

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 21-0510

CODY WAYNE JOHNSTON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Seventh Judicial District Court,
Richland County, The Honorable Elizabeth A. Best, Presiding

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STATEMENT OF THE ISSUE

Whether the district court correctly concluded that Johnston did not meet his burden to demonstrate that his counsel was ineffective for failing to object to the State's closing argument.

STATEMENT OF THE CASE

The State charged Appellant Cody Wayne Johnston with deliberate homicide and tampering with physical evidence, alleging that he killed his girlfriend, Nicole Waller (Waller), and then concealed or removed her body with the purpose to impair its verity or availability in the investigation. (Trial Doc. 3.)¹ A jury convicted Johnston of killing Waller and tampering with evidence by hiding her body, which has not been found. (Trial Doc. 160.) The court imposed a life sentence for deliberate homicide and a ten-year sentence for tampering with evidence, with the two sentences to run consecutively. (Trial Doc. 180.) On direct appeal, Johnston challenged only his sentence, which this Court affirmed. *State v. Johnston*, 2018 MT 256N, 394 Mont. 387, 428 P.3d 253.

After Johnston filed a pro se Petition for Postconviction Relief, the district court appointed him counsel. Counsel filed an Amended Petition for

¹The State refers to documents from the underlying criminal case, DC 15-92, as "Trial Doc." and refers to documents from the postconviction proceeding, DV 18-185, as "PCR Doc."

Postconviction Relief raising different claims than Johnston had raised. (PCR Doc. 52.) In the Amended Petition, Johnston argued that his counsel was ineffective for failing to object to prosecutorial misconduct the State committed during trial. After receiving affidavits from trial counsel and holding a hearing, the district court concluded that Johnston had not received ineffective assistance of counsel and denied his petition. (Trial Doc. 80, available at Appellant's App.)

STATEMENT OF THE FACTS

I. The offense

Johnston and Waller dated for one or two years. (Trial Tr. at 282.)² During their relationship, Johnston was living in Fairview and working in northeastern Montana, and Waller was living in Kalispell. Waller suffered from medical problems and was struggling financially. Johnston helped her move into a nicer home in Kalispell. He purchased a double-wide trailer and lot for it to sit on, and then he sold it to her in a buy-sell agreement for \$12,000. (*Id.* at 848-50.) Waller gave Johnston \$10,000, and they agreed that she would make payments to him to pay the remaining \$2,000. (*Id.* at 851.)

²The trial transcript is in the record from the direct appeal, DA 17-0153, and is also attached to PCR Doc. 67.

The relationship ended in February 2013. (*Id.* at 286-88.) Johnston was angry at Waller because she had falsely told him she was pregnant. (*Id.* at 286, 380, 852-55.) And Waller was upset because she believed Johnston was dating someone else. (*Id.* at 287-88.) They both seemed to want to end the relationship. (*Id.* at 294.)

Waller spent several days at Johnston's Fairview home collecting her belongings. (*Id.* at 293, 381.) Waller wanted to get to her home in Kalispell before Johnston could go there because he had threatened to remove the belongings from the house, and she believed he could not remove her from the home if she was there. (*Id.* at 701-05.) She spent the night of February 13, 2013, at Johnston's Fairview home and planned to return to her home in Kalispell the next day. (*Id.* at 296.) Johnston spent that night with his friend in a camper at the trucking company he worked for. (*Id.* at 495-96, 582-83.) That evening, Johnston arranged for a friend to place locks on the door of the trailer in Kalispell. (*Id.* at 750-53, 807.)

At 6:58 a.m. on February 14, Waller called her ex-husband, Jason Waller (Jason), and told him she was moving back to Kalispell. (*Id.* at 365, 715-16.) Jason told her that padlocks had been placed on her home in Kalispell, which made her very upset. (*Id.* at 365.)

Waller called Johnston at 7:02 a.m. and spoke to him for a minute and a half. (*Id.* at 716.) He later acknowledged that she was angry during that call because he had had locks placed on her doors. (*Id.* at 353.) Johnston later told law enforcement that Waller kept calling him, so he shut off her phone through his Verizon account. (*Id.* at 353-54.) But phone records demonstrate that, instead, he called her 7 times in the next 20 minutes, with the calls lasting between 35 seconds and 3 minutes and 39 seconds. (*Id.* at 716-17.)

Because of Waller's medical problems, she had a personal care assistant named Mark Hines. (*Id.* at 288.) She texted Hines at 7:25 a.m. stating, "I'm on way [sic]." (*Id.* at 717.)

No more calls or texts were sent from Waller's phone after that time. (*Id.* at 597.) Her children, family, and friends never heard from her again. (*Id.* at 298, 346, 376.)

Cell phone records demonstrate that as Johnston was calling Waller, he was traveling toward his house, where Waller was still located. (*Id.* at 583-84.) He arrived home around 7:26 a.m. (*Id.*) A coworker drove by Johnston's house around that time and saw Johnston's vehicle running outside of his house. (*Id.* at 497.)

Johnston left his house around 7:41 a.m. and arrived at the trucking company where he worked around 8:00 or 8:30 a.m. (*Id.* at 475, 484, 503, 584.)

Johnston told his manager that he had some business to take care of and that he was going to be gone for a little while. (*Id.* at 475.) His coworkers did not see him there again that day. (*Id.* at 476, 485, 503.) He told another coworker that morning that he was going to take a personal day because he had some stuff to take care of. (*Id.* at 490.) Johnston later asked two coworkers to tell anybody who asked that he was at work all day. (*Id.* at 484, 504.)

At 8:18 a.m., Johnston called Bill Sorteberg. (*Id.* at 650, 719.) Johnston asked Sorteberg for a banded barrel with a lid that could be secured on it. (*Id.* at 651-52, 719.) Sorteberg only had barrels without lids, and Johnston was not interested in those. (*Id.*)

Johnston also asked Sorteberg to give Johnston a ride from Poplar back to his house. (*Id.* at 652.) Sorteberg agreed. (*Id.*) According to cell phone data, Johnston was at his home around 9:00 a.m. (*Id.* at 587-88.) By 9:30 a.m., his phone records demonstrate that he had traveled back toward Sidney. (*Id.*) He turned off his phone at that time, and his phone remained off for nearly three hours. (*Id.* at 588.) Waller's phone was in the same location as Johnston's phone between 9:00 and 9:30 a.m., and it was powered off at the same time. (*Id.* at 595.) Because the phones were off, there is no cell phone data demonstrating his location for that time period.

During that time, Johnston drove Waller's Ford Expedition to meet Sorteberg, and then Sorteberg followed him in his truck. (*Id.* at 652, 657.) Johnston left the Expedition on the side of the road near Poplar and got a ride back to his house from Sorteberg. (*Id.* at 655.)

Johnston had two phones with him when he got into Sorteberg's vehicle. (*Id.* at 655.) When Sorteberg stopped at a John Deere dealership to pick up a tire, Johnston asked the dealership for a barrel. (*Id.* at 656.) He did not take one because the barrels they had did not have a secure lid like he was looking for. (*Id.* at 657.) Between 11 a.m. and noon, one of Johnston's coworkers drove past his house and saw his truck backed up to the garage. (*Id.* at 504.)

The next day, Johnston called Sorteberg and asked him to forget that he gave Johnston a ride back from Poplar. (*Id.* at 658.) And he called several days later to find out if they "were on the same page with the story." (*Id.* at 660.) Law enforcement later discovered the Expedition on the side of Highway 2 just west of Poplar. (*Id.* at 316.) It was full of Waller's belongings, including her medications, and contained two live guinea pigs. (*Id.* at 316, 404-07, 620-21.)

On February 16, 2013, a friend of Waller's called law enforcement to report that she was supposed to have come back to Kalispell two days earlier, and she had not arrived. (*Id.* at 310.) The assistant chief-of-police in Sidney, Bob Burnison, called Johnston on February 18, 2013, and spoke to him. (*Id.* at 347.) Burnison

also interviewed Johnston at the police station on February 19, 2013. (*Id.* at 351.) Johnston told Burnison that he last saw Waller around noon on February 13, 2013 when he came home for lunch, and she was at his house. (*Id.* at 348.) Johnston said he went back to work and then spent that night in a camper at his worksite. (*Id.*) Johnston claimed that Waller called him on the morning of February 14 and told him she was leaving for Kalispell. (*Id.* at 349.) He stated that when he went home around noon on February 14, Waller and her vehicle were gone. (*Id.*) Johnston claimed that he and the bank owned the house in Kalispell that Waller was living in. (*Id.* at 352.) Johnston stated that Waller was angry at him on the morning of February 14 because he had placed padlocks on the home in Kalispell. (*Id.* at 353.)

Leading up to February 14, 2013, Johnston had been texting Amber Fleming, with whom he had been romantically involved, telling her that he was trying to take care of the situation with Waller so that he and Fleming could be together. (*Id.* at 693-700.) Johnston renewed his relationship with Fleming within one day of Waller's disappearance. (*Id.* at 911-12.)

Law enforcement went to Fleming's home in Flathead County on February 23, 2013, to execute a search warrant for Johnston's truck. (*Id.* at 327.) Officers located a safe containing Waller's paperwork in a trash bag inside of a locked box in the back of Johnston's truck. (*Id.* at 331-32, 761.)

The safe contained a buy-sell agreement stating, “I, Cody Johnston, am selling Nicole Waller a 1996 Liberty home for the sum of \$12,000.” (*Id.* at 796-800.) The agreement provided that “Nicole has made a down payment of \$10,000 with the balance to be paid with monthly payments of \$100 per month for 20 months until the balance is paid in full. As soon as the balance is paid in full, the title to the home will be transferred to Nicole.” (*Id.* at 800-01.)

Johnston was interviewed by Flathead County Sheriff’s Deputy Geno Cook, and he again stated that the house in Kalispell was his, and Waller was very angry that he had placed locks on it. (*Id.* at 329, 673.) Deputy Cook asked Johnston if Waller would have any paperwork giving her possession of the home, and he said no. (*Id.* at 674.)

On February 20, 2013, Waller’s sister received a Facebook message, purportedly from Waller, stating, “Everybody had a lovely evening. Not coming home. Don’t laugh at me. Sorry I let everybody down.” (*Id.* at 632.) Law enforcement discovered that a friend of Johnston’s posted the message at Johnston’s request. (*Id.* at 632, 775-76.) Before that friend posted the message, Johnston tried to get two other people to post a Facebook message purporting to be Waller. Both declined. (*Id.* at 767-68, 771-72.) One person asked Johnston why he wanted him to falsify a Facebook posting. Johnston told him that the cops were

hounding him about his missing girlfriend, and he wanted to make it look like she was okay somewhere else. (*Id.* at 772.)

Law enforcement was never able to find Waller's body, but they also could not find any indication that she was alive. Waller did not contact her family, including her young children. (*Id.* at 298.) She also did not access her bank accounts, visit her daughter residing in a treatment facility, request her medical records, or follow up with medical appointments. (*Id.* at 780-95.) Although Waller's body was never found, law enforcement determined that Waller was dead and charged Johnston with homicide in August 2015. (Trial Doc. 3.)

II. The criminal trial

At trial, Johnston testified that Waller called him on the morning of February 14, 2013, and she was angry that he had locked up the house in Kalispell. (Trial Tr. at 860.) He testified that when he got to his house, she was gone, but her vehicle was there. (*Id.* at 861.) He claimed that he assumed she had left with somebody, and he moved her vehicle because he "was being very childish and very vindictive." (*Id.* at 863.) He stated that the keys and her phone were in the vehicle, and he threw the phone away. (*Id.* at 865.)

Johnston testified that he was not worried about Waller because he always knew she would show up. (*Id.* at 869.) He claimed he sold the trailer that she had

been living in a few months after she disappeared because it had been broken into. (*Id.*) He acknowledged that he repeatedly lied to investigators. And he acknowledged that he asked others to lie for him to hide the fact that he had not been at work that morning and that he had moved Waller's vehicle. (*Id.* at 870, 881-83, 903-04.) He claimed that he lied because he was scared. (*Id.* at 870.) He said he thought the false Facebook posting was "a harmless thing. I'd get left alone, and she would come back." (*Id.* at 872.)

Near the beginning of the State's closing argument, the prosecutor stated, "I'll try to be as brief as I can, because I, quite honestly, think it's obvious that after three years, Nicole Waller is dead." (*Id.* at 935.) The prosecutor then highlighted the quantity of evidence demonstrating that Waller was no longer alive. The prosecutor noted that Waller had not had any contact with her children, whom she had had regular contact with before. Waller had not sent anyone any messages, even though she had previously used text messages, phone calls, and social media extensively. Waller had not followed up with her medical appointments, which she had routinely attended previously. Additionally, Waller did not withdraw any money from her accounts, even though she had been desperate for money before her death. (*Id.* at 935-41.) The prosecutor noted that Waller had left her belongings in her vehicle, which Johnston had abandoned on the side of the road near Poplar, and she had put live guinea pigs in her vehicle,

which suggested that she was planning on leaving soon. (*Id.* at 935-36.) While making that argument, the prosecutor stated that the live guinea pigs “tell[] me that’s one of the last things she put in the car, and she’s on her way home.” (*Id.* at 936.) After discussing the evidence that Waller was dead, the prosecutor concluded, “I think it’s clear, unfortunately, that we have proven beyond any doubt that Nicole Waller is dead.” (*Id.* at 941.)

The prosecutor shifted to arguing that Johnston had killed Waller. The prosecutor discussed the morning of February 14 and provided a theory about what had occurred that morning. (*Id.* at 941-42.) He opined that “the story the defendant told you yesterday makes no sense whatsoever You should reject it as pure fiction.” (*Id.* at 942.) The prosecutor pointed out that Johnston had lied to Waller on the evening of February 13, and argued that he also lied to Fleming. (*Id.* at 943-44.) He then asked, “Who treats a person like that? Who lies to a person like that?” (*Id.* at 944.) The prosecutor then discussed Johnston having padlocks placed on Waller’s trailer in Kalispell, after which the prosecutor stated, “Wow. Nice guy.” (*Id.*) The prosecutor pointed out that Johnston got a person to place locks on Waller’s door by falsely claiming that squatters were in the trailer, but Waller had paid Johnston \$10,000 for the trailer, and the people in the trailer were people allowed to be there. (*Id.* at 945.) The prosecutor further pointed out that after locking Waller out of her trailer, Johnston exchanged text messages about it

with Fleming, and they were both happy about it. (*Id.*) The prosecutor then stated, “I ask you, what kind of man does that? And what does that tell you about his character? It certainly tells us he wanted her out of the house.” (*Id.*) After discussing Johnston’s locking of the trailing further, the prosecutor stated, “I think that, again, tells us reams about who he is.” (*Id.* at 946.) The prosecutor then pointed out that the evidence demonstrated that Johnston drove to his house on the morning of February 14 shortly after Waller had learned that he had placed locks on her house and she had called him about that. (*Id.* at 948.) The prosecutor argued that they had an argument that morning about the house, and he killed her during that argument. (*Id.* at 947-51.)

The prosecutor acknowledged that the State did not know how Johnston had killed Waller. He pointed out that “[w]e don’t know, because he hid the body. Her body now rests in some dirty and disrespectful location, hidden by the defendant.” (*Id.* at 951.)

The prosecutor also discussed Johnston’s efforts to have coworkers lie and say he had been at work and to have Sorteberg lie about seeing Johnston move Waller’s vehicle. (*Id.* at 952-53.) Discussing differences between Johnston’s and Sorteberg’s testimony about the type of barrel Johnston was looking for, the prosecutor stated, “I submit to you, ladies and gentleman, when it comes to the credibility of this defendant, who has lied and lied and lied throughout this trial,

compared to Bill Sorteberg, who raised his hand under oath, you make that decision. I think it's simple. I think it's easy." (*Id.* at 953.)

The prosecutor next discussed Johnston's efforts to falsify a Facebook post from Waller suggesting she was still alive, which caused her family significant pain. (*Id.* at 958-60.) The prosecutor also pointed out that Johnston cleaned out Waller's belongings from her home without notifying Waller's sister, even though he had previously agreed they would go to the house together. (*Id.* at 960.) The prosecutor questioned again what that told the jury about Johnston's character. (*Id.* at 961.)

The prosecutor then discussed the timeline in detail, pointing out that the phone evidence demonstrated that Johnston arrived at the house immediately after Waller sent her last text message. (*Id.* at 962.) Johnston later possessed the phone Waller had sent the message from, demonstrating he took it from her after she sent that last message. (*Id.*) The prosecutor explained that that evidence was inconsistent with Johnston's claim that Waller had just left the house and left her phone behind. (*Id.*) The prosecutor also pointed out that Johnston turned off his phone again several days later, so they could not track where he had been at that time. (*Id.* at 962-63.)

The prosecutor acknowledged that the State did not know where Waller's body was or how she was killed. (*Id.* at 964.) He then stated, "Unfortunately, only

the defendant knows the answer to those [questions]. Somewhere in Montana, Nicole Waller lies in a cold and lonely grave, taken from her children, taken from her family, by that man, Cody Johnston.” (*Id.* at 964-65.) Johnston’s counsel did not object during the State’s closing argument.

In response, Johnston’s counsel highlighted the weaknesses in the State’s case. He pointed out that the State had not told the jury how Waller had died or where her body was located. (*Id.* at 966.) He acknowledged that Johnston had lied to authorities, but he argued that those mistakes did not establish that Johnston killed Waller. (*Id.* at 967.) Counsel argued that the evidence did not clearly establish that Johnston arrived that morning when Waller was still there. (*Id.*) And counsel explained that it would have been reasonable for Waller to have left her phone behind when Johnston had already told her he was going to turn off service to the phone. (*Id.*) Counsel pointed out that there was no indication a fight had happened, noting that Johnston did not have injuries, there was no blood in the house, and neighbors did not hear fighting. (*Id.* at 968.) Counsel emphasized the timeline and argued that Johnston could not have disposed of Waller’s body on the morning of February 14 when his phone was off because he was with Sorteberg that morning. (*Id.* at 971.) Counsel also argued that the barrel was a red herring that did not demonstrate that Johnston killed Waller. (*Id.* at 969.) Counsel asked the jury to read all of the text messages in evidence, rather than just the ones the

State had pulled out in a presentation. (*Id.* at 972.) He argued that the messages demonstrated that Johnston had been trying to get Waller to go to treatment and that both Waller and Johnston engaged in manipulation. (*Id.* at 972-74.) Counsel argued that the State did not meet its burden to prove its case beyond a reasonable doubt because the State left too many questions unanswered. (*Id.* at 980-81.)

In rebuttal, the State emphasized that Johnston asked coworkers to lie to create an alibi, moved Waller's vehicle, and solicited people to create false Facebook posts, which was consistent with him trying to cover up killing Waller. (*Id.* at 982-94.) Addressing the barrel again, the prosecutor stated that Johnston's claim that he needed a barrel for his mechanic work was "ridiculous." The prosecutor stated, "I know what that barrel was for. Bill Sorteberg knew what that barrel was for. And I submit you should know what that barrel was for as well." (*Id.* at 984.) In conclusion, the prosecutor argued that the jury could use its common sense to conclude that Waller did not go anywhere on the morning of February 14, and she was instead killed by Johnston. (*Id.* at 985.)

The jury found Johnston guilty of deliberate homicide and tampering with physical evidence. (*Id.* at 989.)

III. Postconviction proceeding

Johnston filed a pro se Petition for Postconviction Relief, raising three claims: actual innocence/insufficiency of the evidence, prosecutorial misconduct, and ineffective assistance of counsel. (PCR Doc. 2.) Johnston asserted that there was evidence that Waller was alive after February 14, 2013, so he was actually innocent; that the State maliciously prosecuted him despite evidence that Waller was alive; that his counsel was ineffective for failing to present evidence that the victim was alive; and that the State engaged in a conspiracy against him. (PCR Doc. 2 at 10-11.) He later filed an “addendum,” in which he asserted that he had been unable to communicate to his attorney to express his actual innocence because he had a brain injury. (PCR Doc. 16.)

The court issued a *Gillham* Order, allowing Johnston’s trial counsel, Clark Mathews and Casey Moore, to respond to his claims. (PCR Doc. 9.) The court also ordered the State to respond. (PCR Doc. 19.)

In response, the State argued that Johnston’s sufficiency of the evidence claim was procedurally barred, his prosecutorial misconduct claim lacked any factual basis, he failed to show that his counsel was ineffective, and he failed to establish that any new evidence existed to support a claim of actual innocence. (PCR Doc. 25.) The State explained that Johnston’s counsel and law enforcement

investigated all tips and were unable to find evidence that Waller was alive. (*Id.* at 10-11.)

The State attached affidavits from Johnston's counsel, Mathews and Moore. (PCR Doc. 25, Exs. 1, 2.) They explained that they had investigated alternative theories, but they were not able to corroborate information to show there was any veracity to reports that Waller may have been alive or killed by somebody else. (PCR Doc. 25, Ex. 1 at 3-8, Ex. 2 at 3-7.) They explained that Johnston denied that he was involved in Waller's disappearance, but he did not provide any specific information about what may have happened to her, and he admitted that he moved her vehicle and asked people to pose as her on Facebook. (PCR Doc. 25, Ex. 1 at 2-3, Ex. 2 at 2.)

After receiving the State's response, the court appointed Johnston counsel. (PCR Doc. 42.) Joseph P. Howard filed an Amended Petition for Postconviction Relief and a 149-page brief in support. (PCR Docs. 52-53.) Pursuant to a motion from the State, the court ordered Howard to file a brief within the 30-page limit for briefs in district court. (PCR Doc. 64.) Howard filed an amended brief in support. (PCR Doc. 65.)

In the Amended Petition, Johnston alleged that trial counsel was ineffective when counsel failed to object: 1) to portions of the State's opening and closing arguments that constituted prosecutorial misconduct; 2) to multiple instances of

prosecutorial misconduct during the evidentiary portion of the case; and 3) to the State's use of a puzzle as a visual presentation in closing argument that he alleged lowered the burden of proof. (PCR Doc. 52 at 57-58.) He also argued that if any of those claims should have been raised on direct appeal, his appellate counsel was ineffective for failing to raise them. (*Id.* at 58.)

In his brief, Johnston argued that the prosecutor, Brant Light, committed prosecutorial misconduct in his closing argument because he improperly inflamed the passions of the jury by repeatedly appealing to its sympathies for Waller, he improperly attacked Johnston's character, he improperly vouched for the credibility of the State's evidence and witnesses, and he stated personal beliefs and opinions as to Johnston's defense, credibility, and guilt. (PCR Doc. 65 at 3-12.) Johnston argued that his counsel's failure to object to Light's statements in closing argument was unreasonable and that he was prejudiced by his counsel's failure to object. (*Id.* at 13.) Johnston also argued that his counsel was ineffective for failing to object to prosecutorial misconduct committed during the presentation of evidence and for failing to object to a puzzle Light used as a visual aid during his closing. (*Id.* at 14-29.)

In response, the State argued that Johnston did not demonstrate that his counsel's failure to object was unreasonable or that he was prejudiced by counsel's performance. (PCR Doc. 66.) The State disputed Johnston's claim that the State

had introduced evidence or made statements merely to create sympathy for the victim. The State pointed out that evidence about Waller's connection to her children and other people was relevant to show that Waller was dead and had not simply run off as Johnston claimed. (*Id.* at 12.) The State also noted that evidence of Johnston's bad behavior was admissible to show that he had the motive, plan, and state of mind to commit and cover up a murder. (*Id.* at 13.) The State explained that the closing argument did not ask the jury to find that Johnston was a bad person and therefore committed murder. (*Id.* at 14.) Instead, the State asked the jury to consider Johnston's acts as evidence of his knowledge of the murder and intent to get away with murder. (*Id.*) The State argued that negative characterizations it made were appropriate because they were based on the evidence. (*Id.*) The State acknowledged that it used the term "I" while making some statements about the evidence, but the State explained that it had been asking the jury to rely on the evidence, not the opinion of the prosecutor. (*Id.* at 15.) The State argued that the puzzle was an appropriate visual aid that was used to help the jury analyze the evidence. (*Id.* at 17.)

The State argued that defense counsel was not deficient for failing to object because the State did not commit prosecutorial misconduct. The State also noted that trial counsel provided good reasons in their affidavits for not objecting to statements even if they were potentially objectionable. (*Id.* at 18.) In addition, the

State argued that Johnston failed to demonstrate that he was prejudiced by his counsel's failure to object. (*Id.* at 18-19.)

The State also filed supplemental affidavits from Mathews and Moore in which they explained their decisions to not object. (PCR Doc. 67, Exs. 1-2.) Mathews explained that they believed their best “strategy was to argue the State could not prove Cody was responsible for Nicole’s disappearance and death [W]e attempted to investigate various alternative theories about Nicole’s death and disappearance but they were ultimately not viable[.]” (PCR Doc. 67, Ex. 1 at 2.) Mathews explained that he “did not object to the statements pointed out in closing because while I agree that Mr. Light’s closing was histrionic, I did not think his arguments conflicted with our theory of defense. In fact, I thought some of his arguments were a rather desperate attempt to conjure up a motive. I believed the jury would see it that way.” (*Id.* at 2.)

Mathews did not believe they should have objected to the State’s introduction of evidence about Johnston’s relationship with Fleming. (*Id.* at 2-3.) Mathews explained that the evidence about Fleming was relevant, and could actually be helpful to Johnston because it showed that he was ready to move on with Fleming. (*Id.*)

Mathews also disagreed with Johnston’s claim that defense counsel should have objected to Light’s description of the callousness of Johnston’s admission to

being responsible for the Facebook post. (*Id.* at 3.) Mathews explained that while he “agree[d] that Mr. Light was histrionic, his delving into the pathos behind Cody’s role in the post was clearly relevant. An objection, that in my opinion would have been overruled, would have only placed more emphasis on facts we believed very detrimental to Cody’s defense.” (*Id.*) Mathews explained that Johnston’s fabrication of a Facebook post making it look like Waller was still alive “is obviously relevant to the credibility of Cody’s explanation. It was my opinion then and now that the Court would have overruled the objection for that reason.” (*Id.*)

Regarding vouching, Mathews explained that “Mr. Light’s statements regarding the State having proved Ms. Waller was dead were likely inappropriate. I did not object because we made the strategic decision to not challenge [the argument that] she was likely dead. We believed it was more appropriate for the jury to consider whether Cody was the one responsible for it.” (*Id.*)

Similarly, Moore explained he did not believe the State’s closing was egregious or designed to inflame the passions of the jury. (PCR Doc. 67, Ex. 2.) Moore explained that while “some statements or questions may be borderline[,] they all appeared to be relevant and material.” (*Id.* at 2.) He observed that “[b]ased on the evidence[,] the jurors did not need to resort to passion to reach a verdict.” (*Id.* at 3.) He explained that he and Mathews “tried to mitigate the bad facts,” but it was not within their “power to change the facts to suit Mr. Johnston[.]” (*Id.*)

The court held a hearing on the Amended Petition at which Mathews testified. (8/4/21 Tr.) Mathews explained that he did not object to the statements Johnston challenged for various reasons, including that he did not expect the objection to be sustained, an objection would not have helped to persuade the jury, and some of the prosecutor's arguments, while "histrionic," were not contrary to the defense. (*Id.* at 14-38.) He explained that, in his experience, judges usually overrule objections made during closing arguments, and they are unhelpful. (*Id.* at 22.)

For example, Mathews explained that while Johnston's involvement with two women at the same time, both of whom he was not completely honest with, may have made Johnston look bad, his relationship with Fleming also supported the defense because it showed that "he was prepared to move on with Amber [Fleming], and the relationship with Nicole was done." (*Id.* at 14.) Mathews also explained that Light's emphasis on the impact to Waller's children when Johnston locked her out of her home may have been irrelevant, but he did not object because it did not conflict with their theory of the defense. (*Id.* at 18.) Mathews also did not believe that Light's statements about Johnston's handling of Waller's home after her death were helpful to the State. (*Id.* at 22.) And Mathews explained that he and Moore did not believe that the jury would be persuaded by the State's emphasis on the trailer as the source of the motive. (*Id.* at 19.)

Mathews opined that Light's comment on Nicole's character when she invited Johnston to have dinner with her was not relevant, but he also did not "think that it mattered." (*Id.* at 20-21.)

Similarly, Mathews explained that he did not object to Light's references to Johnston's character, even though he did not believe they were relevant, because "I didn't think they were helpful . . . to the State's case, and nor were they inconsistent with our defense. I mean, frankly, the more time he spent, you know, focusing on things like that rather than some of the more damning evidence I was okay with." (*Id.* at 26.) Mathews believed that Light's argument about Johnston cleaning out Waller's trailer was a distraction from the bigger, and more problematic, issues. (*Id.* at 27.)

Mathews also explained that he did not object to Light's opinion stating that Waller was dead because their defense was not arguing that she was alive. (*Id.* at 27.) Mathews believed that the evidence overwhelmingly demonstrated that Waller was dead, so they argued that there was an absence of proof that Johnston was involved in her death. (*Id.* at 27-28.) Mathews explained that they chose that strategy "to maintain credibility with the jury." (*Id.* at 27.)

Mathews explained that he did not object to Light's statements using "I" to offer his opinion to the jury because

nothing jumped out to me [that] could cause me to want to object to where I thought the Judge would sustain it. And typically, I mean, in

rereading the transcript some of those “I” statements are jumping out at me more than they did at the time. Because typically, my instinct in closing, unless something jumps out at me, is I’m not going to get up there and object because, as I’ve seen countless times, the Judge says, you know, this is argument; this is closing argument. I remind the jury that this isn’t evidence and—and so, that was—that was what happened.

(*Id.* at 32-33.)

Mathews also explained that by being “overly emotional or histrionic,” a prosecutor may damage his own credibility, thereby benefiting the defense. (*Id.* at 35.) Mathews also believed that, even if Light’s characterization of the facts was not always appropriate, the facts that he was discussing were relevant. (*Id.* at 38.)

During the court’s discussion with Johnston’s postconviction counsel, the court observed that Light’s closing argument may have been histrionic and not focused on the important issues, but the court noted that Mathews “described professional strategic reasons for not objecting.” (*Id.* at 48.)

In response to Johnston’s argument about vouching, the State, represented by Melissa Broch, argued that, even if Mathews would have objected to Light’s statements that began with “I,” Light could have simply rephrased the statement to say the same thing without the “I believe” part of it. (*Id.* at 51.) Broch also argued that “Light made pretty clear that the jury had to reach the conclusion about what the significance of the facts were.” (*Id.*) The court explained that it believed Light’s statements went beyond using “I” as a pattern of speech and constituted

improper vouching. (*Id.* at 52.) In response, Broch argued that the evidence in the case was overwhelming. (*Id.* at 53.)

The court was sympathetic to Howard’s concerns about prosecutors engaging in misconduct without consequences, but the court concluded that Johnston was not entitled to relief. (*Id.* at 54.) The court concluded that “there was some prosecutorial misconduct during the argument itself in the form of vouching, and I don’t think that anyone would argue that that was appropriate. But I also agreed with Ms. . . . Broch, in this case the evidence, from my perspective from where I sat, was overwhelming.” (*Id.* at 54-55.) The court explained that it had “worked very hard to try to make sure this was a fair trial, and from my observation, it was. And there was every effort made to make sure that the presumption of innocence was protected through the verdict.” (*Id.* at 55.)

The court subsequently issued an Order Denying Postconviction Relief. (Appellant’s App.) The court concluded that trial counsel “made strategic decisions” to not object to some testimony that might have painted Johnston in a bad light “partly because they thought the evidence was probative of their theory of the case, and partly because they believed it would not, ultimately, interest the jury or be considered in a verdict.” (*Id.* at 7.) The court observed that “[w]hile reasonable minds can differ, the Court does not find these decisions to have constituted ineffective assistance to Johnston.” (*Id.*) The court also concluded that

some of the evidence Johnston had argued his counsel should have objected to was properly admitted because it was “probative of Johnston’s motive and whereabouts at the time of the crime, as well as the likelihood that Waller was dead.” (*Id.*)

The court concluded that counsel made a strategic decision to not object during Light’s closing statement, and that was not deficient. (*Id.* at 8-9.) The court concluded that Light engaged in improper vouching and made improper statements, but also concluded that failing to object to the improper statements did not constitute ineffective assistance of counsel. (*Id.*) The court concluded “that Mathews and Moore’s representation of Johnston was effective, measured by *Strickland* and its progeny.” (*Id.* at 10.) The court admonished prosecutors to not inflame the passions of the jury or vouch for witnesses. (*Id.*) Nevertheless, the court concluded that “the evidence at trial was overwhelming and proved Johnston’s guilt beyond a reasonable doubt.” (*Id.*) The court explained that “[w]hile reasonable lawyers’ minds may differ on strategy, and benefit of hindsight may cause some to believe a different strategy might have been preferred, there is no basis to conclude that Johnston was ineffectively represented or denied a fair trial.” (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Johnston failed to meet his burden to demonstrate both that his counsel were deficient for failing to object to the State’s

closing argument and that he was prejudiced by his counsel's failure to object.

Prosecutors, like all parties, are given significant latitude in their closing arguments, and even if a statement might constitute misconduct, an objection may not be helpful. Instead of helping the defendant's case, an objection may draw attention to the evidence that is damaging to the defendant or make it appear that the defendant is trying to hide from the evidence. Therefore, defense counsel is given significant discretion to determine whether it should object to a prosecutor's closing argument.

In this case, the State's argument focused on the significant incriminating evidence demonstrating that Johnston killed Waller. Although a few of the prosecutor's statements may have been improper, none of them would have led the jury to decide the case on an improper basis. Johnston's counsel provided strong reasons for their lack of objection, and the court correctly concluded that they had not been deficient.

Further, the court correctly concluded that the evidence against Johnston was overwhelming. Given the strong evidence against Johnston, he cannot demonstrate a reasonable probability that the outcome of the case would have been different if his counsel had objected to the State's closing argument. Because Johnston failed to meet either prong necessary to establish ineffective assistance of counsel, the district court correctly denied Johnston's Amended Petition.

ARGUMENT

I. Standard of review and applicable law

A. Standard of review

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118. Discretionary rulings made by the district court in a postconviction relief proceeding, including rulings on whether to hold an evidentiary hearing, are reviewed for an abuse of discretion. *Heath*, ¶ 13. Mixed questions of law and fact presented by ineffective assistance of counsel claims are reviewed de novo. *Id.* A postconviction petitioner bears a heavy burden in seeking to overturn a district court's denial of postconviction relief based on ineffective assistance of counsel claims. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948.

B. Law applicable to claims of ineffective assistance of counsel

This Court reviews ineffective assistance of counsel claims by applying the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petitioner has a burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *Baca*, ¶ 16; *Ellenburg v. Chase*, 2004 MT 66, ¶ 12, 320 Mont. 315, 87 P.3d 973.

A trial counsel's performance is deficient if it falls "below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances." *Whitlow v. State*, 2008 MT 140, ¶ 20, 343 Mont. 90, 183 P.3d 861. There is a strong presumption that counsel's actions were within the broad range of reasonable professional assistance. *Baca*, ¶ 17.

To establish that a defendant was prejudiced by counsel's deficient performance, the defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

II. The district court correctly determined that Johnston did not demonstrate that his counsel was deficient or that he was prejudiced by his counsel's failure to object to the State's closing argument.

The only claim Johnston raises on appeal is whether his trial counsel were ineffective when they failed to object to the prosecutor's closing argument.

Johnston relies heavily on the standard for prosecutorial misconduct. But he has not raised a prosecutorial misconduct claim, and such a claim would be procedurally barred under Mont. Code Ann. § 46-21-105(2). The only issue on

appeal is whether his counsel were ineffective for failing to object to statements made by the prosecutor during his closing argument. Although the standard for prosecutorial misconduct informs the question of whether an objection would have been sustained, it does not establish that counsel were deficient for failing to object.

A. Counsel’s failure to object was not deficient performance.

This Court has explained that the “decision to object during an opening or closing argument falls well within the range of permissible professional legal conduct.” *Rosling v. State*, 2012 MT 179, ¶ 30, 366 Mont. 50, 285 P.3d 486. Similarly, the Ninth Circuit has explained that “[b]ecause many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the ‘wide range’ of permissible professional legal conduct.” *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993). In *Necoechea*, the Ninth Circuit held that counsel was not deficient for failing to object to statements even though it concluded that two of the statements constituted improper vouching. 986 F.2d at 1279-81. The Ninth Circuit has also concluded that failing to object to statements to avoid highlighting them is a reasonable strategic decision. *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013).

This Court relied on *Necoechea* in *State v. Dawson*, 2000 MT 219, ¶¶ 105-06, 301 Mont. 135, 10 P.3d 49, and held that defense counsel’s failure to object to the

prosecutor's use of the term "killing pen" was not deficient because it "was not an egregious misstatement." Similarly, in *Rosling*, this Court concluded that counsel was not ineffective for failing to object where she based her decision on the court's reaction to her prior objections. *Rosling*, ¶ 30.

Johnston's counsel's decision to not object to the prosecutor's statements in the closing argument falls within the wide range of reasonable professional conduct. "During a closing argument, a prosecutor may comment on 'the gravity of the crime charged, the volume of evidence, credibility of witnesses, inferences to be drawn from various phases of evidence, and legal principles involved, to be presented in instructions to the jury'" *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798 (citation omitted). "While it is generally improper for the prosecution to offer personal opinions as to the credibility of the accused or the witnesses," a prosecutor may "comment on conflicts and contradictions in testimony, as well as to comment on the evidence presented and suggest to the jury inferences which may be drawn therefrom." *Id.* (citation and quotation marks omitted). Further, prosecutors are "entitled to some latitude in [their] argument about a witness's credibility." *Green*, ¶ 34; *see also Necoechea*, 986 F.2d at 1276 ("[P]rosecutors must have reasonable latitude to fashion closing arguments, and thus can argue reasonable inferences based on the evidence, including that one of two sides is lying.").

This Court recently noted that “the dividing line between an improper and proper prosecutorial argument or comment regarding witness credibility or truthfulness or the guilt of the accused” is “highly nuanced.” *State v. Miller*, 2022 MT 92, ¶ 27, 408 Mont. 316, ___ P.3d ___. The argument is proper if “in the context of the entirety of the particular opening statement or closing argument at issue, the argument or comment is more akin to . . . an argument or comment based on the prosecutor’s analysis of the evidence regarding the nature, quality, or effect of the evidence and supported inferences in relation to the applicable law[,]” rather than “a statement of the prosecutor’s personal opinion or direct characterization of the accused or a witness as ‘lying’ or a ‘liar’ (or his or her testimony as a ‘lie’).” *Id.*

Johnston has not demonstrated that the prosecutor made any statements during his closing that were so egregious that his counsel’s failure to object fell outside of the wide range of permissible legal representation. When read as a whole, the prosecutor’s closing argument properly highlighted the quantity of evidence against Johnston and argued that the jury should conclude based on the evidence that he had killed Waller. The prosecutor began by pointing out the evidence demonstrating that Waller was dead, which included her failure to contact her children or anyone else, her failure to follow up with her medical appointments, her failure to access her accounts, and the fact that she left her vehicle with her belongings at Johnston’s home. (Trial Tr. at 936-40.)

The prosecutor then argued that Johnston's actions were evidence that he had killed her. The prosecutor appropriately discussed evidence that Johnston used deception to have someone lock Waller's trailer house and observed that this action demonstrated that he wanted her out of the house. (*Id.* at 945.) The prosecutor also appropriately emphasized Johnston's failed efforts to fabricate evidence to create an alibi and mislead anyone looking for Waller, which included moving her vehicle, asking coworkers to lie, and fabricating a Facebook post. (*Id.* at 952, 955-59.) And the prosecutor explained the inferences that could properly be drawn from the cell phone evidence, which demonstrated that Johnston repeatedly called Waller while driving to his house on the morning of her disappearance, that he arrived at his house one minute after she sent a text message indicating that she was on her way home, and that he had her phone later that day when he drove her vehicle toward Poplar. (*Id.* at 948-49, 962.)

While the prosecutor's references to Johnston's character may not have been appropriate, those references were enmeshed in appropriate arguments about the inferences that could be drawn from the evidence. Similarly, the prosecutor may have erred when he offered his personal opinion about the evidence, but the comments were part of the prosecutor's argument about inferences that could be drawn from the evidence, rather than a suggestion that the jury should find the defendant guilty because of the prosecutor's personal opinion. Because none of

the prosecutor's potentially improper statements were egregious, Johnston's counsel's decision to not object to the statements was well within the wide range of reasonable professional conduct.

Contrary to Johnston's assertion, the prosecutor did not appeal to the jurors' biases or prejudices. That occurs where a prosecutor encourages a jury to find a defendant guilty based on the defendant's race or lifestyle choices. *See, e.g., Calhoun v. United States*, 568 U.S. 1206 (2013) (prosecutor suggested the defendant was guilty based on his race); *see also State v. Criswell*, 2013 MT 177, ¶¶ 7, 49-50, 370 Mont. 511, 305 P.3d 769 (the prosecutor improperly referred to the defendants as "professional freeloaders"). In contrast, the prosecutor in this case appropriately emphasized the defendant's actions that were relevant to his motive to kill Waller and his efforts to conceal his offense. The prosecutor did not appeal to prejudice or bias.

Additionally, while the prosecutor offered his personal opinion several times, he did not suggest that he had personal information from outside of the record indicating that the defendant was guilty or make personal assurances about any witness's veracity. Because the prosecutor's closing argument was focused on his argument about inferences that could be drawn from the record, the few statements he made offering his personal opinion did not significantly affect the State's closing argument.

Defense counsel reasonably determined that objections would have served no purpose. Objecting might have highlighted statements that defense counsel did not want to bring attention to. For example, counsel reasonably determined that objecting to statements about the Facebook posts “would only have placed more emphasis on the facts we believed very detrimental to Cody’s defense.” (PCR Doc. 67, Ex. 1 at 3.) And objecting would not have prevented the prosecutor from discussing the damaging evidence against Johnston. Nearly all of the argument made by the prosecutor was proper. The few statements that might have been objectionable could have simply been rephrased by the prosecutor if the court had sustained an objection. The State would still have had a compelling argument about Johnston’s guilt based on the evidence. Instead of objecting, Johnston’s counsel reasonably chose to focus on maintaining credibility with the jury and emphasizing the missing pieces of evidence and the State’s burden of proof. (PCR Doc. 67, Ex. 1 at 2; 8/4/21 Tr. at 27.) That decision was well within the wide range of reasonable professional conduct. As a result, the district court correctly concluded that Johnston’s counsel was not ineffective.

B. Johnston was not prejudiced by his counsel’s failure to object.

In addition to not showing that his counsel was deficient, Johnston has also failed to demonstrate a reasonable probability that the jury would have reached a different outcome if his counsel had objected to the State’s closing argument. As

the district court observed, the evidence in this case was “overwhelming.” (8/4/21 Tr. at 54-55.) Cell phone evidence demonstrated that Waller was alive, in Johnston’s home, at 7:25 a.m. on the morning of her disappearance. (Trial Tr. at 717.) A minute later, he arrived at his house. (*Id.* at 583-84.) She was angry at him because he had placed locks on her house, which she had paid him \$10,000 for. There is no sign she was alive after that time. That morning, he asked his coworkers to falsely state that he worked all morning, and he moved her vehicle many miles away. He then lied to law enforcement, denying that he had been there that morning or had seen her vehicle. And he later fabricated a Facebook post to make it appear that she was still alive. Johnston’s deceitful behavior and cell phone evidence placing Johnston with Waller when she disappeared demonstrated beyond a reasonable doubt that he killed her.

The prosecutor properly highlighted this evidence in his closing argument. If Johnston’s counsel had objected to some of the statements made by the prosecutor that might have been improper, it would not have had any impact on the verdict. Because Johnston failed to demonstrate that he was prejudiced by his counsel’s failure to object, the district court correctly concluded that his counsel were not ineffective.

CONCLUSION

The district court's denial of Johnston's Amended Petition for Postconviction Relief should be affirmed.

Respectfully submitted this 6th day of July, 2022.

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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 8,754 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

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CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 07-06-2022:

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