IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0395

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GLEN JOHN GLENN,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUES

1. Did the district court properly exercise its discretion when it allowed the State to enter rebuttal evidence of jail-recorded telephone calls between Appellant and his wife to impeach the testimony of Appellant's wife concerning her clear recollection of events?

2. Did Appellant meet his heavy burden on appeal of proving his trial counsel provided ineffective assistance of counsel?

STATEMENT OF THE CASE

The State charged Appellant Glen Glenn by Amended Information with one count of felony Strangulation of a Partner or Family Member and two counts of felony Partner or Family Member Assault. (D.C. Doc. 37.) Glenn gave notice that he would be relying on the defense of alibi. (D.C. Doc. 15.) Before trial, the State filed a Notice of Additional Witness, identifying John Tate of the Billings Police Department as a possible witness. (D.C. Doc. 30.) The State also filed a trial brief in which it listed Detective Tate as a possible rebuttal witness and explained, "The State may further introduce in rebuttal any evidence necessitated by the evidence the Defendant may present." (D.C. Doc. 44 at 4, ¶ 4.)

The district court conducted a jury trial on March 4 and 5, 2019. (3/4/19-3/5/19 Transcript of Jury Trial [Tr.].) During the State's rebuttal case, Glenn

objected to the State admitting portions of recorded jail phone calls between Glenn and his wife. (Tr. at 360.) The district court allowed the State to play portions of the recorded phone calls over Glenn's objection. (Tr. at 361, 372.) The court did not allow the jury to have access to the phone calls during jury deliberations when the jury asked to relisten to the recordings. (Tr. at 405-07.)

The jury convicted Glenn of all charges. (D.C. Doc. 52.) The district court sentenced Glenn to the Department of Corrections for five years for each conviction, to run concurrently. (D.C. Doc. 58.)

STATEMENT OF THE FACTS

I. The offenses

Josie Risingsun, who was 34 years old at the time of trial, met Glenn when she was 13 years old. (Tr. at 207.) Josie and Glenn dated in high school. They eventually married and had a child together. At the time of trial, their daughter was 16 years old. Josie and Glenn were married for about three years when they divorced in 2008. Their daughter lives with Josie. (*Id*.)

In the spring of 2018, Josie returned to Montana to live in Billings after spending 11 years as an IT specialist in the United States Army. Josie was attending school in Billings while working as an IT support specialist. (Tr. at 205-06.) On June 16, 2018, Josie was moving into a house in Billings. Josie's

father, Irvin was helping Josie settle into her new home. (Tr. at 105, 208.) Irvin explained that Josie wanted to move back to be near her family, but had been hesitant to do so because she was afraid of Glenn. (Tr. at 107.) Josie's children were staying with Josie's mother in Lame Deer the weekend of June 16, 2018. Josie's brother, Chris, was spending the weekend with Josie. (Tr. at 105, 208.)

Josie's furniture had been delayed in transit between Georgia and Billings, so Josie's dad brought over a television and some blankets to set up a temporary sleeping area in the living room. (Tr. at 209.) After Chris got off work in the early afternoon, he and Josie went to a casino and Josie's dad went home. (Tr. at 209-10.) At some point in the afternoon, Josie and Chris picked up Glenn's sister Lacey Doney. Josie has known Lacey for as long as she has known Glenn. (Tr. at 211, 235.) Lacey claimed that Josie and Chris picked her up "early in the morning," and they were already intoxicated. (Tr. at 273.) Lacey clarified that they were "okay enough to drive." (*Id.*)

Josie, Chris, and Lacey cruised around, purchased some alcohol, and eventually returned to Josie's house. They sat on the front porch and drank. Josie felt content to be back in Billings near her family. (Tr. at 212.) Josie thought she went inside to go to sleep around midnight. When she did so, she remembers Lacey was standing in the kitchen. (Tr. at 214.) Lacey claimed that after they all went inside, Josie and Chris argued and were "wrestling around," although she did

not really pay attention and did not actually see them wrestling around. (Tr. at 275-76.)

Josie does not remember if she locked the door behind her after going inside, although that was her common practice. When Josie went to bed, Lacey and Chris were at her house. (Tr. at 215.) The next thing Josie remembers was thinking that she was dreaming because she heard Glenn's voice. She recalled wondering why she was dreaming about Glenn. Josie opened her eyes and Glenn was crouched down next to her telling her that he was going to get revenge because Josie had hurt Pooh Bear—their daughter. Josie looked at Glenn in disbelief with no understanding of what he was talking about. As Josie looked towards where her brother was sleeping, she saw a male who she did not recognize coming out of the kitchen area. (Tr. at 216.)

As Josie attempted to wake up her brother, the unidentified male started beating up Chris. Glenn got on top of Josie. As Josie struggled with Glenn, she kept calling out to her brother. (Tr. at 216.) At first, Glenn held Josie down while the other male was hitting Chris. As Josie struggled to get away from Glenn, Glenn started to choke her. Josie was "freaking out." (Tr. at 219.) She struggled to pull Glenn's arms off her to escape his grasp on her throat. Glenn looked angry. Josie felt that she could not breath and was terrified. For a brief period, everything went

dark and Josie could not see. Glenn finally eased up on choking her. Josie tucked her chin to protect her neck area from Glenn. (*Id*.)

After Glenn eased his grasp around Josie's neck, he punched her on the left side of her face and the back side of her head. It hurt and made her feel sick and dizzy. (Tr. at 220-21.) While Glenn was attacking Josie, she was worrying about Chris. Josie managed to get away from Glenn. Glenn and the other male ran out the front door. Meanwhile, Chris was trying to get up and was bleeding all over the place. Chris managed to get out the front door. It took a lot of effort for Josie to get up. When she initially stood up, she was unsteady. Lacey was nowhere in sight. (Tr. at 222-23.)

Josie looked around for her cell phone but could not find it. She found the keys to her truck, so she drove to her dad's house and pounded on his door and on his bedroom window. When Josie's dad and stepmom opened the door, Josie was scared, confused, and her whole body hurt. (Tr. at 224-25.)

Irvin explained that Josie showed up at his house during the early morning hours, knocking loudly on the door. (Tr. at 112.) Josie was afraid and crying. She had blood on her and marks around her neck. (Tr. at 113.) Josie told her dad that she woke up to Glenn over her face, and that Glenn told Josie he was going to kill her and started choking her. (Tr. at 119.) Irvin called 911, and Josie spoke with the

dispatcher. (Tr. at 119, 230-31; State's Ex. 21.) Josie was not intoxicated when she arrived at her dad's house. (Tr. at 123.)

Officer Hilde of the Billings Police Department was dispatched to Irvin's residence at about 4:30 a.m. on June 17, 2018. (Tr. at 137.) Upon meeting Josie, it was apparent to Officer Hilde that Josie was distraught and in pain. (Tr. at 138.) Josie named Glenn as her attacker. Officer Hilde believed Josie needed medical attention. (Tr. at 139-40.) Josie was worried about her brother, Chris, and wanted someone to check on him. (Tr. at 141.)

Officer Carney and Officer Romero located Chris. (Tr. at 181.) Chris was badly beaten and bleeding, but he did not want to give a statement or allow officers to photograph his injuries. (*Id*.) In Officer Carney's experience, this is not unusual, even when a person has been badly beaten. (Tr. at 182.)

After speaking with Officer Hilde, Josie went to the emergency room for medical treatment. Emergency medical providers had put a C-collar around her neck before Josie left her dad's house. The C-collar caused Josie great distress because it reminded her of the feeling of Glenn choking her. (Tr. at 226.) Officer Hilde photographed all of Josie's injuries. (Tr. at 227; State's Exs. 1-12.)

When Officer Hilde photographed Josie's injuries, he observed physical evidence that Josie had been strangled, including Josie's extremely bloodshot eyes, indicating the bursting of blood vessels. (Tr. at 144-45.) At the time Josie gave

Officer Hilde a recorded statement, she was still distraught and in pain. (Tr. at 152.) Josie never wavered on identifying Glenn as her attacker. (Tr. at 154.) Officer Hilde did not successfully locate Glenn on June 17, 2018. (Tr. at 156.)

When Josie returned home from the hospital, her dog, Oreo, was missing. About a week later, Josie retrieved Oreo from Glenn's sister's house after receiving a text message from her. (Tr. at 215, 230.) Josie has no doubt that Glenn is the person who punched and strangled her during the early morning hours of June 17, 2018. (Tr. at 234.)

II. The alibi defense and the evidentiary ruling

A. Alibi

Glenn's sister, Lacey, acknowledged that she was at Josie's house during the late evening of June 16, 2018. Lacey fell asleep on the floor in the living room. At some point, Lacey woke up and walked home. Lacey claimed Josie was passed out when she left during the early morning hours, and she did not see Chris. (Tr. at 275-78.) Lacey denied seeing Glenn that evening or early the next morning when she woke up and walked home. (Tr. at 279.)

Glenn's wife Franshre (Fran) testified that she remembered the events of June 16 and June 17, 2018. (Tr. at 298-99.) Fran explained that on June 16, 2018, she and Glenn ran errands, including buying groceries. (Tr. at 299.) On the way

home, the car broke down. This was the only working car Fran and Glenn had available to drive. (Tr. at 302.) That night they had a barbecue and a bonfire. (Tr. at 299.) Fran named numerous people who stopped by to visit at the bonfire. (Tr. at 307-08.) Neither Fran nor Glenn left the house after they started the bonfire. (Tr. at 303.) Eventually Fran and Glenn put out the fire, went inside, watched a movie in their bedroom, and went to sleep. (Tr. at 312.)

Fran thought she and Glenn started watching the movie around 1 a.m. Fran stated that Glenn fell asleep before her. Fran was not aware of Glenn leaving their bedroom. (Tr. at 313.) Fran maintained that she clearly recalled the events of June 16, 2020, because she spent time with her family. (Tr. at 324.) The next day was Fathers' Day. Around 10 or 11 in the morning, Fran, Glenn, and their kids went to a barbecue at another family member's house. They stayed at the barbecue until about 5 or 6 p.m. (Tr. at 320.) Fran declined to give a statement to the police because she had given a statement to the defense investigator. (Tr. at 316.) Fran gave the statement to the defense investigator on December 18, 2018. (Tr. at 316.)

Fran became aware of Glenn's criminal charges on September 11, 2018. (Tr. at 315.) Fran said she never provided the details of the family's activities on the evening of June 16, 2018, because no one ever specifically asked her. Fran maintained, however, that she clearly remembered the family's activities on both June 16 and June 17, 2018. (Tr. at 326-29, 331.)

Glenn's 14-year-old son testified that on the evening of June 16, 2018 he ate at the bonfire but then went inside, watched Game of Thrones, and went to sleep. (Tr. 345.) Glenn's son said that he went to bed before 1 a.m. and did not remember his dad ever leaving that night. (Tr. at 345, 353.)

B. Evidentiary ruling

Prior to presenting any rebuttal testimony or evidence, the State informed the court and the defense:

> Detective Tate is expected to testify about the contents of Fran Knowshisgun's testimony. Detective Tate uncovered a number of jail phone calls between the Defendant and Ms. Knowshisgun. The State intends to introduce those calls to refute comments made by Ms. Knowshisgun that she was aware of what happened on June 16th, 2018, more or less since this offense occurred and that the only reason she didn't provide that information was because it was not asked of her, and we provided the call—Mr. Atkins had the opportunity to listen to the calls over our lunch recess. We were unsure of whether or not to disclose them, their relevance—I don't think that they would have been relevant until Ms. Knowshisgun testified in the manner that she did so that's why the State is providing—or intending to present those items now.

(Tr. at 359-60.)

Defense counsel objected to the State admitting the phone calls, explaining that the telephone calls were recorded on February 13 and February 15, 2019. (Tr. at 361.) One of the prosecutors explained that the State learned of the calls on the Sunday before trial while preparing for trial. (Tr. at 365.) The following exchange occurred between one of the prosecutors and defense counsel:

MR. YERGER: The reason that the State is offering this evidence in rebuttal, Your Honor, is to impeach Ms. Knowshisgun on specific testimony that she knew of the events of June 16th, was aware of what happened that day, had a full memory of what happened that day and simply chose not to provide that information.

The portion of the call that we played for Mr. Atkins, really the most relevant portion of the call is a discussion between the Defendant and Ms. Knowshisgun about how they need to figure out what they did on June 16th, and that call occurred two weeks ago, so that—her testimony was completely different on that point.

MR. ATKINS: And what I would say, Your Honor, is that I didn't ask them any questions on June 16th, it was a dumb mistake, I should have done it. I tried to bring that up to the jury when we had discussions, and that was it, that was an honest mistake so when I figured that out, I approached Mr. Glenn, and I approached the witness separately and said, hey, actually we are looking at June 16th and into the early morning, not June 17th, sorry, what did you guys do? What were you doing that day[?]

MR. YERGER: . . . What's heard on the call is a realization that they need to have an explanation for what happened on June 16th to make the alibi credible, it goes to the heart of whether or not the witnesses called in support of that alibi are being completely truthful, and I think that the finder of fact is entitled to hear that information.

(Tr. at 362-63.)

The prosecutor later elaborated:

The State was not furnished with any material in reciprocal discovery from the Defendant, indicating that they would testify about anything other than what happened on June 17th so in order to prepare for trial, the State used the statements provided in discovery and directed its attention in preparation toward the events of June 17th, but June 16th is equally critical, and the State, for the first time today, several months after this offense was charged, after the time for exchanging discovery had been completed, heard for the first time a very specific

> account from Ms. Knowshisgun and from [Glenn's son] about what happened on June 16th so this is our response to that, Your Honor.

(Tr. at 364.)

The district court took a recess to consider Glenn's objection to the State's admission of recordings of jail calls between Glenn and his wife in rebuttal to his alibi defense. (Tr. at 267.) The court allowed the State to introduce portions of the recorded calls in rebuttal. In so doing, the court explained that the State was not aware of the content of the calls until the Sunday preceding the trial. Also, the State was not aware that the recordings could impeach Fran's testimony until Fran testified. As soon as Fran testified, the State disclosed the calls to defense counsel and provided defense counsel the opportunity to listen to the calls. (Tr. at 368.) The court elaborated:

> I do not find that the State was using a dilatory or prejudicial tactic, I believe that the Defendant had enough notice of this simply because of the fact that he was a party to the telephone call; and while Mr. Atkins was not a party to the phone call, the Defendant was, and he knows that his phone calls are being recorded because it states on the telephone when you make a call from the jail that your calls are subject to monitoring, therefore he knew his calls were being monitored, he knew that they could be used against him, and I am going to allow the State to play those calls as part of the rebuttal.

(Tr. at 372.) The court also offered defense counsel additional time to prepare for cross-examining Detective Tate if he needed it. (Tr. at 373.)

Detective Tate testified that, during his investigation of the case, he asked Fran to provide a recorded statement, but she refused. (Tr. at 379.) Through

Detective Tate, the State admitted the recordings of three jail calls between Glenn and his wife, Fran. (Tr. at 381; State's Exs 22-24.) The State played portions of the recorded jail calls. (Tr. at 382.) During these calls, Glenn and his wife discussed the need to explain how they spent their time on the evening of June 16, 2018. (State's Exs. 22-24.)

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion when it allowed the State to admit evidence in rebuttal that impeached a defense witness—Glenn's wife. The State did not have to give advance notice of the impeachment evidence. Even so, the State did give notice of the evidence as soon as the relevance of the evidence became apparent to the State. Glenn cannot claim to be surprised by the impeachment evidence because the evidence was recordings of phone calls between him and has wife. Glenn was not only a party to the phone calls, he was also fully aware that the jail was recording his phone calls.

Glenn fails to prove his ineffective assistance of counsel claim against trial counsel. This Court should not allow Glenn to use his conduct, and that of his wife, as the basis for an ineffective assistance of counsel claim. To the extent that defense counsel may have been confused about the date and time of the criminal offense, defense counsel corrected that confusion prior to trial and independently

spoke with Glenn and his wife to clear up any confusion. Defense counsel is not responsible for Glenn's and his wife's poor decision making in discussing their lack of recollection about events that transpired on June 16, 2018, during jail telephone calls they knew were being recorded.

Even if this Court believes that Glenn somehow proved the deficient performance prong of *Strickland*, Glenn fails to prove prejudice. Glenn's wife Fran could not provide him with a complete alibi defense because she testified that she was sleeping during the early morning hours of June 17, 2018, when the offenses occurred. Thus, even assuming the jury found Fran's testimony credible, the jury still could have convicted Glenn because no one could provide him an alibi during the time of the offenses.

Also, the State presented testimony that Fran had evidence favorable to her husband that she admittedly refused to share with law enforcement. Josie's testimony identifying Glenn as her attacker was unequivocal, there was no motive for Josie to falsely accuse Glenn, and Josie's dog was missing when she returned from the hospital. A week later, Glenn's sister sent Josie a text that she had her dog. There is not a reasonable probability of a different outcome if the court had not admitted the recordings of the phone calls, and assuming admission of the phone calls resulted from defense counsel's deficient performance.

ARGUMENT

I. The standard of review

A district court has broad discretion in controlling the admission of evidence at trial. *State v. Dobrowski*, 2016 MT 161, ¶ 7, 385 Mont. 179, 382 P.3d 490. This Court reviews a district court's admission of rebuttal evidence for abuse of discretion. *State v. Weitzel*, 2000 MT 86, ¶¶ 23-24, 299 Mont. 192, 998 P.2d 1154.

This Court considers only record-based ineffective assistance of counsel claims on direct appeal. To the extent such claims are reviewable, they present mixed questions of law and fact, which the Court reviews de novo. *State v. Chafee*, 2014 MT 226, ¶ 11, 376 Mont. 267, 332 P.3d 240.

II. The district court properly exercised its discretion in admitting rebuttal evidence that impeached a defense witness's credibility.

Rebuttal evidence offered by the State is admissible if the evidence tends to contradict or tends to disprove evidence the defense has offered. *State v. Garding*, 2013 MT 355, ¶ 38, 373 Mont. 16, 313 P.3d 912. Glenn seemingly argues that the district court abused its discretion in admitting portions of jail phone calls between Glenn and his wife, which occurred in February 2019, because the State acted in bad faith by not disclosing the existence of these phone calls on the first day of trial. (Appellant's Br. at 11-13.) Glenn's argument lacks merit, first, because the State does not have a duty to disclose evidence used in rebuttal for impeachment

purposes, second, because the State did disclose the evidence when the relevance became apparent, and third, because Glenn was fully aware of the content of his phone calls with his wife, and he was fully aware that the jail was recording those phone calls.

This Court considered an issue similar to the issue Glenn has raised in *State v. Weitzel*. The State charged Weitzel with felony assault involving a gun. Weitzel gave notice that he intended to rely upon the defenses of good character and justifiable use of force. *Id*. ¶¶ 1, 15. At trial, Weitzel testified that he had last purchased a handgun in March or April of 1996 and had given it to his brother at that time. On cross-examination, Weitzel clarified that he had purchased a .9 mm Beretta as a belated birthday present for his brother in 1996 and denied purchasing, owning, or possessing any handguns himself. Weitzel's brother testified at trial about receiving the gun as a gift and confirmed that Weitzel did not possess or own any handguns. *Id*. ¶ 15.

At the close of Weitzel's case-in-chief, the State moved to present rebuttal testimony that Weitzel had pawned and then subsequently retrieved a handgun from a pawnshop in 1996. This handgun was a .45-caliber Llama, similar in appearance to the gun the State's witnesses described. The State explained that it had not known prior to trial specifically what Weitzel and his brother would testify about concerning Weitzel's possession or ownership of handguns. Over objection,

the court permitted the State to introduce pawn shop records as rebuttal evidence. *Id*. ¶ 16.

On appeal, Weitzel argued that the district court abused its discretion in allowing the State to present the pawn shop records because there was no basis in the record for introduction of the evidence and the state failed to disclose the evidence in advance of trial as Mont. Code Ann. § 46-15-322 requires. *Id*. ¶ 26. This Court disagreed. It initially concluded that Weitzel's argument that there was no basis to admit the rebuttal evidence lacked merit because Weitzel had opened the door to such testimony when he testified about his own gun ownership and that he had only purchased one handgun in the past as a gift for his brother. *Id*. ¶¶ 27-28. Here, Glenn does not argue that the jail telephone recordings were not appropriate rebuttal testimony, but instead argues that the State failed to timely disclose them.

But in *Weitzel*, this Court further concluded that, even though the investigative officer learned of Weitzel's 1996 pawn shop transaction approximately a month before trial, and the prosecutor knew about the pawn shop records about two weeks before trial, that did not mean the State was under an obligation to disclose the information before trial. The Court explained, "As we have indicated in the past, the prosecution is under no statutory duty to provide pre-trial notice of a witness called to impeach the credibility of a defense witness."

Id. ¶ 31, citing *State v. Hildreth*, 267 Mont. 423, 430-31, 884 P.2d 771, 775-76 (1994).

Here, the State offered the jail recordings to impeach Fran's credibility on her claim that she had a clear recollection of her and Glenn's activities on the day and evening of June 16, 2018, until falling asleep in the early morning hours on June 17, 2018. The phone call recordings demonstrated that, as of February 13, 2019, Fran and Glenn did not have a clear recollection of their activities on the evening of June 16, 2018. Glenn acknowledges in his brief that the telephone recordings cast doubt on Fran's credibility. (Appellant's Br. at 4.) As such, the phone recordings were proper impeachment evidence in the same way that the pawn shop records were proper impeachment evidence in *Weitzel*.

Even so, the State *did* disclose the evidence once it became aware of the relevance of the jail recordings. The State had no way of knowing that Fran would testify so adamantly about the clarity of her recollections of everything she and Glenn did on June 16, 2018, until they fell asleep in the early morning hours of June 17, 2018, when Fran had not shared any of this information in her statement provided during discovery. Here, the State provided notice of the jail phone call recordings when the relevance of these recordings became evident following Fran's testimony. *Weitzel*, ¶¶ 33-34.

Glenn argues that the district court misapplied this Court's holding in *Dobrowski*, because it incorrectly concluded that the State's disclosure 48 hours after its discovery of the recorded conversations was not prejudicial, dilatory conduct. (Appellant's Br. at 11.) In *Dobrowski*, this Court affirmed the district court's ruling to allow the State to introduce Dobrowski's medical marijuana application during rebuttal. *Id*. ¶ 24. Glenn argues that, unlike in *Dobrowski*, the prosecutors' intent here was to ambush him with surprise. As the district court noted, however, Glenn could not possibly have been surprised by the phone call recordings because Glenn participated in the phone calls with his wife a few weeks before trial *and* Glenn knew that the jail recorded all of his phone calls.

Glenn was simply betting on the odds that the prosecutors would never know about the phone calls. Glenn was caught in a trap of his own making. *Weitzel*, ¶ 35. Disclosure rules are not meant to protect witnesses who are misleading juries. Once Fran testified about the clarity of her recollections from June 16, 2018, recollections that had never been disclosed to the State, the recorded phone calls became appropriate rebuttal evidence, similar to the pawn shop records in *Weitzel* and the medical marijuana application in *Dobrowski*. The phone recordings showed that, despite Fran's testimony of her clear recollections, a few weeks before trial, her recollections were far from clear. The district court

properly exercised its discretion when it allowed the State to play portions of the recorded jail calls between Glenn and his wife as rebuttal evidence.

III. Glenn has failed to meet the heavy burden of his ineffective assistance of counsel claim.

A. Introduction

"The United States and Montana Constitutions guarantee criminal defendants the right to effective counsel." *State v. Weber*, 2016 MT 138, ¶ 21, 383 P.3d 506, 373 P.3d 26. This Court analyzes claims of ineffective assistance of counsel under the two-part test the United States Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668 (1984). *McGarvey v. State*, 2014 MT 189, ¶ 24, 375 Mont. 495, 329 P.3d 576. To prove ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. *McGarvey*, ¶ 24.

To prove the deficient performance prong, the defendant must demonstrate that counsel's performance "fell below an objective standard of reasonableness considering prevailing professional norms, and in the context of all circumstances." *McGarvey*, ¶ 25. The defendant must overcome a strong presumption that "counsel's defense strategies and trial tactics fall within a wide range of reasonable and sound professional decisions." *State v. Turnsplenty*, 2003 MT 159, ¶ 14, 316 Mont. 275, 70 P.3d 1234. Under the second prong of the

Strickland test, a defendant must establish that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Id*. Because a defendant must prove both prongs of *Strickland*, if a defendant fails to prove either prong, this Court need not consider the other. *Rose v. State*, 2013 MT 161, ¶ 22, 370 Mont. 398, 304 P.3d 387.

B. Glenn has failed to prove either prong of *Strickland*.

Glenn attempts to build an ineffective assistance of counsel claim against his attorney based upon his and his wife's conduct. He claims that his attorney was deficient because he did not properly inform Fran of the time frame of the crime for which he needed an alibi, which in turn caused Fran and Glenn to discuss, on a recorded phone call, what they could or could not recollect occurring on June 16, 2018. But Glenn's claim fails at the outset because no one could give Glenn an alibi for the early morning hours of June 17, 2018. Glenn's two alibi witnesses both professed to be sleeping during the early morning hours of June 17, 2018. Also, Glenn presumably had access to the Motion for Leave to File an Information, which clearly set forth that Josie's attack occurred during the early morning hours of June 17, 2018.

And even though defense counsel initially focused his inquiry about the family's activities on the day of June 17, 2018, he corrected this mistake before trial and informed Fran and Glenn independently about the State's theory of when

the crime occurred—the early morning hours of June 17, 2018. Thus, defense counsel corrected any error he made concerning the timing of the crime in advance of trial. While defense counsel did not provide an updated report to the prosecutor about Fran's recollections, he also did not instruct Fran and Glenn to discuss their recollections or lack of recollections during jail-recorded phone calls. And defense counsel was unaware of the recorded calls. Glenn, however, was fully aware of the recorded phone conversations he had had with his wife. Apparently, Glenn did not share this information with his attorney.

Even assuming, though, that this Court were to conclude that defense counsel performed deficiently, Glenn has also failed to prove the prejudice prong of *Strickland* because he has not established that, without the admissibility of the jail phone recordings, there is a reasonable probability of a different outcome. Again, no one can give Glenn an alibi for the early morning hours of June 17, 2018. Fran was not a true alibi witness because her testimony only established that she was with Glenn until they fell asleep around 1 a.m. on June 17, 2018. Fran implied that if Glenn had left the residence, she would have heard him do so. Fran did not, however, positively state that Glenn did not leave the residence while she was sleeping. Thus, even assuming the jury found her testimony about the events during the evening of June 16, 2018, to be credible up until she and Glenn fell

asleep, the jury still could have found Glenn guilty because he could have left his house undetected and returned before Fran awoke the next day.

Also, the State presented other admissible evidence that called Fran's credibility into question. Fran refused to speak with Detective Tate when he was completing follow-up investigation in this case. If Fran had information that was helpful to her husband, then common sense dictates that she would have promptly shared that information with law enforcement shortly after learning of the charges in September 2018.

In addition to Josie's compelling testimony, and her certainty about her attacker's identity, the State presented testimony that when Josie returned from the hospital, her dog, Oreo, was missing and remained missing for a week. Glenn's sister finally texted Josie that she had her dog. This is another piece of strong circumstantial evidence that Glenn caused Josie's injuries and emotional trauma.

Glenn has failed to prove that, because of defense counsel's alleged deficient conduct, the district court admitted prejudicial rebuttal evidence, and that without the deficient performance and lack of rebuttal evidence there was a reasonable probability of a different outcome.

CONCLUSION

For the reasons set forth above, the State requests that this Court affirm the district court's ruling allowing the State to present rebuttal evidence to impeach Fran's credibility and to conclude that Glenn has failed to meet the heavy burden of proving his ineffective assistance of counsel claims, and affirm Glenn's convictions.

Respectfully submitted this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 5,633 words, excluding cover page, table of contents, table of authorities, signatures, certificate of service, certificate of compliance, and appendices.

/s/ Tammy K Plubell
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CERTIFICATE OF SERVICE

I, Tammy Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-17-2020:

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Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy Plubell
Dated: 08-17-2020