

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

COREY WICKHAM,)	Supreme Court No.
Petitioner and Appellee,)	20210313
)	
v.)	District Court Nos.
)	08-2020-CV-02968
STATE OF NORTH DAKOTA,)	08-2018-CR-02679
Respondent and Appellant.)	

APPELLANT'S BRIEF

**Appeal from the Order Granting Post-Conviction Relief Entered
September 15, 2021, in the Burleigh County District Court,
South Central Judicial District, State of North Dakota,
the Honorable Judge Bobbi Weiler, Presiding.**

ORAL ARGUMENT REQUESTED

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General Notes regarding this Brief

References to filings in this post-conviction matter are as follows:

To the post-conviction hearing transcript: T. _____
To the post-conviction Odyssey filings: Index # _____

References to filings in the underlying criminal matter are as follows:

To the criminal trial transcript: Crim. T. _____
To the criminal Odyssey filings: Crim. Index # _____

STATEMENT OF THE ISSUE

[¶1] The State presents one issue on appeal:

1. Whether the district court's grant of post-conviction relief for ineffective assistance of counsel was clearly erroneous under Strickland and North Dakota case law.

JURISDICTION

[¶2] The State appeals an order vacating a judgment and granting a new trial in a post-conviction proceeding. An order granting a new trial in a post-conviction proceeding is a final judgment that is appealable to the supreme court under N.D.C.C. § 29-32.1-14. See Hill v. State, 2000 ND 143, ¶ 13, 615 N.W.2d 135 (“The effect of an order granting a new trial compels holding it is a final judgment.”).

ORAL ARGUMENT REQUESTED

[¶3] The State requests oral argument in this matter to emphasize and clarify the arguments contained herein. The State feels oral argument will be beneficial to the Court given the fact-intensive nature of this appeal.

STATEMENT OF THE CASE

[¶4] On August 27, 2018, Corey Wickham was charged with two counts of Gross Sexual Imposition. Crim. Index # 1. The case was tried to a jury on January 22–24, 2019, and Mr. Wickham was found guilty on both counts. Id. # 132. Following a pre-sentence investigation, Mr. Wickham was sentenced on May 1, 2019, to 20 years incarceration, with 5 years suspended in one count. Id. # 169. Mr. Wickham appealed his conviction, which this Court affirmed on January 28, 2020. See State v. Wickham, 2020 ND 25, 938 N.W.2d 141.

[¶5] Mr. Wickham filed the current petition for post-conviction relief on November 3, 2020. See Index # 1. On July 7, 2021, a post-conviction hearing was held in front of Judge Bobbi Weiler, who had taken over the case from the now-retired Judge Gail Hagerty. The district court granted Mr. Wickham’s application for post-conviction relief on September 15, 2021, ordered the criminal judgment vacated,

and ordered a new trial. See id. # 39. The State appealed that Order on November 10, 2021. Id. # 42.

STATEMENT OF FACTS

[¶6] In the early morning hours of August 25, 2018, L.A., an adult, called for a Lyft ride to take her home from a bar. Crim. T. at 27. Corey Wickham was a Lyft driver at the time, and he responded to the call. Id. at 29. At approximately 1:16 AM, Wickham and L.A. arrived at her home, where Wickham parked his car on the street. Id. at 30–31, 41. As she was about to get out of the car, Wickham reached across her and prevented her from opening the door. Id. at 31. He shifted his body weight on top of her, forcefully kissed her, and began forcefully groping L.A. Id. at 31–32. During this interaction, he digitally penetrated L.A., causing injury to her vagina that resulted in bleeding. Id. at 33–34. He also groped her breasts with his right hand, leaving a bloody hand mark on her bra. Id. at 34, 35. L.A. attempted to escape during the entire interaction. Id. at 33, 34. After approximately 10 minutes, L.A. was able to break free from Wickham’s grasp and exit the vehicle, after which she quickly went into her house. Id. at 34–35, 37.

[¶7] When L.A. arrived in her bedroom, she found her undergarments were covered in blood, and she was experiencing severe pain in her vaginal region. Id. at 38. The next day, L.A. was still experiencing severe pain. Id. at 49. That afternoon, she texted a friend that she may have been sexually assaulted the night before. Id. at 50. Her friend contacted law enforcement, and L.A. was sent for a SANE examination. Id. at 54, 56–57, 116. The SANE examination revealed injuries

consisted with L.A.'s story. Id. at 123–24. Swabs were taken from L.A.'s undergarments for DNA analysis. Id. at 175–76.

[¶8] Law enforcement used L.A.'s Lyft app to identify her driver, after which it made contact with Corey Wickham. Id. at 42, Wickham agreed to an interview with Detective Lahr at the Bismarck Police Department. Id. at 145. During that interview, Detective Lahr noted that Wickham was extremely nervous, that his story about the interaction was inconsistent, and that he showed signs of deception. Id. at 148–55. Detective Lahr released Wickham that day. Id. at 156. The following day, Detective Lahr attempted to locate Wickham to arrest him on two charges of Gross Sexual Imposition. Id. at 177–79. Wickham was located driving with his mother, at which time he was placed under arrest. Id. at 179. At that time, Wickham requested a lawyer. Id. at 179–80. At some point, Detective Lahr collected DNA samples from Wickham. Id. at 176, 178.

[¶9] Wickham was transported to the Burleigh Morton Detention Center, where he was ultimately held in custody until trial on a \$500,000 cash bond. See Crim. Index # 5. At the detention center, Wickham made a number of calls to his mother, all of which were recorded per standard procedure. Crim. T. at 169–70. The DNA swabs from Wickham were tested against the swabs from L.A.'s undergarments, and Wickham's Y-chromosomal profile was a match. Id. at 252. At trial, Wickham testified the encounter with L.A. was consensual. Id. at 270–75.

LAW AND ARGUMENT

[¶10] An application for post-conviction relief for ineffective assistance of counsel is a mixed question of law and fact. See Brewer v. State, 2019 ND 69, ¶ 5, 924 N.W.2d 87 (citing Rourke v. State, 2018 ND 137, ¶ 5, 912 N.W.2d 311). Questions of law are fully reviewable by the supreme court. See Abdi v. State, 2021 ND 110, ¶ 8, 961 N.W.2d 303. Findings of fact are reviewed under the clearly erroneous standard, which states:

A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made.

Id. at ¶ 4 (quoting Middleton v. State, 2014 ND 144, ¶ 5, 849 N.W.2d 196).

[¶11] Here, the district court's grant of post-conviction relief does not follow the law as established by the North Dakota and United States Supreme Courts under Strickland v. Washington. Further, although the district court's Order was supported by some evidence, a full and fair review of the record will leave this Court with a definite and firm conviction a mistake has been made.

1. **The district court's grant of post-conviction relief did not properly apply the Strickland test and its findings of fact were clearly erroneous.**

[¶12] The two-prong test for ineffective assistance of counsel is long-settled:

In order to prevail on a post-conviction relief application based on ineffective assistance of counsel, the petitioner must (1) "show that counsel's representation fell below an objective standard of reasonableness," and (2) "show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Brewer v. State, 2019 ND 69, ¶ 5, 924 N.W.2d (quoting Strickland v. Washington, 466 U.S. 668, 688, 694 (1984)). “The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Strickland at 696.

- a. Counsel’s choice not to object at trial to the alleged constitutional violation was a trial strategy that fell well within the “wide range of reasonable professional assistance.”

[¶13] In applying prong one of the Strickland test, the district court must adopt a “strong presumption that counsel’s conduct f[ell] within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689. In addition, “courts must consciously attempt to limit the distorting effect of hindsight.” Brewer, 2019 ND 69, ¶ 6. “Simply using an ‘unsuccessful trial strategy does not make defense counsel’s assistance defective.’” Id. (quoting Garcia v. State, 2004 ND 81, ¶ 8, 678 N.W.2d 568). “When trial counsel gives coherent and rational reasons for proceeding the way he did at trial, we will not second-guess the trial strategy and tactics of the attorney.” DeCoteau v. State, 2000 ND 44, ¶ 12, 608 N.W.2d 240.

[¶14] Here, at the post-conviction hearing, trial counsel—an attorney with over 30 years of litigation experience—gave a number of reasons why he chose not to object to Detective Lahr’s testimony about Wickham’s invocation of counsel. He began by describing how the statement fit into the context of Detective Lahr’s testimony as a whole, noting that Detective Lahr testified to numerous affirmative and inconsistent statements Wickham made about the events at issue throughout the course of the investigation. See T. at 68. Trial counsel testified that he saw the “gist” of Detective Lahr’s testimony was not to draw attention to the invocation, but

rather to draw attention to these affirmative and inconsistent statements. See id. at 68–69. Trial counsel testified that objections to testimony and limiting instructions can often have a negative effect on the defense’s case by focusing the jury’s attention to damaging testimony. See id. at 69–71. Finally, trial counsel testified that in his experiences with the trial judge, she preferred to hear motions on the record and in front of the jury, which would also have a negative effect on the defense’s case. See id. at 71.

[¶15] By all accounts, trial counsel gave “coherent and rational reasons” for why he chose not to object to Detective Lahr’s comment about Wickham requesting counsel. His choice not to object to damaging testimony was rational in these circumstances to minimize any negative effects on his client’s case. The district court disagreed, however, and found that trial counsel’s performance fell below the objective standard of reasonableness. See Index # 39 at ¶ 51.

[¶16] The district court’s analysis for Strickland prong one is both unsupported by law and erroneous for a number of reasons. First, the district court’s reliance on Brewer is misplaced, as the key facts underlying the holding of Brewer are substantially distinguishable from those in the current matter. In Brewer, the trial counsel stated he did not renew a pretrial objection to evidence during trial because he felt the record at the pretrial hearing properly preserved the issue for appeal. See Brewer, 2019 ND 69, ¶¶ 2, 8. Because trial counsel’s failure to object was based solely on his fundamental misunderstanding of the law—“a basic legal error”—the supreme court held that his performance fell below the objective standard of reasonableness. See id.

[¶17] The distinguishing fact between Brewer and the current matter is that in Brewer, trial counsel explicitly testified at a post-conviction hearing that his decision to withhold an objection was not based on trial strategy, but instead was based solely on his legally-incorrect belief that the pretrial record would properly preserve his objection. See Brewer at ¶ 8. The opposite is the true in the matter at hand. At the post-conviction hearing in the current matter, trial counsel testified at length about how his choice not to object was based on a coherent and reasonable balancing of the issues as he knew them at the time of trial. At no time did trial counsel testify that his decision was based in any way upon a misunderstanding or misapplication of the law—which is the precise issue upon which Brewer turned. Brewer is inapplicable to the current matter.

[¶18] The second reason the district court’s analysis is erroneous is that in applying Brewer and describing trial counsel’s failure to object as “a basic legal error,” the district court erroneously applies a heightened standard to certain objections at trial. In its Order, the district court states that trial counsel “has an obligation to protect his clients Constitutional Rights.” Index # 39 at ¶ 50. The district court then extrapolates that the “obligation to protect” creates an “obligation to object” based upon a potential violation a client’s constitutional rights. Id. The district court supports this notion by stating that while the choice not to ask for a limiting instruction upon an overruled objection and motion for mistrial could have been trial strategy, the choice to withhold the objection altogether could not. Id.

[¶19] The district court’s assertion that the “obligation to protect” creates an “obligation to object” is not supported by statute, case law, or rule. To the contrary,

case law supports the notion that regardless of whether the alleged error of performance is constitutional, counsel's conduct in an ineffective assistance claim is to be measured using prong one of the Strickland test. See, e.g., Kinsella v. State, 2013 ND 238, ¶ 12, 840 N.W.2d 625 (finding trial counsel's failure to object to evidence collected in violation of the Fourth Amendment was not deficient performance); Flanagan v. State, 2006 ND 76, ¶ 21, 712 N.W.2d 602 (finding that failure to object to potential Equal Protection violations during voir dire was a trial tactic). The notion that trial counsel's failure to object is itself "a basic legal error," rather than a trial tactic, is mistaken.

[¶20] Finally, the district court does not properly apply the Strickland standard, and instead relies heavily upon hindsight second-guessing of trial counsel's performance. In its Order, the district court acknowledges that trial counsel did not want to draw attention to damaging testimony. Index # 39 at ¶ 50. It goes on to state, though, that it is "baffled by this reasoning," and outlines the other actions trial counsel could have taken. Id. Not only are the district court's prolific use of the words "could have" and "would have" clear hallmarks of improper second-guessing, but it does not state any facts from the record of either the post-conviction hearing or the trial itself to support why in this case trial counsel's actions fell outside the scope of reasonable professional assistance.

[¶21] An objective reading of the district court's Order shows it did not begin its analysis as required by Strickland with the "'strong presumption' that trial counsel's conduct fell within the wide range of reasonable professional assistance." See Brewer, 2019 ND 69, ¶ 6 (citations omitted). Instead, the district court's Order is

based solely upon a subjective, hindsight disagreement with trial counsel's strategy. Further, any indication of what the trial court "would have" done upon an objection by the defense should be given no relevance in this matter. Because the post-conviction judge here is not the same as the now-retired trial judge, the actions of the post-conviction judge are mere speculation, and are not based upon the in-the-moment knowledge of the circumstances of the trial that would have been known to the trial judge.

[¶22] By all measures, the district court did not properly apply Strickland prong one. The trial counsel's assistance in this matter was well within the wide range of reasonable professional assistance, and the district court's finding his performance was deficient is clearly erroneous because it is supported by so little evidence this Court, upon review of the record, will be left with a definite and firm conviction a mistake has been made.

- b. Even if counsel's assistance was ineffective, there was ample other evidence with which to convict the Defendant, and he suffered no prejudice because the result would have been the same.

[¶23] Deficient attorney performance can only merit overturning a conviction if the Defendant can meet "the heavy burden of establishing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Laib v. State, 2005 ND 187, ¶ 10, 681 N.W.2d 769 (citing Greywind v. State, 2004 ND 213, ¶ 13, 689 N.W.2d 390). Regarding that "heavy burden," this Court has stated that:

Unless counsel's errors are so blatantly and obviously prejudicial that they would in all cases, regardless of the other evidence presented, create a reasonable probability of a different result, the prejudicial effect of counsel's errors must be assessed within the context of the

remaining evidence properly presented and the overall conduct of the trial.

Id. (citing State v. Steen, 2004 ND 228, ¶ 19, 690 N.W.2d 239.

[¶24] Here, the district court's analysis under Strickland prong two is also erroneous for a number of reasons. First, the district court begins by again applying a heightened standard, this time to the State regarding witness preparation. The district court states that "State witnesses should be more aware than most witnesses of the dangers of referencing a criminal defendant's invocation of the right to counsel." Index # 39 at 17. It continues to say those witnesses "should be more aware of this danger because the State should properly prepare its witnesses." Id. The district court provide no statutory or case law support for this assertion that State's *witnesses* are held to a higher standard than other witnesses. More concerning, though, is that the district court failed to objectively consider the evidence itself. Important here is the context of the statement, including how the statement was "elicited," and also how—or in this case, whether—the statement was used by the prosecution.

[¶25] The context of the statement at issue is crucial to determining prejudice. The statement at issue was made by Detective Lahr. He provided a substantial amount of testimony at trial, which takes up nearly 70 pages of transcript. See Crim. T. at 135–202. The statement at issue occurred close to the end of his direct examination, and the exact colloquy is as follows:

Q. Did you have a conversation with Mr. Wickham at that time when their vehicle was pulled over?

A. It was very brief. Basically, I told him that he was under arrest. The patrolman made contact with Mrs. Wickham, the driver, first and then Mr. Wickham was in the passenger's seat. And then by the time I got up there, I had told Mr. Wickham to step out of the vehicle, which he complied. I told him that he was under arrest. He asked for what. I explained. And then at that time he was brought back to his vehicle.

During that process, no information was obtained that was pertinent to this case or evidentiary value or exculpatory. *He basically, in summary, stated that he would like to speak with a lawyer or have a lawyer.* So at that time anything relevant to this case was never discussed.

Crim. T. at 179–80 (statement at issue emphasized). The context, then, is that this was a single comment, made without follow-up or extrapolation, that was the tenth sentence of an eleven-sentence narrative answer, and which was spoken near the very end of the direct examination.

[¶26] Regarding how the statement was “elicited,” a couple of factors are relevant. First, the question from the prosecution was objectively a yes-or-no question. Second, the witness chose to answer that yes-or-no question with a lengthy narrative. Had the witness answered more succinctly, the prosecution could have directed his testimony away from the forbidden topic. Despite the district court saying the prosecution “elicited” this statement from the witness, nothing about the content of the exact question can reasonably be seen as “eliciting” the statement about Wickham’s invocation of counsel in any intentional sense of the word. Rather, the witness merely continued talking for longer than was necessary to address the prosecutor’s precise question, and in doing so he veered into an improper topic.

[¶27] Regarding how the prosecution used the statement, the district court invoked Doyle v. Ohio. Index # 39 at 17. In Doyle, the prosecution extensively questioned the defendants about their post-arrest silence, claiming the questioning was not for proof of guilt but for impeachment purposes. Doyle, 426 U.S. 610, 612–16 (1976). The Supreme Court held “that the use for impeachment purposes of [the defendant’s] silence . . . violated the Due Process Clause of the Fourteenth Amendment.” Id. at 619. This holding, along with the Fifth Amendment, forms the basis for the doctrine that a defendant’s silence, which includes invocation of the right to counsel, may not be used in any way against a defendant at trial. See State v. Anderson, 2016 ND 28, ¶ 12, 875 N.W.2d 496.

[¶28] Invoking Doyle in the context of a Strickland prong two analysis is problematic, as Strickland and Doyle use different tests with different parties carrying the burden. Strickland uses the “but for” test, which places the burden on the *defendant* to prove that, but for counsel’s errors, “the result of the proceeding would have been different.” See Strickland, 466 U.S. at 694; Brewer, 2019 ND 69, ¶ 10. Doyle violations, on the other hand, use harmless error analysis, which places the burden upon the *state* to “prove beyond a reasonable doubt that the comments did not contribute to the verdict.” State v. Wilder, 2018 ND 93, ¶ 8, 909 N.W.2d 684. Invoking Doyle in the context of Strickland prong two, then, risks an implication either that a Doyle violation shows per se prejudice, or that the burden shifts to the state to prove there was no prejudice. Either of these is erroneous.

[¶29] Apart from the Doyle reference, the district court’s analysis is erroneous when viewed from the standpoint Strickland. As noted above, “the prejudicial effect

of counsel's errors must be assessed *within the context of the remaining evidence properly presented and the overall conduct of the trial.*" Laib, 2005 ND 187, ¶ 10 (emphasis added). In making this assessment, "the district court considers not only the evidence introduced up to that point in the trial, but *must* consider the probability of a different result in light of the evidence presented and the overall conduct of the entire trial before and after the claimed error." Brewer, 2019 ND 69, ¶ 9 (emphasis added). The goal of the assessment is to determine whether it was the improperly admitted evidence that caused the jury to reach a different result. See id. at ¶ 10.

[¶30] Here, the district court failed to consider the remaining evidence properly presented. Regarding that evidence, the district court made only two brief remarks. The first of these merely recognized that there was other evidence. See Index # 39 at ¶ 53 ("In this case, the Court recognizes that the State presented evidence of Wickham's guilt other than eluding to (twice) his invocation of the right to counsel."). The second of these was a summary conclusion that the evidence was not "clear." Id. ("[T]his Court concludes that this was not a case where the evidence implicating the Defendant's guilt was otherwise clear, notwithstanding the Constitutional error."). At no point in its analysis does the district court make any mention of how any specific evidence influenced its decision.

[¶31] Had the district court assessed the remainder of the evidence properly presented, it would have found there was ample evidence upon which to convict Mr. Wickham notwithstanding the alleged constitutional violation. Prior to the

reference to Mr. Wickham's invocation of counsel, the jury heard the following testimony:

- The victim testified first, during which she shared graphic details of the assault by forceful digital penetration, identified Wickham as her assailant, asserted that the sexual contact was in no way consensual, and testified that her underpants were bloody and she experienced severe pain as a result of the assault (Crim. T. at 31–35, 47–50);
- The State presented photos of the victim's Lyft app, which confirmed Wickham had been her driver and added credibility to her timeline (Id. at 39–42);
- The SANE examiner testified as to the victim's injuries, and testified those injuries were consistent with forced digital penetration (Id. at 123–26);
- Detective Lahr testified (prior to mentioning the invocation of counsel) about a police interview with Mr. Wickham, during which Mr. Wickham changed his story, was visibly nervous, and was showing signs of deception (Id. at 148–51). He testified about a jail visit between Wickham and his mother, during which Wickham made admissions that differed from the first interview with Detective Lahr (Id. at 170–71). He testified Mr. Wickham lied about being out of town on the day of his arrest (Id. at 178). Detective Lahr also testified that at no time did Mr. Wickham admit to having sexual contact with the victim (Id. at 151–52).

[¶32] Immediately following the mention of Mr. Wickham's right to counsel, Detective Lahr testified that Mr. Wickham was voluntarily turning himself in, despite

never having been told he was under arrest. Crim. T. at 180. The jury then heard from three State's witnesses regarding the DNA evidence, the final of which testified that DNA matching Mr. Wickham's Y chromosomal profile was found in the victim's underpants. Id. at 250. For the defense, Mr. Wickham then testified on his own behalf, during which he described the encounter in detail from his point of view and testified that it was consensual. Id. at 270–75, 280–81. Mr. Wickham invoking his right to counsel was not mentioned in any other witness testimony, nor did the prosecution make any reference to it during its closing argument.

[¶33] Crucially, none of the evidence in the previous two paragraphs would have been tainted in any way by the brief mention of Mr. Wickham's invocation of counsel. Had the defense counsel objected and the court given a limiting instruction, the jury still would be left with plenty of evidence—from both sides—with which to make its decision.

[¶34] Further, the district court's assertion the evidence was not "clear" is an improper framework from which to evaluate Strickland prejudice. A primary function of holding a trial is to determine disputed issues of fact, which makes it unsurprising that in this case—a case for which the only direct witnesses to the incident were Mr. Wickham and the victim—the evidence would not be "clear." The case law under Strickland, however, is clear that the focus of prong two prejudice is whether, but for the deficient performance, the jury would have convicted. The perceived "clarity" of the evidence is an erroneous consideration.

[¶35] While the district court did consider some of the "overall conduct of the trial," the district court's Order focused almost entirely on the perceived content of jury

deliberations. As an initial matter, because jury deliberations are confidential, any musings on their content cannot be more than speculation. The district court even acknowledges as much. See Index # 39 at ¶ 56 (“It would be impossible for the Court to know which part of Detective Lahr’s testimony the jury relied upon.”). Despite that admission, the district court proceeds to write that it “has to assume that the jury relied upon all of it, including Detective Lahr’s testimony regarding Wickham’s request for an attorney.” Id.

[¶36] The district court’s assumption errs in that it fails to consider two key factors. First, it fails to consider that Detective Lahr’s testimony was substantial in scope and content, and it was incriminating in many ways outside the comment on invocation. It included inconsistent statements and purported lies told by Mr. Wickham, denials of all sexual contact in direct contradiction to Mr. Wickham’s testimony on the stand, allegations of deception during a police interview, and testimony about a jail call in which Mr. Wickham made admissions to his mother. See ibid. ¶ 31. The comment regarding his invocation of counsel was a single sentence, non-responsive answer that was not expanded upon by the prosecutor. To imply there is a “reasonable probability” that out of all Detective Lahr’s testimony it was the invocation comment caused the jury to convict is not supported by a fair reading of the record.

[¶37] Second, the district court’s assumption fails to consider that there was ample other evidence upon which the jury could have convicted (e.g., the victim’s testimony, the SANE examiner’s testimony, the DNA evidence). Because of the speculative nature of talking about jury deliberations, any number of possibilities

are equally plausible based on this record as to why the jury wanted to hear Detective Lahr's testimony twice. It could be the jury wanted to hear Detective Lahr's testimony to compare with recollections about other testimony. Or, the jury could have wanted to compare it with the contradictory story of Mr. Wickham. Without indulging further possibilities, it is sufficient simply to note that in no case can an assumption the jury "must" have relied on certain testimony ever amount to more than speculation.

[¶38] The key error in the district court's Strickland prejudice analysis, then, is that it places controlling weight, without sufficient explanation beyond speculation, and without considering the other evidence properly admitted and other aspects of the trial, on the short period of time between the jury hearing Detective Lahr's testimony a second time and reaching a verdict, and from that it extrapolates that it *must* have been hearing the comment about invocation of counsel that caused the jury to convict. As was shown, this assertion is unsupported by the record. For the district court to have found prejudice based on such speculative reasoning is clearly erroneous.

[¶39] It was Mr. Wickham's burden to show that but for the deficient performance of his trial counsel the jury would not have convicted. A full and fair reading of the record shows he has not met his burden at post-conviction, that his attorney's performance was constitutionally sufficient, and that his criminal trial was fundamentally fair.

CONCLUSION

[¶40] Based on the above, the State respectfully asks this Court to **VACATE** the Order granting post-conviction relief, **DENY** Wickham's application for post-conviction relief, and **RE-INSTATE** Mr. Wickham's prior criminal judgment.

Dated this 23rd day of February, 2022.

/s/ Joshua Amundson

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CERTIFICATE OF COMPLIANCE

[¶1] COMES NOW Joshua Amundson and David Rappenecker of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellant is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

[¶2] The number of pages in the Principal Brief is twenty-two (22) according to the page count of the filed electronic document.

Dated this 23rd day of February, 2022.

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Respondent and Appellant.)	

CERTIFICATE OF SERVICE

We, Joshua Amundson and David Rappenecker, do certify that on February 23, 2022, we served the following documents:

1. Appellant Brief
2. Certificate of Compliance
3. Certificate of Service

by electronic filing to the following:

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