both from American Fork," if the fact that the victim was also from American Fork would influence them in any way, which they denied. *Id.* Trial counsel then asked whether any of the venire members knew the victim. *Id.* at 33. Finally, trial counsel asked whether the fact that the victim was white and defendant was black would cause jurors to credit the

victim's testimony over that of defendant, and whether the fact that defendant was from an urban area, Chicago, would cause them to treat him differently. *Id.* at 33-34.

Following jury selection, the trial court made a record of the fact that it had "agreed at bench that [Juror] Johnson could be excused for cause on motion of plaintiff." *Id.* at 38. The trial court also noted that trial counsel had submitted written questions for the jury, and that it had given "those which it felt was appropriate and denied giving any of those which it had not expressly given or given through implication and other instructions." *Id.* The trial court specifically noted that with reference to the "handicap of the prosecutrix," the trial court would give "its standard instruction to the jury about not being influenced by the prejudices or unfairness, and it should reflect any verdict based thereon." *Id.* The trial court then asked if trial counsel wanted to make any other "express exception," to which trial counsel responded affirmatively. *Id.* Trial counsel then took exception to the trial court's refusal to ask whether the venire panel would have been sympathetic to the victim given her deafness, and also noted that the trial court had overruled his motion to challenge Juror Douglas for cause, due to her employment as the clerk of the Spanish Fork Circuit Court. *Id.* at 38-39.

As can be seen, trial counsel actively participated in selecting the jury. He submitted written questions to the trial court, made one unsuccessful challenge for cause, and may well have moved to challenge Juror Johnson, but the trial court indicated that it would not be necessary as he was already planning to excuse that juror. Trial counsel

also suggested that the trial court specifically inquire into questions of race, disability, and urban versus rural attitudes. Finally, trial counsel used all four of his peremptory challenges. *See* R63. Specifically, trial counsel peremptorily challenged Jurors Douglas, Edwards, Hazlett, and Smith. *Id.* The prosecution likewise used all four of its peremptories, removing Jurors Gates, Millet, W. Johnson, and Clark. *Id.* No one removed Juror Williams and she sat on the jury.

A. Defendant has not proven either *Strickland* prong.

Defendant argues that trial counsel performed deficiently for failing to further question, challenge, or use a peremptory challenge on Juror Williams. *Aplt. Br.* at 30-32. To prevail on a Sixth Amendment ineffectiveness claim, defendant must “show that counsel’s performance was deficient”*and* that “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687. A failure to establish either prong defeats the defendant’s claim. *See id.* at 687, 697.

1. Defendant has not shown that trial counsel performed deficiently.

As set out more fully in Point I(A)(1) of this brief, to satisfy the first *Strickland* prong, defendant “must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Additionally, when, the ineffectiveness claim is that trial counsel failed to object to or remove a particular juror, “the *Strickland* standard requires the appellate court to make two distinct presumptions.” *State v. Litherland*, 2000 UT 76, ¶ 20, 12 P.3d 92. First, “trial counsel’s lack of

objection to, or failure to remove, a particular juror is presumed to be the product of a conscious choice or preference.” *Id.* Second, “because the process of jury selection is a highly subjective, judgmental, and intuitive process, trial counsel’s presumably conscious and strategic choice to refrain from removing a particular juror is further presumed to constitute effective representation.” *Id.* In short, an “appellate court will presume that counsel’s lack of objection to, or failure to remove, a particular juror was the result of a plausibly justifiable conscious choice or preference.” *Id.* at ¶ 25.

To rebut these presumptions, defendant must show that (1) “defense counsel was so inattentive or indifferent during the jury selection process that the failure to remove a prospective juror was not the product of a conscious choice or preference”; (2) “a prospective juror expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror”; or (3) “there is some other specific evidence clearly demonstrating that counsel’s choice was not plausibly justifiable.” *Id.*

Finally, the burden is on defendant to prove his ineffective assistance of counsel claim on appeal and to ensure that the record is adequate for him to do so. *Id.* at ¶ 16. The natural consequence of that burden “is that an appellate court will presume that any argument of ineffectiveness presented to it is supported by all the relevant evidence of which defendant is aware.” *Id.* at ¶ 17. “Where the record appears inadequate in any

fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively.” *Id.*

Defendant has not overcome any of the foregoing presumptions with respect to his trial counsel’s decision to not remove Juror Williams. Indeed, defendant’s claim rests entirely on his assumption that Juror Williams was biased against him. *See* Apl’t. Br. at 30 (asserting that Williams had “an obvious conflict of interest that inevitably tainted the trial process”). Defendant makes that assumption based solely on the fact of Williams’s employment as a secretary to the court administrator and her short, unspecified, prior working relationship with the prosecutor. *Id.* Defendant does not assert that Juror Williams had prior knowledge of his case, only that her courthouse employment constituted an “obvious conflict of interest.” *Id.*

Notably, defendant points to no statute or court rule mandating “that prejudice is to be presumed from one’s employment as a deputy clerk,” let alone an administrative secretary, as in this case. *State v. McKinney*, 609 N.E.2d 613, 617 (Ohio App. 1992) (rejecting McKinney’s claim that defense counsel was constitutionally deficient for not objecting to juror who was also a deputy court clerk). Nor does he point to any case law—and the State is aware of none—holding that court personnel or any “state employee is [] or . . . automatically disqualified from serving as a juror where the state is a party and where actual bias is lacking.” *Id.* (citation omitted). *See also Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O’Connor, J., concurring) (“Some examples [of implied bias] might

include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction”).

To the contrary, defendant recognizes that this Court has “concluded that ties to law enforcement by potential jurors did not establish bias.” Aplt. Br. at 30. Defendant relies on *State v. Ramos*, 882 P.2d 149 (Utah App. 1994), to support his claim. But, in rejecting Ramos’s claim of juror bias, this Court found it significant that the juror at issue, who had spent twenty years as a police dispatcher, never made any statement indicating bias based on his former occupation. *Id.* at 152-54. Rather, the Court observed that Ramos’s objection to the juror was based solely on the juror’s comments reflecting his law enforcement background and experience. *Id.* at 153-54. Accordingly, the juror’s statement that his prior law enforcement experience would not affect his opinion sufficed to dispel any possible question of bias in that case. *Id.* at 154. The same result should obtain here. Because Juror Williams never made any statement indicating bias based on her employment as secretary to the court administrator or her prior unspecified working relationship with the prosecutor, her denial that her work experience would affect her opinion in this case sufficed to dispel any possible question of bias. *See* R138:9; *see also Ramos*, 882 P.2d at 154.

Defendant seeks to distinguish the result in *Ramos* by alleging that Juror Williams's employment "by the court charged with administering justice in this matter," together with her "previous working relationship" with the prosecutor, suggests a stronger possibility of bias than did the *Ramos* juror's former law enforcement experience. *See* Aplt. Br. at 30 ("An independent judiciary is one of the basic tenets of American government and jurisprudence. Essentially [Juror Williams] and Judge Harding were colleagues in the judicial branch of Utah government"). Defendant's attempt to distinguish *Ramos* fails for essentially two reasons. First, a juror who is also a court employee "does not give rise to the same inference of bias or prejudice which arises from a relationship or close acquaintance with law enforcement or prosecutorial officers charged with an adversarial function." *State v. Brown*, 355 S.E.2d 614, 620 (W.Va. 1987). Second, although Juror Williams had previously worked with the prosecutor for a short period of time, she was serving as a court employee at the time she was called to jury duty. R138:26. Juror Williams felt comfortable referring to the prosecutor by her first name, but she also assured the trial court that her prior working relationship with the prosecutor would not affect her ability to be fair and impartial in this case. R138:10. Defendant thus has presented nothing that would support a conclusion that Juror Williams was biased as a matter of law. Although defendant asserts that Juror Williams should have been further questioned, he does not identify those questions, let alone demonstrate that Juror Williams was biased, given that the trial court questioned Juror Williams as to

her “ability to be unbiased and to fairly evaluate the evidence, and the trial court, as well as trial counsel, were apparently satisfied with [Juror Williams’s] responses.” *State v. Robertson*, 2005 UT App 419, ¶¶ 10-11, 122 P.3d 895 (rejecting Robertson’s claim that juror whose brother-in-law was employed in law enforcement was biased as a matter of law).

Moreover, as in every criminal case, trial counsel “had an opportunity to examine . . . each juror’s body language and facial expressions, and the reactions that each juror had to the information that was presented to them.” *Id.* at ¶ 11. Thus, trial counsel “easily could have identified some factor present in any or all of these observations that led him to believe that [Juror Williams was] well suited to serve on [defendant’s] jury.” *Id.* This view is made all the more likely by trial counsel’s decision to challenge Juror Douglas, who was also a court employee, but not Juror Williams. *See* R138:38-39. Because trial counsel unsuccessfully challenged and ultimately used a peremptory challenge on Juror Douglas, it is reasonable to infer that “trial counsel discerned some qualitative difference” between Juror Douglas, the court clerk he challenged for cause, and Juror Williams, the court administrative secretary whom he did not challenge.³ *State v. Simmons*, 2000 UT App 190, ¶ 16, 5 P.3d 1228 (inferring “from trial counsel’s different treatment of the two

³Defendant sought remand on this question under rule 23B, Utah Rules of Appellate Procedure. *See* Rule 23B Motion for Remand, dated 15 December 2006. This Court denied the motion because defendant failed “to set forth any nonspeculative facts that establish ineffective assistance and resulting prejudice.” *See* Order, dated 5 March 2007.

prospective jurors that ‘trial counsel discerned some qualitative difference between the juror he challenged for cause and those he did not’” (citation and alterations omitted)). See also *State v. Alfatlawi*, 2006 UT App 511, ¶ 19, 153 P.3d 804 (rejecting Alfatlawi’s claim that trial counsel was constitutionally ineffective where trial counsel actively participated in jury selection).

In sum, because defendant fails to provide any basis for finding that Juror Williams was biased as a matter of law or fact, or that Juror Williams expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove her, and because trial counsel was anything but inattentive or indifferent during the jury selection process, this Court should reject defendant’s claim that trial counsel was constitutionally ineffective “for his choices in juror selection.” *Robertson*, 2005 UT App 419, ¶ 11.

2. Defendant also has shown no prejudice.

Based on the above, trial counsel acted objectively reasonably in retaining Juror Williams. Therefore, there is no need to reach *Strickland*’s requirement of prejudice. See *Alfatlawi*, 2006 UT App 511, ¶ 19 (declining to reach prejudice prong of ineffectiveness claim where Alfatlawi failed to establish that his trial counsel performed deficiently in retaining allegedly biased juror).

In any event, defendant has not proven that trial counsel’s alleged deficient performance in retaining Juror Williams prejudiced him. *Strickland*’s prejudice prong

can be met “only by showing there is a reasonable probability that ‘but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Tennyson*, 850 P.2d at 466 (quoting *Strickland*, 466 U.S. at 694). In this context the claimed prejudice is not the resulting guilty verdict, but that counsel’s alleged deficient performance resulted in a biased juror sitting. Thus, an ineffective assistance of counsel claim “premised on failure to challenge a juror for cause can succeed only if the juror was biased as a matter of law.” *Robertson*, 2005 UT App 419, ¶ 9 (additional quotation and citation omitted); *see also Simmons*, 2000 UT App 190, ¶ 12. Defendant has not made that showing.

First, like defendant’s claim of deficient performance, his claim of prejudice rises or falls on defendant’s assumption that Juror Williams’s employment as the court administrator’s secretary together with her former working relationship with the prosecutor rendered her biased as a matter of law. Appt. Br. 29-30. For all the reasons stated in Point II(A)(1), *supra*, defendant’s assertion lacks merit. Defendant provides no authority that court employees are biased as a matter of law, nor does he provide any authority that jurors with ties to the prosecution are biased as a matter of law. He therefore fails to demonstrate that Juror Williams was actually biased or that any prejudice occurred here. He thus fails to show that trial counsel was constitutionally ineffective in retaining Juror Williams.

B. Defendant has not shown plain error.

Defendant alternatively claims that the trial court plainly erred in not sua sponte removing Juror Williams. Aplt. Br. at 26. As set forth in Point I(B), *supra*, to prevail on a claim of plain error, defendant must show “that the trial court committed an error that was both obvious and prejudicial.” *Cruz*, 2005 UT 45, ¶ 24. But a defendant can prevail on a claim of plain error “[o]nly where a juror expresses a bias or conflict of interest that is so strong or unequivocal as to inevitably taint the trial process should a trial court overrule trial counsel’s conscious decision to retain a questionable juror.” *Alfatlawi*, 2006 UT App 511, ¶ 21 (quoting *Litherland*, 2000 UT 76, ¶ 32). *See also State v. King*, 2006 UT 3, ¶¶ 22-23, 131 P.3d 202 (same). This is because “[i]t is generally inappropriate for a trial court to interfere with counsel’s conscious choices in the jury selection process” *Litherland*, 2000 UT 76, ¶ 32. For all the reasons set out in Point II(A), *supra*, defendant has not demonstrated that Juror Williams’s current or past employment gave rise to a bias or conflict so strong or unequivocal as to inevitably taint the trial process such that the trial court should overrule trial counsel’s conscious decision to retain her. *See McKinney*, 609 N.E.2d at 617 (declining to presume prejudice from fact of juror’s employment as deputy court clerk). *See also Alfatlawi*, 2006 UT App 511, ¶ 22 (“The simple fact that a potential juror may have ties to law enforcement does not establish bias” (citing *Ramos*, 882 P.2d at 152)); *Brown*, 355 S.E.2d at 620 (holding juror who is also a court employee “does not give rise to the same inference of bias or prejudice

which arises from relationship or close acquaintance with law enforcement or prosecutorial officers charged with an adversarial function”). Because defendant has not and cannot show that Juror Williams was actually biased against him, he cannot show prejudicial error.

POINT III

DEFENDANT IS NOT ENTITLED TO A NEW TRIAL BASED ON HIS CLAIM THAT HE WAS SURPRISED BY ADMISSIBLE EVIDENCE—A RECORDING OF HIS POLICE INTERVIEW—WHERE HE NEVER SOUGHT A CONTINUANCE IN THE TRIAL COURT

In Point III of his brief, defendant asserts that “the trial court erred in admitting the audiotape of the police interrogation of [defendant] where the State violated rule 16 of the Utah Rules of Criminal Procedure.” Aplt. Br. at 32 (capitalization and bolding omitted). Defendant’s claim is foreclosed because he never sought a continuance.

Proceedings below. During the State’s case-in-chief, Lieutenant Fox testified regarding the substance of his interview with defendant. R138:115; R388:9. According to Lieutenant Fox, defendant initially claimed that he visited Judy Tidwell’s house only one time. R138:116. When challenged, however, defendant admitted to having lied about that. *Id.*; R388:29-30.

When defendant testified later that day, he denied having admitted to lying during the police interview. R138:200. Therefore, at the conclusion of the first day of trial, following defendant’s testimony, and after the defense had rested, the prosecutor asked to

play portions of defendant's recorded police interview to "rebut the statements of the defendant denying that he said certain things to Lieutenant Fox." R388:20; *see also* R138:206. Defendant objected on the ground that he was surprised that the interview had been recorded. *Id.*

The matter was addressed again the next morning, the second day of trial. *See* R388:4. Defendant moved to suppress the recording on the grounds that he was not given a *Miranda* warning, and that he was "unaware of the tape recording . . . until after [his] testimony." *Id.* at 8; *see also id.* at 7.⁴ Trial counsel argued that because police withheld the recording from both the prosecutor and defendant, "it ought to be suppressed." *Id.* at 8. He did not request a continuance. *Id.*

The trial court denied the motion to suppress, ruling that the recording was admissible to rebut defendant's trial testimony. *Id.* Although trial counsel continued to object to the recording on the grounds of *Miranda* and surprise, he concurred that the recording was admissible for rebuttal purposes. *See id.* at 20 ("No objection to the tape being admitted for that purpose"); *see also id.* at 21. Portions of the recording were then played for the jurors, who were instructed that it was "simply for that limited rebuttal purpose," and that "[t]he purpose . . . was to determine the testimony of the defendant as

⁴Apparently, the microphone was hidden in the ceiling of the room where defendant was interviewed. R388:21.

it relate[d] on the tape as compared to his statements on the stand relative to that same examination.” *Id.* at 22.

Following the playing of portions of the recording at trial, see *id.* the State again rested, and defendant again took the stand. *Id.* at 26. Defendant acknowledged that the recording was a “fairly accurate reflection of the interview.” *Id.* He also testified that he was nervous and confused during the police interview, and that he did not “remember a lot of things about the interview.” *Id.* at 28. On cross-examination, defendant affirmed that he had previously testified that he did not tell Lieutenant Fox that he had lied to him during the interview, but that the recording of the interview reflected that he did make such a statement to Lieutenant Fox “at the beginning” of the interview. *Id.* at 28-29 (“That’s what the tape said. I still don’t remember”).

A. Because defendant did not request a continuance to meet the unexpected evidence, he is foreclosed from relief on appeal.

On appeal, defendant no longer challenges the admissibility of his recorded police interview under *Miranda*, or on any other ground than that of surprise. Aplt. Br. at 32-36. However, if defendant was surprised by the recording at trial, he should have asked for a continuance.

“In criminal prosecutions, the State has two independent obligations to provide evidence to the defense.” *State v. Perez*, 2002 UT App 211, ¶ 34, 52 P.3d 451. “First, the State has a duty under the Due Process Clause of the United States Constitution to provide, without request by the defendant, all exculpatory evidence.” *Id.* (case citation

omitted). Additionally, the State has a duty under rule 16, Utah Rules of Criminal Procedure, to provide, upon order of the court or the request of the defendant, any inculpatory evidence. *Id.* at ¶¶ 34-35. “Whether prosecutors produce inculpatory evidence under court order or on request, they have a duty to comply fully and forthrightly.” *Id.* at ¶ 35. If the prosecutor discloses inculpatory evidence, “the prosecutor has a continuing obligation to disclose newly acquired information so as to avoid misleading the defense.” *Id.* But, when a defendant is confronted with unanticipated evidence, he “essentially waive[s] his right to later claim error if [he] fails to request a continuance or seek other appropriate relief under Rule 16(g).” *Id.* at ¶ 37 (case citation and quotation omitted) (first brackets in original).

As noted above, defendant no longer claims that his recorded police interview should have been suppressed due to an alleged *Miranda* violation, and for good reason. “Even assuming [defendant’s] statements were taken in violation of *Miranda* . . . , they were offered on rebuttal only for purposes of impeachment and as such are admissible.” *State v. Gardner*, 789 P.2d 273, 282 (Utah 1989) (case citations omitted). Rather than reassert a *Miranda* violation, defendant asserts that he is entitled to a reversal based only on his allegation of surprise, or that a discovery violation occurred on two arguably alternative grounds. First, recognizing that he never filed a written discovery motion, defendant suggests that the prosecutor nonetheless violated rule 16 by failing to disclose the recording of his police interview because the prosecutor had “provided various police

reports.” Aplt. Br. at 34. Therefore, defendant reasons, the State incurred a continuing obligation to disclose newly-acquired information under rule 16(g). Aplt. Br. at 34. *See also Perez*, 2002 UT App 211, ¶ 35. Additionally, although he never claims a due process violation, defendant suggests that the recording “was potentially exculpatory evidence,” implying the recording should have been disclosed irrespective of rule 16(g). Aplt. Br. at 35 (“[Defendant] asserts that the audiotape of his interrogation by law enforcement was potentially exculpatory evidence . . . [a]ccordingly, the duty of the prosecution to disclose such evidence was violated by law enforcement’s withholding of it”).

Assuming *arguendo* that a discovery violation occurred, if defendant was surprised, he should have sought a continuance. As noted above, when confronted with unexpected but otherwise admissible evidence, a defendant “‘essentially waive[s] his right to later claim error’ if the defendant fails to request a continuance or seek other appropriate relief under Rule 16(g).” *Perez*, 2002 UT App 211, ¶ 37 (case citation and quotation omitted). *See also State v. Knight*, 734 P.2d 913, 919 n.6 (Utah 1987) (recognizing that the failure to seek a continuance or to otherwise mitigate prejudice resulting from a discovery violation “is significant”); *State v. Workman*, 635 P.2d 49, 53 (Utah 1981) (rejecting Workman’s claim of surprise and consequent prejudice resulting from the State’s alleged failure to disclose the full content of statements he allegedly made to a witness where Workman “did [not] seek a continuance of trial to overcome the

claimed element of surprise”). Because defendant did not assert that a continuance was necessary in order to mitigate his claimed surprise, *see* R183:206; R388:20, he is foreclosed from relief on appeal. *See State v. Griffiths*, 752 P.2d 879, 883 (Utah 1988) (holding that Griffith’s failure to move for a continuance constituted a waiver of relief under rule 16(g)); *State v. Rugebregt*, 965 P.2d 518, 523 (Utah App. 1998) (same).

B. Defendant suffered no prejudice.

Notwithstanding his failure to mitigate his claimed surprise, defendant asserts that prejudice “must be presumed because the record is inadequate for this [C]ourt to properly consider [the recording’s] impact upon the jury and its impact upon [his] defense.” Apl’t. Br. at 35. Defendant’s claim of prejudice is based on his speculation that the recording, which “was not transcribed and apparently no longer exists,” “was potentially exculpatory evidence.” *Id.*

Regardless of whether the recording is properly characterized as inculpatory or exculpatory, prejudice is not presumed merely because a defendant is surprised by otherwise admissible evidence. Rather, “a breach of discovery rules does not warrant reversal absent a showing of prejudice to the defendant.” *State v. Blair*, 868 P.2d 802, 807 (Utah 1993) (citation omitted); *see also State v. Harmon*, 956 P.2d 262, 274-75 (Utah 1998) (“Unless a review of the record shows that the court’s decision is plainly wrong in that the defendant cannot be said to have had a fair trial, we will not find

that . . . the court's decision was an abuse of discretion." (quotations and citations omitted)). Moreover, unless or until "defendant can make a credible argument that the prosecutor's errors have impaired the defense," the burden never shifts to the State to show "that there is no reasonable likelihood that absent the error, the outcome of trial would have been more favorable for the defendant." *Knight*, 734 P.2d at 921. As shown below, defendant has not demonstrated any prejudice on this record.

First, contrary to defendant's assertion, the record is more than adequate to determine that the recording was not exculpatory. It is clear that the defense had access to the recording overnight and that trial counsel listened to it in preparing the motion to suppress. *See e.g.*, R138:206; R388:4-20. If there was anything exculpatory in the recording, presumably trial counsel would have sought to admit, rather than suppress, the recording. Moreover, if the recording was exculpatory, presumably, the State would not have sought to impeach defendant with it.

Second, defendant was not surprised by any *new* substantive evidence. Defendant and trial counsel were fully aware before trial that defendant was interviewed by Lieutenant Fox. Indeed, Lieutenant Fox testified as to his memory of the interview during the State's case in chief. *See e.g.*, R138:115-117. Defendant also testified as to his memory of the interview. *See e.g.*, R138:198-200. Therefore, the recording of that interview, which was admitted only to rebut or impeach defendant's recollection of his statement, was cumulative of Lieutenant Fox's earlier testimony. *Cf. State v. Boyd*, 2001

UT 30, ¶ 28, 25 P.3d 985 (“As a general rule, newly discovered evidence does not warrant a new trial where its only use is impeachment”) (citation omitted).

Third, rebuttal testimony is not the kind of surprise testimony that justifies a new trial. *See State v. Worthen*, 765 P.2d 839, 850 (Utah 1988) (holding that doctor’s “rebuttal testimony” did “not constitute the kind of surprise that justifies a new trial”). Indeed, in asking this Court to presume prejudice, defendant does not assert that he would have conducted his defense any differently if had only known of the recording before trial. Aplt. Br. at 32-36. *See also Knight*, 734 P.2d at 921 (requiring defendants to make a “credible argument” that an alleged discovery violation “impaired” the defense before burden will shift to the State to show “that there is no reasonable likelihood that absent the error, the outcome of trial would have been more favorable”). In any event, the most that defendant arguably could have done here, had he known of the recording before he testified, and presumably refreshed his memory, would have been to acknowledge to the jury that he had told Lieutenant Fox that he lied during the interview. But defendant got that opportunity when he testified on surrebuttal. Defendant told the jury that he was nervous and confused during the interview, and that he did not “remember a lot of things about the interview,” but that the recording reflected that he did make such a statement to Lieutenant Fox. *Id.* at 28-29 (“That’s what the tape said. I still don’t remember”).

In short, because the recording contained information of which trial counsel and defendant were already aware, and because in asking this Court to presume prejudice,


defendant has not put forward a credible demonstration of how he would have conducted his defense differently, defendant has not shown that he was prejudiced by the prosecutor's failure to disclose the recording's existence before trial. *See Knight*, 734 P.2d at 921; *see also Blair*, 868 P.2d 807-08 (declining to find "prejudice resulting from the prosecution's failure to provide a copy of the transcript of Blair's statement," where Blair's counsel was advised that he had made a statement and "because the statement contained information of which Blair's counsel was already aware"). He is not, therefore, entitled to a reversal on appeal.

CONCLUSION

Defendant's jury conviction for rape should be affirmed.

RESPECTFULLY submitted on 8th August 2007.

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MAILING CERTIFICATE

I certify that on 8th August 2007, I caused to be mailed, postage prepaid, two copies of the BRIEF OF APPELLEE, to the following:

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Addendum

Rules of Prof.Conduct, Rule 1.7

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Client-lawyer Relationship

→RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(a)(1) The representation of one client will be directly adverse to another client; or

(a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(b)(4) each affected client gives informed consent, confirmed in writing.

[Amended effective November 1, 2001; November 1, 2005.]

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see

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Rules of Prof.Conduct, Rule 1.9

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Client-lawyer Relationship

→RULE 1.9. DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(b)(1) whose interests are materially adverse to that person; and

(b)(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(c)(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(c)(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[Amended effective November 1, 2005.]

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a

Rules of Prof.Conduct, Rule 1.10

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Client-lawyer Relationship

→RULE 1.10. IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(b)(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(b)(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(c)(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(c)(2) written notice is promptly given to any affected former client.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

[Amended effective November 1, 2005.]

COMMENT

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Rules of Prof.Conduct, Rule 1.11

C

West's Utah Court Rules Annotated Currentness

State Court Rules

Utah Code of Judicial Administration

Part II. Supreme Court Rules of Professional Practice

Chapter 13. Rules of Professional Conduct (Refs & Annos)

Client-lawyer Relationship

**→RULE 1.11. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT
GOVERNMENT EMPLOYEES**

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(a)(1) is subject to Rule 1.9(c); and

(a)(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(b)(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(b)(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which at the time the Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee:

Rules of Prof.Conduct, Rule 1.11

(d)(1) is subject to Rules 1.7 and 1.9; and

(d)(2) shall not:

(d)(2)(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(d)(2)(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(e)(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and

(e)(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

[Amended effective November 1, 2005.]

COMMENT

[1] A lawyer, who has served or is currently serving as a public office or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7 In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of