APPENDIX A

Supreme Court

IN THE SUPREME COURT
STATE OF WYOMING
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IN THE SUPREME COURT, STATE OF WYOMING

2017 WY 155

OCTOBER TERM, A.D. 2017

December 28, 2017

DONALD DEAN FOLTZ, JR., Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).	S-17-0064

Appeal from the District Court of Campbell County
The Honorable Michael N. Deegan, Judge

Representing Appellant:

Office of the Public Defender: Diane Lozano, State Public Defender; Tina N. Olson, Chief Appellate Counsel; David E. Westling, Senior Assistant Appellate Counsel. Argument by Mr. Westling.

Representing Appellee:

Peter K. Michael, Wyoming Attorney General; David L. Delicath, Deputy Attorney General; Christyne M. Martens, Senior Assistant Attorney General; Katherine A. Adams, Assistant Attorney General. Argument by Ms. Adams.

Before BURKE, C.J., and HILL, DAVIS, FOX, and KAUTZ, JJ.

KAUTZ, Justice.

[¶1] A jury convicted the appellant, Donald Dean Foltz, Jr., of first-degree murder and the district court sentenced Mr. Foltz to life without the possibility of parole. Mr. Foltz appeals his conviction, arguing the district court erred when it denied his motion for judgment of acquittal. We affirm.

ISSUE

[¶2] Mr. Foltz raises one issue in this appeal:

> Did the trial court err by denying Mr. Foltz's motion for judgment of acquittal in that there was insufficient evidence to support proof of the elements of child abuse?

FACTS

[¶3] In the fall of 2014, Mr. Foltz moved into the home of his girlfriend, Amanda Russell, and her two children. On December 22, 2014, Ms. Russell took her two-year-old son, BB, to a pediatrician, Dr. Fall, with concerns that BB had been vomiting, complaining of leg pain, and that he was bruising easily. After an examination and receiving the results of blood work, Dr. Fall concluded that BB's injuries were due to child abuse. He informed Ms. Russell of his suspicions and contacted the Department of Family Services (DFS). The next day, Sergeant Michael Hieb of the Campbell County Sheriff's Office accompanied an individual from DFS to follow up on Dr. Fall's report. Sergeant Hieb noted many bruises on BB; however, after Ms. Russell explained how BB received all the bruises, he concluded the injuries did not appear to be the result of child abuse.

[¶4] From the evening of December 23 through the morning of December 29, BB and his four-year-old sister, AR, spent most of their time with babysitters and family friends. During the evening of December 23, Ms. Russell left the children with their babysitter, Mercedes Corbett, while she and Mr. Foltz went to Rapid City to finish Christmas shopping. The children spent the day and night of December 24 with John and Candace LaValle. Ms. Russell arrived at the LaValle house at around noon on Christmas day, and after eating Christmas dinner and opening presents, took the children to her mother, Donna Blake's, home to open presents. Ms. Russell and AR went to Ms. Russell's home after spending time with the family at Ms. Blake's, while BB stayed the night with his grandmother. On December 26, both children went back to the LaValle home where they stayed until approximately noon on December 29. The LaValles then delivered the children to Ms. Russell at her residence.

[¶5] The children spent the rest of December 29 at the home with Ms. Russell and Mr. Foltz. The family had no visitors. That evening, Mr. Foltz put BB to bed and he and Ms. Russell went to bed at approximately 10:30 p.m. On December 30, Mr. Foltz got out of bed at 8:00 a.m. when he heard through the baby monitor that BB had awakened. Ms. Russell stayed in bed until after noon, but she could hear through a window Mr. Foltz, BB and AR working and playing outside. After Ms. Russell got out of bed, she remained in the home until about 4:00 p.m. when she left the children with Mr. Foltz for approximately forty-five minutes while she visited a friend. Ms. Russell returned home, but later that evening went to the grocery store to purchase electrolytes for BB because Mr. Foltz said that BB had vomited during the day. When Ms. Russell left for the store, Mr. Foltz had already put BB to bed for the night.

[¶6] While Ms. Russell was at the store, Mr. Foltz brought an unresponsive BB into Ms. Blake's home through the back door.[1] Mr. Foltz told Ms. Blake that he had checked on BB after hearing a noise on the baby monitor. He discovered there was something wrong with BB, he needed help, and he did not know what to do. Ms. Blake called 911, wrapped BB in a blanket, and then got into her vehicle with her boyfriend and BB to meet the ambulance on the way to the hospital. Mr. Foltz stayed behind to take care of AR.

[¶7] Ms. Blake attempted to perform CPR as instructed by the 911 operator, but when she pressed on BB's chest he began to vomit. She turned on a light in the vehicle and noticed a large bruise on BB's forehead. She then met the ambulance, and emergency medical personnel took BB to the hospital. Emergency staff made vigorous attempts to revive BB, but were unsuccessful. He was pronounced dead at 10:35 p.m. The emergency room physician who attempted to revive BB noted extensive bruising from BB's jaw to chest, a bruise with swelling on his forehead, a distended abdomen, and multiple bruises over the rest of BB's body. The physician believed the injuries were due to child abuse and contacted law enforcement.

[¶8] Dr. Donald Habbe performed an autopsy the next day and concluded that BB died from blunt force trauma to the abdomen. Dr. Habbe discovered multiple tears in BB's mesentery[2] which caused bleeding into the abdomen. He believed the tears were caused by multiple instances of force and were recent injuries that had occurred in the twenty-four hour period before BB's death.

[¶9] Following an investigation, the State charged Mr. Foltz with one count of first-degree murder under Wyo. Stat. Ann. § 6-2-101(a) (LexisNexis 2017).[3] The State

[1] Ms. Blake's home is immediately next door to Ms. Russell's home in rural Campbell County.

[2] Dr. Habbe described the mesentery as the tissues that hold the small and large bowels in place in the abdomen.

[3] Section 6-2-101(a) states: "Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape,

alleged that Mr. Foltz caused BB's death during the perpetration of child abuse. A jury found Mr. Foltz guilty of the charge, and the district court sentenced Mr. Foltz to life imprisonment without the possibility of parole. Mr. Foltz filed a timely notice of appeal.

STANDARD OF REVIEW

[¶10] This Court reviews a motion for judgment of acquittal in the same light as the district court. *Bean v. State*, 2016 WY 48, ¶ 43, 373 P.3d 372, 387 (Wyo. 2016). When reviewing a motion for judgment of acquittal:

> we examine and accept as true the evidence of the prosecution together with all logical and reasonable inferences to be drawn therefrom, leaving out entirely the evidence of the defendant in conflict therewith.
>
> A motion for judgment of acquittal is to be granted only when the evidence is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime. Or, stated another way, if there is substantial evidence to sustain a conviction of the crime, the motion should not be granted. This standard applies whether the supporting evidence is direct or circumstantial.

Bruce v. State, 2015 WY 46, ¶ 52, 346 P.3d 909, 925-26 (Wyo. 2015) (quoting *Butcher v. State*, 2005 WY 146, ¶ 11, 123 P.3d 543, 548 (Wyo. 2005)). As a practical matter, the standard of review for denial of a motion for judgment of acquittal is the same as that used when an appeal claims insufficient evidence to convict. This is because these appeals both challenge the sufficiency of the evidence. Although Mr. Foltz facially challenges the denial of his motion for judgment of acquittal, he is in fact claiming that the evidence was insufficient to sustain a conviction. When applying this standard, we do not reweigh the evidence or re-examine the credibility of the witnesses. *Bean*, ¶ 45, 373 P.3d at 387. Instead, we simply determine "whether or not the evidence could reasonably support such a finding by the factfinder." *Id.* (quoting *Hill v. State*, 2016 WY 27, ¶ 13, 371 P.3d 553, 558 (Wyo. 2016)). "We review the sufficiency of the evidence 'from this perspective because we defer to the jury as the fact-finder and assume they believed only the evidence adverse to the defendant since they found the defendant guilty beyond a reasonable doubt.'" *Id.* (quoting *Oldman v. State*, 2015 WY 121, ¶ 5, 359 P.3d 964, 966 (Wyo. 2015)). This standard applies whether the evidence supporting the conviction is direct or circumstantial. *Id.*, ¶ 44, 373 P.3d at 386 (quoting *Guerrero v. State*, 2012 WY 77, ¶ 14, 277 P.3d 735, 738-39 (Wyo. 2012)).

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resisting arrest, kidnapping or abuse of a child under the age of sixteen (16) years, kills any human being is guilty of murder in the first degree."

DISCUSSION

[¶11] At the end of the State's case-in-chief, Mr. Foltz moved for a judgment of acquittal. Because the State alleged that Mr. Foltz killed BB during the perpetration of child abuse, the State was necessarily required to prove each element of child abuse found in Wyo. Stat. Ann. § 6-2-503(a) (LexisNexis 2017). That statute states:

> (a) A person who is not responsible for a child's welfare as defined by W.S. 14-3-202(a)(i), is guilty of child abuse, a felony punishable by imprisonment for not more than ten (10) years, if:
>
> (i) The actor is an adult or is at least six (6) years older than the victim; and
>
> (ii) The actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years:
>
> (A) Physical injury as defined in W.S. 14-3-202(a)(ii)(B);
>
> (B) Mental injury as defined in W.S. 14-3-202(a)(ii)(A); or
>
> (C) Torture or cruel confinement.

Id. Mr. Foltz argued that because the State had not presented evidence of how BB received his injuries, the State failed to prove that Mr. Foltz had intentionally or recklessly inflicted BB's injuries. After considering the "broad panoply of evidence," the district court denied the motion, concluding the State presented sufficient evidence that could allow a jury to conclude by proof beyond a reasonable doubt that Mr. Foltz committed the charged crime.

[¶12] Shortly after the trial concluded, Mr. Foltz filed a renewed motion for judgment of acquittal. He renewed his argument that the State had failed to prove he intentionally or recklessly caused BB's injuries, but also argued the State failed to prove that Mr. Foltz was a person not responsible for the welfare of BB. Mr. Foltz additionally raised these arguments in a motion for new trial. While the record does not contain a written order denying the post-trial motions, the district court signed the judgment upon guilty verdict three days after Mr. Foltz filed the motions.

[¶13] On appeal, Mr. Foltz maintains the district court should have granted his motions for judgment of acquittal on the basis the State failed to prove Mr. Foltz intentionally or recklessly inflicted BB's injuries or that he was not responsible for the welfare of BB at the time he inflicted the injuries. We will discuss each of these elements in turn.

Intentionally or Recklessly Inflicts Injury

[¶14] To sustain a conviction for murder premised upon child abuse under § 6-2-503(a), the State must prove Mr. Foltz intentionally or recklessly inflicted injury upon BB. Mr. Foltz argues the State failed to show he acted intentionally or recklessly because it did not provide evidence "that Mr. Foltz was angry or that he meant to hurt BB in any respect." Further, Mr. Foltz argues the State did not present any evidence of what conduct Mr. Foltz engaged in that created an unjustifiable risk sufficient to substantiate a finding of reckless infliction of injury upon BB.

[¶15] Before considering the evidence the State presented at trial, we must first address Mr. Foltz's misunderstanding of the "intent" required to prove child abuse. While Mr. Foltz does not openly argue the State was required to prove Mr. Foltz acted with the specific intent to cause BB's injuries, he implies as much by arguing the State did not present evidence that "Mr. Foltz was angry or that he meant to hurt BB in any respect." Additionally, he asserts that our precedent "indicates that abuse must be deliberate." These statements are wholly inaccurate. Our precedent is clear that child abuse is a general intent crime; therefore, the State need not show that Mr. Foltz intended the consequence of his actions. *Rowe v. State*, 974 P.2d 937, 939-40 (Wyo. 1999). Instead, it must prove that Mr. Foltz intentionally or recklessly ***acted*** in a way that resulted in BB's physical injury. *Id.* at 940. Thus, evidence regarding Mr. Foltz's feelings toward BB or whether he "meant to hurt BB" are not required in the final inquiry.

[¶16] The jury determined that Mr. Foltz had both intentionally and recklessly caused BB's physical injuries. Applying our standard of review to the evidence presented at trial, we are convinced the State presented sufficient evidence to sustain Mr. Foltz's conviction and, thus, the district court properly denied his motion for judgment of acquittal. Dr. Donald Habbe, the pathologist who performed BB's autopsy, testified that BB died from blunt force trauma to the abdomen, which caused tears in the mesentery and bleeding into the abdomen. Dr. Habbe stated he discovered three mesentery tears, and concluded that the tears had to be caused by multiple instances of abdominal trauma. Dr. Habbe believed the mesentery injuries were recent, having been caused within a twenty-four hour period prior to BB's death on December 30. He also noted that BB had suffered contusions and abrasions over widespread areas of his body, including his forehead, cheek, nose, neck, chin, ears, back, abdomen, and buttocks.

[¶17] Dr. Thomas Bennett, a forensic pathologist, reviewed BB's autopsy at the request of the Campbell County Coroner. Dr. Bennett testified that BB died of "traumatic

injuries to his abdomen from non-accidental blunt force trauma to his abdomen." Dr. Bennett explained that the mesenteries are soft, flexible, resilient, and are rarely injured absent non-accidental force. He also testified that tears are the result of tremendous force, such as forceful punches and kicks or car crashes, and not from falling or running into the corner of a table or down the stairs or other routine toddler activities. Dr. Bennett agreed that, due to the location of the mesentery tears, three separate events caused the tears, and that the injuries occurred in roughly the twenty-four hours before BB's death.

[¶18] Amanda Russell testified that Mr. Foltz lived with her and her children in her home. Ms. Russell stated that Mr. and Mrs. LaValle brought BB and AR home sometime before noon on December 29, and she did not notice any visible injuries to BB at that time. She also testified that the children stayed home with her and Mr. Foltz for the reminder of the day and they did not have any visitors. On December 30, Mr. Foltz got up at approximately 8:00 a.m. when BB woke up; however, Ms. Russell did not get out of bed until after noon that day. Ms. Russell was at the home until approximately 4:00 p.m. when she left for thirty to forty-five minutes to visit a friend. She left BB at home with Mr. Foltz. After her visit, Ms. Russell returned to the home, but left later that evening to go to the grocery store. Again, BB stayed at the home with Mr. Foltz, although Mr. Foltz had put BB to bed before Ms. Russell left. Additionally, Investigator Pownall testified that Mr. Foltz told him that only he, Ms. Russell, and the children were at the home on December 30.

[¶19] Based upon this evidence, a reasonable jury could, and did, conclude that Mr. Foltz—one of only two adults who were with BB during the time-period wherein the injuries were inflicted—intentionally and recklessly inflicted the non-accidental blunt force trauma to BB's abdomen. Despite this evidence, Mr. Foltz seems to argue the evidence is insufficient because it does not shed light on how Mr. Foltz caused BB's injuries. However, the State is not required to prove how Mr. Foltz inflicted the injuries; instead, it is required to prove simply that he intentionally and recklessly caused the injuries. *See* § 6-2-503(a).

[¶20] This Court has acknowledged that child abuse is a private act, often being witnessed only by the victim and the perpetrator. *Marshall v. State*, 646 P.2d 795, 797 (Wyo. 1982). In order "to protect the most helpless members of our society from violence on the part of others," we have recognized that "opportunity, together with injuries consistent with child abuse, is sufficient evidence to support a conviction for homicide." *Goldade v. State*, 674 P.2d 721, 727 (Wyo. 1983) (citing *Marshall*; *Rinehart v. State*, 641 P.2d 192 (Wyo. 1982); *Grabill v. State*, 621 P.2d 802 (Wyo. 1980); *Seyle v. State*, 584 P.2d 1081 (Wyo. 1978); *Jones v. State*, 580 P.2d 1150 (Wyo. 1978)). In *Jones*, the State presented the following evidence:

> Appellant's stepdaughter died as a result of an acute bilateral subdural hemorrhage; such a hemorrhage is almost always caused by physical trauma of considerable force; the child had three bruises on her head which could have been caused by a hand or other blunt instrument; these bruises and other injuries were not present prior to the time that the child came under the exclusive control of appellant; appellant's wife left appellant alone with her apparently-normal child for a period of twenty to twenty-five minutes; and the hemorrhage, in the attending doctor's opinion, could not have been caused by a prior high-chair-fall or other accident.

Jones, 580 P.2d at 1152. The Court concluded this evidence was sufficient for a jury to reasonably infer that the appellant inflicted the injury that caused the victim's death. *Id.*

[¶21] Similarly, in *Grabill*, the victim's mother left her seemingly normal sleeping infant alone with the appellant. *Grabill*, 621 P.2d at 804. When the mother returned less than two hours later, the infant was still sleeping and the appellant showed the mother a bruise on the infant's ear. *Id.* The mother took the infant to the hospital, and the treating doctor testified that the child was comatose and, due to bruising on the child's head, he believed she had suffered a severe brain injury from non-accidental trauma. *Id.* at 805. The doctor also testified that a fall from a changing table or out of bed would not be severe enough to cause the injury. *Id.* Another doctor who treated the infant reiterated that the injuries were caused by non-accidental trauma, such as shaking the baby, and that a fall would likely not cause the injuries. *Id.* at 806. The Court concluded this evidence was sufficient for a jury to reasonably infer that the appellant caused the infant's injuries when the mother left her alone with the appellant. *Id.* While the appellant had denied causing the injuries, the Court recognized the jury "chose to accept the circumstantial evidence against appellant rather than his denial." *Id.*

[¶22] Just as in *Jones* and *Grabill*, the State produced medical testimony concluding that BB's injuries were the result of non-accidental blunt force trauma to the abdomen requiring at a minimum reckless, if not intentional, conduct. Additionally, the evidence is undisputed that Mr. Foltz had the opportunity to cause the injuries because he was with BB the entire twenty-four hours preceding BB's death, and the only adult present other than Ms. Russell. While Ms. Russell was also at home with BB, the jury must have believed her when she testified that she did not abuse BB.

[¶23] The State presented additional incriminating evidence not present in *Jones* and *Grabill*. The jury heard testimony about inconsistent statements Mr. Foltz made in the days following BB's death. At times, Mr. Foltz said he found BB unconscious after he heard unidentified sounds on the baby monitor, while at other times he said he just spontaneously checked on BB. Mr. Foltz told Investigator Pownall that he immediately

ran to Ms. Blake's house with BB after finding the child unresponsive; however, he told others that he put BB in the bathtub to try to revive him before taking him to Ms. Blake's home. Mr. Foltz also gave inconsistent stories about the large abrasion and bruise on BB's forehead. He told Investigator Pownall that BB had run into the knob on his bedroom door at about noon on December 30. But, Mr. Foltz told one of his co-workers that he may have hit BB's head on the doorjamb as he was taking the child to Ms. Blake's home.

[¶24] In addition to the inconsistent statements, the jury heard comments made by Mr. Foltz which it could have found incriminating. Mr. Foltz told his supervisor at work that, "Even if I did hit [BB's] head on a doorjamb, [] they would have to prove it." He also told the same co-worker that BB's older sister "would not be a good witness to anything because she talks to dead people. Her father had passed and she's somehow communicating with her father[.]" Mr. Foltz told a co-worker that BB died from an infection in his throat, although at that point in time Mr. Foltz knew the cause of BB's death was non-accidental blunt force trauma. This co-worker also testified that Mr. Foltz said, "Even if I did kill the kid, [BB] was the only witness and he's dead now."

[¶25] Finally, the jury heard the testimony of several witnesses who stated they observed other injuries on BB in the days before his death. Dr. Fall testified that he treated BB on December 22, 2014, and noted multiple bruises on his body, including in the genital area. Dr. Fall ordered blood tests, and when the results came back normal, Dr. Fall told Ms. Russell that he suspected BB's bruising was the result of child abuse. He also reported the visit and his suspicions to DFS. The doctor who treated BB in the emergency room also noted bruising consistent with abuse, particularly bruising in his perineal region. This bruising was also noted on December 23, 2014, by Sergeant Hieb when he followed up on Dr. Fall's child abuse report, and by Ms. LaValle in the days immediately preceding BB's death. From this evidence, the jury could reasonably infer that Mr. Foltz's abuse of BB was not simply an isolated act, but repeated intentional actions that ultimately led to BB's death.

[¶26] The jury considered and weighed the credibility of the witness testimony, heard the statements Mr. Foltz made, and concluded that Mr. Foltz caused BB's death. "[W]e do not have the benefit of how the trial judge (jury) sees and hears the witness-the pitch of the voice, facial changes, the movement in the witness-all of which may tell a separate story, to be given credence. The conclusion of what preponderates is with the trier of fact." *Marshall*, 646 P.2d at 797. Our standard of review requires we defer to those conclusions if the evidence allows, and "[a]ppellate courts cannot try a case de novo." *Id.* The evidence presented by the State supports a conclusion that BB died from non-accidental trauma, and that Mr. Foltz acted intentionally, and necessarily recklessly, when he inflicted the trauma. Granted, the evidence linking Mr. Foltz to the abuse is circumstantial; however, "[t]his type of case is usually presented of necessity by

circumstantial evidence." *Marshall*, 646 P.2d at 797. The district court did not err in denying Mr. Foltz's motion for judgment of acquittal.

Person Responsible for the Welfare of a Child

[¶27] Mr. Foltz argues the State failed to prove that he was "a person not responsible for the welfare of the child" as required by § 6-2-503(a) because the evidence showed that Ms. Russell left her children alone with him on two occasions the day BB died. "A person responsible for a child's welfare" is defined as "the child's parent, noncustodial parent, guardian, custodian, stepparent, foster parent or other person, institution or agency having the physical custody or control of the child." Wyo. Stat. Ann. § 14-3-202(a)(i) (LexisNexis 2017). He argues that because BB at times was with him and not with Ms. Russell, he was a person responsible for BB's welfare and his conviction cannot stand.

[¶28] Mr. Foltz's argument completely disregards our standard of review in sufficiency of the evidence claims. As stated above, when reviewing the sufficiency of the evidence to support a district court's denial of a motion for judgment of acquittal, we do so "with the assumption that the evidence of the prevailing party is true, disregard the evidence favoring the unsuccessful party, and give the prevailing party the benefit of every favorable inference that we may reasonably draw from the evidence." *Levengood v. State*, 2014 WY 138, ¶ 11, 336 P.3d 1201, 1203 (Wyo. 2014) (quoting *Brown v. State*, 2014 WY 104, ¶ 8, 332 P.3d 1168, 1171-72 (Wyo. 2014)). Thus, we must review the evidence and determine if evidence exists that would allow a jury to conclude that Mr. Foltz was a person not responsible for the welfare of BB when the injuries occurred. In doing so, we must disregard any evidence that would support a conclusion to the contrary.

[¶29] The question of whether an individual is a person responsible for the welfare of a child does not always have a clear and obvious answer. In many situations, the answer is factually driven and the jury must determine whether an individual fits the criteria based upon the facts presented by the State. This is one of those situations. There is no dispute that Mr. Foltz was not BB's parent, noncustodial parent, guardian, stepparent, or foster parent. However, if the facts presented would allow, Mr. Foltz could arguably be a "custodian" or "other person . . . having the physical custody or control" of BB. Section 14-3-202(a)(i). While Wyoming law does not further define the catchall "other person" category, a "custodian" is defined as: "a person, institution or agency responsible for the child's welfare and having legal custody of a child by court order or having actual physical custody and control of a child and acting in loco parentis[.]" Wyo. Stat. Ann. § 14-3-402 (LexisNexis 2017).

[¶30] Ms. Russell's testimony supports the jury's conclusion that when the fatal child abuse occurred, Mr. Foltz was not a "custodian" or "other person ... having physical custody or control" of BB. Ms. Russell testified that, although Mr. Foltz lived in her

home with her children, she never gave him the authority to discipline the children. She also testified that she never asked him to babysit the children. She explained that she did not do so because she already had childcare arrangements established and she did not want to change the children's routine. She also stated that she did not want to impose upon Mr. Foltz because their relationship was still new at that point in time. This testimony is sufficient for a reasonable jury to believe that Mr. Foltz was not an "other person ... having physical custody or control" of BB when the fatal abuse occurred.

[¶31] As Mr. Foltz has pointed out, it is undisputed that Ms. Russell left the children at home with him twice for brief periods of time during the twenty-four hour period before BB died. Because of that undisputed fact, he claims that our opinion in *Rogers v. State*, 2015 WY 48, 346 P.3d 934 (Wyo. 2015), dictates that he must be considered a person responsible for the welfare of a child. In *Rogers*, this Court considered whether a babysitter could hold a position of authority over his charge for purposes of Wyoming's sexual assault statutes. *Id.*, ¶¶ 11-17, 346 P.3d at 937-39. We specifically discussed the definition of "custodian" found in § 14-3-402(a)(vii) and concluded "this definition would clearly imply that an individual serving as a babysitter is a custodian of a minor and thus in a position of authority." *Id.*, ¶ 16, 346 P.3d at 938. We also discussed the fact that Mr. Rogers was left in charge of the children while their father left and that he was the only adult present in the residence. *Id.*, ¶ 17, 346 P.3d at 939. However, it is important to recognize that we were analyzing this issue using our sufficiency of the evidence standard of review. *Id.* We concluded that based on the evidence before the *Rogers* jury, the State presented sufficient evidence for the jury to conclude Mr. Rogers, as a babysitter, was acting *in loco parentis*[4] and thus was a custodian. *Id.* This conclusion is not dispositive as to whether the State presented sufficient evidence in this case to support the jury's conclusion that Mr. Foltz was not responsible for the welfare of BB. The two cases rely on different statutes, and while there may be similarities between the application of the two, each case presented unique facts for the jury to consider. There was adequate evidence before the jury indicating that Ms. Russell had not placed Mr. Foltz in the role of a parent (not acting *in loco parentis)*, for it to find that he was not a "custodian" and not responsible for BB's welfare.

[¶32] Additionally, even if the jury had concluded Mr. Foltz was responsible for the welfare of BB during those two short periods of time, the State's evidence would still allow the jury to find that Mr. Foltz inflicted the injuries at a time when Ms. Russell was home and Mr. Foltz was not responsible for BB's welfare. The jury could reasonably have concluded that the injuries occurred before Ms. Russell left late in the afternoon because Mr. Foltz told her BB had been throwing up during the afternoon—indicating that at least some of the injuries had already occurred by then. Similarly, the jury could

[4] *In loco parentis* is a Latin phrase meaning "in the place of a parent" or "[a]cting as a temporary guardian of a child." *Daniels v. Carpenter*, 2003 WY 11, ¶ 12, 62 P.3d 555, 560 (Wyo. 2003) (quoting Black's Law Dictionary 791 (7th ed. 1999)).

reasonably have found that because BB was asleep when Ms. Russell left him with Mr. Foltz later that night, the injuries occurred sometime earlier, while Ms. Russell was home and had "physical custody." Because the State presented evidence that established Mr. Foltz was not responsible for BB's welfare during a substantial majority of the twenty-four hours before BB's death, including the reasonably likely times when the fatal injuries occurred, the district court did not err when it denied Mr. Foltz's motion for judgment of acquittal.

[¶33] While the basis of our opinion rests on our decision that the State presented sufficient evidence to support a conclusion that Mr. Foltz was not responsible for the welfare of the child, we take this opportunity to point out the curious nature of the child abuse statute and Mr. Foltz's situation. Wyoming's child abuse statute is framed in such a way that any person can commit child abuse, whether they are a person responsible for the welfare of a child or not. *See* § 6-2-503. However, the elements the State must prove differ depending upon within which category an individual falls. As explained *supra* ¶ 11, if the defendant is not responsible for the welfare of the child, the State must prove the individual is an adult or at least six years older than the victim and the victim must be under sixteen years old. Section 6-2-503(a). In contrast, if the defendant is responsible for the welfare of the child, there is no age requirement for the defendant, the victim must be under eighteen years old, and the State must show the injuries were not the result of reasonable corporal punishment. Section 6-2-503(b). Thus, the legislature's intent in creating the two categories was not to narrow the class of people that can be held criminally responsible for child abuse, but instead takes into consideration the different dynamics between adults who have a legal responsibility for a child, including the authority to discipline using corporal punishment, and those who do not.

[¶34] In this case, the question of whether Mr. Foltz was or was not responsible for the welfare of BB is a distinction without a difference. Mr. Foltz was thirty-four years old when BB died, satisfying the age requirement of the defendant under either subsection of the statute. Further, BB was two years old, satisfying the age requirement of the victim under either subsection. Interestingly, even though the State charged Mr. Foltz with not being responsible for BB's welfare, the district court nonetheless instructed the jury that the State had to prove BB's injuries were not the result of reasonable corporal punishment:

> Instruction No. 16
>
> The elements of the crime of Child Abuse, identified as the underlying crime in the charge of Murder in the First Degree (elements of which are found in Instruction No. 15), are:
>
> 1. On or between December 29, 2014 and December

30, 2014;

2. In Campbell County, Wyoming;

3. The Defendant, Donald D. Foltz, Jr.;

4. A person not responsible for the welfare of the alleged victim, [BB];

5. Who was at least six (6) years older than the alleged victim, [BB];

6. Intentionally or recklessly;

7. Inflicted physical injury;

8. Which was not the result of reasonable corporal punishment;

9. Upon [BB], who was the time under the age of sixteen (16) years.

If you find from your consideration of all the evidence that each of these elements has been proved beyond a reasonable doubt, then you should proceed to determine your verdict on the charged crime of Murder in the First Degree.

Further, the verdict form required the jury to consider whether the injuries were the result of reasonable corporate punishment. Thus, regardless of whether Mr. Foltz was responsible for BB's welfare or not, the State proved the required elements of both subsections of the crime.

CONCLUSION

[¶35] The State presented expert medical testimony that BB died from three separate mesentery tears that were caused by non-accidental blunt force trauma and inflicted within twenty-four hours of his death. The evidence also established that BB had likely been abused over a period of time before his death. The State showed that Mr. Foltz was with BB that entire twenty-four period and, therefore, was one of only two persons who could have inflicted the fatal injuries. The other person, Ms. Russell, testified that she did not injure BB. This evidence, coupled with incriminating and inconsistent statements made by Mr. Foltz, could lead a reasonable jury to conclude that Mr. Foltz intentionally and recklessly inflicted physical injury on BB. Further, viewing the evidence in the light

most favorable to the State, the State presented sufficient evidence for the jury to conclude that Mr. Foltz was not responsible for the welfare of BB when he inflicted the injuries. Therefore, the district court appropriately denied Mr. Foltz's motion for judgment of acquittal.

[¶36] Affirmed.

APPENDIX B

Finding of facts and order granting respondents motion to dismiss.

STATE OF WYOMING	)	IN THE DISTRICT COURT
	) SS.	
COUNTY OF CAMPBELL	)	SIXTH JUDICIAL DISTRICT

DONALD D. FOLTZ, JR.,	)	
Petitioner,	)	
v.	)	Criminal Case No. 7151
STATE OF WYOMING,	)	
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS PETITION

THIS MATTER came before the Court upon the motion of Respondent, the State of Wyoming, to dismiss Petitioner Donald D. Foltz, Jr.'s *Consolidated Amended Petition for Post-Conviction Relief*. The Court, having considered the filings and the record before it, and being fully advised therein, finds, concludes, and orders as follows:

I. Findings of Fact

1. The Court presided over a jury trial in which the jury convicted Foltz of first degree murder, namely felony murder occurring during the perpetration of the crime of abuse of a child under the age of sixteen years, in violation of Wyoming Statute § 6-2-101(a)-(b).

2. Foltz appealed this conviction to the Wyoming Supreme Court, raising one issue, whether this Court erred "by denying Mr. Foltz's motion for judgment of acquittal in that there was insufficient evidence to support proof of the elements of child abuse[.]" *Foltz*

v. State, 2017 WY 155, ¶ 2, 407 P.3d 398, 400 (Wyo. 2017). Rejecting his sufficiency of the evidence claim, the Wyoming Supreme Court affirmed Foltz's conviction. *Id.* ¶ 1, 407 P.3d at 400.

3. On March 29, 2019, Foltz signed the present *Consolidated Amended Petition for Post-Conviction Relief* raising a number of claims alleging ineffective assistance of appellate counsel, which this Court understands as:

1. Ineffective assistance of appellate counsel due to appellate counsel's briefing presented on appeal.
2. Ineffective assistance of appellate counsel for failing to raise the following claims regarding his trial on direct appeal:
    a. Ineffective assistance of trial counsel for failure to object to the use of an "in life" photograph of the minor victim B.B., and relatedly, prosecutorial misconduct for use of the photograph.
    b. Ineffective assistance of trial counsel for not calling the minor victim's sister as a witness.
    c. Prosecutorial misconduct in statements made by the prosecution at trial.
    d. Ineffective assistance of trial counsel for failing to file a renewed motion for change in venue after *voir dire*.
    e. Ineffective assistance of trial counsel for not challenging, via for-cause or peremptory challenge, a juror married to an employee of the Campbell County Attorney's Office.

f. A hearsay violation based on the State's use of Foltz's statements presented through the testimony of other witnesses.

g. A claim of cumulative error on behalf of trial counsel for the preceding ineffective assistance of trial counsel claims.

3. Various issues concerning the sufficiency of the evidence presented against him.

4. On April 4, 2019, this Court ordered the State to answer or move to dismiss the amended petition within forty-five days as required under Wyoming Statute § 7-14-105(a). The State timely filed its motion to dismiss.

II. Conclusions of Law

A. General Principles of Post-Conviction Relief

5. Post-conviction relief in Wyoming is a "strictly confined statutory remedy." *Schreibvogel v. State*, 2012 WY 15, ¶ 10, 269 P.3d 1098, 1101 (Wyo. 2012) (citations omitted). Wyoming Statutes §§ 7-14-101 through -108 govern post-conviction relief. In Wyoming Statute § 7-14-101(b), the Wyoming Legislature limited post-conviction relief to claims made by persons serving sentences in Wyoming penal institutions who set forth specific violations of constitutional rights that occurred in the proceedings resulting in their felony convictions or sentences.

6. In Wyoming Statute § 7-14-103(a), the Legislature further limited the availability of post-conviction relief by providing three procedural bars which prohibit consideration of claims: (i) that could have been raised on direct appeal to the Wyoming Supreme Court; (ii) that were not raised in a previous petition for post-conviction relief;

and (iii) that were decided "on [the] merits or on procedural grounds in any previous proceeding which has become final." *See* Wyo. Stat. Ann. § 7-14-103(a)(i)-(iii). A post-conviction claim of ineffective assistance of trial counsel is procedurally barred under Wyoming Statute § 7-14-103(a)(i) where it could have been raised on direct appeal. *See Schreibvogel*, ¶ 16, 269 P.3d at 1104.

7. However, in Wyoming Statute § 7-14-103(b), the Legislature provided three limited exceptions to revive claims which would otherwise be barred under § 7-14-103(a)(i) for failure to have been raised on direct appeal. These three exceptions permit a court to consider claims that could have been raised on direct appeal if: (i) the petitioner presents new facts not known or available at the time of appeal, (ii) prove appellate counsel was ineffective for failing to raise existing claims, or (iii) where the "petitioner was represented by the same attorney in the trial and appellate courts." *See* Wyo. Stat. Ann. § 7-14-103(b)(i)-(iii). These three exceptions are applicable only to revive claims under the first procedural bar of Wyoming Statute § 7-14-103(a)(i); claims procedurally barred under § 7-14-103(a)(ii) and (iii) cannot be presented under the exceptions of § 7-14-103(b)(i)-(iii). *Schreibvogel*, ¶ 15, 269 P.3d at 1103-04.

8. For the purposes of post-conviction relief, "[a] 'claim' is '[t]he aggregate of operative facts giving rise to a right enforceable by a court[.]'" *Rathbun v. State*, 2011 WY 116, ¶ 9, 257 P.3d 29, 33 (Wyo. 2011) (citing *Black's Law Dictionary* 281 (9th ed. 2009)). "An 'issue,' on the other hand, is '[a] point in dispute between two or more parties . . . [that] may take the form of a separate and discrete question of law or fact, or a combination of both.'" *Id.* (citing *Black's* at 907). Where a petitioner's claim is procedurally barred

under Wyoming Statute § 7-14-103(a)(iii), that claim may not be reconsidered despite the petitioner's presentation of different issues in support of that claim. *See Schreibvogel*, ¶ 11, 269 P.3d at 1102.

9. Under Wyoming Statute § 7-14-103(b)(ii), a court may consider a claim which could have been presented on direct appeal, but was not, where the court determines the petitioner's appellate counsel provide constitutionally ineffective assistance by failing to assert that claim, and that claim was "likely to result in a reversal of the petitioner's conviction or sentence on his direct appeal." Under this statutory provision, "claims of ineffective assistance of appellate counsel are statutorily recognized as the "portal" through which otherwise waived claims of trial-level error may be reached. " *Harlow v. State*, 2005 WY 12, ¶ 6, 105 P.3d 1049, 1057 (Wyo. 2005).

10. To demonstrate that appellate counsel was constitutionally ineffective for failure to raise an issue on direct appeal, a petitioner must meet a "strict test[.]" *Id.* ¶ 6, 105 P.3d at 1058; *Smizer v. State*, 835 P.2d 334, 337 (Wyo. 1992). This test, first prominently explained by the Wyoming Supreme Court in *Cutbirth v. State*, is similar to the three-part test applied to plain error review; it first requires petitioner "demonstrate to the district court, by reference to the record of the original trial without resort to speculation or equivocal inference, what occurred at that trial." *Cutbirth v. State*, 751 P.2d 1257, 1266 (Wyo. 1988). Second, a petitioner "must identify a clear and unequivocal rule of law which those facts demonstrate was transgressed in a clear and obvious, not merely arguable, way." *Id.* And third, a petitioner "must show the adverse effect upon a substantial right in order to complete a claim that the performance of appellate counsel was constitutionally deficient

because of a failure to raise the issue on appeal." *Id.* This adverse effect is shown through demonstration of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

11. Because appellate attorneys do not typically raise every conceivable issue on appeal, a successful showing under the *Cutbirth* test demonstrating ineffective assistance of counsel must involve an omission so serious as to indicate the failure of appellate counsel to provide a constitutional minimum of representation to the petitioner, to the prejudice of the petitioner. *Keats v. State*, 2005 WY 81, ¶ 14, 115 P.3d 1110, 1116 (Wyo. 2005). And while ineffective assistance of appellate counsel provides a "portal" through which otherwise waived claims may be reached, no "stand-alone" claim of ineffective assistance of appellate counsel exists to challenge appellate counsel's performance on appeal. *Schreibvogel*, ¶ 17, 269 P.3d at 1104.

B. Foltz's Claims

12. Referencing the claims identified above in paragraph three of this Order, the Court addresses each of Foltz's claims in turn.

1. Claim 1: Ineffective Assistance of Appellate Counsel due to Appellate Counsel's Performance on Direct Appeal.

13. The Court rejects Foltz's claim that he was denied effective assistance of appellate counsel by reference to his appellate counsel's performance in briefing the issues for appeal. No "stand-alone" claim of ineffective assistance of appellate counsel exists

under Wyoming law; instead, ineffective assistance of appellate counsel exists as an analysis as to whether appellate counsel failed to raise an issue on appeal, and that this failure to raise the issue prejudiced the criminal defendant. *Schreibvogel*, ¶ 17, 269 P.3d at 1104.

14. Additionally, this claim lies outside of the scope of the post-conviction relief statute. Wyoming Statute § 7-14-101(a) limits post-conviction relief to errors occurring in the "proceedings which resulted in" a conviction or sentence. *Id.* Foltz's stand-alone claims regarding his appellate counsel's substantive performance on appeal are denied.

2. Claim 2: Ineffective Assistance of Appellate Counsel due to Appellate Counsel's Failure to Raise Claims on Direct Appeal.

15. In order to satisfy the exception to the procedural bar under Wyoming Statute § 7-14-103(b)(ii), Foltz must demonstrate each claim that he now petitions should have been raised on direct appeal satisfies each of the three requirements of the *Cutbirth* analysis.

16. Before addressing in turn each claim Foltz argues his appellate counsel should have been raised on direct appeal, the Court notes that the first requirement under *Cutbirth*, that the occurrence at trial be demonstrable by the record, is met for all of Foltz's claims. *Cutbirth v. State*, 751 P.2d at 1266. Therefore, this Court addresses whether each claim constitutes a clear and obvious violation of a clear and unequivocal rule of law, and if so, whether that error adversely effected one of Foltz's substantial rights. *See id.*

a. Claim 2(a): Ineffective Assistance of Trial Counsel for Failure to Object to "In Life" Victim Photograph, and Prosecutorial Misconduct for Using the Photograph.

17. Foltz alleges that the publication to the jury of a photograph taken of victim B.B. constituted prosecutorial misconduct, and that the failure of his trial counsels to object to it constituted ineffective assistance of trial counsel. While the Wyoming Supreme Court has clarified that "[p]hotographs of homicide victims taken during life should be admitted to the jury only under very limited circumstances[,]" B.B.'s "in life" photograph was properly admitted because it was "relevant to some material issue" and its relevancy outweighed the danger of prejudice to Foltz. *Wilks v. State*, 2002 WY 100, ¶ 13, 49 P.3d 975, 982 (Wyo. 2002) (quoting *Valdez v. State*, 900 P.2d 363, 380 (Okla. Crim. App. 1995)).

18. B.B.'s photograph was taken only two days before his death, and therefore was relevant to a material issue in the case, namely the differentiation of injuries at the time the photograph was taken and the injuries present on his body at the time of his death. The photograph limited the timeframe in which the injuries causing B.B.'s death must have occurred; it was therefore probative for the State's method of proof, namely to establish Foltz as the only person with the opportunity to have inflicted the injuries on B.B. within the timeframe of when the injuries must have occurred. The Court finds this was an appropriate use of an "in life" photograph consistent with *Wilks* and that its probative value outweighed any prejudicial effect to Foltz under Wyoming Rule of Evidence 403.

19. Constituting an appropriate admission of evidence, the non-objection to this photograph by Foltz's trial counsel did not constitute ineffective assistance of trial counsel.

See Sorenson v. State, 6 P.3d 657, 660 (Wyo. 2000) (affording trial counsel a "wide range of professionally competent assistance"). Likewise, because the photograph was admissible, the prosecution committed no improper or illegal act to substantiate prosecutorial misconduct. *See Craft v. State*, 2013 WY 41, ¶¶ 11, 13, 298 P.3d 825, 829 (Wyo. 2013).

20. Constituting no error resulting in ineffective assistance of trial counsel or prosecutorial misconduct, the use of B.B.'s "in life" photograph provided no grounds for appellate relief. Thus, the *Cutbirth* analysis to establish ineffective assistance of counsel fails on the second requirement, failure by Foltz to demonstrate a clear and obvious violation of a clear and unequivocal rule of law. *Cutbirth*, 751 P.2d at 1266. The Court rejects this claim of ineffective assistance of appellate counsel.

b. Claim 2(b): Ineffective Assistance of Trial Counsel for not Calling B.B.'s Sister as a Witness.

21. Foltz claims that his trial counsel were ineffective in failing to call B.B.'s sister, A.R., as a witness at trial. He complains his attorneys rejected his request to call A.R. because of the potential appearance to the jury of a lack of compassion by having a minor testify. However, "the decision as to whether call a particular witness is a matter of trial tactics properly committed to the discretion of counsel." *Gist v. State*, 737 P.2d 336, 343 (Wyo. 1987). This form of trial tactical decision is a strategic choice; "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Persuasive precedent indicates that this consideration, the creation of an unfavorable impression of the defense tactics to the

jury, is an appropriate tactical consideration. *See United States v. Cree*, 778 F.2d 474, 479 (8th Cir. 1985).

22. Thus, Foltz's trial counsel were not ineffective when deciding not to call A.R. as a witness at trial. In the absence of ineffective assistance of trial counsel, this Court finds no ineffective assistance of appellate counsel because, under the second requirement of *Cutbirth*, Foltz's appellate counsel cannot be held ineffective for failing to raise this issue, were it was not a violation of any rule of law. *Cutbirth*, 751 P.2d at 1266.

c. Claim 2(c): Prosecutorial Misconduct in Statements Made by the Prosecution at Trial.

23. Foltz identifies two statements made by the State which he argues constituted a comment on his right not to testify. Prosecutorial misconduct can arise when a prosecutor comments on a defendant's exercise of his right to remain silent at trial. *Carothers v. State*, 2008 WY 58, ¶ 15, 185 P.3d 1, 10 (Wyo. 2008). The first is inapposite, as it was argument made outside of the presence of the jury. The second is the following statement from the State's closing argument:

> So now the big question is, how do you, the jury, know that it was Mr. Foltz who caused all these injuries? Well, look at the timing of it. The injuries that killed him, the tears to the mesentery, happened in the last 24 hours or so of his life. Who was he around? He was around Amanda, he was around [A.R.], he was around Mr. Foltz. For good measure on the 29th he was also around Jake and Candace LaVallee. You got to hear from Jake and Candace LaVallee. They didn't harm him. They didn't see him come to harm. Amanda, Amanda got on the stand and said no, I didn't hurt him. She didn't cause these. [A.R.], no indication from anybody that [A.R.] touched him that day. None. Just leaves Donnie. And it just leaves Mr. Foltz.

(Trial Transcript at 1849-50).

24. The Court finds this statement does not constitute a comment on Foltz's decision not to testify, but rather it focuses on the reasoning of the evidence presented at trial to establish that Foltz was the only adult with the opportunity to inflict the injuries on B.B. immediately preceding B.B.'s death. To commit prosecutorial misconduct by commenting on a defendant's decision not to testify at trial, the prosecution must actually comment on that fact, rather than just the import of the evidence provided at trial. *Carothers*, ¶ 16, 185 P.3d at 12.

25. Because no improper statements about Foltz's decision not to testify were made, the Court finds no prosecutorial misconduct occurred on this ground. In the absence of a violation of law on this ground, Foltz's appellate counsel was not ineffective for failing to raise this ground on appeal. *Cutbirth*, 751 P.2d at 1266.

d. Claim 2(d): Ineffective Assistance of Trial Counsel for Failing to File a Renewed Motion for Change in Venue After *Voir Dire*.

26. Foltz argues his trial counsel were ineffective for failing to file a post-*voir dire* motion for change in venue under Wyoming Rule of Criminal Procedure 21(a). However, Rule 21(a) imposes a high threshold of prejudice a defendant must show in order to support a change of venue. "Prejudice will not be presumed from mere local publicity; such presumption will rarely be invoked and only in extreme circumstances. To require venue to be changed, pre-trial publicity must be so inflammatory as practically to dictate the community's opinion." *Carothers*, ¶ 11, 185 P.3d at 8-9 (citing *Sanchez v. State*, 2006 WY 116, ¶ 13, 142 P.3d 1134, 1139 (Wyo. 2006)) (internal citation omitted).

27. Foltz cannot illustrate how the *voir dire* process would have supported a Rule 21(a) motion. Far from demonstrating exceptional and inflammatory prejudice against Foltz, the *voir dire* process was able to seat a jury acceptable to Foltz's trial counsel and the State within one day. The Court finds that it would not have granted a Rule 21(a) motion for a change in venue after *voir dire*. His trial counsel were therefore not ineffective in not raising this issue. *Barnes v. State*, 2004 WY 146, ¶ 8, 100 P.3d 1256, 1259 (Wyo. 2004). Because no ineffective assistance of trial counsel resulted from this decision, there was no clear violation of any rule of law, and thus, Foltz's appellate counsel was not ineffective. *Cutbirth*, 751 P.2d at 1266.

e. Claim 2(e): Ineffective Assistance of Trial Counsel for Not Challenging, via For-Cause or Peremptory Challenge, Juror 1301.

28. Foltz challenges his trial counsel's performance for allowing Juror 1301 to remain on his jury. Foltz argues that, because Juror 1301 was married to a legal secretary for the Campbell County Attorney's Office, that his trial counsel should have initially challenged this juror for-cause, and subsequently, should have exercised a peremptory challenge to remove this juror.

29. Juror 1301's responses at *voir dire* demonstrated that he had no knowledge of the case, had no relationship with the prosecutors at trial, and that his wife's position would not affect his judgment as a juror. This Court finds that a for-cause challenge to Juror 1301 would not have been granted based on the *voir dire* responses from Juror 1301 on the record.

30. With respect to whether his trial counsel should have exercised a peremptory challenge to remove Juror 1301, this Court finds the decision to exercise peremptory challenge to be a strategic choice which is "virtually unchallengeable." *Strickland,* 466 U.S. at 690. Because Juror 1301 was not "an actual employee of the prosecuting agency[,]" Juror 1301 did not fall under the category of a juror with implied bias. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998) (quoting *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring)). In the absence of demonstrating how Juror 1301 was impliedly biased, this Court finds that the exercise of Foltz's peremptory challenges was an appropriate exercise of strategic discretion that would not constitute ineffective assistance of trial counsel.

31. For failure to demonstrate ineffective assistance of trial counsel for any action regarding Juror 1301, Foltz cannot show ineffective assistance of appellate counsel for not raising this claim on direct appeal. *Cutbirth*, 751 P.2d at 1266.

f. Claim 2(f): The State's use of Foltz's Statements Presented through the Testimony of Other Witnesses Violated the Hearsay Rule.

32. Foltz claims that the State's presentation of his statements through the testimony of its witnesses violated the hearsay rule. This is incorrect; his statements are admissible as admissions by parties-opponent under Wyoming Rule of Evidence 801(d)(2)(A). "A criminal defendant's statement qualifies as an admission under Rule 801(d)(2)(A) and is not hearsay regardless of whether it was against his interest at the time he made it or whether it "admits" anything in the conventional sense of that word." *Leach v. State*, 2013 WY 139, ¶ 23, 312 P.3d 795, 800 (Wyo. 2013).

33. Because the use of Foltz's statements against him is not a hearsay violation, Foltz's appellate counsel was not ineffective for failing to raise this claim on direct appeal. *Cutbirth*, 751 P.2d at 1266.

g. Claim 2(g): Ineffective Assistance of Trial Counsel due to Cumulative Error.

34. Foltz alleges his trial counsel were ineffective by means of cumulative error. "Cumulative error occurs when two or more individually harmless errors have the potential to prejudice the defendant to the same extent as a single reversible error." *Watts v. State*, 2016 WY 40, ¶ 23, 370 P.3d 104, 112 (Wyo. 2016) (internal citations and quotations omitted).

35. Having found no errors in any of Foltz's claims, these non-erroneous decisions cannot accumulate to prejudice Foltz. Therefore, a claim of ineffective assistance of trial counsel based on cumulative error would have failed on appeal, and thus, appellate counsel was correct not to raise a cumulative error claim. *Cutbirth*, 751 P.2d at 1266.

3. Claim 3: Arguments Challenging the Sufficiency of the Evidence Presented against him.

36. Foltz's petition raises a variety of issues which pertain to whether the evidence presented at trial was sufficient to support the jury's convicting him of first degree murder. The Court finds these issues presented to be barred under Wyoming Statute 7-14-103(a)(iii) because Foltz's sufficiency of the evidence claim was already raised on direct appeal. *See Foltz*, ¶ 2, 407 P.3d at 400.

37. Even though Foltz's current petition focuses on different issues of sufficiency of the evidence that those presented by appellate counsel at trial, the entire

claim of sufficiency of the evidence is precluded from subsequent review. *See Schreibvogel*, ¶¶ 3-4, 11, 269 P.3d at 1100, 1102 (rejecting subsequent claim of ineffective assistance of trial counsel despite post-conviction petition alleging new issues of why trial counsel was ineffective). Because the Wyoming Supreme Court has already conclusively determined on the merits that the evidence presented against Foltz was sufficient to sustain his conviction, this Court finds Foltz's arguments regarding the nature of the evidence presented against him to be procedurally barred under Wyoming Statute 7-14-103(a)(iii).

III. Order

For the foregoing reasons, this Court must dismiss Foltz's *Petition* and deny his claims for post-conviction relief.

IT IS, THEREFORE, ORDERED that the State's *Motion* is GRANTED; and

ORDERED that Foltz's *Petition* is DISMISSED WITH PREJUDICE; and

ORDERED that any outstanding matters not addressed in this ORDER are DENIED AS MOOT.

DATED this 1 day of August 2019.

MICHAEL N. DEEGAN

HON. MICHAEL N. DEEGAN
DISTRICT JUDGE

Copies to: Donald D. Foltz Jr., #31021, Petitioner *pro se*
Timothy P. Zintak, Assistant Attorney General, Counsel for Respondent

APPENDIX C

Writ of certiorari in Wyoming Supreme

IN THE SUPREME COURT, STATE OF WYOMING

April Term, A.D. 2019

DONALD DEAN FOLTZ, JR.,	
Petitioner,	
v.	**S-19-0185**
THE STATE OF WYOMING,	
Respondent.	

ORDER DENYING PETITION FOR WRIT OF CERTIORARI

This matter came before the Court upon a "Petition[] for Writ of Certiorari," filed herein August 16, 2019, and a "Notice of Appeal," filed herein August 15, 2019. This Court has treated the notice of appeal as a request for a writ of certiorari, in conjunction with the Petition for Writ of Certiorari filed on August 16. Now, after a careful review of the petition, the notice of appeal, the materials attached to the petition, the "Response to Petition for Writ of Review," "Petitioner's Response to Respondent's Response and Request the Writ of Certiorari Be Granted," and the file, this Court finds that the petition should be denied. It is, therefore,

ORDERED that Petitioner, Donald Dean Foltz, Jr., be allowed to proceed in this matter *in forma pauperis*; and it is further

ORDERED that the Petition for Writ of Certiorari, filed herein August 16, 2019, be, and hereby is, denied.

DATED this 4th day of September, 2019.

BY THE COURT:

/s/

MICHAEL K. DAVIS
Chief Justice

Resp'ts' Attach. I

APPENDIX D

Habeas Corpus

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

DONALD D. FOLTZ, Jr.,

Petitioner,

vs.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, et al.,

Respondents.

Case No. 19-cv-00195-SWS

ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

This matter comes before the Court on a Petition for Writ of Habeas Corpus filed *pro se* by Donald D. Foltz, Jr. [Doc. 6] and the Respondents' Motion for Summary Judgment [Doc. 22]. Having considered the filings, applicable law, and being otherwise fully advised, the Court finds the Motion for Summary Judgment should be **GRANTED** and the Petition **DISMISSED with prejudice.**

BACKGROUND

Petitioner Donald D. Foltz, Jr., was convicted of first-degree murder following the death of his girlfriend's two-year-old son, BB. The prosecutor alleged, and the jury found,

Petitioner caused BB's death during the perpetration of child abuse. The district court sentenced Petitioner to life imprisonment without the possibility of parole. The Wyoming Supreme Court affirmed Mr. Foltz's conviction. *Foltz v. State*, 407 F.3d 398 (Wyo. 2017).

The Wyoming Supreme Court detailed the relevant facts as follows:

> In the fall of 2014, Mr. Foltz moved into the home of his girlfriend, Amanda Russell, and her two children. On December 22, 2014, Ms. Russell took her two-year-old son, BB, to a pediatrician, Dr. Fall, with concerns that BB had been vomiting, complaining of leg pain, and that he was bruising easily. After an examination and receiving the results of blood work, Dr. Fall concluded that BB's injuries were due to child abuse. He informed Ms. Russell of his suspicions and contacted the Department of Family Services (DFS). The next day, Sergeant Michael Hieb of the Campbell County Sheriff's Office accompanied an individual from DFS to follow up on Dr. Fall's report. Sergeant Hieb noted many bruises on BB; however, after Ms. Russell explained how BB received all the bruises, he concluded the injuries did not appear to be the result of child abuse.
>
> From the evening of December 23 through the morning of December 29, BB and his four-year-old sister, AR, spent most of their time with babysitters and family friends. . . The children spent the rest of December 29 at the home with Ms. Russell and Mr. Foltz. The family had no visitors. That evening, Mr. Foltz put BB to bed and he and Ms. Russell went to bed at approximately 10:30 p.m. On December 30, Mr. Foltz got out of bed at 8:00 a.m. when he heard through the baby monitor that BB had awakened. Ms. Russell stayed in bed until after noon, but she could hear through a window Mr. Foltz, BB and AR working and playing outside. After Ms. Russell got out of bed, she remained in the home until about 4:00 p.m. when she left the children with Mr. Foltz for approximately forty-five minutes while she visited a friend. Ms. Russell returned home, but later that evening went to the grocery store to purchase electrolytes for BB because Mr. Foltz said that BB had vomited during the day. When Ms. Russell left for the store, Mr. Foltz had already put BB to bed for the night.
>
> While Ms. Russell was at the store, Mr. Foltz brought an unresponsive BB into Ms. Blake's[1] home through the back door. Mr. Foltz told Ms.

[1] Donna Blake is Amanda Russell's mother and lived next door to Ms. Russell in rural Campbell County.

> Blake that he had checked on BB after hearing a noise on the baby monitor. He discovered there was something wrong with BB, he needed help, and he did not know what to do. Ms. Blake called 911, wrapped BB in a blanket, and then got into her vehicle with her boyfriend and BB to meet the ambulance on the way to the hospital. Mr. Foltz stayed behind to take care of AR.
>
> Ms. Blake attempted to perform CPR as instructed by the 911 operator, but when she pressed on BB's chest he began to vomit. She turned on a light in the vehicle and noticed a large bruise on BB's forehead. She then met the ambulance, and emergency medical personnel took BB to the hospital. Emergency staff made vigorous attempts to revive BB, but were unsuccessful. He was pronounced dead at 10:35 p.m. The emergency room physician who attempted to revive BB noted extensive bruising from BB's jaw to chest, a bruise with swelling on his forehead, a distended abdomen, and multiple bruises over the rest of BB's body. The physician believed the injuries were due to child abuse and contacted law enforcement.
>
> Dr. Donald Habbe performed an autopsy the next day and concluded that BB died from blunt force trauma to the abdomen. Dr. Habbe discovered multiple tears in BB's mesentery which caused bleeding into the abdomen. He believed the tears were caused by multiple instances of force and were recent injuries that had occurred in the twenty-four hour period before BB's death.

Foltz v. State, 407 F.3d at 400-401.

On direct appeal, Petitioner's counsel raised a single issue: whether the trial court erred by denying the motion for judgment of acquittal due to insufficient evidence supporting the elements of child abuse. *Id.* at 400. The Wyoming Supreme Court held the district court properly denied the motion for judgment of acquittal:

> The State presented expert medical testimony that BB died from three separate mesentery tears that were caused by non-accidental blunt force trauma and inflicted within twenty-four hours of his death. The evidence also established that BB had likely been abused over a period of time before his death. The State showed that Mr. Foltz was with BB that entire twenty-four period and, therefore, was one of only two persons who could have inflicted the fatal injuries. The other person, Ms. Russell, testified that she did not

> injure BB. This evidence, coupled with incriminating and inconsistent statements made by Mr. Foltz, could lead a reasonable jury to conclude that Mr. Foltz intentionally and recklessly inflicted physical injury on BB. Further, viewing the evidence in the light most favorable to the State, the State presented sufficient evidence for the jury to conclude that Mr. Foltz was not responsible for the welfare of BB when he inflicted the injuries. Therefore, the district court appropriately denied Mr. Foltz's motion for judgment of acquittal.

Id. at 407-408.

Petitioner filed a Petition for Post-Conviction Relief in state district court, raising issues focusing primarily on the effectiveness of his trial and appellate counsel. [Doc. 16-4, pp. 10-11.]

i. Ineffective assistance of Appellate Counsel for filing an inadequate brief;

ii. Ineffective Assistance of Trial Counsel by Allowing Prejudicial and Irrelevant Evidence to be Admitted and Uncontested- Regarding States Presentation of in Life Picture

iii. Ineffective Assistance of Trial Counsel for Failing to Call A.R. as a Material Witness

iv. Ineffective Assistance of Appellate Counsel for Failing to Assert Petitioners Right to Remain Silent Was Used Against Him

v. Ineffective Assistance of Trial Counsel for not Re-filing for Change of Venue after Voir Dire and Failing to Remove Juror For Cause

vi. Ineffective Assistance of Appellate Counsel for not claiming Ineffective Assistance of Trial Counsel

vii. Cumulative Error Grounds for Ineffective Assistance of Counsel

The state district court ruled against Petitioner on each of the claims raised and dismissed the petition for post-conviction relief with prejudice. [Doc. 16-6.] Petitioner then filed a Notice of Appeal with the Wyoming Supreme Court, seeking a writ of certiorari to review the district court's order. [Doc. 16-7.] The Court denied the petition in a brief order dated September 4, 2019. [Doc. 16-9.]

On October 10, 2019, Petitioner filed his Petition for Writ of Habeas Corpus with this Court. [Doc. 6.] He set forth four claims for relief:

> 1) Constitutionally deficient performance of counsel, a Sixth and Fourteenth Amendment rights violation;
>
> 2) A right to a fair trial by unbiased jury, a Fourteenth Amendment right;
>
> 3) Prosecutorial misconduct, a Fifth, Sixth and Fourteenth Amendment rights violation, and
>
> 4) Insufficient evidence to convict beyond a reasonable doubt, a Fourteenth Amendment rights violation.

[Doc. 6, p. 4.]

He also alleged an absence of an available State corrective process to address the issue of ineffective assistance of appellate counsel. *Id.* He contends he is innocent of the charges of which he has been convicted and asks this Court to vacate the judgment against him or in the alternative remand for a new trial with effective counsel. [Doc. 6, pp. 1, 28.]

STANDARD OF REVIEW

Mr. Foltz, Petitioner, is proceeding *pro se* in this matter. The Court considers complaints from *pro se* petitioners by a "less stringent" standard than the complaint

requirements set forth in Fed. R. Civ. P. 8(a)(2). *See e.g., Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Estelle v. Gamble*, 429 U.S. 97, 97 (1976). If the Court can "reasonably read" the petitioner's valid claims, it will consider the claims despite a petitioner's improper citation, confusion of legal theories, or poor writing. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court is not obligated to act as counsel to a *pro se* litigant. *Pliler v. Ford*, 542 U.S. 225, 231 (2004). Further, a *pro se* petitioner must still present evidence of his claims and cannot rely on "mere speculation, conjecture, or surmise," to survive summary judgment. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004).

Petitioner's petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, which provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

This standard for review of state-court rulings is "difficult to meet" and "highly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). This standard "demands that state-court decisions be given the benefit of the doubt." *Id. quoting Woodford v. Viscotti*, 537 U.S. 19, 24 (2002). The petitioner bears the burden of proof. *Cullen v. Pinholster,* 563 U.S. at 181. Moreover, a determination of a factual issue made by a State court is presumed

to be correct, and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Goode v. Carpenter,* 922 F.3d 1136, (10th Cir. 2019). "The threshold question for review under § 2254(d)(1) is whether there exists clearly established federal law on the issue raised by the prisoner." *Goode v. Carpenter,* 922 F.3d at 1148. If so, "a state court decision is 'contrary to' it only if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases or if the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nonetheless arrives at a different result." *Id.*

Both the United States Supreme Court and the Tenth Circuit have held that "in determining whether a petitioner has satisfied § 2254(d)'s rigorous requirements, a federal habeas court's review 'is limited to the record that was before the state court that adjudicated the claim on the merits.'" *Eaton v. Pacheco*, 931 F.3d 1009, 1018–19 (10th Cir. 2019), *cert. denied*, 206 L. Ed. 2d 942 (May 18, 2020), *quoting Cullen v. Pinholster*, 563 U.S. at 181:

> In other words, "evidence introduced [for the first time] in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 185, 131 S.Ct. 1388.

Federal statutory law does not address the standard for summary judgment in habeas corpus proceedings. Thus, the Federal Rules of Civil Procedure govern analysis of Respondents' Motion for Summary Judgment. Fed. R. Civ. P. 91(a)(4)(A). The applicable rule is Fed. R. Civ. P. 56. Under this rule, summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a

matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if under the substantive law it is essential to resolution of the claim. *Crowe v. ADT Sec. Servs., Inc.*, 643 F.3d 1189, 1194 (10th Cir. 2011).

The party moving for summary judgment bears the burden of demonstrating "that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). Once the moving party "has identified a lack of a genuine issue of material fact, the nonmoving party has the burden to cite to 'specific facts showing that there is a genuine issue for trial.'" *Ezell v. BNSF Ry. Co.*, 949 F.3d 1274, 1278 (10th Cir. 2020), *quoting May v. Segovia,* 929 F.3d 1223, 1234 (10th Cir. 2019). When considering a motion for summary judgment, the Court considers the evidence "in the light most favorable to the non-moving party." *Bowling v. Rector*, 584 F.3d 956, 963 (10th Cir. 2009).

DISCUSSION

Petitioner sets forth four claims in his petition, which distill to three areas in which he believes his trial counsel was deficient, and a fourth contention that appellate counsel was ineffective for failing to point out those deficiencies. Petitioner's claims before this Court are simply a restatement of the issues he raised on post-conviction relief in state court, and at their core, are little more than his contention that he is not guilty of the offense. In reiterating these arguments, he fails to clearly articulate how the state court erred in upholding his conviction or to rebut the determination of facts with clear and convincing evidence.

Petitioner's principal argument is that the State did not prove beyond a reasonable doubt that Petitioner was the "only" actor who could have abused the child. [Doc. 6, pp. 16, 18-19, 22-27.] However, this Court's role pursuant to 28 U.S.C. § 2254(d) is not to retry his case. Under 28 U.S.C. § 2254(d), the Court can review the state court's decisions to determine (1) whether they were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) that they resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

This Court is required to give great deference to the state court's decisions. *Cullen v. Pinholster,* 563 U.S. at 181. Furthermore, the determination of factual issues made by the state court is presumed to be correct. 28 U.S.C. § 2254(d). Thus, to succeed on his claims, Petitioner must rebut this presumption of correctness by clear and convincing evidence. *Id.* He has not done so. Absent such evidence, this Court must defer to the findings of the state court.

Issue 1: Effective Assistance of Counsel.

Petitioner alleges he did not receive the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. [Doc. 6, pp. 5-11.] He claims his appellate counsel was ineffective for failing to raise several issues on direct appeal, specifically the ineffectiveness of trial counsel, implied bias on the part of Juror 1301, and prosecutorial misconduct during the trial. [Doc. 6, pp. 5-9.]

He also alleges his trial counsel was ineffective, primarily due to his failure to object to comments made by the prosecutor during closing arguments. [Doc. 6, pp. 10-11.]

The state district court ruled Petitioner did not receive ineffective assistance of appellate counsel. [Doc. 16-6, pp. 7-13.] Petitioner fails to demonstrate how this decision is either contrary to, or an unreasonable application of, clearly established federal law.

The test to be applied in reviewing a claim of ineffective assistance of counsel was set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "First, the defendant must show that counsel's performance was deficient . . . Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687. There is a "strong presumption that counsel's performance fell within the wide range of reasonable professional assistance." *Id.* at 689.

"When the claim at issue is one for ineffective assistance of counsel, moreover, AEDPA review is 'doubly deferential,' because counsel is 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.' In such circumstances, federal courts are to afford 'both the state court and the defense attorney the benefit of the doubt.'" *Woods v. Etherton*, __ U.S. __, 136 S. Ct. 1149, 1151 (2016) (citations omitted).

Petitioner's initial argument about the adequacy of appellate counsel's representation focuses on the extent to which counsel challenged the sufficiency of the evidence. [Doc. 6, p. 9.] The Wyoming Supreme Court in fact reviewed in-depth the sufficiency of the evidence in affirming Petitioner's conviction. *Foltz v. State*, 407 P.3d at 401 ("Although Mr. Foltz facially challenges the denial of his motion for judgment of

acquittal, he is in fact claiming that the evidence was insufficient to sustain a conviction."). Petitioner presents no law or facts to support his allegation that appellate counsel did not adequately address this issue on appeal.

Petitioner also enumerates three issues he believes appellate counsel should have raised on direct appeal: ineffective assistance of trial counsel, implied juror bias, and prosecutorial misconduct. [Doc. 6, p. 9.] He does not further elaborate on how the failure to address these issues on appeal constituted ineffective assistance of appellate counsel, and as the discussion on each of these points indicates, trial counsel did not err in their approach to these matters – therefore there could be no error in appellate counsel not raising those issues on appeal.[2]

Issue 2: Implied bias of Juror 1301

During *voir dire*, one potential juror, Juror 1301, brought to the court's attention his marriage to a legal secretary working for the prosecuting attorney's office. In response to questioning by the attorneys, the juror said his wife had not talked with him about the case, he did not believe his relationship with her would affect the way he would listen to the evidence, and he did not have any relationship with the prosecutors in the case. [Doc. 25-1, Trial Transcript, pp. 53-54; 25-2, Trial Transcript, p. 82.][3]

[2] As the state court noted with respect to the allegations of ineffective assistance of trial counsel, and appellate counsel's "failure" to not raise those issues on appeal, "[h]aving found no errors in any of Foltz's claims, these non-erroneous decisions cannot accumulate to prejudice Foltz. Therefore, a claim of ineffective assistance of trial counsel based on cumulative error would have failed on appeal, and thus, appellate counsel was correct not to raise a cumulative error claim." [Doc. 16-6, p. 14.]

[3] Portions of the trial transcript have been included as exhibits attached to Document 25. When reference is made to these transcripts, the numbers are to the pages of the actual transcript(s), rather than to the page numbers assigned in this Court's docket, in order to remain consistent with references in Respondents' memorandum of law [Doc. 23].

Petitioner challenged Juror 1301's service on the jury in his petition for post-conviction relief, alleging he was impliedly biased because of his marriage to an employee in the prosecuting attorney's office, and that trial counsel should have either challenged him for cause or struck him using a preemptory challenge. [Doc. 16-4, pp. 23-26.] The state court found Juror 1301 did not fall into the category of a juror with implied bias; a for-cause challenge to Juror 1301 would not have been granted based on the juror's *voir dire* responses; and trial counsel's exercise of preemptory challenges was an appropriate exercise of strategic discretion. [Doc. 16-6, pp. 2-13.]

While there are situations in which bias will be implied, the Supreme Court has not held that a spouse of a government employee falls into such category. *See Smith v. Phillips*, 455 U.S. 209, 216-18 (1982) (discussing history of implied bias and rejecting its application to a juror who submitted his job application to the prosecutor's office while serving as a juror in criminal matter being pursued by prosecutor). Almost ninety years ago, the United States Supreme Court held there was no automatic disqualification of governmental employees to serve as jurors in criminal cases, and therefore, such was not a requirement of the Sixth Amendment. *United States v. Wood*, 299 U.S. 123, 137 (1936). And in *Dennis v. United States*, 339 U.S. 162, 168 (1950), the Court reviewed a Congressional Act providing that persons employed by either the United States Government or the District of Columbia were qualified to serve as jurors and should not be exempt from service on the basis of their employment. The Court rejected a claim of implied bias based on the jurors' employment status: "A holding of implied bias to

disqualify jurors because of their relationship with the Government is no longer permissible . . .. Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Id.*, at 171-172; *see also Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232 (10th Cir. 2016) (in light of *Wood* government employment carries with it no blanket assumption of implied bias in criminal cases).

Finally, in *Smith v. Phillips*, 455 U.S. 209, the Court acknowledged jurors may be placed "in a potentially compromising situation," but such occurrence does not mandate a new trial in every instance:

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Id. at 217.

In Petitioner's case, the state court found that because Juror 1301 was not "'an actual employee of the prosecuting agency[,]'" he did not fall into the category of a juror with an implied bias. [Doc. 16-6, p. 13, ¶30, *quoting Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998).] The court further noted Petitioner had failed to demonstrate how Juror 1301 was impliedly biased, and therefore his trial counsel was not ineffective for not either challenging the juror for cause or exercising a preemptory challenge, and his appellate counsel was not ineffective for not raising this claim on direct appeal. [Doc. 16-6, p. 13, ¶30.] A review of the trial transcripts confirms Juror 1301 voluntarily disclosed

his wife's employment with the County Attorney's office during initial voir dire. [Doc. 25-1 at 53-54]. Upon learning of the relation Juror 1301 was asked if he and his wife had talked about the case, to which he responded they had not. *Id.* at 54. Finally, Juror 1301 was asked if his relationship with his wife would affect the way he would view the case or "make decisions at the end" if selected as a juror, to which he responded "no". *Id.* There was clearly full disclosure and discussion of Juror 1301's relationship and any potential bias.

In this habeas petition, Petitioner has failed to carry his burden of rebutting the presumption of correctness of the state court's ruling by clear and convincing evidence. He also has not demonstrated a clearly established federal law on the issue. *Goode v. Carpenter*, 922 F.3d at 1148; *Cannon v. Gibson*, 259 F.3f 1253, 1281 (10th Cir. 2001). Since the relevant federal law does not support his position, he cannot show, and has not shown, the state court's decision to be "clearly contrary" to federal law. Thus, he has failed to establish a legal or factual basis for relief.

Issue 3 – Prosecutorial misconduct

Petitioner alleges prosecutorial misconduct occurred at his trial when the prosecutor improperly vouched for the credibility of a witness and commented on Petitioner's right to remain silent. [Doc. 6, pp. 3-4, 10, 13-16.] He also alleges, in the context of arguing that his trial counsel was ineffective, the prosecutor used an "in-life" photo of the victim at trial. [*Id.* at p. 10.] In ruling on the petition for post-conviction relief, the state district court held that the statements made by the prosecutor at trial did not constitute either vouching for a witness or a comment on Petitioner's decision to not testify. [Doc. 16-6, p. 11, ¶24.] The

state court also held that the prosecutor's use of an "in-life" photo was relevant to a material issue in the case and was probative of the State's theory, which was that Petitioner was the only person with the opportunity to have injured BB during the relevant period of time. [*Id.* at pp. 8-9, ¶¶17-20.] The court ruled Petitioner's trial counsel was not ineffective for not objecting to the use of the photograph.

Petitioner's allegations misstate the record. The record does not support his version of events. And as before, Petitioner fails to carry his burden of rebutting the presumption of correctness of the state district court's ruling by clear and convincing evidence and of demonstrating the state district court ruled in violation of a clearly established federal law on the issue.

Prosecutor's statements at trial and during closing argument.

Petitioner objects to two of the prosecutor's statements. The first occurred during the argument at the end of the State's case, when the prosecutor was responding to defense counsel's motion for judgment of acquittal. This occurred **after the jury left the courtroom**. [Doc. 25-21, p. 1573.]

> And, Your Honor, I think that's important because we are doing a process of elimination here. There are other people that had access to him, and because the only other witness is no longer available, no longer alive, we have to do that process of elimination. And I think that process of elimination is very important because it leaves this defendant, it leaves the defendant as the only one who could possibly have inflicted the blows that killed Braxton.

[Doc. 25-21, p. 1579.]

In his petition for post-conviction relief, Petitioner contended the prosecutor was playing on the sympathies of the jury "to sustain a conviction [through] process of

elimination. . .." [Doc. 16-4, p. 20.] The state district court noted Petitioner's argument as to this statement by the prosecutor was "inapposite, as it was argument made outside of the presence of the jury." [Doc. 16-6, p. 10.] The state district court's ruling on this issue is correct. The jury did not hear this statement by the prosecutor; therefore, it could not constitute error.

The second statement to which Petitioner objects was made by the prosecutor during his closing argument.

> So now the big question is, how do you, the jury, know that it was Mr. Foltz who caused all these injuries? Well, look at the timing of it. The injuries that killed him, the tears to the mesentery, happened in the last 24 hours or so of his life. Who was he around? He was around Amanda, he was around [A.R.], he was around Mr. Foltz. For good measure on the 29th he was also around Jake and Candace LaVallee. You got to hear from Jake and Candace LaVallee. They didn't harm him. They didn't see him come to harm. Amanda, Amanda got on the stand and said no, I didn't hurt him. She didn't cause these. [A.R.], no indication from anybody that [A.R.] touched him that day. None. Just leaves Donnie. And it just leaves Mr. Foltz.

[Doc. 25-25, pp. 1849-50.]

The state district court found this statement was not a comment on Petitioner's decision to not testify but rather focused on the prosecution's theory of the case, establishing Petitioner as the only adult with the opportunity to inflict the injuries on BB. [Doc. 16-6, p. 11, ¶24.]

Petitioner now contends this argument constituted "vouching for [the] witness," presumably Amanda Russell, and "creat[ed] the impression that only the defendant could rebut the evidence, commenting on his failure to provide such evidence, using petitioners' silence, right not to testify, as guilt." [Doc. 6, pp. 14-16.]

The American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated guidelines addressing a prosecutor's comment on evidence:

> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

ABA Standards for Criminal Justice 3-5.8(b)(2d ed. 1980), *quoted in United States v. Young*, 470 U.S. 1, 8 (1985).

These guidelines have been incorporated into decisions of the United States Supreme Court. *See e.g. U.S. v. Young*, 470 U.S. 1, 8 (1985). While a prosecutor "must refrain from interjecting personal beliefs into the presentation," *id.*, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." *Id.* at 11.

Petitioner does not point to a specific statement made during closing that would constitute vouching for a witness. Presumably, he objects to the following statements: "You got to hear from Jake and Candace LaVallee. They didn't harm him. They didn't see him come to harm. Amanda, Amanda got on the stand and said no, I didn't hurt him. She didn't cause these."

The record is clear the prosecutor did not vouch for any of these witnesses. Rather, the prosecutor simply walked the jury through the witness testimony that was presented by three of the four adults who were last with BB prior to his death.

In addition, the prosecutor did not comment on Petitioner's decision to not testify at trial. He summarized what the witnesses said, not what Petitioner did not say or do. While a prosecutor may not comment on a defendant's refusal to testify, *Griffin v. California*, 380 U.S. 609, 613-614 (1965), the prosecutor may comment on the evidence presented. "[P]rosecutorial misconduct in a state court violates a defendant's right to a fair trial only if the prosecutor's actions 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Nguyen v. Reynolds*, 131 F.3d 1340, 1358 (10th Cir. 1997), *quoting Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974). This would occur if a prosecutor actually commented on a defendant's decision to not testify at trial, rather than just focusing on the evidence presented. *See Griffin v. California*, 380 U.S. at 614 ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.") In this case, the prosecutor summarized the testimony of the LaVallees and BB's mother, then said "And it just leaves Mr. Foltz." [Doc. 25-25, pp. 1849-50.] That was not a comment on Petitioner's decision to not testify.

The state district court's ruling that "no improper statements about [Petitioner's] decision not to testify were made," therefore "no prosecutorial misconduct occurred," [Doc. 16-6, p.11, ¶25], was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court.

Prosecutor's use of "in-life" photo of victim.

Petitioner argues appellate counsel was ineffective for not raising a claim of prosecutorial misconduct based on the prosecutor's use of a photograph taken of BB prior

to his death. [Doc. 6, p. 10, ¶1.] During opening arguments, the prosecutor briefly displayed a photograph of BB and his sister which was taken two days before BB's death. [Doc. 25-5, pp. 256-57; Doc. 25-30, p. 1.] Immediately thereafter, the State displayed a photograph of BB's lifeless body taken at the hospital two days later. [Doc. 25-5, pp. 256-257.] The prosecutor explained that six days before the "in-life" photograph was taken, BB was examined by his pediatrician who noted extensive bruising, which he believed to be indicative of child abuse. [*Id.* at 257- 58.] The prosecutor then compared the "in-life" photograph and noted the lack of visible bruises on BB's forehead or neck area at that time. [*Id.* at 260-61).

In his petition for post-conviction relief, Petitioner argued his trial counsel was ineffective for not objecting to the "in-life" photograph, and the prosecutor committed misconduct for using it. The state district court ruled the photograph was properly admitted because it was relevant to a material issue in the case – when the injuries occurred – and its relevance outweighed the danger of prejudice. [Doc. 16-6, p. 8, ¶¶17-18.] The court then concluded that because the photograph was admissible, the failure of trial counsel to object did not constitute ineffective assistance of counsel, and the prosecutor's use of the photograph did not rise to the level of prosecutorial misconduct. [*Id.* at pp. 8-9, ¶19.]

"While 'an important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence,' a fair trial does not include the right to exclude relevant and competent evidence." *Zafiro v. United States*, 506 U.S. 534, 540 (1993) (*internal citation omitted*). The Wyoming Supreme Court has held that "[e]vidence is always relevant if it tends to prove or disprove one of the elements of the

crime charged," *Grabill v. State*, 621 P.2d 802, 809 (Wyo. 1980), although even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." Wyo. Rule of Evidence 403, *quoted in Wilks v. State*, 49 P.3d 975, 981 (Wyo. 2002).

Here, the photo taken of BB just two days prior to his death was deemed relevant to a material issue in the case:

> [N]amely the differentiation of injuries at the time the photograph was taken and the injuries present on his body at the time of his death. The photograph limited the timeframe in which the injuries causing B.B.'s death must have occurred; it was therefore probative for the State's method of proof, namely to establish Foltz as the only person with the opportunity to have inflicted the injuries on B.B. within the timeframe of when the injuries must have occurred.

[Doc. 16-6, p. 8, ¶18.]

Under Wyoming law, the burden is on Petitioner to demonstrate this evidence was unduly prejudicial. *Wilks v. State*, 49 P.3d at 981. Furthermore, it is not within this Court's province to "reexamine state court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "Federal habeas review is not available to correct state law evidentiary errors; rather it is limited to violations of constitutional rights." *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999). This Court is to consider only whether the admission of the "in-life" photo "so infected the [trial] with unfairness" as to constitute a denial of due process. *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir. 2003).

The state district court properly deemed the photograph to be probative and therefore, the prosecutor did not commit prosecutorial misconduct in showing it to the jury.

See United States v. Oldman, ---F.3d ---, 2020 WL 6140991 at 11 (10th Cir. Oct. 20, 2020) (photos were relevant and admissible given issues at trial as to how victim died and who killed him). The court also ruled Petitioner's trial counsel was not ineffective for not objecting to its use. Petitioner has failed to demonstrate how this decision was in violation of, or constituted an unreasonable application of, clearly established Federal law as determined by the United States Supreme Court.

Issue 4 – Sufficiency of the evidence

Petitioner's final argument is there was insufficient evidence presented at trial to convict beyond a reasonable doubt because, he argues, opportunity alone is not enough to convict when there is more than one person involved. His argument is that the burden was on the State to prove he was "the only" actor who could have inflicted the fatal injuries on BB. [Doc. 6, pp. 16-26.] Petitioner's argument misstates the necessary elements of the offense set forth in Wyoming law. He also ignores the fact this issue was addressed squarely by the Wyoming Supreme Court, which found sufficient evidence both to withstand the motion for judgment of acquittal and to uphold his conviction.

Petitioner has failed to demonstrate that the Wyoming Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, " or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The Wyoming Supreme Court applied the correct standard of review when it evaluated the case, accepting as true all the prosecution's evidence and drawing all reasonable inferences from that evidence. *Foltz v. State*, 407 P.3d at 401. Because that Court conclusively

determined the evidence was sufficient to sustain Petitioner's conviction, on post-conviction the state district court found the arguments presented regarding the sufficiency of the evidence to be procedurally barred under Wyoming Statute § 7-14-103(a)(iii). [Doc. 16-6, p. 15, ¶37.]

Petitioner's attempt to resurrect this argument, through a convoluted articulation of a non-existent requirement that the State prove he was "the only" actor with the opportunity to inflict the injuries on BB, is similarly unsuccessful. First, it is not within the purview of a federal district court to re-weigh the evidence when ruling on a petition for writ of habeas corpus. The United States Supreme Court has stated:

> [I]it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. The evidence is sufficient to support a conviction whenever, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And a state-court decision rejecting a sufficiency challenge may not be overturned on federal habeas unless the decision was objectively unreasonable.

Parker v. Matthews, 567 U.S. 37, 43 (2012) (*internal quotations and citations omitted*).

In this case, the Wyoming Supreme Court rejected Petitioner's challenge to the sufficiency of the evidence supporting his conviction. Petitioner has pointed to no facts or law demonstrating this decision to be objectively unreasonable.

Second, Petitioner's argument is factually and legally incorrect. It is not an element of child abuse under Wyoming state law for the State to prove that the defendant was "the only" actor who could have caused the injuries. Petitioner was convicted of killing BB in

the perpetration of child abuse. The relevant Wyoming statute is Wyoming Statute § 6-2-503(a), provides:

> (a) A person who is not responsible for a child's welfare as defined by W.S. 14-3-202(a)(i), is guilty of child abuse, a felony punishable by imprisonment for not more than ten (10) years, if:
>
> (i) The actor is an adult or is at least six (6) years older than the victim; and
>
> (ii) The actor intentionally or recklessly inflicts upon a child under the age of sixteen (16) years:
>
> (A) Physical injury as defined in W.S. 14-3-202(a)(ii);
>
> (B) Mental injury as defined in W.S. 14-3-202(a)(ii)(A); or
>
> (C) Torture or cruel confinement.

The statute identifies "the actor" but sets forth no requirement that the individual charged with child abuse be the "only" actor or individual who could perpetrate the crime. Indeed, the Wyoming Supreme Court has oft stated that "opportunity, together with injuries consistent with child abuse, is sufficient evidence to support a conviction for homicide."

> This Court has acknowledged that child abuse is a private act, often being witnessed only by the victim and the perpetrator. *Marshall v. State*, 646 P.2d 795, 797 (Wyo. 1982). In order "to protect the most helpless members of our society from violence on the part of others," we have recognized that "opportunity, together with injuries consistent with child abuse, is sufficient evidence to support a conviction for homicide." *Goldade v. **State***, 674 P.2d 721, 727 (Wyo. 1983).

Foltz v. State, 407 P.3d at 403.

Finally, Petitioner's repeated contention that there was an eight-day period of time during which the injuries could have been inflicted – and therefore other actors could have perpetrated the abuse - is not supported by the record. Petitioner argues the relevant time frame is from the day BB was seen by the pediatrician, December 22, 2014, to the date of the child's death, December 30, 2014. [Doc. 6, p. 9.] However, the prosecutor narrowed

the relevant time frame to a two-day period prior to the child's death, a time period during which only Petitioner, BB's mother, and BB's sister, were present. Whatever bruises the pediatrician may have seen and been concerned about on December 22, 2014, the "in-life" photograph taken six days later showed BB had no lump or bruise on his right temple, nor any bruising on his neck. [Doc. 25-30, p. 1 – State's Exhibit 41.] In sharp contrast, the autopsy photos show a large lump/bruise on BB's temple and significant bruising on his neck, after his death. [Doc. 25-28, p. 5 – State's Exhibit 10.] Those injuries were inflicted during a time period during which only three people were with BB: Petitioner, BB's mother, and his four-year-old sister.

The Wyoming Supreme Court affirmed Petitioner's conviction, ruling that opportunity plus injuries consistent with child abuse, were sufficient evidence. Petitioner has not carried his burden of demonstrating the Wyoming Supreme Court's ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

CONCLUSION

Petitioner seeks relief from this Court by once again challenging the sufficiency of the evidence supporting his conviction and raising alleged errors about the proceedings themselves. His claims were adjudicated on the merits in state court, and he has failed to carry his burden of demonstrating error under the standard articulated in 28 U.S.C. § 2254(d).

Respondents have demonstrated there are no genuine issues of any material fact. Petitioner has cited to no specific facts showing there are any genuine issues of material fact for trial.

ORDER

IT IS THEREFORE ORDERED the Motion for Summary Judgment is **GRANTED** and the **Petition DISMISSED with prejudice.** All other Pending motions, if any, are also hereby denied as moot.

IT IS FURTHER ORDERED pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, a Certificate of Appealability (COA) **SHALL NOT ISSUE.** When a habeas petition is denied on procedural grounds, a petitioner is entitled to a COA only if he demonstrates that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner cannot make such a showing.

Dated this 26th day of October, 2020.

Scott W. Skavdahl
United States District Judge

APPENDIX E

Opening brief and application for a certificate of appealabilty

FILED
United States Court of Appeals
Tenth Circuit

July 28, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DONALD D. FOLTZ, JR.,

Petitioner - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, in his official capacity, a/k/a Eddie Wilson; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 20-8063
(D.C. No. 2:19-CV-00195-SWS)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

This matter arose from the death of a two-year-old boy, BB. For roughly a day and a half, BB stayed home with his mother, his four-year-old sister, and Mr. Foltz. According to an autopsy, BB died from blunt

* We conclude that oral argument would not materially help us to decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

Our order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

force trauma inflicted within the last 24 hours. Mr. Foltz was convicted in state court of first-degree murder.

After unsuccessfully appealing in state court, Mr. Foltz brought a federal habeas action. The federal district court denied relief, and Mr. Foltz wants to appeal. To do so, he needs a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A). We can issue this certificate only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Mr. Foltz would meet this standard only if reasonable jurists "could disagree with the district court's resolution of his constitutional claims or . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Mr. Foltz has not met this standard.

1. Claims that the State Court Did Not Decide on the Merits

Mr. Foltz addresses two claims that the state supreme court did not decide on the merits: (1) prosecutorial misconduct and (2) jury bias. The state district court treated these as part of Mr. Foltz's claim of ineffective assistance of counsel (rather than as stand-alone claims for habeas relief), and the state supreme court denied certiorari without identifying the claims at issue. Mr. Foltz lacks a reasonably debatable argument on these claims.

A. A certificate of appealability is unwarranted on Mr. Foltz's claim involving prosecutorial misconduct.

Mr. Foltz claims improper comment on his decision not to testify. In closing argument, the prosecutor summarized the testimony of three individuals who had accompanied BB shortly before he died. Each individual denied harming BB. The prosecutor then added that this "just leaves Mr. Foltz." R. vol. 2, at 1853–54. Mr. Foltz asserts that this statement implicitly referred to his decision not to testify.

In post-conviction proceedings, the state district court rejected this claim as it related to defense counsel's failure to raise the issue on appeal. The state district court found that the prosecutor had not commented on Mr. Foltz's silence, finding instead that the prosecution was suggesting that Mr. Foltz had been the only adult who could have injured BB. R. vol. 1, at 287.

The federal district court agreed. The court explained that a prosecutor cannot comment on a defendant's refusal to testify but can comment on the trial evidence. *See Griffin v. California*, 380 U.S. 609, 614 (1965) ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."). In our view, the federal district court's reasoning was unassailable.

B. A certificate of appealability is unwarranted on Mr. Foltz's claim involving jury bias.

Mr. Foltz claims that Juror 1301 had implied bias from his marriage to a legal secretary at the prosecutor's office. In voir dire, Juror 1301 disclosed his wife's employment. But he added that he had not discussed the case with his wife, had no relationship with the prosecutor, and believed that his spousal relationship would not affect his consideration of the evidence. R. vol. 2, at 57–58.

In state post-conviction proceedings, Mr. Foltz claimed that his counsel should have challenged the inclusion of Juror 1301. The state district court made three pertinent findings:

1. Juror 1301 had no implied bias.
2. A challenge for cause would not have been granted based on Juror 1301's responses in voir dire.
3. Trial counsel had appropriately exercised strategic discretion when declining to strike Juror 1301.

R. vol. 1, at 288–89, 374. Based on these findings, the state district court rejected Mr. Foltz's claim.

In his federal habeas petition, Mr. Foltz reasserted implied bias as a stand-alone claim. The federal district court rejected the claim, relying on opinions involving jurors employed by the government, not spouses of governmental employees. *See, e.g.*, *United States v. Wood*, 299 U.S. 123, 137, 141, 150 (1936) (concluding that governmental employees are not

automatically disqualified from jury service in criminal cases); *Dennis v. United States*, 339 U.S. 162, 171–72 (1950) (rejecting a claim of implied bias based on a juror's employment with the government). But Juror 1301 was not just married to a government employee; he was married to a legal secretary employed by the prosecutor's office. That relationship could implicate different concerns than government employment in general. Nonetheless, neither the Supreme Court nor our court has ever

- held that jurors are biased whenever their spouses work for the prosecutor's office or
- recognized implied bias without a connection between the juror and a trial participant or involvement in the underlying matter.

We have said that implied bias can be found when the juror has a personal connection to the case or has had experiences similar to the issues being litigated. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 517 (10th Cir. 1998). We have also emphasized that a finding of implied bias must be reserved for especially extreme or unusual circumstances. *United States v. Powell*, 226 F.3d 1181, 1188 (10th Cir. 2000).

Mr. Foltz asserts that Juror 1301's wife was on the trial team. For this assertion, however, Mr. Foltz cites no evidence and the record reflects none. Juror 1301's responses at voir dire reveal no awareness of a connection between his wife's work and Mr. Foltz's case, and no other evidence suggests that the wife participated in the trial. And neither the

Supreme Court nor our court has suggested inherent bias whenever a juror is married to someone working for the prosecutor's office.

Mr. Foltz cites opinions involving jurors who were victims or family members of victims of crimes similar to the cases at issue or who were dishonest at voir dire. *See, e.g.*, *United States v. Powell*, 226 F.3d 1181, 1189 (10th Cir. 2000) (juror's daughter had been a victim); *Skaggs*, 164 F.3d at 518 (dishonesty); *Gonzales v. Thomas*, 99 F.3d 978, 991 (10th Cir. 1996) (juror had been a victim). These opinions do not guide the analysis here, for Juror 1301 answered honestly at voir dire and hadn't been victimized or related to a victim.

Mr. Foltz presented no evidence that Juror 1301 or his wife had any connection to his case, so no jurist could reasonably debate the constitutionality of Juror 1301's participation on the jury. We thus deny a certificate of appealability on this claim.

2. Issues that the State Supreme Court Decided on the Merits

In deciding whether to grant a certificate of appealability on the remaining claims, we consider Mr. Foltz's rigorous burden for habeas relief. *See Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (stating that when deciding whether to grant a certificate of appealability, the court "look[s] to the District Court's application of [the habeas statute] to petitioner's constitutional claims"). This burden is steep when the state appeals court has rejected a petitioner's claims on the merits. On appeal, a

habeas petitioner would need to show that the state appellate court's decision was

- contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court or
- based on an unreasonable factual determination.

28 U.S.C. § 2254(d)(1)–(2).

Mr. Foltz seeks a certificate of appealability on two claims that the state appellate court rejected on the merits: (1) insufficiency of the evidence of guilt and (2) ineffective assistance of trial and appellate counsel. On these claims, reasonable jurists could not debate Mr. Foltz's constitutional challenges.

A. The state appeals court rejected these claims on the merits, triggering deferential review in habeas proceedings.

In the direct appeal, the state appeals court rejected Mr. Foltz's claim involving sufficiency of the evidence. So we defer to the court's decision and reasoning. *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

In the post-conviction proceedings, the state district court rejected Mr. Foltz's characterization of his trial and appellate counsel as ineffective. The state appeals court declined certiorari in the post-conviction proceedings, but supplied no explanation.

Because the state appeals court did not provide an explanation, we consider the state district court's rationale and presume that the appeals court adopted the same reasoning. *Id.* We then examine whether this

reasoning constitutes an unreasonable application of clearly established federal law as determined by the U.S. Supreme Court or is based on an unreasonable factual determination. *See* pp. 6–7, above.

B. A certificate of appealability is unwarranted on Mr. Foltz's claim involving insufficiency of the evidence.

In the course of claiming prosecutorial misconduct, Mr. Foltz questions the sufficiency of the evidence. The federal district court thus interpreted sufficiency of the evidence as a distinct habeas claim.

On direct appeal, the state supreme court concluded that the evidence had sufficed for the conviction. The federal district court concluded that this determination was reasonable based on the evidence and federal law. R. vol. 1, at 383. In our view, no jurist could reasonably question this conclusion.

C. A certificate of appealability is unwarranted on Mr. Foltz's claims of ineffective assistance of counsel.

Mr. Foltz also claims ineffective assistance of counsel. For trial counsel, Mr. Foltz bases this claim on his attorney's failure to object to Juror 1301 and the prosecutor's alleged comment on the decision not to

testify. Mr. Foltz also claims that his appellate counsel should have raised the issue involving Juror 1301's implied bias.[1]

To establish ineffective assistance of counsel, Mr. Foltz must show that

- his "counsel's representation fell below an objective standard of reasonableness" and
- "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Strickland v. Washington, 466 U.S. 668, 687–88, 694 (1984).

The state appeals court declined to overturn the state district court's determinations that

- Mr. Foltz had not shown errors by his trial attorney and
- appellate counsel had not been ineffective for failing to raise those supposed errors.

R. vol. 1, at 282–90. In rejecting the claim of ineffective assistance of counsel, the state district court reasoned "that a for-cause challenge to Juror 1301 would not have been granted based on the *voir dire* responses

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[1] Mr. Foltz also alleges that

- trial counsel failed to object to prejudicial and irrelevant evidence, failed to call a material witness, and neglected to refile a request for change of venue and
- appellate counsel failed to raise certain issues and presented improper argument to the state supreme court.

But he does not elaborate on these allegations.

from Juror 1301 on the record." *Id.* at 288. The state district court also reasoned that Mr. Foltz's counsel would have been ineffective only if Juror 1301 had actually been impliedly biased. *Id.* at 289.

This reasoning is not subject to reasonable debate because Mr. Foltz hasn't presented any evidence of implied bias. For example, he has not pointed to any evidence that Juror 1301's wife had worked with the prosecutor or had any involvement in the case. Juror 1301 was asked at voir dire whether his wife had spoken about Mr. Foltz's case, and he said "no."

Perhaps Mr. Foltz's attorney could have

- asked if anyone else had told Juror 1301 whether his wife had worked on Mr. Foltz's case or
- further explored the possibility that Juror 1301's wife had been involved in the case.

Even if counsel should have done more, Mr. Foltz would have needed to show prejudice. *Strickland*, 466 U.S. at 693.[2] But he presented no evidence

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[2] The state district court reasoned that

- "a for-cause challenge to Juror 1301 would not have been granted based on the *voir dire* responses from Juror 1301 on the record" and
- Mr. Foltz had needed to show that Juror 1301 was impliedly biased in order to prevail on the claim of ineffective assistance for failing to issue a peremptory challenge to Juror 1301.

of prejudice. He instead speculated that Juror 1301's wife had worked on his case. But even now, Mr. Foltz presents no evidence of such involvement. Without such evidence, Mr. Foltz couldn't possibly show that the state appeals court had unreasonably rejected the claim of ineffective assistance.

Mr. Foltz also did not demonstrate any misconduct by the prosecutor. *See* Part 1(A), above. So he cannot show that his trial attorney erred by failing to object to the prosecutor's comments.[3]

3. Denial of an Evidentiary Hearing and Appointment of Counsel

In federal district court, Mr. Foltz requested an evidentiary hearing and appointment of counsel. The federal district court denied both requests, and Mr. Foltz challenges these rulings. We affirm these rulings.[4]

R. Vol. 1, at 288–89. This reasoning suggests that the state district court had rejected the claim of ineffective assistance based on a failure to show prejudice. In reviewing this determination about prejudice, we consider the reasonableness of the court's factual determinations and application of Supreme Court precedent. *See* pp. 7–8, above.

[3] The state court ruled on the merits of this claim as it related to ineffective assistance of appellate counsel. But even without deference as to the conduct of trial counsel, Mr. Foltz lacks a reasonably debatable argument because he cannot show any prosecutorial misconduct.

[4] Mr. Foltz does not need a certificate of appealability to appeal the denial of an evidentiary hearing or appointment of counsel. *See Harbison v. Bell*, 556 U.S. 180, 183, 194 (2009) (appointment of counsel); *Norman v. Stephens*, 817 F.3d 226, 234 (5th Cir. 2016) (evidentiary hearing).

A. The federal district court didn't err in denying an evidentiary hearing.

In considering the denial of an evidentiary hearing, we apply the abuse-of-discretion standard. *Anderson v. Att'y Gen. of Kan.*, 425 F.3d 853, 858 (10th Cir. 2005). Under this standard, we consider the possible effect of 28 U.S.C. § 2254(e)(2), which restricts the availability of an evidentiary hearing if the petitioner "failed to develop the factual basis of a claim in State court proceedings." [5] Because Mr. Foltz requested an evidentiary hearing in his state post-conviction proceedings, we will assume for the sake of argument that § 2254(e)(2) does not apply.

When § 2254(e)(2) does not apply, petitioners are entitled to evidentiary hearings when their allegations, if true, would justify habeas relief. *Anderson*, 425 F.3d at 858. "[T]he factual allegations must be 'specific and particularized, not general or conclusory.'" *Id.* at 858–59 (quoting *Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir. 1995)).

In district court, however, Mr. Foltz did not make specific allegations when he moved for an evidentiary hearing. To the contrary, the substance of the motion consisted of a single sentence: "Due to the

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[5] If § 2254(e)(2) does apply, Mr. Foltz would not be entitled to an evidentiary hearing because his habeas claim does not rely on "a new rule of constitutional law" or "a factual predicate that could not have been previously discovered through the exercise of due diligence." 28 U.S.C. § 2254(e)(2)(A)(i)–(ii).

complexity of petitioner's capital case of first degree murder and a sentence of life without parole, he is requesting the Court for an evidentiary hearing and appoint counsel in his behalf that his rights to due process and a fair trial will not be violated." Petitioner's Response to Respondents' Response at 18, *Foltz v. Wyo. Dep't of Corr. Medium Corr. Inst. Warden*, No. 19-cv-00295-SWS (D. Wyo. Oct. 26, 2020). Given Mr. Foltz's failure to identify any specific facts to be proven, the district court did not abuse its discretion in denying the request for an evidentiary hearing.

B. The federal district court didn't err in declining to appoint counsel.

Nor did the district court err in declining to appoint counsel. "There is no constitutional right to counsel beyond the direct appeal of a criminal conviction . . . ." *Coronado v. Ward*, 517 F.3d 1212, 1218 (10th Cir. 2008). Although a defendant is entitled to counsel when an evidentiary hearing is required, Mr. Foltz had no right to an evidentiary hearing. *See* Part 3(A), above; *see also Swazo v. Wyo. Dep't of Corr. State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994) (recognizing a right to counsel in habeas proceedings when the district court determines that an evidentiary hearing is required). So he was not entitled to appointment of counsel.

4. Disposition

Because Mr. Foltz failed to present reasonable debatable arguments on prosecutorial misconduct, jury bias, insufficiency of the evidence, or ineffective assistance of counsel, we decline to issue a certificate of appealability. Given the absence of a certificate, we dismiss the matter as to these issues. We also affirm the denial of an evidentiary hearing and appointment of counsel.

Entered for the Court

Robert E. Bacharach
Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

DONALD D. FOLTZ, Jr.,

Petitioner,

vs.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, et al.,

Respondents.

Case No. 19-cv-00195-SWS

FINAL JUDGMENT

This matter came before the Court on Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, and the Respondents' Motion for Summary Judgment. The Court entered an Order Granting the Motion for Summary and Dismissing with Prejudice the § 2254 Petition and all pending motions, if any. The Court also ruled no certificate of appealability shall issue. Accordingly, it is therefore ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment is GRANTED, and this matter is DISMISSED WITH PREJUDICE.

Dated this 26th day of October, 2020.

Scott W. Skavdahl
United States District Judge

APPENDIX F

Rehearing

FILED
United States Court of Appeals
Tenth Circuit

August 12, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DONALD D. FOLTZ, JR.,

Petitioner - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS MEDIUM CORRECTIONAL INSTITUTION WARDEN, in his official capacity, a/k/a Eddie Wilson, et al.,

Respondents - Appellees.

No. 20-8063
(D.C. No. 2:19-CV-00195-SWS)
(D. Wyo.)

ORDER

Before **HOLMES**, **BACHARACH**, and **MORITZ**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk