APPENDIX

Appendix A

THE SUPREME COURT, STATE OF WYOMING

[STAMP]
IN THE SUPREME COURT
STATE OF WYOMING
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S-21-0234, S-22-0167

CHRISTOPHER DAVID TARPEY,

Appellant (Defendant),

—v.—

THE STATE OF WYOMING,

Appellee (Plaintiff).

Appeal from the District Court of Teton County
The Honorable Marvin L. Tyler, Judge

Representing Appellant:

Devon Petersen of Fleener Petersen, LLC, Laramie, Wyoming.
Argument by Mr. Petersen.

Representing Appellee:

Bridget L. Hill, Attorney General; Jenny L. Craig, Deputy Attorney General; Kristen R. Jones, Senior Assistant Attorney General; and Donovan Burton, Assistant Attorney General.
Argument by Mr. Burton.

Before FOX, C.J., and KAUTZ, BOOMGAARDEN, GRAY and FENN, JJ.

FENN, Justice.

[¶1] Following a jury trial, Christopher Tarpey was convicted of one count of first-degree sexual assault. On appeal he contends the district court violated his Sixth Amendment right to a public trial, the district court committed plain error when it admitted a recording of the victim's statement to the police, and he received ineffective assistance of counsel. We affirm.

ISSUES

[¶2] Mr. Tarpey raises three issues, which we rephrase as follows:

I. Did the district court violate Mr. Tarpey's Sixth Amendment right to a public trial?

II. Did the district court commit plain error by admitting the recording of the victim's statement to the police?

III. Did Mr. Tarpey receive ineffective assistance of counsel?

FACTS

[¶3] On July 26, 2020, Sergeant Russ Ruschill of the Jackson Police Department received a call from BS who informed him Christopher Tarpey sexually assaulted her in the early morning hours of July 23, 2020. Sergeant Ruschill recorded his telephone interview of BS with his body camera. On December 10, 2020, the State charged Mr. Tarpey with one count of sexual assault in the first degree. He pled not guilty at his arraignment, which was conducted by videoconference with Mr. Tarpey's consent.

Pretrial Proceedings and Covid-19 Protocols

[¶4] The district court set Mr. Tarpey's trial for five days, beginning on June 1, 2021. The district court's scheduling order informed the parties the trial would be conducted in compliance with its Covid-19 jury trial plan, and it required the parties to file any objections to those protocols by March 26, 2021. Mr. Tarpey did not file any objections to those protocols. The scheduling order also required the parties to submit a stipulated exhibit list. The parties filed an exhibit list that indicated they stipulated to the

admission of "select excerpts" of the recording of Sergeant Ruschill's phone interview with BS, which was identified as Exhibit 1/MM. The exhibit list did not identify which excerpts the parties intended to play.

[¶5] The district court addressed its Covid-19 protocols at the pretrial conference held on May 7, 2021. The district court indicated it would be "taking every reasonable precaution" to protect the jurors, including socially distancing all the participants. The district court stated the courtroom could not accommodate more than three people at each counsel table, and any other people who wanted to attend the trial would have to do so by a video link. Mr. Tarpey did not object at that time. The district court issued an order following the pretrial conference, which incorporated the district court's pandemic jury trial plan and stated: "Counsel are directed to review that plan and raise any questions at any upcoming conferences." The order reiterated that due to the size of the courtroom, three people could sit at counsel tables, and "[a]ll other support staff, co-counsel, investigators, friends, family, Victim Services staff, etc. may attend by videoconference link."

[¶6] The district court held another pretrial hearing on May 25, 2021. At this hearing, the State asked the district court if it had decided how it would be broadcasting the trial to the public. The following discussion then took place:

> THE COURT: The short answer is, no. I could get your -- what are your thoughts about -- the easiest way to do this is there's a streaming capability audio only through the Supreme Court website and some judges

have done that. And obviously you don't have the video.

The other two choices for video are either full streaming to YouTube or let people know how they could tune in through Microsoft Teams. They each have their problems. However, [the court reporter] and I are talking about -- at least this would have to happen after voir dire because we wouldn't have enough space otherwise. But we're talking about the possibility of actually putting a Hub probably up there on the jury box so that we could maybe get it at an angle that would get the witness and the judge and the lawyers.

It would be kind of a long distance view, but at least it would be a visual view. And we think we might be able to do that without showing who the jurors are, which I want to avoid. So, that's an option we are working on this week.

Anybody have any recommendations?

[DEFENSE COUNSEL]: We anticipate that the defense would be requesting sequestration. We'd have to make sure that witnesses wouldn't be streaming in and attending.

THE COURT: Yeah, that's tricky, isn't it?

So, you know, upon request I am to issue a sequestration order, it's not a discretionary thing. And so upon request I issue it and then it's impossible for the [c]ourt to really police that, it's up to the parties. And so you'd have to make sure that all of your

> witnesses know that that's listening on anything.
>
> However, it would be broadcast would be a violation of the sequestration order and then as officers of the court if you found out there was a problem you'd have to let us know. But I think that's probably a risk under any of the three modes of transmission.
>
> [THE STATE]: Your Honor, the state prefers the audio only version. That's my preference.
>
> THE COURT: Okay. And other than your comment, [defense counsel], do you have any preference?
>
> [DEFENSE COUNSEL]: No.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: Just it's going to be difficult. Thank you.

[¶7] The district court conducted a final pretrial hearing on May 28, 2021. The district court indicated it made arrangements with the District Court Clerk to post a notice about the audio broadcast on the Clerk's website and at the front of the courthouse, so there would be "reasonable public access in that regard."

[¶8] The district court issued an order after the pretrial hearings. This order set forth the district court's reason for limiting public access to the trial and for using the audio broadcast rather than a video link:

> 17. Public Access. As the [c]ourt's jury trial plan indicates, public access to the trial would occur remotely. Due to the size of the courtroom, there is no space for public access

during the trial while accommodating physical distancing for the jurors. The [c]ourt noted at the May 25 hearing that the video feed, if a video broadcast were used, is not optimal for showing all trial participants, protecting the privacy of the jurors, or both. The [c]ourt was considering using an audio-only feed, used by the Wyoming Supreme Court and other trial courts in Wyoming. Both parties requested the audio-only feed be used.[1]

18. The Sixth Amendment's right to a public trial right was made applicable to the states in *In re Oliver*[,] 333 U.S. 257, 270 (1948). A public trial is "for the benefit of the accused" so "the public may see he is fairly dealt with and not unjustly condemned," which has the effect of "keeping his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* However, the right to a public trial is not absolute. In *Waller v. Georgia*, the Supreme Court set forth a four-part test for trial courts to use to determine whether a courtroom closure is appropriate. 467 U.S. 39 (1984). A closure is appropriate when: (1) the party (or in this case, the court), seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to

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[1] This statement is technically incorrect. As set out above, the State requested the audio broadcast, and defense counsel stated he did not have a preference as to whether the district court utilized the audio broadcast or a video link. While defense counsel did not affirmatively request the audio broadcast, he also did not affirmatively object to its use.

protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the court must make findings adequate to support the closure.

19. The First Amendment also provides the right of public and media access to trial proceedings. *Press-Enterprise Co. v. Superior Court of Cal. For the Cnty. of Riverside*, 478 U.S. 1 (1978). A First Amendment right to access criminal proceedings[] exists if (1) "the place and process have historically been open to the press and general public," and (2) "public access plays a significant role in the functioning of the [p]articular process in question." *Id.* at 8.

20. In this case, the criminal trial is open to the public. The difference from an ordinary criminal trial is that the public and media cannot attend in person. The public and media can attend remotely. Some courts, when evaluating a partial closure, have applied a less stringent test than that announced in *Waller*. *E.g., Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

21. Applying the more stringent *Waller* factors in this case, the overriding interest is one of public health, namely an airborne virus (COVID-19) easily transmitted by aerosols emitted when a person speaks or breaths, although respiratory droplets by sneezing or coughing and fomite transmission through touched surfaces are also recognized means of transmission. One of the several scientifically-recognized tools to reduce contagion of the airborne virus is to

physically distance people six feet apart. The District Courtroom is small. It can accommodate the necessary number of jurors and litigants for trial with physically distanced seating. But the space is too small to allow more than the jurors, court staff, attorneys, and parties. To allow open access for in-person attendance by the public and the media would preclude physical distancing and therefore increase the public health risk to the jurors and trial participants. The [c]ourt therefore finds that the overriding interest of public health warrants a change to the public access procedures for this case.

22. To provide public access, the [c]ourt has considered (1) a live videostream of the trial available online through YouTube or a similar platform, (2) a live [videostream] of the trial by invitation to the video conference meeting (as the [c]ourt has used for bench trials during the pandemic), and (3) a live audiostream to the trial. The Wyoming Supreme Court and several other Wyoming trial courts use the audiostream option. After testing the video capabilities of existing courtroom technology, it is apparent that the available angles for the videostream in the small courtroom are inadequate for a jury trial. The video option has worked well for bench trials, all of which have occurred remotely during the pandemic. For the few in-person proceedings that have occurred during the pandemic, the video option has also worked well since the bench proceedings necessarily have a much smaller volume of

> courtroom participants. As a result, the video angles are appropriate and adequate. For a jury trial, they are not.
>
> 23. After testing the available options for a jury trial, the [c]ourt must find that the live audiostream is the only feasible and practical option at this time. As the only feasible option, the audiostream is narrowly tailored. As noted above, the [c]ourt has considered the other available options and found them unworkable at this time after testing.
>
> 24. With respect to the Sixth Amendment, it is notable that the Defendant, whose right it is to have a public trial, did not oppose the audiostream options and joined in the State's preference to use that option. With respect to the First Amendment, the audiostream option is narrowly tailored to serve the interest of public health.

[¶9] At the beginning of voir dire, the district court informed the jurors that due to Covid- 19, members of the public could not be seated in the courtroom, but the trial was being broadcast to the public through the Supreme Court's website. At the end of voir dire, the district court again reminded the parties it intended to stream the trial through the audio broadcast. Neither the State nor defense counsel objected to the use of the audio broadcast.

Presence of Victim's Advocate

[¶10] About a week before trial, the State filed its second amended witness and exhibit list, which contained the following request:

> ***The State requests the [c]ourt consider allowing the victim's advocate to be present in the courtroom, in close proximity to [BS] while she testifies in this matter, for the duration of her testimony, as it is critical under the [] Victim's Bill of Rights, W.S. § 1-40-201 et seq.[,] the victim be free from any form of harrassment [sic], intimidation, or retribution, especially related to the victim being accompanied into the courtroom and when giving testimony. W.S. § 1-40-205. The State has consulted counsel for the Defendant who stipulates to the victim's advocate being present while the victim testifies in this matter, which includes entering and exiting the courtroom at any time.***

Toward the end of the hearing on May 28, 2021, defense counsel asked the district court how it planned to handle the victim's advocate being present during BS's testimony. The following exchange occurred:

> THE COURT: So, would it be okay -- since there's not going to be anybody up in the jury, there is a chair . . . in front of the jury. I don't know if you want to be able to see her during the testimony, but if you come up here and see -- if you look.
>
> [DEFENSE COUNSEL]: I can see a corner of the chair.
>
> THE COURT: It's basically over there. So, it wouldn't distract the jury because she would be hidden by that partial partition. That

> would be the most inconspicuous place for her. Is that acceptable?
>
> [DEFENSE COUNSEL]: Yeah. It sounds like it would be. Yes, sir.
>
> THE COURT: Is that okay?
>
> [THE STATE:] Yes, Your Honor. And to the point I guess the next question is would the [c]ourt be explaining her presence and her role or would you like the state to do that? Seems like it's . . .
>
> THE COURT: **Since there's no objection**, I think it would be appropriate for you to just explain that she's there in a supportive role and not to, you know, coach the witness or anything like that. Just in a supportive role as an advocate, probably not a victim's advocate. And I think that would be fine.
>
> [THE STATE]: Thank you, sir.
>
> THE COURT: Sure.

(Emphasis added). Defense counsel did not object either orally or in writing to having the prosecutor explain the reason for the advocate's presence or to the district court's proposed seating arrangement.

[¶11] At the trial, the State called BS as its first witness. Prior to BS's testimony, the State made the following statement regarding the reason for the advocate's presence:

> And before I begin my examination with this witness, I would like to point out for the record and for the jury that [AH] has joined us in the courtroom. [AH] is an advocate for the witness and will be sitting near her for the duration of her testimony. She will not

> be coaching the witness, but rather present in a supportive role. The defendant has agreed to [AH] being present.

Defense counsel did not object to this statement or request a limiting instruction.

[¶12] Toward the end of the trial, the State asked the district court to allow BS and her advocate to be present in the courtroom during closing arguments and suggested they sit at the end of the jury box. The district court indicated it had never excluded witnesses from attending closing arguments, and it asked for the defense's position on the matter. Defense counsel stated he was aware of the victim's rights, and he thought it would be appropriate for BS to be present if she was cautioned not to display any emotions during the closings. The district court then discussed where BS and her advocate could sit, and it proposed BS be placed "where she's not really in sight of the jury and still able to hear everything." The State then mentioned it thought BS "would like to be present and be visible." Defense counsel stated he would prefer BS sit in the chair her advocate had occupied during BS's testimony. Both BS and the advocate were present during closing arguments, although the record is unclear on where they were seated.

Evidence Adduced at Trial

[¶13] BS testified she worked at a custom hat shop in Jackson, Wyoming, and she went there on the afternoon of July 22, 2020, to hear a musician perform a private concert. When she arrived, a group of her friends were already there. Mr. Tarpey arrived later. BS had previously met Mr. Tarpey because she often went to the barbeque restaurant where he worked as a bartender. The group stayed at the hat

shop for 60–90 minutes drinking alcohol, listening to music, and eating food. The group left the hat shop and went to Miller Park to play a game, which BS referred to as "alcoball." They later returned to the hat shop and consumed more alcohol. The group then walked across the street to the Cowboy Bar, where they consumed more alcohol. BS gave Mr. Tarpey her phone number because she thought he wanted to be friends. The group left the Cowboy Bar after last call, and they returned to the hat shop. Shortly thereafter, BS walked home alone.

[¶14] In the early hours of July 23, 2020, BS and Mr. Tarpey exchanged text messages and decided he would come over to her house to smoke marijuana and watch a movie. BS informed Mr. Tarpey she did not want to have sex, and he replied he "never said anything about sex[.]" Mr. Tarpey then sent BS a message saying: "You better be naked when I come in[.]" BS testified she did not take this message seriously, and she tried to treat it as a joke by replying "lol naked[.]"

[¶15] Mr. Tarpey arrived at BS's house around 2:00 a.m. BS testified Mr. Tarpey appeared to be more intoxicated and "zombie-like." Shortly after arriving, Mr. Tarpey pulled BS down onto her bed and removed his clothing. Mr. Tarpey removed BS's clothing in a "slightly aggressive" manner. BS told Mr. Tarpey to "chill out" and asked him what he was doing.

[¶16] He positioned her so that she was laying on her back on the left side of the bed and got on top of her. She was not able to get up because he was a lot bigger than she was, he was holding her down with his weight, and she was starting to get scared. Mr. Tarpey attempted to have sexual intercourse with

her, and he did not stop when she told him to "chill out." When Mr. Tarpey was unable to penetrate her, he struck BS on the right side of her face with the heel of his hand and told her to "Take it, b*tch."

[¶17] BS suggested they stop trying to have sex. He then grabbed her and repositioned her while saying something that she took as a command to perform oral sex. BS submitted to performing oral sex because she preferred that to being forced to have sexual intercourse with him or being struck in the face again. While she was performing oral sex on Mr. Tarpey, she felt him put his fingers inside her vagina. She did not want him to do this, and she asked him to stop, but he did not stop.

[¶18] Mr. Tarpey then repositioned her, so she was straddling him. He struck her on the right side of her face again with the heel of his hand. She then felt his penis penetrate her vagina. Mr. Tarpey wrapped his hands around her thighs and pulled her legs down onto his waist. Mr. Tarpey also bit her right ear. The assault lasted about 15 minutes, and it ended when Mr. Tarpey passed out in her bed.

[¶19] BS did not reach out to anyone immediately after the assault because she did not know who to call, she was in shock, and she did not know what to do. She eventually fell asleep on her bed. They both awoke around 10:00 a.m. Mr. Tarpey told BS he was hungover, and he then proceeded to place an online order for breakfast. BS wanted to get him out of her house, so she drove him to pick up his breakfast. They shared a small, strange embrace and parted ways. After she parted from Mr. Tarpey, BS drove home.

[¶20] Over the next couple of hours, BS and Mr. Tarpey exchanged the following text messages:

[BS] Yo I am going to be very chill about this but that was absolutely uncool. You need to understand that I said in writing and out loud, I DO NOT want to have sex with you, I wanted to get high and watch a movie. You didn't even bring weed after saying you would. I asked you to stop fingering me multiple times. I literally was giving you head so that you wouldn't f*ck me or HIT ME IN THE FACE again. I have a bruise on my face dog. You're my homie so it's all good we can get juice together and sh*t but understand I was uncomfortable and not in control whatsoever because you were at my crib and I'm not the kinda person to ask one to leave. This never gets talked about again and never happens again. Mad love, enjoy your hangover!

[TARPEY] So sorry

[TARPEY] That's not who I am. I promise

[BS] No that is who you are. And you're a lot bigger than me. That was scary for me.

[TARPEY] I promise that's not me. I feel so bad [TARPEY] Can't apologize enough

[TARPEY] Alcoball was not good for my knee. Walking around like a geyser [sic] sh*t is throbbing so bad

[BS] stop texting me I don't think you get what you did to me last night

[BS] I do not f*ck with you. I kept it so cool just to get you out of my f*cking house. Are you on pills or something?

> [TARPEY] I'm not on pills I was really drunk. I'll leave you be. Sorry again

Later that day, BS reached out to a friend and told him what happened. BS did not think about calling law enforcement immediately after the assault, but she did consider it in the following days. On July 26, 2020, BS called the Jackson Police Department to report the assault, and Sergeant Ruschill interviewed her by phone because she was too upset to come to the station in person.

[¶21] After BS's direct testimony, but before she was cross-examined, the State moved to introduce the recording of her phone interview with Sergeant Ruschill into evidence. Defense counsel did not object, and the district court admitted the recording. The State then started playing the 42-minute recording for the jury. The State stopped playing the recording approximately 33 minutes into the video and requested a bench conference. The State offered not to play the rest of the recording. Defense counsel stated he stipulated to the admission of the recording, and he insisted the entire recording be played to the jury. The district court stated:

> Well, by stipulating to this going into evidence I would think that the defendant would be giving up any objections and appeal issues on this. . . . But it's already been stipulated to. I don't know that on a plain error standard, I'm not sure that it violates any unequivocal rule of law. So, I think it's okay. So, I'll go ahead with the stipulation and allow it to be played, but appreciate your heads-up on that.

[¶22] In her recorded interview, BS told Sergeant Ruschill she had been sexually assaulted by Mr.

Tarpey. Sergeant Ruschill told her he was going to ask her questions, he would believe everything she told him, and she was in complete control and could end the interview at any time. Most of what BS told Sergeant Ruschill was consistent with her trial testimony. However, she told him that Mr. Tarpey did penetrate her once before he forced her to perform oral sex. BS also told Sergeant Ruschill she had been laid off from her job in Colorado due to Covid-19, and she was not working in Wyoming. She also stated she did not know Mr. Tarpey well, and she did not know where he worked.

[¶23] On cross-examination, defense counsel attacked BS's credibility with portions of her recorded statement. BS admitted that at the time she was interviewed by Sergeant Ruschill, she did indeed know where Mr. Tarpey worked, and she had met him on numerous occasions before July 22, 2020. BS also admitted she lied to Sergeant Ruschill about being unemployed. BS testified she was collecting unemployment from Colorado, and she was nervous to tell law enforcement she was also being paid in cash under the table while in Wyoming because she thought she might get in trouble. Defense counsel also asked BS if she used any drugs on the night of the alleged assault. BS initially denied using drugs before admitting she used cocaine with Mr. Tarpey at the hat shop that night.

[¶24] A Sexual Assault Nurse Examiner [SANE] examined BS at the emergency room on July 27, 2020. The sequence of events BS relayed to the nurse differed slightly from what she had told Sergeant Ruschill and her trial testimony. BS told the nurse Mr. Tarpey did penetrate her while he was on top of her, he then repositioned her so she was on top of him, before repositioning her again and commanding

her to perform oral sex. BS told the nurse Mr. Tarpey grabbed her legs when he was trying to force himself in her, bit her right ear, and grabbed her neck. The nurse observed, measured, and made note of the injuries on BS's body. The nurse observed bruising on the back of BS's thighs, a bruise above her left knee, a scratch on her left thigh, a bruise on her right cheekbone, a red area on the right side of her neck that was painful to the touch, and a red area behind her right ear with a small scab.

[¶25] Mr. Tarpey testified after he arrived at BS's house, they attempted to engage in consensual sexual intercourse, and the encounter ended when he could not perform sexually. He denied grabbing BS by her thighs or holding her down. He also denied hitting BS in the face and calling her a b*tch. He said BS never told him to stop or chill out, nor did she say she did not want to have sex. He testified when he replied to her messages by saying he was sorry, he was not apologizing. Instead, he was reaching out to her for an explanation because he did not understand the allegations she was making against him.

[¶26] In his closing argument, defense counsel pointed out several things that called BS's credibility into question: she lied about not knowing Mr. Tarpey before that night; she lied about not knowing where he worked; she lied about her drug use; and she lied about working and getting paid under the table while collecting unemployment. Defense counsel also asked the jury to consider how BS's statements to Sergeant Ruschill and the SANE nurse differed from her trial testimony, and he claimed the "core details" were different in each account.

[¶27] The jury found Mr. Tarpey guilty of sexual assault in the first degree. Mr. Tarpey was

subsequently sentenced to imprisonment for not less than 10 nor more than 15 years. He timely appealed his conviction and sentence.

Motion for a New Trial

[¶28] While his direct appeal was pending, Mr. Tarpey filed a motion for a new trial based on ineffective assistance of trial counsel pursuant to Rule 21 of the Wyoming Rules of Appellate Procedure (W.R.A.P.). We stayed his first appeal pending the district court's decision on his W.R.A.P. 21 motion.

[¶29] Mr. Tarpey's W.R.A.P. 21 motion set forth six grounds he asserted constituted ineffective assistance of counsel: 1) trial counsel misunderstood the rules of evidence regarding the admission of character evidence; 2) trial counsel stipulated to the admission of the recording of BS's phone interview with Sergeant Ruschill and allowed it to be played in open court; 3) trial counsel stipulated to the victim's advocate sitting next to the BS during her testimony, and did not object to the prosecutor telling the jury the advocate was present in a supportive role; 4) trial counsel stipulated or failed to object to nearly the entirety of the State's case; 5) trial counsel did not adequately prepare Mr. Tarpey to testify; and 6) if no ground in itself was found to be ineffective assistance, when taken together, they amounted to ineffective assistance of counsel that prejudiced Mr. Tarpey. Mr. Tarpey attached an affidavit to his motion, which set forth his allegations relating to his trial counsel's misunderstanding of character evidence and his opinion as to how he was inadequately prepared to testify.

[¶30] Prior to the hearing on his W.R.A.P. 21 motion, Mr. Tarpey filed a witness list, which indicated he intended to call three witnesses who were expected to

testify about "Mr. Tarpey's reputation for character traits pertinent to the charges in this case and his theory of defense, such as peacefulness, truthfulness, and respect for women." Mr. Tarpey attached "declarations" from these character witnesses to his witness list.

[¶31] Mr. Tarpey did not testify at the W.R.A.P. 21 hearing, and the district court agreed to consider the portions of his affidavit that were based on his personal knowledge and complied with the requirements for an affidavit under Rule 56 of the Wyoming Rules of Civil Procedure. Mr. Tarpey called his trial counsel as a witness at the hearing. Mr. Tarpey also offered testimony from a retained expert who opined he was prejudiced by trial counsel's errors. Mr. Tarpey did not call any of the character witnesses to testify at the hearing, nor did he make an offer of proof as to what their testimony would have been. The district court ruled it would not consider the declarations from these witnesses that were attached to the witness list.

[¶32] The district court denied the W.R.A.P. 21 motion and found Mr. Tarpey "failed to show that his constitutional rights to assistance of effective counsel were violated and/or fail[ed] to prove that he was prejudiced" by any of trial counsel's alleged deficiencies. Mr. Tarpey timely appealed the district court's order denying his W.R.A.P. 21 motion, and we consolidated his appeals.

DISCUSSION

I. Did the district court violate Mr. Tarpey's Sixth Amendment right to a public trial?

[¶33] Mr. Tarpey claims the district court violated his right to a public trial under the Sixth Amendment to the United States Constitution. "We review the constitutional issue *de novo*." *Dugan v. State*, 2019 WY 112, ¶ 52, 451 P.3d 731, 746 (Wyo. 2019) (citing *Kramer v. State*, 2012 WY 69, ¶ 18, 277 P.3d 88, 93 (Wyo. 2012)). "Constitutional errors are presumed prejudicial, unless this Court is convinced the error was harmless beyond a reasonable doubt." *Anderson v. State*, 2014 WY 74, ¶ 17, 327 P.3d 89, 94–95 (Wyo. 2014) (citing *West v. State*, 2013 WY 128, ¶ 12, 311 P.3d 157, 160 (Wyo. 2013)). Mr. Tarpey asserts "[t]he court's selective closure [of the courtroom] to all but BS and her advocate violated [his] right to a public trial[,]" which "constitutes structural error and requires automatic reversal and remand for a new trial." The State asserts Mr. Tarpey waived his right to challenge the use of the audio broadcast.

[¶34] A structural error "is a defect 'affecting the framework within which the trial proceeds, rather than simply errors in the trial process itself.'" *Anderson*, ¶ 20, 327 P.3d at 95 (citing *Granzer v. State*, 2008 WY 118, ¶ 16, 193 P.3d 266, 271 (Wyo. 2008)). "Errors of this type are so intrinsically harmful as to require automatic reversal without regard to their effect on the outcome." *Id.* (quoting *United States v. Pearson*, 203 F.3d 1243, 1260 (10th Cir. 2000)). We have held "[t]he bar for finding structural error is high." *Id.* at ¶ 21, 327 P.3d at 95.

[¶35] While we have not had the opportunity to address this issue, the Supreme Court of the United

States has held the denial of a public trial is structural error. *Id.* at ¶ 21, 327 P.3d at 95 (citing *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). In *Waller*, the Supreme Court of the United States recognized the right to a public trial was created for the benefit of the accused. *Waller,* 467 U.S. at 46, 104 S. Ct. at 2215 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 2905, 61 L. Ed. 2d 608 (1979)). When a trial is open to the public, they "may see [a defendant] is fairly dealt with and not unjustly condemned, and [] the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* (quoting *Gannett*, 443 U.S. at 380, 99 S. Ct. at 2906). An open trial also "encourages witnesses to come forward and discourages perjury." *Id.* (citing *In re Oliver*, 333 U.S. 257, 270 n.24, 68 S. Ct. 499, 506 n.24, 92 L. Ed. 682 (1948)).

[¶36] The right to a public trial is not absolute. *United States v. Allen*, 34 F. 4th 789, 796 (9th Cir. 2022) (citing *United States v. Yazzie*, 743 F.3d 1278, 1286 (9th Cir. 2014)). The Supreme Court of the United States "has made clear that the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller,* 467 U.S. at 45, 104 S. Ct. at 2215. The *Waller* court noted that such circumstances would be rare, "and the balance of interests must be struck with special care." *Id.* at 45, 104 S. Ct. at 2215.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly

> tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. (quoting *Press–Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 510, 104 S. Ct. 819, 824, 78 L. Ed. 2d 629 (1984)). *Waller* announced the following test for determining whether a trial may be closed to the public:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

Id. at 48, 104 S. Ct. at 2216.

[¶37] Preventing the spread of Covid-19 is unquestionably a compelling interest. *Roman Cath. Diocese of Brooklyn v. Cuomo*, ___ U.S. ___, 141 S. Ct. 63, 67, 208 L. Ed. 2d. 206 (2020). We must determine whether using the audio broadcast was narrowly tailored and no broader than necessary to protect that interest. *Waller,* 467 U.S. at 48, 104 S. Ct. at 2216. "In considering whether a burden imposed on a constitutional right is narrowly tailored, [courts] consider[], among other things, 'different methods that other jurisdictions have found effective' in addressing the problem 'with less intrusive tools.'" *Allen*, 34 F.4th at 797 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494, 134 S. Ct. 2518, 2539, 189 L. Ed. 2d. 502 (2014)). "The existence of reasonable

alternatives also sheds light on whether closure restrictions are narrowly tailored." *Id.* at 798.

[¶38] Mr. Tarpey asks us to follow the approach used by the Ninth Circuit in *Allen* and find providing an audio-only broadcast violated his right to a public trial. In *Allen*, the federal district court's Covid-19 protocols "precluded members of the public from entering the courtroom[] and gave them access to the proceedings only by streaming audio over the internet." *Allen*, 34 F.4th at 793. Mr. Allen objected to this protocol asserting it violated his Sixth Amendment right to a public trial, and his counsel advocated for video streaming the trial. *Id.* The trial court overruled Mr. Allen's objection. *Id.* at 794. The Ninth Circuit found the district court erred because it did not consider less restrictive alternatives, such as video streaming, and it did not articulate any unique reasons for its more restrictive order. *Id.* at 798–800. However, the Ninth Circuit did not hold using an audio broadcast always violates a defendant's right to a public trial. Rather, it stated:

> [W]e emphasize that an order prohibiting the public's visual access to the trial . . . will not always violate the defendant's public trial right. Certain interests . . . may be so compelling that prohibiting the public's observation of some or all of the proceedings may be warranted. . . . And where a prohibition on the public's presence at a trial or hearing is no broader than necessary to achieve a compelling interest . . . [an] audio recording may be sufficient to satisfy the public trial right[.]

Id. at 800 (internal citations omitted).

[¶39] In another recent case involving this issue, the Supreme Court of Iowa reversed a defendant's conviction after finding his right to a public trial was violated by the trial court's complete closure of the courtroom to the public, including the defendant's family. *State v. Brimmer*, No. 21-0744, 2022 WL 17835685 (Iowa Dec. 22, 2022). Mr. Brimmer's trial was originally scheduled for March 31, 2020, but due to the pandemic, his trial was continued multiple times. *Id.* at *1. In response to the pandemic, the Supreme Court of Iowa "issued guidance on how to safely resume in-person trials while still honoring defendants' constitutional rights, including the right to an open trial." *Id.* at *3. This guidance required trial courts to maintain six feet of distance between persons in the courtroom, which meant public attendance would be limited. *Id.* If social distancing resulted in having no room available for the public, trial courts were directed to "set up live feeds of public court proceedings in another room in the courthouse (or, as necessary, streaming online or by videoconference) to permit simultaneous viewing." *Id.* (quoting Iowa Sup. Ct. Supervisory Order, *In the Matter of Resuming In Person Court Services During COVID-19* (July 9, 2020)).

[¶40] After the trial court seated the venire members, there was still a little room for public spectators. 2022 WL 17835685, at *3. Mr. Brimmer requested his family and friends be allowed to attend the trial in person, but the trial court denied his request after concluding any public observers would be seated too close to the jurors "for the court's liking." *Id.* at *1. However, the trial court did allow the victim's advocate to sit in the jury box at the state's request. *Id.* at *4. The trial court "explained that the advocate had 'a purpose with this trial' and

was not considered part of the public." *Id.* The trial court also dismissed the option of electronically livestreaming the trial because "the judge couldn't navigate the technology by himself." *Id.* at *1, *4. Just before voir dire, defense counsel "again brought up [Mr. Brimmer's] right to a public trial, 'requesting that the public be allowed in' and objecting if it was not." *Id.* at *3. The trial court overruled this objection. *Id.* Ultimately, the courtroom was completely closed to public spectators for the entire trial, and no electronic recording or livestream was made available so the public could watch remotely. *Id.* at *4. The Supreme Court of Iowa found the "complete 'closure was far more extensive than necessary.'" *Id.* at *11 (quoting *Waller*, 467 U.S. at 49, 104 S. Ct. at 2217). It went on to find the trial court had not complied with its obligations under *Waller*. *Id.* at *12–*16. It further found the trial court "had available a reasonable alternative to cutting off all public view of Brimmer's trial, and it violated his right to a public trial when it failed to use that alternative." *Id.* at *16. The Supreme Court of Iowa stated: "No solution to the COVID conundrum was ideal. But simply closing Brimmer's trial to the public violated his constitutional rights, and that structural error entitles him to a new trial." *Id.* at *1.

[¶41] Turning to the case before us, the record reflects the district court was cognizant of its obligations under *Waller*. The district court considered several alternatives to a complete closure, including video streaming the trial on YouTube or through the court's video conference system. However, it found video streaming the trial was not workable because the size of the courtroom made it difficult to place the video equipment in a location where it could capture both the witnesses and the

attorneys. The district court specifically stated it "considered the other available options," and it found "the live audiostream [was] the only feasible and practical option. . . ."

[¶42] Unlike *Allen* or *Brimmer*, the district court specifically articulated its reasoning for physically closing the courtroom to the public, it attempted to narrowly tailor the closure, it considered all available alternatives, and it implemented the least restrictive, available option to provide virtual public access to the trial. In addition, at the beginning of the trial, the district court informed the jury Mr. Tarpey was constitutionally entitled to a public trial, explained why the courtroom was not open to members of the public, and notified them the trial was being broadcast so the public and the press could listen to the trial. This announcement showed the district court was attempting to comply with the purposes of a public trial. The public could listen in to ensure Mr. Tarpey was being "fairly dealt with," and the jurors' knowledge that "spectators" were monitoring the trial kept them aware of their responsibility and the importance of their function. *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (quoting *Gannett*, 443 U.S. at 380, 99 S. Ct. at 2906). We find the district court complied with *Waller*, and it did not commit structural error when it balanced Mr. Tarpey's right to a public trial against the overriding and compelling interest of preventing the spread of Covid-19 and implemented the least restrictive option for physically closing the courtroom to the public while allowing virtual public access to the trial.

[¶43] In addition, although we have not had a chance to address the issue, other jurisdictions have held a defendant can waive his right to a public trial. *See Singer v. United States,* 380 U.S. 24, 35, 85 S. Ct.

783, 790, 13 L. Ed. 2d 630 (1965) (recognizing a defendant can "under some circumstances" waive his constitutional right to a public trial); *Levine v. United States,* 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960) (holding the exclusion of the public did not violate due process because there was no request to open the courtroom); *United States v. Christi*, 682 F.3d 138, 142–43 (1st Cir. 2012) (holding the defendant waived his public trial argument because defense counsel knew about the closure and failed to object to the closure); *Hutchins v. Garrison*, 724 F.2d 1425, 1431–32 (4th Cir. 1983) (holding the defendant knowingly and intelligently waived his right to a public trial); *Martineau v. Perrin*, 601 F.2d 1196, 1199–1200 (1st Cir. 1979) (holding petitioner and his counsel knowingly and deliberately waived his right to a public trial when they made a conscious decision not to object to the closure); *Commonwealth v. Wall*, 15 N.E.3d 708, 725 (Mass. 2014) (holding "the right to a public trial may be procedurally waived whenever a litigant fails to make a timely objection to an error[,]" and defense counsel could waive a public trial as a "tactical decision without the defendant's express consent"); *State v. Butterfield*, 784 P.2d 153, 155–57 (Utah 1989) (finding defendant waived his right to a public jury trial by failing to object to a closure order).

[¶44] In this case, Mr. Tarpey knew about the district court's plan to partially close the courtroom, and he never objected to that partial closure or to the use of the audio broadcast, even though he had multiple opportunities to do so. The district court's scheduling order put Mr. Tarpey on notice the trial would be subject to Covid-19 protocols, and it set a deadline for Mr. Tarpey to object to those protocols. Mr. Tarpey did not file any objection to those

protocols. During a pretrial hearing, the district court informed the parties it would be using the audio broadcast to provide public access, and although defense counsel expressed concerns that this might make it difficult to sequester the witnesses, he did not object to using the audio broadcast. At the end of voir dire, the district court again reminded the parties it intended to provide public access through the audio broadcast, and Mr. Tarpey did not object. Under the facts of this case, we find Mr. Tarpey waived his right to a public trial.

[¶45] Mr. Tarpey also takes issue with the fact that BS and her advocate were allowed to be in the courtroom during closing arguments, while Mr. Tarpey was not allowed to have a family member or friend attend the trial. Defense counsel did not object to BS or the advocate being present for BS's testimony or during closing arguments, and he indicated he believed it would be appropriate to allow BS to be present if she was cautioned not to display any emotions during the closings. Mr. Tarpey's brief does not contain a citation to anywhere in the record where he asked the district court to permit a family member or friend be present for all or a portion of his trial.

[¶46] The Supreme Court of the United States has recognized:

> Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.

Levine, 362 U.S. at 619-20, 80 S. Ct. at 1044. Unlike the defendant in *Brimmer*, Mr. Tarpey never asserted the district court was violating his right to a public trial by not allowing him to have a family member or friend present during all or a portion of the trial. He was repeatedly advised his family members and friends would have to attend the trial remotely, and he never objected to this or any other of the district court's Covid-19 protocols.

[¶47] We "strongly adhere[] to the rule that [we] will not address issues that were not properly raised before the district court." *Harrison v. State*, 2021 WY 40, ¶ 15, 482 P.3d 353, 358 (Wyo. 2021) (quoting *Four B Props., LLC v. Nature Conservancy*, 2020 WY 24, ¶ 69, 458 P.3d 832, 849 (Wyo. 2020)). Even when the newly raised issue presents a constitutional question, "we have held that a new issue may not be considered on appeal even when it is 'of a fundamental nature, because the issue was 'not properly developed for review.'" *Davis v. State*, 2018 WY 40, ¶ 34, 415 P. 3d 666, 678 (Wyo. 2018) (quoting *Crofts v. State ex rel. Dept. of Game and Fish*, 2016 WY 4, ¶ 24, 367 P.3d 619, 625 (Wyo. 2016)). Because Mr. Tarpey never asked to have a family member or friend present, and the district court never had an opportunity to grant or deny this request, this issue was not properly developed for review, and we will not address it.

[¶48] We find the district court did not violate Mr. Tarpey's Sixth Amendment right to a public trial, and he waived his right to a public trial.

II. Was it plain error to admit the recording of Sergeant Ruschill's phone interview of BS?

[¶49] Mr. Tarpey asserts the district court committed plain error when it allowed BS's recorded interview to

be played at the end of her testimony, prior to cross-examination and without any allegation of recent fabrication or improper motive. The State alleges Mr. Tarpey knowingly and affirmatively waived any argument regarding the admissibility of the recorded interview when he stipulated to its admission. We agree with the State.

[¶50] "We reject attempts by a defendant to turn a trial strategy into an appellate error." *Mackley v. State*, 2021 WY 33, ¶ 11, 481 P.3d 639, 642 (Wyo. 2021) (quoting *Toth v. State*, 2015 WY 86A, ¶ 45, 353 P.3d 696, 710 (Wyo. 2015)). "The doctrine of invited error prohibits a party from raising on appeal alleged trial court errors that were induced by that party's actions." *Id.* (quoting *Jackson v. State*, 2019 WY 81, ¶ 9, 445 P.3d 983, 986 (Wyo. 2019)). "When a party affirmatively waives a right or objection, we do not review it; however, when a party merely forfeits a right or objection, we review for plain error." *Id.* (citing *Jackson*, ¶ 9, 445 P.3d at 987). "Waiver is the 'intentional relinquishment or abandonment of a known right[,]'" while "[f]orfeiture is the failure to make a timely assertion of a right." *Id.* (quoting *Jackson*, ¶ 9, 445 P.3d at 987). "Waiver requires something more affirmative than simple agreement. . . ." *Id.* at ¶ 13, 481 P.3d at 643 (citing *Jackson*, ¶ 9, 445 P.3d at 987).

[¶51] The record shows Mr. Tarpey did more than simply agree to the admission of BS's recorded statement. He stipulated to its admission before trial, and he affirmatively insisted the entire recording be played for the jury. The district court advised Mr. Tarpey that by stipulating to the admission of the recording, he "would be giving up any objections and appeal issues" relating to its admission.

[¶52] At the hearing on the W.R.A.P. 21 motion, trial counsel testified he knew the recording was hearsay, but he made a strategic decision to stipulate to its admission because he believed it supported their theory of defense, and it created credibility issues that could be brought up on cross-examination. Trial counsel did in fact question BS about those issues at trial, and he was able to get BS to admit she lied to law enforcement about her employment status, not knowing Mr. Tarpey or where he worked, and her use of illicit drugs. Admitting the recording also allowed him to argue to the jury that the core details of BS's story changed in each interview. Stipulating to the admission of the recorded statement was an "act of such independent intent" that we must "view it as a complete waiver of the error now alleged on appeal." *Mackley*, 2021 WY 33, ¶ 12, 481 P.3d at 642 (quoting *Vaught v. State*, 2016 WY 7, ¶ 35, 366 P.3d 512, 520 (Wyo. 2016)); *see also Stastny v. State*, 2011 WY 138, ¶ 4, 261 P.3d 747, 748 (Wyo. 2011) (holding abuse of discretion and plain error standards of review are inapplicable "where the appellant has not only failed to object at trial, but has affirmatively acted to introduce or allow introduction of the evidence"). We will not allow Mr. Tarpey to turn this trial strategy into appellate error, and we find Mr. Tarpey waived any appellate argument regarding the admissibility of BS's recorded statement.

III. Did Mr. Tarpey receive ineffective assistance of counsel?

[¶53] Mr. Tarpey asserts he received ineffective assistance of counsel due to a combination of pretrial and trial deficiencies. He argues "it was not a reasonable tactical decision to stipulate to the admission of BS's recorded interview . . . especially prior to trial." He also asserts trial counsel's

performance was deficient in not objecting to the presence of the victim's advocate during BS's testimony and in not objecting to the prosecutor's statement explaining the reason for the advocate's presence. Finally, he claims trial counsel's performance was deficient because he did not understand the Wyoming Rules of Evidence (W.R.E.) pertaining to character evidence. The State contends "all of the challenged decisions were reasonable tactical decisions that did not fall below the standards for a reasonably competent attorney[,]" and Mr. Tarpey cannot establish he was prejudiced by these alleged errors.

[¶54] To succeed on his claim that he is entitled to a new trial because he was denied his Sixth Amendment right to effective assistance of counsel, Mr. Tarpey "must show both that [his] counsel's performance was deficient, and he was prejudiced as a result." *Buckingham v. State*, 2022 WY 99, ¶ 25, 515 P.3d 615, 619 (Wyo. 2022) (quoting *Steplock v. State*, 2022 WY 12, ¶ 20, 502 P.3d 930, 936 (Wyo. 2022)). "A failure to establish one of the two prongs dooms an ineffective assistance of counsel claim." *Steplock,* ¶ 20, 502 P.3d at 937 (quoting *Neidlinger v. State*, 2021 WY 39, ¶ 53, 482 P.3d 337, 351–52 (Wyo. 2021)). "We may dispose of an ineffective assistance of counsel claim solely on the prejudice prong." *Id.* at ¶ 22, 502 P.3d at 937 (quoting *Jendresen v. State*, 2021 WY 82, ¶ 37, 491 P.3d 273, 285 (Wyo. 2021)). "Appeal of a district court's ruling on a W.R.A.P. 21 motion involves mixed questions of law and fact." *Buckingham*, ¶ 26, 515 P.3d at 619 (citing *Steplock*, ¶ 20, 502 P.3d at 937). "The district court's factual findings are entitled to deference unless they are clearly erroneous, but we review de novo the court's

legal conclusions on deficient performance and prejudice." *Id.* (citing *Steplock*, ¶ 20, 502 P.3d at 937).

[¶55] We dispose of Mr. Tarpey's claim under the prejudice prong. To establish prejudice, Mr. Tarpey "must show that absent defense counsel's deficiencies 'there is a reasonable probability the outcome of the trial would have been more favorable to [him.]'" *Steplock*, ¶ 22, 502 P.3d at 937 (citing *Richmond v. State*, 2021 WY 111, ¶ 12, 496 P.3d 777, 781 (Wyo. 2021)). "A claim of prejudice must be supported by more than bald assertions or speculation." *Id.* at ¶ 26, 502 P.3d at 938 (quoting *Jackson*, 2019 WY 81, ¶ 28, 445 P.3d at 991). Mr. Tarpey "must show prejudice under 'circumstances which manifest inherent unfairness and injustice or conduct which offends the public sense of fair play.'" *Klingbeil v. State*, 2021 WY 89, ¶ 43, 492 P.3d 279, 288–89 (Wyo. 2021) (quoting *McGinn v. State*, 2015 WY 140, ¶ 13, 361 P.3d 295, 299 (Wyo. 2015)). When determining if Mr. Tarpey was prejudiced, we review the entire record. *Klingbeil*, ¶ 44, 492 P.3d at 289 (quoting *Hathaway v. State*, 2017 WY 92, ¶ 33, 399 P.3d 625, 634–35 (Wyo. 2017)). "The most important factor in our prejudice analysis is the strength of the State's case." *Shields v. State*, 2020 WY 101, ¶ 40, 468 P.3d 1097, 1108 (Wyo. 2020) (citing *Bogard v. State*, 2019 WY 96, ¶ 72, 449 P.3d 315, 332 (Wyo. 2019)).

A. Stipulating to the Admission of BS's Recorded Statement

[¶56] Mr. Tarpey asserts he was prejudiced by trial counsel's stipulation to the admission of this evidence because playing the interview bolstered BS's credibility and allowed law enforcement to vouch for her credibility. The State argues Mr. Tarpey was not prejudiced by trial counsel's decision to stipulate to

the admission of the recording because it allowed him to attack BS's credibility and argue to the jury that the core details of BS's allegation became more dramatic each time she told her story.

[¶57] As discussed above, trial counsel made a tactical decision to admit the recording because he thought it helped establish their theory that the sex was consensual. He felt it was important for the jury to know BS delayed in reporting the incident, and the information she provided to Sergeant Ruschill was incomplete and inaccurate. He wanted to use the details of her statement to cross-examine her about the inconsistencies in her stories. Trial counsel also testified he had some concerns about letting BS tell her story twice, but there was an "abundance of evidence" in the case, and he considered all that evidence, including the text messages, when he made the tactical decision to admit the recording. The district court found trial counsel's stated justifications for stipulating to the admission of the exhibit were "presumptively sound" at the time the decision was made, even though many of the reasons for playing the recording were not realized at the time he cross-examined BS. The district court concluded Mr. Tarpey failed to show he was prejudiced by trial counsel's tactical decision.

[¶58] We have said: "[w]hen trial counsel makes a 'strategic decision' in a case, that decision is 'virtually unchallengeable.'" *Neidlinger*, 2021 WY 39, ¶ 56, 482 P.3d at 352 (quoting *Larkins v. State*, 2018 WY 122, ¶ 67, 429 P.3d 28, 44 (Wyo. 2018)). "The fact that this strategy was ultimately unsuccessful does not require a holding of ineffective assistance of counsel." *Owen v. State*, 902 P.2d 190, 199 (Wyo. 1995), overruled on other grounds by *Sweets v. State*, 2013 WY 98, ¶ 50, 307 P.3d 860, 876 (Wyo. 2013). In addition, "[a]n

unfavorable verdict does not equate to ineffective assistance of counsel." *Larkins*, 2018 WY 122, ¶ 67, 429 P.3d at 44 (citing *Woods v. State*, 2017 WY 111, ¶ 15, 401 P.3d 962, 969 (Wyo. 2017)).

[¶59] In this case, BS testified in detail about how Mr. Tarpey sexually assaulted her. During this testimony, she stated Mr. Tarpey struck her twice on the right side of her face, wrapped his hands around her thighs to hold her down, and bit her right ear. The SANE nurse testified she observed injuries that were consistent with BS's testimony. The jury saw the string of text messages between BS and Mr. Tarpey, including those where he appears to apologize for what happened.

[¶60] Because the physical evidence supported BS's version of events, trial counsel needed to challenge BS's credibility. Playing BS's recorded statement permitted the jury to hear the inconsistencies in the "core details" of her story and allowed trial counsel to elicit BS's admissions about lying to law enforcement. "[A] 'jury's rejection of the defense strategy does not necessarily demonstrate ineffective assistance of counsel but merely a defense strategy that the jury did not accept.'" *Woods*, 2017 WY 111, ¶ 15, 401 P.3d at 969 (quoting *Barkell v. State*, 2002 WY 153, ¶ 22, 55 P.3d 1239, 1244 (Wyo. 2002)). Mr. Tarpey failed to establish a reasonable probability he would have enjoyed a more favorable verdict if the recording had not been admitted. Because Mr. Tarpey failed to establish prejudice, this ineffective assistance of counsel claim fails.

B. Not Objecting to the Presence of the Advocate

[¶61] Mr. Tarpey asserts there was no strategic reason for trial counsel not to object to the presence of

BS's advocate or to the prosecutor's statement about the reason for her presence. He argues the presence of the advocate showed "the jury that BS [was] in fact a victim and ha[d] been so victimized that she [could] not testify without emotional support." He alleges it sent a "powerful, court and State approved message that [BS was] fragile and vulnerable *because [she] had been victimized*." The State asserts trial counsel "exercised reasonable professional judgement [sic]" when he decided not to object to the advocate's presence.

[¶62] At the hearing on the W.R.A.P. 21 motion, trial counsel testified he agreed to let the advocate be present because he thought it was required by the Victim's Bill of Rights. He also stated he knew from personal experience that a victim's advocate is always present in the courtroom during a victim's testimony, and due to the structure of the courtroom during Covid-19, there was no other place for the advocate to sit. He did not object to the announcement regarding the reason for her presence, nor did he request a limiting instruction. In its order denying the W.R.A.P. 21 motion, the district court found: "The Defendant's claim of prejudice on this issue is founded upon nothing more than 'bald assertions or speculation.'" The district court concluded Mr. Tarpey failed to meet his burden of proving there was a reasonable probability he would have enjoyed a more favorable verdict if the advocate had not been present.

[¶63] We agree with the district court. The only evidence Mr. Tarpey offered to support his claim regarding the advocate's presence was the opinion of his expert witness, who opined the presence of the advocate was "hugely prejudicial" to the defense because it sent a clear message that BS was a victim.

The expert did not offer any evidence to show it was reasonably probable an objection to the advocate's presence would have been sustained. Given the evidence presented at trial, which the trial court described as substantial and trial counsel described as abundant, we cannot say there is a reasonable probability Mr. Tarpey would have enjoyed a more favorable outcome if the advocate had not been present. Because Mr. Tarpey failed to establish prejudice, this ineffective assistance of counsel claim fails.

C. Not Calling Character Witnesses

[¶64] Shortly before the trial, Mr. Tarpey sent defense counsel a list of potential character witnesses. Defense counsel informed Mr. Tarpey the Wyoming Rules of Evidence would not allow them to introduce any character evidence unless the State first attacked his reputation for truthfulness. Defense counsel also sent Mr. Tarpey an email in which he discussed portions of W.R.E. 404, while omitting any discussion of W.R.E. 404(a)(1), which allows a defendant to offer evidence of a "pertinent trait" of his character.

[¶65] Mr. Tarpey asserts his trial counsel misunderstood the rules pertaining to character evidence, and because of that misunderstanding, defense counsel did not call any character witnesses at trial. He asserts there were "multiple witnesses who would have testified in this case about Mr. Tarpey's pertinent character trait of peacefulness and respect for boundaries in intimate situations," and "there is a reasonabl[e] probability that the outcome of the trial would have been more favorable" if those witnesses had testified. The State asserts "when considering the potential consequences of opening the door to the

character evidence, [Mr.] Tarpey cannot show that his attorney's decision was unreasonable[,] nor can he show that presenting character evidence would have changed the trial outcome."

[¶66] At the hearing on the W.R.A.P. 21 motion, trial counsel admitted he did not fully understand the rules pertaining to character evidence, and he did not fully or accurately explain these rules to Mr. Tarpey. However, trial counsel also testified he decided not to call character witnesses because he uncovered some information suggesting Mr. Tarpey had anger and substance abuse issues, which could have come out if he called character witnesses. Trial counsel spoke to Mr. Tarpey's mother, who informed him Mr. Tarpey's girlfriend would testify he changed and became angry when he drank. Mr. Tarpey told trial counsel not to call his girlfriend as a witness, and the girlfriend told trial counsel she did not want to testify. In addition, an investigator for the Sheriff's Office contacted one of Mr. Tarpey's previous coworkers, who told the investigator she thought Mr. Tarpey was abusive, he had been rude to her at work, and he was hotheaded, touchy, and creepy. Another witness, who was a good friend of Mr. Tarpey, told trial counsel "things happen when people drink" and he was on BS's side. Armed with this knowledge, trial counsel decided not to call character witnesses.

[¶67] Mr. Tarpey did not call any of the proposed character witnesses to testify at the hearing on his W.R.A.P. 21 motion, nor did he make an offer of proof as to what those witnesses would have said. The district court found trial counsel "faced legitimate concerns in 'opening the door' on character and credibility issues," and Mr. Tarpey "fell short of proving" trial counsel's decision not to call character

witnesses could not be considered sound trial strategy or that he was prejudiced by this decision.

[¶68] When reviewing claims that counsel was ineffective for not calling certain witnesses we have held:

> The decision not to call witnesses is a strategic choice. In order to successfully show ineffective assistance of counsel, the appellant must present the facts about which the proposed witnesses would have testified. The decision whether to call witnesses is normally within the judgment of counsel and will rarely be second-guessed through appellate hindsight.

Richmond, 2021 WY 111, ¶ 24, 496 P.3d at 783 (quoting *Byerly v. State*, 2019 WY 130, ¶ 92, 455 P.3d 232, 255-56 (Wyo. 2019). Mr. Tarpey failed to present the facts about which of his potential character witnesses would have testified, so he failed to meet his burden of showing he would have enjoyed a more favorable result if these witnesses were called. Because Mr. Tarpey failed to establish prejudice, this ineffective assistance of counsel claim fails.

D. Not Objecting to the Closure of the Courtroom

[¶69] In his reply brief, Mr. Tarpey argued if we find his right to a public trial was waived by trial counsel, we should find that waiver constituted ineffective assistance of counsel because it resulted in a fundamentally unfair trial. Mr. Tarpey did not raise this issue in his W.R.A.P. 21 motion. Because it was not raised in his W.R.A.P. 21 motion, it was not addressed at the W.R.A.P. 21 hearing. In the affidavit attached to his W.R.A.P. 21 motion, Mr. Tarpey never

alleged that he wanted a public trial or that he objected to the closure of the courtroom or the use of the audio broadcast. He also did not aver that he wanted to have family or friends attend the trial. Thus, we do not know if trial counsel made a unilateral decision not to object to the partial closure of the courtroom or if it was a joint decision made by trial counsel and Mr. Tarpey. We also do not know whether trial counsel had a strategic reason for not objecting to the partial closure. Other jurisdictions have recognized that there might be strategic reasons for not objecting to the closure of the courtroom. *See Martineau*, 601 F.2d at 1200; *Hutchins*, 724 F.2d at 1431-32; *Commonwealth v. Lavoie*, 981 N.E.2d 192, 195 (Mass. 2013). Assuming it was trial counsel's decision not to object to the partial closure of the courtroom, Mr. Tarpey has not shown that decision was not an "exercise of reasonable judgment." *Steplock*, 2022 WY 12, ¶ 20, 502 P.3d at 937 (quoting *Neidlinger*, 2021 WY 39, ¶ 53, 482 P.3d at 351–52).

[¶70] Mr. Tarpey's reply brief does not analyze the evidence that was presented at trial, nor does it explain why there would be a reasonable probability that the jury would have viewed this evidence differently if his supporters were present in the courtroom. Because this claim was not supported by more than bald assertions or speculation, Mr. Tarpey failed to meet his burden of showing he was prejudiced by the partial closure of the courtroom. *Steplock*, ¶ 26, 502 P.3d at 938 (quoting *Jackson*, 2019 WY 81, ¶ 28, 445 P.3d at 991). Because Mr. Tarpey failed to establish prejudice, this ineffective assistance of counsel claim fails.

CONCLUSION

[¶71] The district court complied with its obligations under *Waller* and did not violate Mr. Tarpey's Sixth Amendment right to a public trial when it used an audio broadcast to provide public access to the proceedings. In addition, Mr. Tarpey waived his right to a public trial because he never objected to the partial closure of the courtroom, despite having multiple opportunities to do so. Mr. Tarpey also waived his right to challenge the admission of BS's recorded statement when he stipulated to its admission and affirmatively insisted the entire recording be admitted and played for the jury. Mr. Tarpey did not meet his burden of demonstrating ineffective assistance of counsel because he failed to prove he was prejudiced by his trial counsel's alleged errors. Affirmed.

Appendix B

IN THE DISTRICT COURT OF THE
NINTH JUDICIAL DISTRICT WITHIN AND FOR
THE COUNTY OF TETON, STATE OF WYOMING

[STAMP]
email
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TETON COUNTY, WYOMING
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CLERK OF DISTRICT COURT

Criminal No. 2717

STATE OF WYOMING,

Plaintiff,

—vs—

CHRISTOPHER DAVID TARPEY,

Defendant.

DECISION AND ORDER DENYING *DEFENDANT'S MOTION PURSUANT TO W.R.A.P. 21 FOR NEW TRIAL BASED ON INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL*

Before the Court are: the *Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on*

Ineffective Assistance of Trial Counsel ("Motion") including the *Affidavit* of "Christophe, Tarpey" ("Affidavit") attached as Exhibit A,[1] and copies of an e-mail exchange attached as Exhibit B; the *State's Response in Opposition to Defendant's W.R.A.P. Rule 21 Motion Based on Ineffective Assistance of Trial Counsel* ("Response"); and, the *Defendant's Reply to State's Response to Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel* ("Reply").

In addition, the Court reviewed and carefully considered: W.R.A.P. 21; all pertinent matters of Record in this case (including, but not limited to, pleadings, motions, briefs, memoranda, Orders, transcripts, jury instructions, and letters); Motion

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[1] During the Hearing upon the Motion, the Court outlined what matters contained in the Affidavit it may properly consider:

> Certainly, the Affidavit by the Defendant attached to the Motion I'm required to consider, but there's a *caveat* to that. There are certainly parts of that Affidavit that don't meet the requirements of being an affidavit of facts based on personal knowledge, and so to that extent I will consider anything that fits within the requirements of what it takes to be an affidavit and I may not consider things that are not within those requirements. And just so it's clear, I'm using a line of cases by the Wyoming Supreme Court under Rule 56, and I'm referring to Wyoming Rule of Civil Procedure – I think it's Rule 56(c) on what is required for an affidavit. I don't know of any other standard other than those things, that is Supreme Court case rulings on Rule 56 motions for summary judgment, where affidavits are included that preceded the 2017 amendment to the Wyoming Rules of Civil Procedure Rule 56 which now has Rule 56(c) that aligns with the Federal Rules of Civil Procedure.

Motion Hearing Transcript, p. 230.

Hearing Exhibits AE-I (the Affidavit), AE-III (Exhibit B to Motion), AE-IV (Exhibit B to Motion), AE-V *(Joint Stipulated Exhibit List),* AE-VI *(Scheduling Order),* and AE-VII (stipulated Exhibit #1/MM);[2] the *Transcript* of the Motion Hearing held March 17, 2022; the *State's Proposed Findings of Fact and Conclusions of Law;* the *Defendant's Proposed Findings of Fact and Conclusions of Law;* the Court's notes from the Hearing; and, the results of the Court's legal research.

All material facts which are undisputed and/or admitted by the parties in their pleadings or at the Hearing on the Motion are accepted by the Court. At the Hearing, there was some inadmissible evidence and testimony, hearsay testimony, and some speculation introduced, or attempted to be introduced, by the parties. No inadmissible evidence and testimony, hearsay testimony, or speculation were given any weight by the Court in reaching its decision(s), and no inadmissible evidence and testimony, hearsay testimony, or speculation proved or disproved any material fact in controversy.

The Court is duly advised in the premises.

Finding and concluding that the Defendant failed to show that his constitutional rights to assistance of effective counsel were violated and/or failing to prove

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[2] Exhibit AE-II, (which the Court characterizes as potential character evidence declarations which were not utilized at the trial), was offered into evidence and the State objected, primarily on the basis of hearsay. The Court deferred ruling, but explained that they are not particularly germane to the nature of the Court's analysis. Nonetheless, the Court has reviewed them to obtain a clearer understanding of the context of one of the claims of ineffective assistance. They are given no evidentiary weight.

that he was prejudiced by any deficiencies in his representation by trial counsel, the Court will deny his Motion.

BACKGROUND

The Defendant, Christopher David Tarpey, faced a single felony criminal charge of Sexual Assault in the First Degree, in violation of Wyo. Stat. Ann. § 6-2-302(a)(i), in Count 1 of the *Information* to-wit:

1. On or about the 23rd day of July, 2020,
2. In Teton County, Wyoming,
3. The Defendant, CHRISTOPHER DAVID TARPEY,
4. Inflicted sexual intrusion on the victim, and
5. The Defendant caused submission of the victim,
6. Through the actual application of physical force,
7. Which the Defendant reasonably calculated would cause submission of the victim.

The Defendant's trial counsel were Richard J. Mulligan ("RJM") and Edward S. Bushnell ("ESB"). RJM was lead trial counsel from the beginning of the case (*i.e.,* at or before the Defendant was arrested and charged), and through the jury trial. ESB became involved in the case as trial neared by researching and filing certain motions and consulting with RJM and the Defendant. ESB participated in limited roles at the jury trial, such as consulting with RJM, making arguments to the Court at sidebar and other conferences outside the jury's presence, and examining an expert witness called by the prosecution.

After the Defendant's Preliminary Hearing held on February 11, 2021, the Circuit Court transferred the case to the District Court.

At the March 3, 2021, Arraignment Hearing, the Defendant entered a plea of "not guilty" to the sexual assault charge. In the March 19, 2021, *Order Upon Arraignment,* among other things, the Court scheduled the jury trial to begin on June 1, 2021.

The Court subsequently entered its *Scheduling Order* establishing dates for filing and submitting, among other things, "Motions," "Exhibit Lists" (including a *"Stipulated Exhibit List*"),[3] and "Witness Lists." The *Scheduling Order* also detailed the Court's "Trial Management Provisions" under its jury trial operating plan and protocols due to the COVID-19 pandemic.

The Court held the Pretrial Conference on May 7, 2021, and the *Order After Pretrial Conference* was filed on May 11, 2021. Discussed at the Pretrial Conference were "several motions" and "trial-related matters." The rulings upon the motions discussed at the Pretrial Conference are set out in the May 10, 2021, *Order on Pretrial Motions,* which includes a requirement for additional briefing related to the Defendant's *Motion In Limine* to, *inter alia,* exclude from trial hearsay statements by multiple witnesses purportedly made by the victim.

The *State's Trial Memorandum in Support of Witness Testimony of Victim's Prior Consistent*

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[3] Paragraph numbered 27 on page 9 of the March 15, 2021, *Scheduling Order* states: *"Stipulated Exhibit List.* Not later **than Thursday, May 27, 2021 at noon,** counsel shall submit a list of stipulated exhibits, signed by counsel for all parties, to be admitted at trial." (Emphasis in original).

Statements was filed on May 26, 2021, and *Defendant's Response to State's Trial Memorandum in Support of Witness Testimony of Victim's Prior Consistent Statements* was filed on May 27, 2021. These filings did not address the victim's recorded phone call to law enforcement on July 26, 2020, approximately three days after the alleged sexual assault had occurred,

The parties' *Joint Stipulated Exhibit List,* filed on May 27, 2021, is formatted into three separate categories:

(1) "Stipulated Exhibit List – State's Exhibits." In this category, State's Exhibit #1 is described as "Body Camera Recording from Sgt. Ruschill of Phone Interview with B.S. on 7/26/20, 109@20200726180521."[4]

(2) "Stipulated Exhibit List – Defendant's Exhibits." In this category, Defendant's Exhibit #MM is described as "Video/Audio Ruschill Interview of BS (7.26.2020) **Select Excerpts (Excerpts)."** (Emphasis added).

(3) "Combined Stipulated Exhibit List – State and Defendant." In this category, stipulated Exhibit #1/MM is listed as "Video/Audio Ruschill Interview of B.S. (7.26.2020) **Select Excerpts (Excerpts).**" (Emphasis added).

The first page of the *Joint Stipulated Exhibit List* states, in pertinent part, as follows:

> Both parties stipulate to these exhibits with respect to foundation, the exhibits being what they are, and that the parties agree to

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[4] "B.S." is the victim in the case. She will be referred to herein as "B.S," or "victim."

> use the stipulated exhibits through a proper witness(s) who has knowledge of the exhibit; however, the parties reserve the right to make objections to any stipulated exhibit at the time of trial regarding relevancy. The parties do not waive their rights to assert any other objections at the time of trial to those exhibits to which the parties did not stipulate.

The jury trial began on June 1, 2021.

The Court instructed the jury before opening statements.

Instruction No. 1, which informed the jury of the functions of the Court and of the jury, provides, in part, as follows:

> On the other hand, it is the exclusive province of the Jury to weigh and consider all evidence which is presented to it, to determine the credibility of all witnesses who testify before it, and from such evidence and testimony, to determine the issues of fact in this case.
>
> [* * *]
>
> The Jury is the sole judge of the credibility of the witnesses, and of the weight to be given their testimony. You should take into consideration their demeanor upon the witness stand, their apparent intelligence, their means of knowledge of the facts testified to, the interest, if any, which any witness may have in the outcome of this trial, the prejudice or motives, or feelings of revenge, if any, which have been shown by the evidence. In so doing, you may take into

> consideration all of the facts and circumstances in the case and give such weight as you think the same are entitled to, in the light of your experience and knowledge of human affairs.

The Court also gave *Instruction No. 8:*

> The term 'victim' means the person alleged to have been subjected to sexual assault.

In the State's case in chief, the victim was called to testify. After she was sworn and seated in the witness box immediately to the left of the Bench, the following was placed on the record by the prosecutor:

> MS. WEISMAN:
> Thank you, Your Honor.
> And before I begin my examination with this witness, I would like to point out for the record and for the jury that Angie Uhl has joined us in the courtroom. Ms. Uhl is an advocate for the witness and will be sitting near her for the duration of her testimony. She will not be coaching the witness, but rather present in a supportive role. The defendant has agreed to Ms. Uhl being present.
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> THE COURT:
> And the Court has approved that, so, thank you.

After the victim completed her testimony on direct examination by the prosecutor, and before any cross-examination by Defense counsel, the State played stipulated Exhibit #1/MM in its entirety (*i.e.*, <u>not</u> just select excerpts) without objection.

The Defendant testified, and he was cross-examined by the prosecutor.

After the close of the testimony and evidence, but before closing arguments, the Court further instructed the jury.

Among other things, *Instruction No. 11* reiterates much of what was already stated in *Instruction No. 1,* including the following:

> The Jury is the sole judge of the credibility of the witnesses and of the weight to be given their testimony. In so doing, you may take into consideration all the facts and circumstances in the case, and give to each such weight as in the light of your experience and knowledge of human affairs you think it entitled.
>
> In judging the credibility of the witnesses in this case, you should take into consideration their demeanor upon the witness stand, their apparent degree of intelligence, their means of knowledge of the facts testified to, their interest, if any, in the outcome of this trial, and their revealed motives or prejudice or feelings of revenge, if any, that have been shown by the evidence in this case.
>
> If you believe from the evidence in this case that any witness willfully and corruptly swore falsely to any material fact in this case, then you are at liberty to disregard all or any part of that testimony, except insofar as the same has been corroborated by other and credible evidence and the facts and circumstances proven during the trial.

> In determining any of the questions before you in this case, you should be governed solely by the evidence. You should not indulge in conjecture or speculation unsupported by the evidence. However, you may consider the evidence presented to you and the reasonable inferences and conclusions which may be drawn there from in the light of your knowledge, observation and experience in the affairs of life,

Instruction No. 16 provides:

> The Jury is instructed that one accused and on trial charged with the commission of a crime may testify or not, if he pleases. When the defendant does testify, you have no right to disregard his testimony merely because he is accused of a crime. When he does testify, his credibility is to be tested by and subjected to the same test and scrutiny as are legally applied to any other witness.

Instruction No. 19, the Defendant's contention Instruction, states:

> The Defendant asserts that [B.S.], the person named in the Information as the victim in this case, consented to sexual intrusion with the Defendant on July 23, 2020, with respect to Count I: Sexual Assault in the First Degree. In order for the State to prevail in this case, the State must disprove this contention beyond a reasonable doubt.

Instruction No, 20 follows the Defendant's contention Instruction by outlining the consent defense:

> Consent by the person assaulted is a defense to the charge of sexual assault. The defense of consent involves two separate elements:
>
> 1. That the victim did voluntarily consent to the act by word or conduct; and
>
> 2. That the victim had the present ability to consent or the defendant could not reasonably have known that the victim lacked the present ability to consent.
>
> Submission alone may not be consent.
>
> The State has the burden to prove beyond a reasonable doubt that the victim did not consent to sexual intrusion.

On June 7, 2021, the jury unanimously found the Defendant "Guilty" of Sexual Assault in the First Degree, in violation of Wyo. Stat. Ann. § 6-2-302(a)(i), as charged in Count 1 of the *Information.*

On September 1, 2021, the Court sentenced the Defendant to not less than 10 years and not more than 15 years, less presentence incarceration credit, to be served in a penal institution in the custody of the Wyoming Department of Corrections. The *Judgment and Sentence* was filed on September 13, 2021.

On October 6, 2021, the Defendant's current attorneys filed his *Notice of Appeal.*

The Motion, Affidavit, and Exhibit B were filed on December 1, 2021.

The Wyoming Supreme Court's *Order Staying Briefing Until Further Notice* was filed in the Supreme Court Clerk's Office on December 2, 2021, and it was filed in this Court on December 7, 2021.

The Response was filed on December 16, 2021. The Reply was filed on December 22, 2021.

The Hearing on the Motion was scheduled for January 13, 2022, but it was vacated on January 12, 2022.

This matter was re-assigned to the undersigned on January 21, 2022.

The Hearing on the Motion was rescheduled at a Status Conference held on February 3, 2022. Among other things, Defendant's counsel agreed that they would not request the Defendant's transport to the "in-person" Hearing by the Department of Corrections if the Court would accept the Affidavit. The Court agreed to do so.

The March 16, 2022, *Order Continuing Determination of Defendant's Motion Pursuant to W.RA.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel* extended the determination of the Motion to June 3, 2022.

The "in-person" Hearing was held on March 17, 2022. Appearing at the Hearing were: Erin Weisman, Teton County and Prosecuting Attorney; Clay Kainer, Deputy Teton County and Prosecuting Attorney; Thomas A. Fleener and Devon W. Petersen, of Fleener Petersen, LLC, attorneys for the Defendant; the Defendant (by video conference); and Frank R. Chapman, attorney for RJM and ESB. The Defendant called three witnesses to testify: RJM; ESB; and, Eric Klein, Johnson & Klein, of Boulder, Colorado, testifying as an expert witness on behalf of the Defendant. The following Exhibits were admitted into evidence: AE-I (the Affidavit), AE-III (Exhibit B), AE-IV (Exhibit B), AE-V (*Joint Stipulated Exhibit List*), AE-VI (*Scheduling Order*), and AE-VII (stipulated

Exhibit #1/MM). Exhibit AE-II, (which the Court characterizes as potential character evidence declarations which were not utilized at the trial), was offered into evidence and the State objected, primarily on the basis of hearsay. The Court deferred ruling, but explained that they are not particularly germane to nature of the Court's analysis. The State presented no testimony or evidence at the Hearing. The Court took the matter under advisement awaiting proposed findings of fact and conclusions of law from respective counsel.

The *Motion Hearing Transcript* was filed on April 12, 2022.

The *State's Proposed Findings of Fact and Conclusions of Law* and the *Defendant's Proposed Findings of Fact and Conclusions of Law* were filed contemporaneously on May 3, 2022.

ISSUES

The Court characterizes the six claims of ineffective assistance of trial counsel alleged in the Motion as follows:

1. RJM misunderstood the Wyoming Rules of Evidence regarding character evidence resulting in his failure to introduce admissible character evidence at the trial.
2. Defense counsel stipulated to Exhibit #1/MM, the victim's recorded prior out-of-court statement to law enforcement, and they failed to object when it was played in its entirety to the jury.
3. Defense counsel agreed to the physical presence of the victim advocate in proximity to the victim in the witness box while she testified, and RJM

failed to object to the prosecutor's statement to the jury.

4. Defense counsel stipulated to or failed to object to most of the testimony and evidence presented during the jury trial.
5. Defendant's counsel failed to adequately prepare the Defendant to testify at trial.
6. The accumulation of ineffective assistance errors requires that the Defendant receive a new trial.

LEGAL CONSIDERATIONS

W.R.A.P. 21

Pertinent portions of W.R.A.P. 21 state:

> (a) Following the docketing of a direct criminal appeal, the appellant may file, in the trial court, a motion claiming ineffective assistance of trial counsel. The motion may be used to seek a new trial [* * *]. The motion shall be filed prior to the filing of the appellant's initial appellate brief. [* * *]. The motion shall contain nonspeculative allegations of facts which, if true, could support a determination that counsel's representation was deficient and prejudiced the appellant. Any claims of ineffectiveness not made in the motion shall not be considered by the trial court unless the trial court determines that the interests of justice or judicial efficiency require the consideration of issues not specifically indicated in the motion. [* * *]. (Emphasis added).

> [* * *]
>
> (d) The order determining the motion shall include findings of fact and conclusions of law concerning the claimed deficient performance by counsel and the claimed prejudice suffered by appellant as a result. [* * *].

Ineffective Assistance – Standard of Review

"Ineffective assistance of counsel claims 'involve mixed questions of law and fact.'" *Jendresen v. State,* 2021 WY 82, ¶ 36, 491 P.3d 273, 284 (Wyo. 2021) (quoting *Sides v. State,* 2021 WY 42, ¶ 34, 483 P.3d 128, 137 (Wyo. 2021) and citing *Mellott v. State,* 2019 WY 23, ¶ 11, 435 P.3d 376, 381 (Wyo. 2019)); *Winters v. State,* 2019 WY 76, ¶ 11, 446 P.3d 191, 198 (Wyo. 2019); *Griggs v. State,* 2016 WY 16, ¶ 37, 367 P.3d 1108, 1124 (Wyo. 2016); *Dixon v. State,* 2019 WY 37, ¶ 56, 438 P.3d 216, 236 (Wyo. 2019); *Castellanos v. State,* 2016 WY 11, ¶ 95, 366 P.3d 1279, 1304 (Wyo. 2016); *Strickland v. Washington,* 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984).

Ineffective Assistance

A defendant facing criminal charges has a fundamental right to effective representation by legal counsel:

> A criminal defendant's right to the assistance of counsel is guaranteed by the Sixth Amendment to the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, and is guaranteed by the Wyoming Constitution in Article 1, Section 10. *Dickeson v. State,* 843 P.2d 606, 608–09 (Wyo. 1992).

> We have adopted the standard for determining whether a defendant received effective assistance of counsel from *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984):
>
> > First, the defendant must show that counsel's performance was deficient. This requites showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.
> >
> > *Dickeson,* 843 P.2d at 609 (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064).
>
> *Miller v. State,* 942 P.2d 1108, 1109 (Wyo. 1997).

Olsen v. State, 2003 WY 46, ¶ 72, 67 P.3d 536, 564–65 (Wyo. 2003).

"An unfavorable verdict does not equate to ineffective assistance of counsel." *Larkins v. State,* 2018 WY 122, ¶ 67, 429 P.3d 28, 44 (Wyo. 2018) (citing *Woods v. State,* 2017 WY 111, ¶ 15, 401 P.3d 962, 969 (Wyo. 2017).

Courts employ the two-prong analysis enunciated in *Strickland* to determine if a defendant received and/or was prejudiced by ineffective assistance of counsel: "To prevail on an ineffective assistance claim, a defendant must show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict."[5] *Wall v. State,* 2019 WY 2, ¶ 39, 432 P.3d 516, 527 (Wyo. 2019); *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Larkins v. State,* 2018 WY 122 ¶ 62, 429 P.3d 28, 43–4 (Wyo. 2018); *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

"A failure to establish one of the prongs dooms an ineffective assistance of counsel claim." *Winters,* 2019 WY at ¶ 12, 446 P.3d at 199 (citing *Dettloff v. State,* 2007 WY 29, ¶ 19, 152 P.3d 376, 382 (Wyo. 2007)); *Yazzie v. State,* 2021 WY 72, ¶ 20, 487 P.3d 555, 562 (Wyo. 2021).

> [T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one, In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the

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[5] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.,* 466 U.S. at 695, 104 S.Ct. at 2068-69.

> alleged deficiencies. The object of an ineffective assistance claim is not to grade counsel's perfonnance, If it is easier to dispose of an ineffective assistance claim on the ground of lack of prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffective assistance claims not become so burdensome to defense counsel that the entire criminal iustice svstem suffers as a result.

Strickland, 466 U.S. at 697, 104 S.Ct. at 2009; *Wall,* 2019 WY 2 at ¶ 39, 432 P.3d at 527 (quoting *Larkins,* 2018 WY at 62,429 P.3d at 43-44) ("Because a defendant must establish both prongs, a court can decide an ineffective assistance claim without considering the deficient performance prong."); *Bittleston v. State,* 2019 WY 64, ¶ 31, 442 P.3d 1287, 1295-96 (Wyo. 2019); *Yazzie,* 2021 WY at ¶ 21, 487 P.3d at 563; *Steplock v. State,* 2022 WY 12, ¶ 22, 502 P.3d 930, 937 (Wyo. 2022).

There is a strong presumption that defense counsel rendered adequate assistance and professional judgment. *Sincock v. State,* 2003 WY 115, ¶ 37, 76 P.3d 323, 337 (Wyo. 2003); *Jendresen,* 2021 WY at ¶ 37, 491 P.3d at 284 (quoting *Neidlinger v. State,* 2021 WY 39, ¶ 53,482 P.3d 337, 352 (Wyo. 2021) ("We adhere to the 'strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable judgment.'"); *Barkell v. State,* 2002 WY 153, ¶ 13, 55 P.3d 1239 (Wyo. 2002); *Mellot,* 2019 WY at ¶ 26, 435 P.3d at 386.

"When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant

must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88, 104 S.Ct. at 2065. "Under Wyoming law, the Court considers performance deficient if a defendant shows that his attorney's performance fell below that of a reasonably competent attorney and that it is reasonably probable that the outcome of the proceeding would have been more favorable to the defendant absent deficient performance." *Bruckner v. State,* 2018 WY 51, ¶ 15, 417 P.3d 178, 181 (Wyo. 2018) (citations omitted); *Winters,* 2019 WY at ¶ 12, 446 P.3d at 199 (quoting *Schreibvogel v. State,* 2010 WY 45, ¶ 47, 228 P.3d 874, 889 (Wyo. 2010)) ("[T]he paramount determination is whether, in light of all the circumstances, trial counsel's acts or omissions were outside the wide range of professionally competent assistance."); *Delgado v. State,* 2022 WY 61, ¶ 14, __ P.3d __ (Wyo. 2022); *Mellot,* 2019 WY at ¶ 26, 435 P.3d at 386 (quoting *Griggs,* 2016 WY at ¶ 36, 367 P.3d at 124) ("Counsel must have failed, in light of all circumstances existing at the time of the challenged act or omission, to employ such judgment or to render such assistance as would have been offered by a reasonably competent attorney under like circumstances."); *Meadows v. Lind,* 996 F.3d 1067, 1075 (10th Cir. 2021) (quoting *Fox v. Ward,* 200 F.3d 1286, 1295 (10th Cir. 2000) ("To demonstrate constitutional deficiency, [the defendant] must show that counsel's performance was completely unreasonable, not simply wrong.").

"While counsel may be unaware of certain aspects of the 'law,' that circumstance does not necessarily equate to deficient performance. Indeed, counsel may be unaware of applicable law and his performance can still meet the *Strickland* standard." *Eaton v.*

State, 2008 WY 97, ¶ 51, 192 P.3d 36, 66 (Wyo. 2008) (citing *Bullock v. Carver,* 297 F.3d 1036, 1048-50 (10th Cir. 2002)). "The presumption that a trial counsel engaged in sound trial strategy dissipates, though, 'when an attorney has demonstrated ignorance of the law directly relevant to a decision.'" *Meadows,* 996 F.3d at 1075 (quoting *Hooks v. Workman,* 689 F.3d 1148, 1198 (10th Cir. 2012)).

A court evaluates "counsel's actions 'under the circumstances existing at the time of the challenged act or omission and from the perspective available' then, not in hindsight." *Jendresen,* 2021 WY at ¶ 37, 491 P.3d at 284 (citations omitted); *Luftig v. State,* 2010 WY 43, ¶ 18, 228 P.3d 857, 865 (Wyo. 2010); *Mraz v. State,* 2016 WY 85, ¶ 44, 378 P.3d 280, 291 (Wyo. 2016); *Jones v. State,* 2017 WY 44, ¶ 14, 393 P.3d 1257, 1261 (Wyo. 2017); *Bruckner,* 2018 WY at ¶ 15, 417 P.3d at 181. "While courts may not indulge 'post-hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." *Meadows,* 996 F.3d at 1075 (quoting *Harrington v. Richter,* 562 U.S. 86, 109, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)).

In order to overcome the strong presumption that defense counsel rendered adequate assistance and professional judgment in light of the circumstances, the defendant must prove that his counsel's actions and/or omissions cannot be considered as "sound trial strategy." *Olsen,* 2003 WY 46, 173, 67 P.3d 565 (quoting *Dudley v. State,* 951 P.2d 1176, 1181 (Wyo. 1998); *Dickeson,* 843 P.2d at 609 (The defendant carries the burden of overcoming the presumption that the "challenged action or failure of the attorney might be considered sound trial strategy."); *Dixon,*

2019 WY at ¶ 56, 438 P.3d at 236 (quoting *Luftig,* 2010 WY at ¶ 18, 228 P.3d at 865) ("As part of our evaluation, 'we determine whether [counsel's] actions could be considered sound trial strategy'"); *Mellot,* 2019 WY at ¶ 26, 435 P.3d at 386; *Neidlinger,* 2021 WY at ¶ 56, 482 P.3d at 352.

Defendant's counsel "is entitled to 'wide latitude' in making such 'tactical decisions.'" *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *Winters,* 2019 WY at ¶ 53, 446 P.3d at 210; *Byerly v. State,* 2019 WY 130, ¶ 87, 455 P.3d 232, 255 (Wyo. 2019).

> "Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.'" *McCoy v. Louisiana,* ___ U.S.___, ___, 138 S.Ct. 1500, 1508, 200 L.Ed.2d 821, 830 (2018) (quoting *Gonzalez v. United States,* 553 U.S. 242, 248, 128 S.Ct. 1765, 1769, 170 L.Ed.2d 616, 624 (2008) (internal quotation marks and citations omitted)). Defense counsel "undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Siler v. State,* 2005 WY 73, ¶ 33, 115 P.3d 14, 31 (Wyo. 2005) (quoting *Florida v. Nixon,* 543 U.S. 175, 187, 125 S.Ct. 551, 560, 160 L.Ed.2d 565, 578 (2004)). "That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.'" *Id.* (quoting *Nixon,* 543 U.S. at 187, 125 S.Ct. at 560); *Taylor v. Illinois,* 484 U.S. 400, 417-18, 108 S.Ct. 646, 657, 98 L.Ed.2d 798, 816 (1988) (an attorney has

> authority to manage most aspects of the defense without obtaining his client's approval).

Flores-Gomez v. State, 2020 WY 5, ¶ 14, 455 P.3d 1212, 1216 (Wyo. 2020).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation . . . applying a heavy measure of deference to counsel's judgments." *Eaton,* 2008 WY at ¶ 38, 192 P.3d at 62 (quoting *Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2066 and citing *Sanchez v. State,* 2002 WY 31, ¶¶ 11-16, 41 P.3d 531, 534-35 (Wyo. 2002)); *Neidlinger,* 2021 WY at ¶ 56, 482 P.3d at 352 (quoting *Larkins,* 2018 WY at ¶ 67, 429 P.3d at 44) ("When trial counsel makes a 'strategic decision' in a case, that decision is 'virtually unchallengeable.'"); *Woods,* 2017 WY at ¶ 15, 401 P.3d at 968-69.

Some challenged strategic choices failing to demonstrate ineffective assistance include: "not objecting upon the belief that such action might draw undue attention to damaging evidence" where the defendant "has failed to establish that any objection would have been sustained or that failure to object was not a reasonable tactical decision." *Schriebvogel,* 2010 WY at ¶ 48, 228 P.3d at 890 (internal citations omitted); claimed ineffective cross-examination of the victim in a sexual assault trial where defense counsel "exposed some minor inconsistencies in [the victim's] testimony and the potential motivation for her to fabricate the allegations, both of which points (trial counsel] brought to the attention of the jury during

closing" where "[s]peculation as to how the cross-examination could have been conducted differently does not meet the *Strickland* test for ineffective assistance." *Barkell,* 2002 WY at ¶¶ 21-23, 55 P.3d at 1244 (citing *Smith v. State,* 959 P.2d 1193, 1198 (Wyo. 1998) and *Cutbirth v. State,* 751 P.2d 1257, 1266 (Wyo. 1988)) and *Farrow v. State,* 2019 WY 30, ¶ 82, 437 P.3d 809, 829 (Wyo. 2019); or by defense counsel agreeing to present a victim's recorded statements to the jury to highlight inconsistencies and lead to potential impeachment where the jury's determination of the victim's credibility as to what had occurred was crucial. *Woods,* 2017 WY at ¶¶ 11-15, 401 P.3d at 967-69 (including cases cited and quoted therein). A "jury's rejection of the defense strategy does not necessarily demonstrate ineffective assistance of counsel but merely a defense strategy that the jury did not accept." *Id.,* 2017 WY at ¶ 15, 401 P.3d at 969 (quoting *Barkell,* 2002 WY at ¶ 22, 55 P.3d at 1244).

Prejudice

"A claim of prejudice must be supported by more than bald assertions or speculation." *Steplock,* 2022 WY at ¶ 26, 502 P.3d at 938 (quoting *Jackson v. State,* 2019 WY 81, ¶ 28, 445 P.3d 983, 991 (Wyo. 2019) and *Castellanos,* 2016 WY at ¶ 99, 366 P.3d at 1305). The Wyoming Supreme Court has declined to adopt a "presumption of prejudice in ineffective assistance of counsel cases." *Steplock,* 2022 WY at ¶ 27, 502 P.3d at 938 (internal citations omitted).

> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Cf. United States v. Morrison,* 449 U.S. 361, 364-

> 365, 101 S.Ct. 665, 667-668, 66 L.Ed.2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Strickland, 466 U.S. at 691-92, 104 S.Ct. at 2066-67.

Moreover,

> The defendant must show that there is 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.
>
> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should

not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

[* * *]

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing

> that the decision reached would reasonably likely have been different absent the errors.
>
> [* * *]
>
> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 695-96, 104 S.Ct. at 2068-69; *See Eaton,* 2008 WY at ¶ 153, 192 P.3d at 103.

Accumulation of Errors

"[A]n accumulation of errors, although none may be reversible individually, may operate so as to deprive a defendant in a criminal case of a fair trial." *Eaton,* 2008 WY at ¶ 74, 192 P.3d at 72-3 (citing *Wilde v. State,* 2003 WY 93, ¶ 31, 74 P.3d 699, 711-12 (Wyo. 2003 and *Schmunk v. State,* 714 P.2d 724, 745 (Wyo. 1986)). "In the usual case, ineffective assistance of counsel is going to be demonstrable because of a cumulation of errors with a determination that, in the entire context of the trial, the defendant either

was, or was not, denied a right to a fair trial." *Dean v. State,* 931 P.2d 942, 947-48 (Wyo. 1997) (quoting *Dickeson,* 843 P.2d at 612). However, "where trial errors, especially when viewed collectively, 'would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process,' or 'possess[ ] a clear capacity to bring about an unjust result,' reversal is the necessary appellate response." *Proffit v. State,* 2008 WY 114, ¶ 50,193 P.3d 228, 245-46 (Wyo. 2008) (quoting *Heywood v. State,* 2007 WY 149, ¶ 29, 170 P.3d 1227, 1235 (Wyo.2007)); *Woods,* 2017 WY at ¶ 25, 401 P.3d at 971 ("While the burden is heavy, [the Wyoming Supreme Court] has been willing to reverse convictions where defense counsel's strategy is nonsensical.").

FINDINGS AND CONCLUSIONS[6]

These findings and conclusions may be facts, legal conclusions, and/or findings of fact mixed with legal conclusions.

1) The Defendant faced a single felony criminal charge of Sexual Assault in the First Degree, in violation of Wyo. Stat. Ann. § 6-2-302(a)(i), in Count 1 of the *Information.*

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[6] This *Decision and Order Denying Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel* includes those findings and/or conclusions necessary to explain the Court's determinations of the issues to the parties and to satisfy the requirements of W.R.A.P. 21(d). However, this *Decision and Order Denying Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel* does **NOT** include all findings and/or conclusions supported by the testimony and evidence adduced at the Hearing and/or contained in the Record.

2) The Defendant's trial counsel were RJM and ESB.
3) RJM was lead trial counsel from the beginning of the case *(i.e.,* at or before the Defendant was arrested and charged), and through the jury trial.
4) ESB became involved in the case as trial neared by researching and filing certain motions and consulting with RJM and the Defendant. ESB participated in limited roles at the jury trial, such as consulting with RJM, making arguments to the Court at sidebar and other conferences outside the jury's presence, and examining an expert witness called by the prosecution.

Issue 1.-- RJM misunderstood the Wyoming Rules of Evidence regarding character evidence resulting in his failure to introduce admissible character evidence at the trial.

5) Exhibit B to the Motion, also designated as Exhibit AE-III and Exhibit AE-IV, are e-mail strings between the Defendant and RJM regarding "potential character witnesses." More specifically, on April 20, 2021, the Defendant e-mailed RJM's assistant with some names and a few addresses of "potential character witnesses."
6) RJM responded in part by his e-mail on April 20th: "Rules of evidence do not allow for character evidence unless the state attacks your reputation for truthfulness."
7) On April 21, 2021, RJM sent a follow-up e-mail to the Defendant:

"Rule 404 of the Wyoming rules evidence states that "evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: character of the witness evidence of the character of the witness, as provided in rule 607-608 and 609."[7] Rule 607 states that the credibility of the witness may be attacked by any party including the party calling the witness. Rule 608 states the credibility of a witness may be attacked or supported by evidence in the form of opinion and reputation but they are subject to the limitations that (1) the evidence must refer only to the character for truthfulness or untruthfulness and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Rule 609 allows for the impeachment of a witness's credibility using that person's criminal history with certain limitations. **Obviously, character evidence in this matter is not in dispute. So I do not think we will need to call any character witnesses. However I've listed a couple people just in case. I hope you**

[7] At the Hearing, RJM admitted that he quoted only W.R.E. 404(a)(3) in the first sentence of the e-mail and that for reasons he could not recall, he omitted W.R.E. 404(a)(1) and W.R.E. 404(a)(2).

understand this explanation. Thank you." (Emphasis added).

8) At the Hearing, RJM admitted his April 20th response was incorrect. Further, RJM testified at the Hearing that he was unsure as of the time of the trial as to whether he understood the ability of the Defendant to call witnesses to testify as to his reputation for truthfulness.
9) RJM had already decided that the Defendant would likely have to testify in order to present the consent defense.
10) RJM had information from his investigation, from the Defendant's mother, and from the Defendant's girlfriend ("A.G.") that the Defendant "had issues regarding alcohol and drug use," and that he "changed when he drank and that he got angry." RJM was unsure whether the State was aware of this information, but he had concerns that the prosecution had spoken to A.G. because the State had subpoenaed her.[8] Also, RJM was informed that the State had identified a female co-worker of the Defendant willing to testify that she believed him to be "abusive," "he had been rude to her at work," and he was "hotheaded, touchy, and creepy."
11) Additionally, RJM was very concerned about calling character witnesses as to the Defendant's reputation for 'truthfulness, peacefulness, and respect for women' in light of the text message exchange when the victim confronted him about the sexual assault and the Defendant

[8] RJM testified at the Hearing that he would have preferred to call A.G. as a witness, but she was reluctant to testify, and the Defendant did not want her to testify.

wrote 'I apologize, it's not me, it's not who I am,' and later wrote that he was "drunk."

12) Prior to trial, RJM and ESB discussed with the Defendant the risks of presenting character evidence.

13) Although RJM's Hearing testimony was inconsistent as to his understanding of the Wyoming Rules of Evidence regarding the Defendant's character evidence leading up to and during trial, he faced legitimate concerns in "opening the door" on character and credibility issues.

14) At the Hearing, RJM testified that he was unaware of the existence of any character-type evidence regarding the victim, other than his plan to highlight inconsistencies between and among various statements she had given.

15) Prior to opening statements, the Court gave *Instruction No. 1* which described the jury's function in determining credibility and weight of the evidence.

16) The Defendant testified, and he was cross-examined by the prosecutor.

17) The Defendant fell short of proving that his trial counsels' decision to forego introducing character evidence could not be considered as "sound trial strategy." *Olsen,* 2003 WY 46, ¶ 73, 67 P.3d 565; *Dudley,* 951 P.2d at 1181; *Dickeson,* 843 P.2d at 609; *Luftig,* 2010 WY at ¶ 18, 228 P.3d at 865; *Mellot,* 2019 WY at ¶ 26, 435 P.3d at 386; *Neidlinger,* 2021 WY at ¶ 56, 482 P.3d at 352.

18) On this ineffective assistance claim, the Defendant failed to "show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable

probability exists that he would have enjoyed a more favorable verdict." *Wall,* 2019 WY at ¶ 39, 432 P.3d at 527; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Larkins,* 2018 WY at ¶ 62, 429 P.3d 43-4; *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

Issue 2.-- Defense counsel stipulated to Exhibit #1/MM, the victim's recorded prior out-of-court statement to law enforcement, and they failed to object when it was played in its entirety to the jury.

19) The sexual assault occurred in the early morning hours of July 23, 2020.
20) On July 26, 2020, the victim initiated a telephone interview with a law enforcement officer regarding the sexual assault. This telephone interview was recorded on the officer's body camera. This became identified as stipulated Exhibit #1/MM.[9]
21) Between July 23, 2020, and July 26, 2020, the victim provided statements to some of her friends and family.
22) After the July 26, 2020, recorded telephone interview, the victim gave other statements to other law enforcement officers, friends, and family.
23) After the Arraignment Hearing, the Court entered its *Scheduling Order,* establishing dates for filing and submitting, among other things, "Motions," "Exhibit Lists," and "Witness Lists." Included in the *Scheduling Order* was a pretrial requirement for counsel to provide a

[9] This recorded interview is Hearing Exhibit AE-VII.

Stipulated Exhibit List: "Not later **than Thursday, May 27, 2021 at noon,** counsel shall submit a list of stipulated exhibits, signed by counsel for all parties, to be admitted at trial." (Emphasis in original).

24) Defense counsel filed a *Motion In Limine* to, *inter alia,* exclude the testimony of multiple witnesses regarding prior hearsay statements made to them by the victim. These filings **did not** seek to exclude the victim's recorded phone call to law enforcement on July 26th (*i.e.,* Exhibit #1/MM).

25) The parties' *Joint Stipulated Exhibit List,* filed on May 27, 2021, designates: State's stipulated Exhibit #1 as "Body Camera Recording from Sgt. Ruschill of Phone Interview with B.S. on 7/26/20, 109@20200726180521"; Defendant's stipulated Exhibit #MM as "Video/Audio Ruschill Interview of BS (7.26.2020) Select Excerpts (Excerpts)"; and, State and Defendant stipulated Exhibit #1/MM as "Video/Audio Ruschill Interview of B.S. (7.26.2020) **Select Excerpts (Excerpts)**." (Emphasis added). In essence, the State designated the entire recorded interview, but the Defendant designated only "Select Excerpts (Excerpts)." The Defendant did not specifically designate what "Select Excerpts (Excerpts)" were agreed to as part of the stipulation.

26) The first page of the *Joint Stipulated Exhibit List* states, in pertinent part, as follows:

> Both parties stipulate to these exhibits with respect to foundation, the exhibits being what they are, and that the parties agree to use the stipulated exhibits through a proper witness(s) who has

> knowledge of the exhibit; however, the parties reserve the right to make objections to any stipulated exhibit at the time of trial regarding relevancy. The parties do not waive their rights to assert any other objections at the time of trial to those exhibits to which the parties did not stipulate.

27) At the Hearing, RJM and ESB both testified that their joint pretrial decision to stipulate to Exhibit #1/MM, which was otherwise an inadmissible hearsay statement, was a tactical or strategic calculation which would, among other things articulated by them at the Hearing, allow the Defense to show the victim's extended delay in reporting the sexual assault, to highlight inconsistencies and omissions in the statement, to provide a basis for impeachment, and to potentially introduce a motive of fabrication. Both counsel testified as to their belief that, overall, the statement diminished the victim's credibility and benefitted the Defendant.

28) The jury trial began on June 1, 2021, and the Court instructed the jury before opening statements. This includes *Instruction No. 1,* which informed the jury of the functions of the Court and of the jury, and provides, in part, as follows:

> On the other hand, it is the exclusive province of the Jury to weigh and consider all evidence which is presented to it, to determine the credibility of all witnesses who testify before it, and from such evidence and testimony, to determine the issues of fact in this case.

[* * *]

> The Jury is the sole judge of the credibility of the witnesses, and of the weight to be given their testimony. You should take into consideration their demeanor upon the witness stand, their apparent intelligence, their means of knowledge of the facts testified to, the interest, if any, which any witness may have in the outcome of this trial, the prejudice or motives, or feelings of revenge, if any, which have been shown by the evidence. In so doing, you may take into consideration all of the facts and circumstances in the case and give such weight as you think the same are entitled to, in the light of your experience and knowledge of human affairs.

29) In the State's case in chief, the victim was called to testify. After the victim completed her testimony on direct examination by the prosecutor, and before any cross-examination by Defense counsel, the State played stipulated Exhibit #1/MM in its entirety (*i.e.*, not just select excerpts) without objection.[10]

30) RJM cross-examined the victim. He was able to develop some inconsistencies and highlighted her delay in reporting the sexual assault, but by the time of trial many of the other objectives

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[10] The Court could find no reference in the Hearing transcript explaining why the entire recorded interview was played, rather than agreed-upon excerpts. Based upon some testimony at the Hearing by RJM and the *Joint Stipulated Exhibit List,* the only objection that trial counsel could make to playing stipulated Exhibit #1/MM was for lack of "relevancy."

he sought to explore in his examination were no longer viable.

31) After the close of the testimony and evidence, but before closing arguments, the Court further instructed the jury. Among other things, *Instruction No. 11* reiterates much of what was already stated in *Instruction No. 1,* including the following:

> The Jury is the sole judge of the credibility of the witnesses and of the weight to be given their testimony. In so doing, you may take into consideration all the facts and circumstances in the case, and give to each such weight as in the light of your experience and knowledge of human affairs you think it entitled.
>
> In judging the credibility of the witnesses in this case, you should take into consideration their demeanor upon the witness stand, their apparent degree of intelligence, their means of knowledge of the facts testified to, their interest, if any, in the outcome of this trial, and their revealed motives or prejudice or feelings of revenge, if any, that have been shown by the evidence in this case.
>
> If you believe from the evidence in this case that any witness willfully and corruptly swore falsely to any material fact in this case, then you are at liberty to disregard all or any part of that testimony, except insofar as the same has been corroborated by other and credible evidence and the facts and circumstances proven during the trial.

> In determining any of the questions before you in this case, you should be governed solely by the evidence. You should not indulge in conjecture or speculation unsupported by the evidence. However, you may consider the evidence presented to you and the reasonable inferences and conclusions which may be drawn there from in the light of your knowledge, observation and experience in the affairs of life.

32) In his closing argument, among other things, RJM specifically addressed inconsistencies in the victim's testimony and statements, including stipulated Exhibit #1/MM, and the victim's delay in reporting the assault to law enforcement.

33) The essence of this case matched the victim's credibility with the Defendant's credibility. There was no dispute that a physical sexual encounter between the victim and the Defendant occurred on July 23, 2020. The State had the burden of proving beyond a reasonable doubt that the victim did not consent. (*See Instruction No. 19* and *Instruction No. 20, supra*).

34) The Defense counsels' stated justifications for their joint tactical decision to stipulate to Exhibit #1/MM to be played to the jury, at the time that the decision was made,[11] are

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[11] A court evaluates "counsel's actions 'under the circumstances existing at the time of the challenged act or omission and from the perspective available' then, not in hindsight." *Jendresen,* 2021 WY at ¶ 37, 491 P.3d at 284; *Luftig,* 2010 WY at ¶ 18, 228 P.3d at 865; *Mraz,* 2016 WY at ¶ 44, 378 P.3d at 291; *Jones,* 2017 WY at ¶ 14, 393 P.3d at 1261; *Bruckner,* 2018 WY at ¶ 15, 417 P.3 at 181.

presumptively sound. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (Defendant's counsel "is entitled to 'wide latitude' in making such 'tactical decisions.'"); *Winters,* 2019 WY at ¶ 53, 446 P.3d at 210; *Byerly,* 2019 WY at ¶ 87, 455 P.3d at 255; *Woods,* 2017 WY at ¶ 15, 401 P.3d at 968-69 ("When trial counsel makes a 'strategic decision' in a case, that decision is 'virtually unchallengeable.'"); *Eaton,* 2008 WY at ¶ 38, 192 P.3d at 62; *Strickland,* 466 U.S. at 690-91, 104 S.Ct. at 2066; *Sanchez,* 2002 WY at ¶¶ 11-16, 41 P.3d at 534-35; *Neidlinger,* 2021 WY at ¶ 56, 482 P.3d at 352; *Larkins,* 2018 WY at ¶ 67, 429 P.3d at 44.

35) Many of the reasons for the Defense counsels' stipulation to play Exhibit #1/MM to the jury were not realized by the time that RJM cross-examined the victim, which limited his ability to assert that her credibility was jeopardized. *Barkell,* 2002 WY at ¶ 22, 55 P.3d at 1244 (A "jury's rejection of the defense strategy does not necessarily demonstrate ineffective assistance of counsel but merely a defense strategy that the jury did not accept."); *Woods,* 2017 WY at ¶ 15, 401 P.3d at 969.

36) At the Hearing, intertwined with the issue of stipulated Exhibit #1/MM, the Defendant's counsel elicited testimony from RJM and from Mr. Klein pertaining to RJM's cross-examination of the victim and alternative strategies to highlight inconsistencjes and/or impeach her. This approach is unavailing in proving ineffective assistance of counsel. *Barkell,* 2002 WY at ¶¶ 21-23, 55 P.3d at 1244 (Claimed ineffective cross-examination of the victim in a sexual assault trial where defense counsel

"exposed some minor inconsistencies in [the victim's] testimony and the potential motivation for her to fabricate the allegations, both of which points [trial counsel] brought to the attention of the jury during closing" where "[s]peculation as to how the cross-examination could have been conducted differently does not meet the *Strickland* test for ineffective assistance."); *Smith,* 959 P.2d at 1198; *Cutbirth,* 751 P.2d at 1266; *Farrow,* 2019 WY at ¶ 82, 437 P.3d at 829.

37) Under the circumstances, the Defendant failed to prove that his trial counsels' decision to stipulate that Exhibit #1/MM would be played to the jury could not be considered as "sound trial strategy." *Olsen,* 2003 WY 46, ¶ 73, 67 P.3d 565; *Dudley,* 951 P.2d at 1181; *Dickeson,* 843 P.2d at 609; *Luftig,* 2010 WY at ¶ 18, 228 P.3d at 865; *Mellot,* 2019 WY at ¶ 26, 435 P.3d at 386; *Neidlinger,* 2021 WY at ¶ 56, 482 P.3d at 352.

38) On this ineffective assistance claim, the Defendant failed to "show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict." *Wall,* 2019 WY at ¶ 39, 432 P.3d at 527; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Larkins,* 2018 WY at ¶ 62, 429 P.3d 43-4; *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

Issue 3.-- Defense counsel agreed to the physical presence of the victim advocate in proximity to the victim in the witness box while she testified, and RJM failed to object to the prosecutor's statement to the jury.

39) The jury trial in this case was conducted in accordance with the Court's jury trial operating plan with COVID-19 protocols. Due to the physical limitations of the courtroom and the COVID-19 protocols in place, the Court was required to sharply limit the number of persons allowed to be in the courtroom and where each person could be physically located. As part of the operating plan, the jurors were seated in the gallery instead of in the jury box closer to the well of the court. Accordingly, spectators were not allowed to be physically present in the courtroom.

40) Testimony at the Hearing revealed that at some pretrial hearing, the issue of the physical presence of the Teton County victim-advocate, Angie Uhl ("Uhl") being allowed in the courtroom near the victim was discussed by the trial judge and respective counsel. The consensus was that Uhl would be permitted to be present in the courtroom when the victim testified, and she would occupy a chair near the north end of the jury box and the east wall of the courtroom, approximately 10 to 12 feet from the witness box where the victim would be seated. The judge and respective counsel also discussed having a contemporaneous statement read aloud for purposes of the Record and for explanation of Uhl's presence for the jury.

41) As previously noted, the jury trial began on June 1, 2021. The Court instructed the jury before opening statements, including *Instruction No. 8:*

> "The term 'victim' means the person alleged to have been subjected to sexual assault."

42) In the State's case in chief, the victim was called to testify. After she was sworn and seated in the witness box immediately to the left of the Bench, the following was placed on the record by the prosecutor:

> MS. WEISMAN:
> Thank you, Your Honor.
> And before I begin my examination with this witness, I would like to point out for the record and for the jury that Angie Uhl has joined us in the courtroom. Ms. Uhl is an advocate for the witness and will be sitting near her for the duration of her testimony. She will not be coaching the witness, but rather present in a supportive role. The defendant has agreed to Ms. Uhl being present.
>
> THE COURT:
> And the Court has approved that, so, thank you.

43) The Defendant contends that RJM's failure to object to Uhl's physical presence in the courtroom during the victim's testimony and his failure to object to the statement "could have prejudiced Mr. Tarpey and made it look like there had some determination that she's already a victim and she needs support." He

posits that RJM should have requested an instruction that 'the jury should draw no inferences from Uhl's presence.' The Defendant claims that these omissions by RJM constitute ineffective assistance and that they prejudiced him.

44) RJM testified at the Hearing that he "knew from experience that the victim advocate was always in the courtroom," and the Wyoming Victim's Bill of Rights may provide a valid basis for the presence of a victim advocate. He admitted that he did not object to the presence of the victim advocate in the courtroom during the victim's testimony or to the oral statement describing the reason for Uhl's presence, nor did he request a limiting instruction. RJM did not claim that this was a strategic decision on his part, but he asserted that it was not appropriate to appear unduly antagonistic regarding such an issue.

45) *Instruction No. 8* left no doubt as to the identity of the "alleged victim."

46) The oral statement merely noted that "[t]he defendant has agreed to Ms. Uhl being present."

47) Also, the Judge gave his imprimatur: "And the Court has approved that, so, thank you."

48) Here, the Defendant "has failed to establish that any objection would have been sustained," or that failure to object was not a reasonable [] decision" so as to avoid an appearearance that RJM had been unduly antagonistic. *Schriebvogel,* 2010 WY at ¶ 48, 228 P.3d at 890.

49) "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the

error had no effect on the judgment. [* * *] The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland,* 466 U.S. at 691-92, 104 S.Ct. at 2066-67 (citing *Morrison,* 449 U.S. at 364-365, 101 S.Ct. at 667-668).

50) The Defendant's claim of prejudice on this issue is founded upon nothing more than "bald assertions or speculation." *Jackson,* 2019 WY at ¶ 28, 445 P.3d at 991; *Steplock,* 2022 WY at ¶ 26, 502 P.3d at 938; *Castellanos,* 2016 WY at ¶ 99, 366 P.3d at 1305. And there is no "presumption of prejudice in ineffective assistance of counsel cases." *Steplock,* 2022 WY at ¶ 27,502 P.3d at 938.

51) On this ineffective assistance claim, the Defendant failed to "show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict." *Wall,* 2019 WY at ¶ 39, 432 P.3d at 527; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Larkins,* 2018 WY at ¶ 62, 429 P.3d 43-4; *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

Issue 4.–· Defense counsel stipulated to or failed to object to most of the testimony and evidence presented during the jury trial.

52) The Court has combed through the *Motion Hearing Transcript* and carefully reviewed the trial transcript to ascertain the foundation for the Defendant's claim of ineffective assistance and prejudice on this issue. The Court has already addressed Issue 2 and Issue 3, *supra.* If there are other instances where the Defendant asserts that trial counsel stipulated to or failed to object to testimony and evidence presented during the jury trial, he has failed to provide any specificity as to how he has proven that trial counsel rendered ineffective assistance or how he may have been prejudiced.

53) The Defendant "has failed to establish that any objection would have been sustained," or that failure to object was not a reasonable tactical decision." *Schriebvogel,* 2010 WY at ¶ 48, 228 P.3d at 890.

54) "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. [* * *] The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland,* 466 U.S. at 691-92, 104 S.Ct. at 2066-67 (citing *Morrison,* 449 U.S. at 364-365, 101 S.Ct. at 667-668).

55) The Defendant's claim of prejudice on this issue is founded upon nothing more than "bald assertions or speculation." *Jackson,* 2019 WY at ¶ 28, 445 P.3d at 991; *Steplock,* 2022 WY at ¶ 26, 502 P.3d at 938; *Castellanos,* 2016 WY at ¶ 99, 366 P.3d at 1305. And there is no "presumption of prejudice in ineffective assistance of counsel cases." *Steplock,* 2022 WY at ¶ 27, 502 P.3d at 938.

56) The Defendant has failed to prove his counsels' "representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 687-88, 104 S.Ct. at 2065; *Bruckner,* 2018 WY at ¶ 15, 417 P.3d at 181 ("Under Wyoming law, the Court considers performance deficient if a defendant shows that his attorney's performance fell below that of a reasonably competent attorney and that it is reasonably probable that the outcome of the proceeding would have been more favorable to the defendant absent deficient performance.").

57) On this ineffective assistance claim, the Defendant failed to "show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict." *Wall,* 2019 WY at ¶ 39, 432 P.3d at 527; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064; *Larkins,* 2018 WY at ¶ 62, 429 P.3d 43-4; *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

Issue 5.-- Defendant's counsel failed to adequately prepare the Defendant to testify at trial.

58) The Defendant's Affidavit contains the following claim of ineffective assistance:

> [RJM] also never prepared me to testify. Throughout the trial, the State kept telling us that they were going to finish with their case on the following Monday. Then, suddenly before noon on Friday, they rested. [RJM] did not have any witnesses prepared to go because he didn't think he would need any until the following week. So, over lunch, he handed me a list of questions and told me to review them and be prepared to testify that afternoon. We never went through them together. We never discussed strategy or how to answer questions on direct or cross. He just put me on the stand without any preparation or discussion.

59) The Defendant provided RJM with a written statement describing the events of the sexual encounter with the victim on January 12, 2021. RJM used this statement to outline questions for the Preliminary Hearing, and for the Defendant's direct examination and anticipated cross-examination.

60) RJM would frequently try to contact the Defendant to discuss case preparation and strategy based upon ongoing discovery information.

61) Approximately one month before the trial was to begin, the Defendant relocated to Jackson for in-person meetings and preparation.
62) Early on, Defense counsel and the Defendant agreed that the Defendant would have to testify in order to assert the consent defense.
63) At the Hearing, RJM testified that on "May 26th we met for four and a half hours to prepare [the Defendant] for trial." He went over a series of questions with the Defendant, discussed trial strategies, and reviewed the Defendant's version of the events. They also discussed the text messages, cross-examination, and direct examination. RJM "told [the Defendant] that I thought he was prepared and that [h]e would most likely testify."
64) In his testimony at the Hearing, RJM assessed the Defendant's preparation and his anticipated direct examination as "good, it was credible, there was not hiccups so to speak, no big trips, falls."
65) When asked whether he believed that the Defendant was prepared to testify when called to do so, RJM stated, "Absolutely."
66) RJM testified that through the Defendant's testifimony at trial, he was able to advance the consent defense theory of the case. *See Instruction No. 19* and *Instruction No. 20, supra.*
67) The Defendant points to no specific portions of the trial transcript which indicate his lack of preparation in his testimony.
68) Here, the Defendant presented no admissible evidence or testimony refuting his trial counsels' statements under oath made at the Motion Hearing regarding their efforts to

prepare him to testify on direct examination and on cross-examination.

69) It is apparent that the jury members weighed the Defendant's testimony as they were instructed to do in *Instruction No, 11* and *Instruction No. 16, supra.*

70) "An unfavorable verdict does not equate to ineffective assistance of counsel." *Larkins,* 2018 WY at ¶ 67, 429 P.3d at 44; *Woods,* 2017 WY at ¶ 15, 401 P.3d at 969.

71) On this ineffective assistance claim, the Defendant failed to "show that his trial counsel rendered constitutionally deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict." *Wall,* 2019 WY at ¶ 39, 432 P.3d at 527; *Strickland,* 466 U.S. at 687, 104 S.Ct at 2064; *Larkins,* 2018 WY at ¶ 62, 429 P.3d 43-4; *Griggs,* 2016 WY at ¶ 37, 367 P.3d at 1124; *See* W.R.A.P. 21(a).

Issue 6.-- The accumulation of ineffective assistance errors requires that the Defendant receive a new trial.

72) "In the usual case, ineffective assistance of counsel is going to be demonstrable because of a cumulation of errors with a determination that, in the entire context of the trial, the defendant either was, or was not, denied a right to a fair trial." *Dickeson,* 843 P.2d at 612; *Dean,* 931 P.2d at 947-48; *Cf. Eaton,* 2008 WY at ¶ 74, 192 P.3d at 72-3; *Wilde,* 2003 WY at ¶ 31, 74 P.3d at 711-12; *Schmunk*, 714 P.2d at 745.

73) Inasmuch as the Defendant has failed to "show that his trial counsel rendered constitutionally

> deficient performance and that absent that deficiency, a reasonable probability exists that he would have enjoyed a more favorable verdict" as to any issue raised in the Motion, there is no accumulation of ineffective assistance errors which has prejudiced him.

CONCLUSION

Based upon the foregoing findings and conclusions, the Defendant has failed to show that his constitutional rights to assistance of effective counsel were violated and/or he has not proven that he was prejudiced by any deficiencies in his representation by trial counsel, the Court will deny the *Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel.*

ORDER

IT IS ORDERED that the *Defendant's Motion Pursuant to W.R.A.P. 21 for New Trial Based on Ineffective Assistance of Trial Counsel,* and any and all claims for relief therein, be, and the same are hereby, respectfully DENIED.

Dated June 3, 2022.

By the Court:

/s/ [Illegible]
District Court Judge

Please provide copies to:

→ Erin E. Weisman, Teton County and Prosecuting Attorney

→ Thomas A. Fleener / Devon W. Petersen, Attorneys for Defendant

→ Frank R. Chapman, Attorney for Richard J. Mulligan and Edward S. Bushnell of Mulligan Law Office

→ Shawna Goetz, Clerk of Wyoming Supreme Court, No. S-21-0234

[STAMP]
CERTIFICATE OF SERVICE
This is it certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 3 day of June, 2022.
Weisman/[Illegible] pickup
Fleener/Petersen fax
Chapman fax
By /s/ [Illegible]
Goetz fax
P&P email

Appendix C

IN THE DISTRICT COURT TETON COUNTY, WYOMING

NINTH JUDICIAL DISTRICT

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CLERK OF DISTRICT COURT

Criminal Action No. 2717

THE STATE OF WYOMING,

Plaintiff,

—vs—

CHRISTOPHER DAVID TARPEY,

Defendant.

JUDGMENT AND SENTENCE

The above-captioned matter having come before the Court for a Sentencing Hearing on the 1st day of September, 2021, and the above-named defendant appearing in person and with his attorneys, Richard J. Mulligan and Edward S. Bushnell, and the State appearing by and through Erin E. Weisman, Teton County and Prosecuting Attorney and Clayton D.

Kainer, Deputy Prosecuting Attorney, and the defendant having been found guilty of COUNT 1, SEXUAL ASSAULT IN THE FIRST DEGREE, a felony, in violation of W.S. § 6-2-302(a)(i), on the 7th day of June, 2021, after a Jury Trial, and the Court having reviewed and considered the presentence investigation report; as amended, all comments and written submissions regarding the character of the defendant, the victim impact statement, the aggravating and mitigating factors, and the defendant not having given any good or sufficient reason why judgment of the Court should not be pronounced and the Court being otherwise fully advised in the premises;

THE COURT FINDS:

1. That the defendant is alert and not under the influence of intoxicating liquor or drugs.

2. That the defendant has sufficient mental capacity to understand the nature of the proceedings.

3. That the State requests restitution for the victim in the amount of $270.00, in this case and that the defendant does not object.

4. That the Court has considered placing the defendant on supervised probation and has found that supervised probation would unduly depreciate the seriousness of the offense and is therefore inappropriate.

5. That the defendant qualifies as an addicted offender and is recommended for Level 2.1 intensive outpatient treatment and will be sentenced pursuant to the Addicted Offender's Accountability Act.

6. That the defendant was advised that a conviction upon the charge of COUNT 1, SEXUAL

ASSAULT IN THE FIRST DEGREE, a felony, in violation of W.S. § 6-2-302(a)(i), may result in the lifetime disqualification of the defendant to own, carry, purchase, or possess firearms and ammunition for firearms as collateral consequences that may arise from that conviction pursuant to provisions of 18 U.S.C. §§922(g)(1), (9) and 924(a)(2), or other federal law; and, that if the defendant is a peace officer, member of the armed forces, hunting guide, security guard or engaged in any other profession or occupation requiring the carrying or possession of a firearm, that the defendant may now, or in the future, lose the right to engage in that profession or occupation.

7. That the defendant was advised of his right to appeal the sentence or conviction, including the time limits for filing notice of appeal and the right of a person who is unable to pay the cost of an appeal to apply for leave of appeal in forma pauperis, to have appointed counsel represent the defendant on appeal, and to have the clerk of court file a notice of appeal, and that if the defendant so requests, the clerk of court shall prepare and serve forthwith a notice of appeal in accordance with the Wyoming Rules of Appellate Procedure on behalf of the defendant.

8. That the defendant was advised of and shall comply with the Wyoming Sex Offender Registration Act, W.S. § 7-9-1301, et seq, and shall register as a sex offender to the extent required by this Act and that failure to comply could result in additional felony charges.

IT IS ORDERED:

1. Pertaining to COUNT 1, SEXUAL ASSAULT IN THE FIRST DEGREE, a felony, in violation of W.S. § 6-2-302(a)(i), that conviction is hereby entered

and that CHRISTOPHER DAVID TARPEY, be incarcerated for a period of not less than ten (10) years and not more than fifteen (15) years in a state penal institution designated by the Department of Corrections.

2. That CHRISTOPHER DAVID TARPEY remain in the custody of the Sheriff of Teton County, Wyoming, and that CHRISTOPHER DAVID TARPEY be conveyed and delivered within ten (10) days from the date hereof, by said Sheriff into the custody and control of the Department of Corrections, and be then conveyed by an officer or agent of the Department, at the expense of the State, to a State penal institution designated by the Department, and be therein imprisoned and confined for the periods set forth above and be there safely kept, governed, clothed, and subsisted during said confinement according to the rules and regulations of said institution until the term of confinement shall have expired, or the defendant be pardoned, or otherwise legally discharged.

3. That the Court recommends that during incarceration the defendant participate in therapeutic programs for domestic violence, sexual offenders, substance abuse, and mental health counseling.

4. That the Court recommends CHRISTOPHER DAVID TARPEY be given credit against his minimum and maximum sentence for presentence confinement in the amount of eighty-eight (88) days.

5. That the defendant pay restitution in COUNT 1, in the amount of $270.00 payable to the Clerk of the District Court at P.O. Box 4460, Jackson, WY 83001, as soon as possible, and, in any event, as a condition of any parole that the defendant may receive, payable by the Clerk to B.S., the victim in the case; to the address set forth in the State's Notice of

Restitution filed on August 25, 2021. The restitution is hereby reduced to judgment to bear interest at the maximum statutory rate, and to satisfy this Order, the Clerk of Court, upon request of the victim or the County and Prosecuting Attorney, may issue execution against the defendant for any assets, including wages, subject to attachment in the same manner as in a civil action.

6. That the defendant is hereby assessed a Crime Victim surcharge in COUNT 1, in the amount of $150.00, in accordance with the provisions of W.S. §1-40-119(a), which surcharge shall be paid to the Clerk of the District Court, and said Clerk shall promptly thereafter remit the same to the Wyoming Crime Victims Compensation Commission, in accordance with law, and that the warden of any state penal institution where the defendant may be incarcerated is hereby authorized to withhold any and all sums from the defendant's inmate account until this assessment is paid in full.

7. That the defendant is hereby assessed a Court Automation Fee in COUNT 1, in the amount of $40.00 and an Indigent Civil Legal Service Fee in the amount of $10.00 for each count, pursuant to W.S. §6-10-102, to the Clerk of the District Court, P.O. Box 4460, Jackson, WY 83001, and the Clerk shall remit the same as provided by W.S. §5-3-205, and that the warden of any state penal institution where the defendant may be incarcerated is hereby authorized to withhold any and all sums from the defendant's inmate account until this assessment is paid in full.

8. That the defendant pay $75.00 for the Addiction Severity Index to the Clerk of the District Court, P.O. Box 4460, Jackson, WY 83001, payable by the Clerk to Wyoming Department of Corrections,

Attention: Janie White, 1934 Wyott Dr, Suite #100, Cheyenne, WY 82002 and that the warden of any state penal institution where the defendant may be incarcerated is hereby authorized to withhold any and all sums from the defendant's inmate account until this assessment is paid in full.

9. That any bond posted for the defendant or by the defendant is hereby exonerated.

10. That all payments made to the Clerk of the District Court, including, but not limited to restitution, surcharges, Court Automation fee, be made in the form of CASH, CERTIFIED CHECK, or MONEY ORDER.

11. That the defendant shall submit himself to the Wyoming Department of Corrections for the purpose of providing a DNA sample for analysis to determine identification characteristics.

12. That any items of evidence in this case not subject to summary destruction, not previously possessed by the defendant in violation of law, and presently in the possession of the Jackson Police Department shall be returned to the defendant within sixty (60) days.

13. That any items of evidence in this case which were possessed by the defendant in violation of law, which are presently in the possession of the Jackson Police Department, and which are subject to summary destruction shall be summarily destroyed within sixty (60) days.

14. That any items of evidence belonging to the victim and presently in the possession of the Jackson Police Department shall be returned to the victim.

Dated the 13th day of September, 2021.

/s/ Timothy C. Day
Timothy C. Day
District Court Judge

APPROVAL AS TO SUBSTANCE AND FORM:

Dated 9-2-2021

/s/ Erin E. Weisman
Erin E. Weisman, WSB No. 6-3413
Teton County and Prosecuting Attorney
Clayton D. Kainer, WSB No. 7-4572
Deputy Prosecuting Attorney
P.O. Box 4068
Jackson, WY 83001
(307) 733-4012

Dated 9-2-2021

/s/ Richard J. Mulligan
Richard J. Mulligan, WSB No. 5-1731
Attorney At Law
Edward S. Bushnell, WSB No. 7-4951
Attorney At Law
P.O. Box 1066
Jackson, WY 8300
(307) 733-5961

To Be Faxed by the Clerk of Court as Follows:

Ray Mann, JPD (Evidence Technician)- 733-3241

[STAMP]

CERTIFICATE OF SERVICE

This is it certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 13 day of Sept, 2021.

Weisman/Kainer pickup

Mulligan/Bushnell fax

P&P email

By /s/ [Illegible]

JPD Mann -fax

TC Jaildelivery

TCSO delivery

Crook delivery/certified copy

Appendix D

IN THE DISTRICT COURT TETON COUNTY, WYOMING
NINTH JUDICIAL DISTRICT

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CLERK OF DISTRICT COURT

Criminal Action No. 2717

THE STATE OF WYOMING,

Plaintiff,

—vs—

CHRISTOPHER DAVID TARPEY,

Defendant.

ORDER AFTER
MAY 25 & 28, 2021 HEARINGS

Two hearings were held in this matter on May 25 and 28, 2021 in advance of the trial scheduled to begin on June 1, 2021. The May 25, 2021 conference occurred part by videoconference and part in person. The May 28, 2021 conference occurred in person. Richard J. Mulligan and Edward S. Bushnell

appeared with Defendant, Mr. Tarpey. Erin E. Weisman and Clayton D. Kainer appeared for the State. The Court made several rulings from the bench regarding trial logistics at the hearings. This Order provides those rulings by written order.

1. Juror Prescreening. On May 25, 2021, the Court and the parties reviewed juror prescreening questionnaires, issued as part of Covid-19 protocols. Some jurors were excused at the conference without objection.

2. Revisions to Face Covering Requirements. The Court noted on May 25 that it was reconsidering portions of its Jury Trial Plan in response to new federal, state, and local guidance regarding face coverings and the use of paper instructions and exhibits during trial. The jury trial plan was drafted to require face coverings by all participants at all times. It also eliminated the use of paper exhibits and paper jury instructions at trial.

3. After consulting with the local public health department, all vaccinated individuals may elect not to wear face coverings at trial. However, face coverings are required in common spaces in the courthouse at all times. Paper exhibits, paper jury instructions, and other exhibits may be handled during trial. Gloves and hand sanitizer will be provided. The jury has been advised of the changes to the jury trial protocols, and the Court's opening remarks to the jurors will review the same.

4. Voir Dire. All counsel are directed to have gone through courthouse security not later than 8:15 am, which is when the first set of jurors will begin to arrive. The jurors will arrive with

staggered arrival times to avoid congregating for security screening. The State may convene prior to trial in its offices in the courthouse. The defense team and Defendant may convene in the former District Court jury room.

5. Jury selection will occur in three panels. The first panel will begin at 9am. The second panel will begin at 12 noon. The third panel will begin at 3pm.

6. The Court will use approximately 30 or 35 minutes for its opening remarks for each panel. Each side will have approximately 30 or 35 minutes for questioning each panel. The main panel will then be excused. Individual interviews will follow each panel, for those jurors who request a private interview. The jurors to be interviewed will wait in the District Court hallway, lobby, and lobby anteroom to await questioning in order to allow the next panel of jurors to assemble in the Circuit Courtroom.

7. Counsel may use the breaks between private interviews and the next panel for meals and refreshments.

8. After the third panel, the peremptory strike process will occur. The Clerk of District Court will then contact the jurors to notify them of selection for the jury. This is likely to occur after 5pm.

9. Counsel should plan accordingly for refreshments they may need on jury selection day and to plan on the voir dire process to extend into the evening.

10. Alternate Jurors. For a jury of twelve plus two alternates, the qualified pool will need to be 32 jurors. There are three panels of 19, for a total of 57 juror panelists for voir dire. In past criminal cases, initial pools of only 54 jury panelists have been adequate to assemble a jury of this size.

11. Counsel are reminded that the last four jurors in the qualified pool of 32 are the jurors for the two alternates. Two will be alternate jurors and the other two are the peremptory challenges for the alternates.

12. June 2, 2021 Schedule. On the first day of evidence, June 2, 2021, the Court anticipates beginning with the jury at approximately 8:30am. The Court will recess for the day at 11:45 in order to attend, and to allow counsel to attend, the funeral of Hon. Terry Rogers.

13. Additional Day of Trial. Due to the half day recess, the trial schedule has been extended to include Tuesday, June 8, 2021 if the additional time is needed. The Clerk of District Court has notified the jury pool of the change in schedule.

14. No Photographs of Jurors. Counsel for both sides requested an opportunity to take photographs of thejury panels inorder to refresh their recollection of the panels during the peremptory strike process. After considering the request, the Court finds that photographs of jurors would be impermissible and raises concerns about juror privacy. Counsel were advised to work with their co-counsel to take accurate notes. Charts of the jurors' seating locations in each panel will be provided to counsel.

15. Memorandum Regarding Prior Consistent Statements. The State filed a short trial memorandum on prior consistent statements. The Defendant filed a response on May 27. The Court has taken the trial memo and response under advisement.

16. Sequestration. Defendant requests a sequestration order for all witnesses. Once a sequestration order is requested, it must be entered. Counsel are directed to remind the Court at the start of trial so the sequestration order may be entered on the record.

17. Public Access. As the Court's jury trial plan indicates, public access to the trial would occur remotely. Due to the size of the courtroom, there is no space for public access during the trial while accommodating physical distancing for the jurors. The Court noted at the May 25 hearing that the video feed, if a video broadcast were used, is not optimal for showing all trial participants, protecting the privacy of the jurors, or both. The Court was considering using an audio-only feed, used by the Wyoming Supreme Court and other trial courts in Wyoming. Both parties requested the audio-only feed be used.

18. The Sixth Amendment's right to a public trial right was made applicable to the states in *In re Oliver,* 333 U.S. 257, 270 (1948). A public trial is "for the benefit of the accused" so "the public may see he is fairly dealt with and not unjustly condemned," which has the effect of "keep[ing] his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Id.* However, the right to a public

trial is not absolute. In *Waller v. Georgia,* the Supreme Court set forth a four-part test for trial courts to use to determine whether a courtroom closure is appropriate. 467 U.S. 39 (1984). A closure is appropriate when: (1) the party (or in this case, the court), seeking to close the proceeding must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) the court must make findings adequate to support the closure.

19. The First Amendment also provides the right of public and media access to trial proceedings. *Press-Enterprise Co. v. Superior Court of Cal. for the Cnty. of Riverside,* 478 U.S. 1 (1978). A First Amendment right to access criminal proceedings, exists if (1) "the place and process have historically been open to the press and general public," and (2) "public access plays a significant role in the functioning of the articular process in question." *Id.* at 8. The First Amendment right of access can be overcome by an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 8.

20. In this case, the criminal trial is open to the public. The difference from an ordinary criminal trial is that the public and media cannot attend in person. The public and media can attend remotely. Some courts, when evaluating a partial closure, have applied a less stringent test than that announced in *Waller. E.g., Judd v. Haley,* 250 F.3d 1308, 1315 (11th Cir. 2001).

21. Applying the more stringent *Waller* factors in this case, the overriding interest is one of public health, namely an airborne virus (COVID-19) easily transmitted by aerosols emitted when a person speaks or breathes, although respiratory droplets by sneezing or coughing and fomite transmission through touched surfaces are also recognized means of transmission. One of the several scientifically-recognized tools to reduce contagion of the airborne virus is to physically distance people six feet apart. The District Courtroom is small. It can accommodate the necessary number of jurors and litigants for trial with physically distanced seating. But the space is too small to allow more than the jurors, court staff, attorneys, and parties. To allow open access for in-person attendance by the public and the media would preclude physical distancing and therefore increase the public health risk to the jurors and trial participants. The Court therefore finds that the overriding interest of public health warrants a change to the public access procedures for this case.

22. To provide public access, the Court has considered (1) a live videostream of the trial available online through YouTube or a similar platform, (2) a live video stream of the trial by invitation to the video conference meeting (as the Court has used for bench trials during the pandemic), and (3) a live audiostream to the trial. The Wyoming Supreme Court and several other Wyoming trial courts use the audiostream option. After testing the video capabilities of existing courtroom technology, it is apparent that the available angles for the videostream in the small courtroom are inadequate for a jury

trial. The video option has worked well for bench trials, all of which have occurred remotely during the pandemic. For the few in-person proceedings that have occurred during the pandemic, the video option has also worked well since the bench proceedings necessarily have a much smaller volume of courtroom participants. As a result, the video angles are appropriate and adequate. For a jury trial, they are not.

23. After testing the available options for a jury trial, the Court must find that the live audiostream is th eonly feasible and practical option at this time. As the only feasible option, the audiostream is narrowly tailored. As noted above, the Court has considered the other available options and found them unworkable at this time after testing.

24. With respect to the Sixth Amendment, it is notable that the Defendant, whose right it is to have a public trial, did not oppose the audiostream options and joined in the State's preference to use that option. With respect to the First Amendment, the audiostream option is narrowly tailored to serve the interest of public health.

25. Podium. The podium will be available to counsel for voir dire and for opening and closing statements. The microphone is equipped with a microphone cover. Counsel will be directed to remove the cover when they are done with the microphone. The next person to use the microphone will be provided a new microphone cover to unwrap and place on the microphone.

26. Witnesses. The Court reviewed with counsel the protocols to bring witnesses into the courtroom. Witnesses shall wait in the lobby or the Prosecutor's office. Counsel will contact the witness to come to the courtroom. the witness can report to the Clerk of District Court's office and staff will direct the witness around the courtroom to the door closest to the witness box.

27. Confidentiality of Victim's Name. There was some discussion of whether the Victim should be referred to during trial by name or by initials. The Victim is not a minor, whose name would be confidential as a matter of law. The State did not provide legal authority to support a request that an adult victim in a public trial be kept confidential. In the absence of such legal authority, the Victim can be referred to by name at trial.

Dated this 1st day of June, 2021

/s/ Timothy C. Day
Timothy C. Day
District Judge

[STAMP]
CERTIFICATE OF SERVICE
This is it certify that a copy of the foregoing was served by mail/fax upon the following persons at their last known address this 2 day of June, 2021.
Weisman + Kainer pickup
Mulligan + Bushnell fax
P&P email
By /s/ Dep Natalie [Illegible]