IN THE SUPREME COURT

STATE OF WYOMING

EDUARDO VLAHOS,	)	
	)	
Appellant,	)	
	)	
v.	)	No. S-21-0290
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This appeal arises from a criminal conviction in the District Court for the Sixth Judicial District, Campbell County, Wyoming. (R. at 347-48, 438-40). The district court filed the judgment on July 16, 2021, and the sentence on October 4, 2021. (*Id.*). An order imposing a criminal sentence is a final, appealable order. *See Price v. State*, 716 P.2d 324, 327 (Wyo. 1986). As required by Rule 2.01 of the Wyoming Rules of Appellate Procedure, Eduardo Vlahos timely filed his notice of appeal within thirty days of the order, on October 22, 2021. (R. at 454-55). Therefore, jurisdiction is vested in this Court under article 5, section 2 of the Wyoming Constitution.

STATEMENT OF THE ISSUES

I. Did the district court violate Vlahos's constitutional or rule-based rights to a speedy trial?

II. Is reversal required because a juror inadvertently saw Vlahos's statements in a video Vlahos posted to social media during a recess in the trial?

STATEMENT OF THE CASE

I. Nature of the Case

A Campbell County jury convicted Vlahos of one count of felony shoplifting. Walmart security cameras recorded Vlahos stealing merchandise by incorrectly scanning items at self-checkout counters in seventeen different transactions over two months.

In his first of two issues on appeal, Vlahos claims that the district court violated his right to a speedy trial when it issued a number of continuances for a variety of reasons, including the coronavirus pandemic and competency evaluations. The State asserts that the district court complied with this Court's COVID-19 orders, the requirements of Rule 48 of the Wyoming Rules of Criminal Procedure, and the wishes of the parties, and thus, the delay did not prejudice Vlahos. To resolve this issue, this Court should apply its speedy trial case law, such as *Cotney v. State*, 2022 WY 17, 503 P.3d 58 (Wyo. 2022), to determine if the district court violated Vlahos's Rule 48 or constitutional right to a speedy trial.

In his second issue on appeal, Vlahos argues that one of the jurors committed misconduct by watching a video Vlahos posted to social media about the case between the first and second days of trial. The State contends that this Court should find this issue waived under *Peña v. State*, 2013 WY 4, 294 P.3d 13 (Wyo. 2013) because Vlahos did not object below. If this Court does not find the issue waived, it should review for plain error. Under a plain error review, this Court should apply its case law on juror exposure to trial publicity, such as *Pickering v. State*, 2020 WY 66, 464 P.3d 236 (Wyo. 2020), to find no plain error occurred.

II. Facts Relevant to the Issues Presented for Review

Keely Brimmer works as an asset protection associate at the Walmart in Gillette. (Trial Tr. Day 1 at 146-50).[1] On October 19, 2019, Brimmer called police because a customer was attempting to leave the store without correctly paying for all of his items. (*Id.* at 156). The customer used a self-checkout counter to scan lower-priced items but bag higher-priced items. (*Id.*). Brimmer recognized this man from her ongoing investigation that involved similar theft. (*Id.* at 157). Gillette Police Department Officer Justin Harper arrived and questioned Vlahos, but did not arrest him. (*Id.* at 124-28).

Later that month, Brimmer gave Officer Harper video footage from seventeen different transactions she had been investigating. (*Id.* at 162-63; Ex. 19). These thefts occurred from September 3 to October 19, 2019. (Ex. 19; Trial Tr. Day 1 at 166). The videos recorded Vlahos bagging a large amount of merchandise without scanning the correct items into the self-checkout system, and, occasionally, the videos showed Vlahos leaving items in his cart without any attempt to bag them. (Ex. 19).

Brimmer confirmed Vlahos's identity because he used the same card to pay for the prior transactions. (Trial Tr. Day 1 at 202-03; *see* Ex. 19). Also, the videos showed Vlahos's distinct tattoos. (Trial Tr. Day 1 at 177, 190; Trial Tr. Day 2 at 58).

Brimmer reviewed Walmart's internal records that showed how much Vlahos paid on each occasion. (Trial Tr. Day 1 at 150-55, 167-96, 199-220; Trial Tr. Day 2 at 15-40,

[1] The two days of trial transcripts are not consecutively paginated.

49-58). She reviewed the videos to determine which items Vlahos did not scan. (*Id.*). Brimmer generated additional receipts to document the value of the items that Vlahos did not pay for. (*Id.*; Ex. 1-18).[2] She then subtracted the value Vlahos actually paid from the amount of goods he took to determine the value of property stolen. (Trial Tr. Day 2 at 59-61). The value greatly exceeded one thousand dollars, a felony amount. (*Id.*).

III. Relevant Procedural History

A. Pretrial Scheduling

On October 25, 2019, the State charged Vlahos with one count of price tag altering under Wyo. Stat. Ann. § 6-3-404(b)(i) (2019), alleging he illegally obtained $4,462.98 in merchandise. (R. at 22-23). After being arrested on October 31, 2019, Vlahos posted bond the next day. (*Id.* at 13-14, 18-19, 26, 29-30). The circuit court bound the charges over after Vlahos waived a preliminary hearing. (*Id.* at 3, 6). Before arraignment, Vlahos filed a motion with a number of initial requests and demands, including a speedy trial demand under Rule 48 and the Wyoming and United States Constitutions. (*Id.* at 32-44).

On November 15, 2019, the district court arraigned Vlahos, and it later filed a criminal case management order. (Nov. 15, 2019 Arraignment Hr'g Tr. at 1, 28-30; R. at 45-46). This order set Vlahos's trial "the [w]eek of April 6, 2020 (stacked)[.]" (R. at 45-46 (emphasis omitted)). It also scheduled a pretrial conference for March 6, 2020. (*Id.* at 45).

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[2] Exhibit 19 is a disc that includes the videos Brimmer reviewed and scans of Exhibits 1 through 18, the receipts Brimmer reviewed and generated. (Ex. 19).

On January 23, 2020, the State filed a motion to revoke Vlahos's bond because he was cited for misdemeanor stalking, which violated the terms of his release. (*Id.* at 59-61). Officers arrested Vlahos on the bond warrant on February 4, 2020. (*Id.* at 65).

On February 7, 2020, the district court held a combined arraignment and bond revocation hearing. (*See generally* Feb. 7, 2020 Arraignment Hr'g Tr.). Under a separate case number, the district court arraigned Vlahos on two counts of forgery that were unrelated to the Walmart thefts. (*Id.* at 2-8). On the bond revocation, the district court imposed a higher bond, which Vlahos again posted. (*Id.* at 8-11; R. at 72-149-51).

On March 6, 2020, the district court held a pretrial conference as scheduled. (Mar. 6, 2020 Pretrial Conference Tr. at 1-11). At the hearing, Vlahos spoke personally and complained that Walmart representatives had produced receipts to calculate the value of the goods Vlahos did not pay for at self-checkout. (*Id.* at 9). He claimed that this evidence should not be admitted because it would be "evidence that's being falsified." (*Id.*).

On April 8, 2020—in the midst of the week of the originally stacked April 6, 2020 trial date—the district court issued an order continuing the trial. (R. at 103). It set a new trial date, again "stacked[,]" for June 1, 2020. (*Id.*).

On May 22, 2020, Vlahos submitted a pro se "Motion for a[n] Evidentiary Hearing[.]" (R. at 104-07). The district court responded by contacting the parties in an email on May 27, 2020. (*Id.* at 108). The court was unclear if the pro se motion requested a suppression hearing or another preliminary hearing. (*Id.*). It asked how the parties wished to proceed. (*Id.*). The record does not include any responses from the parties to this email. (*See id.*).

On June 3, 2020, the State filed a motion to suspend the proceedings to permit Vlahos to receive a competency evaluation under Wyo. Stat. Ann. § 7-11-303. (*Id.* at 109-14). The State explained that multiple aspects of Vlahos's conduct raised inferences that Vlahos may not be competent to proceed to trial, citing his irrational claims about falsified evidence at the pretrial conference, his pro se motions, and his stalking. (*Id.*).

On June 8, 2020, the district court issued an order suspending the proceedings and requiring Vlahos to submit to an examination to determine his competence to proceed under Wyo. Stat. Ann. § 7-11-302(a). (R. at 115-18). In a corrected order for competency evaluation filed on June 18, 2020, the court made clear that the evaluation would occur in an outpatient manner, without taking Vlahos into custody. (*Id.* at 131-34).

On August 26, 2020, Dr. Ingrid Atiles of the Wyoming State Hospital filed her competency report. (R. at 135-45 (confidential file)). She found Vlahos was competent but recommended that Vlahos be appointed a different attorney. (*Id.*). That same day, the district court scheduled a competency hearing to occur on September 8, 2020. (*Id.* at 146). In response to the evaluation's findings, the Office of the Public Defender reassigned Vlahos's representation to a different attorney. (*Id.* at 147).

At the September 8 hearing, Vlahos indicated, through his new counsel, that he would not seek an additional competency evaluation. (Sept. 8, 2020 Competency Hr'g Tr. at 2). On September 10, 2020, the district court issued an order setting trial for February 8, 2021, and a pretrial conference for January 7, 2021. (R. at 148).

At the pretrial conference on January 7, 2021, the district court noted that, although trial was set for February 8, 2021, there were ongoing COVID-19 issues that could arise.

(Jan. 7, 2021 Pretrial Conference Tr. at 7). The court stated that, "[i]f anybody wishes to have a Rule 48 hearing, we'll put one on the record, but right now [the Court is] intending on going forward[.]" (*Id.*). Later in the hearing, the court explained that neither the Walmart theft nor the forgery cases were stacked first yet. (*Id.* at 11). It noted that if the COVID-19 situation permitted a trial to occur, it would hold trial in whatever case at the top of the stack. (*Id.* at 7, 11).

In a letter to the parties filed on January 25, 2021, the district court made clear that Vlahos's Walmart theft trial was stacked first for February 8, 2021. (R. at 174). On February 2, 2021, the State amended the Information to charge Vlahos with shoplifting under Wyo. Stat. Ann. § 6-3-404(a) (2019), rather than price tag altering. (*Id.* at 185-86).

On February 8, 2021, the trial date, the district court held a hearing via online videoconference. (Trial Continuance Hr'g Tr. at 1-2). The court explained that its court reporter had experienced respiratory symptoms consistent with COVID-19. (*Id.* at 2). Although the court reporter had received a negative test result, the court noted the high rate of false negatives involved with twenty-four hour tests. (*Id.*). It found that requiring the court reporter to attend the trial would contravene public health guidance at the time, which recommended people experiencing symptoms remain at home. (*Id.* at 3). The court was unable to locate a substitute reporter. (*Id.* at 3). It also observed that severe cold weather, which ordinarily would not interfere with its trial procedures, weighed together with the COVID-19 issues to create conditions that might result in a mistrial. (*Id.* at 3-4). The court explained that it would coordinate with the parties to reschedule the trial. (*Id.* at 4-6). Counsel for Vlahos stated that he did not have any objections to this continuance, noting

that although the parties "wanted to get this over with," he understood the circumstances. (*Id.* at 5). The court rescheduled trial for April 28, 2021. (*See* R. at 187).

On February 22, 2021, Vlahos's trial counsel moved for a second competency evaluation. (R. at 192-93). The same day, the district court suspended proceedings for another outpatient competency evaluation. (*Id.* at 194-97). In a report filed on April 23, 2021, Dr. Atiles again found Vlahos competent. (R. at 201-14 (confidential file)).

In an order filed on April 29, 2021, the district court set a competency hearing to occur on May 13, 2021, at which the State subpoenaed Dr. Atiles to testify. (R. at 215-16). On May 11, 2021, before the competency hearing, the district court set a new trial date of June 14, 2021.[3] (R. at 239; *see* May 13, 2021 Competency Hr'g Tr. at 30-32). The district court stacked Vlahos's trial behind another case, where the other defendant's last name was "Mills." (R. at 239). The Mills trial was set for five days, to begin on Monday, June 14, 2021, while Vlahos's trial was set that week for three days, stacked second. (*Id.*).

On May 12, 2021, still before the competency hearing, Vlahos filed a motion to continue the jury trial after June 14, 2021, to which the State did not object. (R. at 234-35).

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[3] The district court set this trial date in a letter to counsel that was dated on May 11, 2021. (R. at 239). This letter was not filed into the record until May 14, 2021. (*Id.*). However, it is clear that Vlahos's counsel received this letter on May 11 or May 12 because Vlahos's counsel filed a motion to amend this setting on May 12 and discussed it at a May 13 hearing. (*Id.* at 234-35; May 13, 2021 Competency Hr'g Tr. at 31-32).

Vlahos's counsel was scheduled to attend a medical appointment in Denver on this date and argued it was "in the best interest of justice to continue th[e] matter." (*Id.*).

After Dr. Atiles testified at the May 13, 2021 competency hearing, the district court permitted the matter to proceed to trial. (May 13, 2021 Competency Hr'g Tr. at 9-32). Regarding its trial setting, the district court noted that, as of the hearing, Vlahos's case was "set two for June 14, behind Mills;" the court added that the Mills "case may not go." (*Id.* at 30-31). Vlahos's attorney explained his pending motion to continue was because he intended to travel with his wife to a medical checkup in Denver the week of June 14, 2021. (*Id.* at 31-32). The court noted that it would review the motion, but it also stated on the record that Vlahos's "case has been on the eve of trial any of a number of times, and trust me when I tell you, I want to get this case tried. I set aside five days to get this done and one way or another, come hell or high water, I'm going to get this case done." (*Id.*).

Later that day, May 13, 2021, the district court granted Vlahos's motion for counsel to travel for medical reasons, but this order explained that the date of trial would be set in a forthcoming order. (R. at 236). On June 14, 2021, the court issued an additional trial setting, rescheduling Vlahos's trial for July 12, 2021. (R. at 246).

On July 2, 2021, Vlahos's defense counsel filed a motion to relieve the public defender. (*Id.* at 258-59). Counsel explained that Vlahos continued to demand that counsel present evidence at the trial that would have no relevance or merit to the case. (*Id.*). Vlahos also submitted a pro se filing requesting to proceed without counsel. (*Id.* at 316-18).

On July 9, 2021, the district court held a hearing to evaluate the merits of counsel's motion to be relieved from representation. (Mot. to Relieve the Public Defender Hr'g Tr.

at 5-35). The public defender explained that he sought to be relieved from representing Vlahos because Vlahos insisted on submitting proposed exhibits, namely Walmart receipts, that counsel's investigation showed to be irrelevant to the case. (*Id.* at 5-9). In an order issued on July 9, 2021, the district court granted the motion to relieve the public defender. (R. at 359-60).

Also on July 9, 2021, Vlahos filed a pro se request to continue the trial. (*Id.* at 319). He claimed he needed time to prepare for trial. (*Id.* at 319). The court denied Vlahos's request that day and informed Vlahos that the trial would begin on July 12, 2021, as scheduled. (*Id.* at 361). The jury trial began on July 12, 2021, with Vlahos appearing pro se and without assistance from standby counsel. (Trial Tr. Day 1 at 1, 37-38, 92).

B. Juror Exposure to Vlahos's Out-of-Court Comments

At the outset of the second day of the jury trial, the State raised an issue with the district court before the jury entered the courtroom. (Trial Tr. Day 2 at 4-9). The State explained that the issue arose from social media posts by Vlahos:

> Apparently, there was a video, a 40-minute video, that was posted on Facebook last night on Mr. Vlahos's page. I'm concerned that it may have caused a mistrial. When my witness[] became aware of it, because she is specifically named in it, and I don't know if the jury, of their own volition or because someone else knew that they were on the jury, provided that information to them. So, I -- I think we need to inquire with regard to each juror if they've been aware -- become aware of Mr. Vlahos's 40-minute diatribe regarding the process of this case.

(*Id.* at 4).

Vlahos stated that he made a video that explained the happenings of the first day of trial. (*Id.* at 5). Vlahos claimed that his brother posted the video to Facebook. (*Id.* at 5-6).

The State questioned Vlahos's explanation for a number of reasons: the video appeared to have been posted using Vlahos's own name and Vlahos's significant other had replied to the video as if she was responding directly to him. (*Id.* at 6-7).

After the jury reentered the courtroom, the district court asked the jurors if any of them had "seen any broadcasts or any social media postings pertaining to these -- this trial, this ongoing case, anyplace; newspaper, television, radio, particularly the internet[.]" (*Id.* at 10). One juror, Juror O.H., raised his hand in response to the court's question. (*Id.*). The court then excused the other jurors to question Juror O.H. about what he had seen:

> [Court:] Please, sir, tell us what you saw.
>
> Juror [O.H.]: Just the description of the receipts and that, just a description of what was going on a little bit. I didn't watch the whole thing. I mean, I didn't -- it just popped up on my web thing. I'm usually on there looking for car parts and stuff like that to buy, and it just popped up.
>
> []Court: And what was it?
>
> Juror [O.H.]: It was -- it was on the -- I think it was Gillette Classified, I think it was.
>
> []Court: All right. Was it a broadcast or just a news blurb? What was it?
>
> Juror [O.H.]: I think it was a broadcast or -- broadcast -- I'm sorry.
>
> []Court: All right. And -- and tell me exactly -- did you see the defendant? Did you see somebody else? What did you see?
>
> Juror [O.H.]: It was the defendant on there. He's just describing his receipts and that, just saying he was innocent all that, is what he was saying on that. I didn't -- it didn't bother me, I didn't watch the whole thing, I just --
>
> []Court: How much of it did you watch?

Juror [O.H.]: Probably a couple of minutes. It just -- it turned up, I seen that and thought -- and I shut it off and looked at something else.

(*Id.* at 11-12).

The State and the district court then questioned Juror O.H.'s ability to remain impartial and decide the case only on the admitted evidence:

[The State]: Your observation of that video, could you -- since it wasn't in a courtroom, and pursuant to Criminal Rules of Procedure, can you set that information aside and if specifically told to disregard it, could you only weigh what's in the courtroom here today, what you heard yesterday, and what you may continue to hear and just consider that when you render a verdict?

Juror [O.H.]: Yes.

[]Court: Mr. Vlahos, any questions?

Mr. Vlahos: No, Your honor.

[]Court: All right. Sir, let me ask one more time, and I realize these things happen from time to time, I need to make a record. And I very much appreciate the fact that you were forthright , that you told me this happened and, again, just - - just to satisfy myself, would you be able to set that aside, totally disregard it and decide this case solely on the facts that you see and hear in the courtroom?

Juror [O.H.]: Yes.

(*Id.* at 12-13). After this, the district court proceeded with trial, with Juror O.H. remaining on the panel. (*Id.* at 13-14).

Before the Court's next recess, after the jury had left the courtroom, the State asked the district court to order the parties not to engage in any social media activity. (*Id.* at 41-42). The court ordered that no social media posts related to the case be deleted. (*Id.*).

When the district court returned from recess but before the jury entered, the State noted that the video post on Facebook had been deleted after the court's pre-recess order. (*Id.* at 44). The court noted that some court employees saw Vlahos use his phone during the recess. (*Id.* at 44-45). Vlahos denied deleting the video. (*Id.* at 44, 47-48). The State explained that Vlahos posted the video to the "Gillette Area Classified" Facebook page, and the video had 200 views counted before it was deleted. (*Id.* at 45-47).

C. Verdict and Sentencing

On July 13, 2021, the jury found Vlahos guilty of shoplifting and the district court remanded Vlahos into custody. (R. at 346; Trial Tr. Day 2 at 169). The court sentenced him to five to ten years of imprisonment and ordered restitution to Walmart. (R. at 438-40). At the September 29, 2021 sentencing, the district court gave Vlahos credit for eighty-five days of time served. (Sentencing Hr'g Tr. at 1, 22). This appeal followed. (R. at 454-55).

IV. Rulings Presented for Review

In his first issue on appeal, Vlahos alleges the district court violated his speedy trial rights. (Appellant's Br. at 15-34). Below, Vlahos made an initial written demand for speedy trial, but he never again engaged in any litigation that contested the district court's trial scheduling. (*See* R. at 32). Accordingly, the district court made no speedy trial ruling.

In his second issue on appeal, Vlahos argues that Juror O.H. should not have served on the panel because Juror O.H. saw Vlahos's video post on social media. (Appellant's Br. at 35-44; Trial Tr. Day 2 at 4-11). At trial, Vlahos did not object to Juror O.H. remaining on the panel. (Trial Tr. Day 2 at 13). Accordingly, this Court must decide this issue based on the questions to Juror O.H. from the district court and the State. (*Id.* at 12-13).

ARGUMENT

I. The district court did not violate Vlahos's speedy trial rights.

Vlahos argues that the district court denied him a speedy trial under the United States Constitution and Rule 48. (Appellant's Br. at 15-34). However, because each continuance was justified, the district court did not violate his Rule 48 right to a speedy trial. Additionally, a review under the *Barker* factors shows that the district court did not deprive Vlahos of his constitutional right to a speedy trial.

A. Standard of Review

This Court reviews Rule 48 and constitutional speedy trial claims de novo. *Rogers v. State*, 2021 WY 123, ¶ 17, 498 P.3d 66, 71 (Wyo. 2021) (citation omitted).

B. Throughout the pretrial proceedings, the district court never violated Rule 48.

Rule 48 requires that a defendant's trial begin within 180 days of arraignment. W.R.Cr.P. 48(b)(2); *see Castellanos v. State*, 2016 WY 11, ¶ 49, 366 P.3d 1279, 1295 (Wyo. 2016). The district court arraigned Vlahos on November 15, 2019. (Nov. 15, 2019 Arraignment Hr'g Tr. at 1, 28-30). Vlahos's trial began 605 days later, on July 12, 2021. (*Id.*; Trial Tr. Day 1 at 1, 92).

When a defendant's trial occurs outside Rule 48's 180-day window, two categories of delay are important in determining whether the charges must be dismissed in accordance with Rule 48(b)(5). The first category, under Rule 48(b)(3), excludes from the calculation:

> (A) All proceedings related to the mental illness or deficiency of the defendant;
>
> (B) Proceedings on another charge;

(C) The time between dismissal and the refiling of the same charge; and

(D) Delay occasioned by defendant's change of counsel or application therefor.

W.R.Cr.P. 48(b)(3)(A)-(D).

The second category, under Rule 48(b)(4), excuses delays beyond the 180-day limit if the delay is made:

(A) On motion of defendant;

(B) On motion of the attorney for the state or the court if:

(i) The defendant expressly consents;

(ii) The state's evidence is unavailable and the prosecution has exercised due diligence; or

(iii) Required in the due administration of justice and the defendant will not be substantially prejudiced[.]

W.R.Cr.P. 48(b)(4)(A)-(B). Under Rule 48, "[i]f a continuance is proposed by the state or the court, the defendant shall be notified. If the defendant objects, the defendant must show in writing how the delay may prejudice the defense." W.R.Cr.P. 48(b)(4)(C).

1. Every continuance the district court imposed complied with Rule 48.

None of the delays between Vlahos's arraignment and trial violated Rule 48(b). *See Castellanos*, ¶ 68, 366 P.3d at 1299. The following review of each time period shows why the district court did not violate Vlahos's Rule 48 right to a speedy trial.

a. District Court Period 1: November 15, 2019 to April 6, 2020

This period of time began with the district court's arraignment on November 15, 2019. (Nov. 15, 2019 Arraignment Hr'g Tr. at 1, 28-30). In an order issued shortly after

arraignment, the district court set trial to begin the week of April 6, 2020, stacked second. (R. at 45-46). Had Vlahos's trial occurred on April 6, 2020, it would have been 143 days after arraignment. (*Id.*; Nov. 15, 2019 Arraignment Hr'g Tr. at 1, 28-30). This initial trial setting thus complied with the 180-day limit set by Rule 48(b). *Castellanos*, ¶ 68, 366 P.3d at 1299. As discussed in the following sections, because "[t]he delays in commencing trial that occurred after that setting do not count against the 180-day limit, [Vlahos] was therefore brought to trial within the time specified by Rule 48(b)." *Id.*

b. District Court Period 2: April 6, 2020 to June 1, 2020

This time period began with the district court's initially-scheduled April 6, 2020 trial date. (R. at 45-46). No trial began on this day. Instead, the record shows that two days later, April 8, 2020, the district court reset Vlahos's trial for June 1, 2020. (*Id.* at 103).

This time period coincided with the onset of the COVID-19 pandemic. This Court issued orders recommending trial courts make "[r]easonable attempts … to reschedule all criminal trials, subject to the requirement that defendants be provided speedy trials as required by law." *Order Adopting Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic*, at *2 (Wyo. Mar. 18, 2020)[4]; *Order Amending and Extending March 18, 2020 Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic*, at *2 (Wyo. Apr. 1, 2020); *Second Order Amending March 18, 2020 Temporary Plan to*

[4] *See* https://www.courts.state.wy.us/coronavirus-covid-19-updates/ for this Court's COVID-19 orders.

Address Health Risks Posed by the COVID-19 Pandemic, at * 2 (Wyo. Apr. 30, 2020). On May 15, 2020, the order was again updated, recommending no jury trials take place until August 3, 2020. *Third Order Amending March 18, 2020 Temporary Plan to Address Health Risks Posed by the COVID-19 Pandemic*, at *1-2 (Wyo. May 15, 2020).

In line with this Court's guidance, the district court took proactive steps to protect against potential COVID-19 spread that could arise from holding a jury trial. *See General Order Vacating All Jury Trials Set to Begin before May 1, 2020* (*General Order 2020-04*), No. 2020-04 (Wyo. Dist. Ct. Mar. 19, 2020).[5] In its general order, the district court noted that "[o]n March 19, 2020, [it] received a request by the Office of the Wyoming State Public Defender that the Court suspend all jury trial scheduled to begin during March and April, 2020." *Id.* at *1. The district court granted this request from the State Public Defender and vacated all jury trials scheduled for March and April 2020. *Id.* at *2-3. The order vacating jury trials included language that it would "remain in effect until May 1, 2020, unless otherwise extended by the Court." *Id.* at *3.

Arguably, the record remains unclear about how the parties knew the district court was not going to hold Vlahos's trial on April 6, 2020. (*See* R. at 45-46, 103). However, even though it was not copied and entered into the record, the district court's general order makes clear that it did not hold Vlahos's trial on April 6, 2020, because the Office of the Public Defender requested that all trials be vacated during that timeframe. *General Order*

[5]https://www.courts.state.wy.us/wp-content/uploads/2020/03/General-Order-2020-04.pdf.

2020-04, at *1-2. Vlahos was represented by the Office of the Public Defender during this timeframe. (*See* R. at 96-97, 108). Accordingly, this request to vacate Vlahos's trial beyond the April 6, 2020 date, to June 1, 2020, constitutes grounds to satisfy Rule 48(b)(4)(A) as a delay "[o]n motion of defendant[.]" *General Order 2020-04*, at *1-3; W.R.Cr.P. 48(b)(4)(A). This Court could also view this continuance as the "defendant['s] express[] consent" under Rule 48(b)(4)(B)(i). W.R.Cr.P. 48(b)(4)(B)(i).

c. District Court Period 3: June 1, 2020 to June 8, 2020

This time period began on Vlahos's previously-scheduled trial date, which was set to begin on June 1, 2020. (R. at 103). Despite the pending trial, Vlahos filed a pro se motion for a hearing on May 22, 2020. (*Id.* at 104-07). The district court replied with an email to counsel on May 27, 2020, asking how the parties desired to proceed. (*Id.* at 108). Although the record does not contain the parties' replies to the district court, the State soon filed a competency motion on June 3, 2020. (*Id.* at 109-14). This period of time ended on June 8, 2020, when the court stayed the case to evaluate Vlahos's competency. (R. at 115-18).

The record arguably is unclear about how the parties knew the district court was not going to hold Vlahos's trial on June 1, 2020. Although the district court's general order implied that the court might extend it, it does not appear that this order was ever formally extended beyond May 1, 2020. *See General Order 2020-04*, at *1-3. It is clear that the district court did not hold jury trials in May or June 2020. In its May 27, 2020 COVID-19 operating plan, the district court proposed to resume some in-person hearings on June 1, 2020, but noted that this start date did not include resuming jury trials. *See COVID-19*

Operating Plan, at *1 (Wyo. Dist. May 27, 2020).[6] The district court explained that "[j]ury [t]rials shall not be held until a COVID-19 Jury Trial Operating Plan is submitted to the Wyoming Supreme Court. The Wyoming Supreme Court will issue further guidance on jury trial proceedings at a later date." *Id.* at *1. Thus, when the district court did not hold jury trials in May and June 2020, it likely acted on its authority under the due administration of justice, in line with this Court's guidance, rather than from additional requests from the Office of the Public Defender. *Compare id.*, *with General Order 2020-04*, at *1-3.

The record also shows that the district court engaged in frequent communications with counsel via email. (*See* R. at 108, 153, 351-58, 361-65). One of the district court's emails to the parties tends to explain why the trial did not begin on June 1, 2020; the record includes the court's May 27, 2020 email, but the parties' responses are not in the record. (*See id.* at 108). After this email, the State soon filed a motion for a competency stay that specifically cited Vlahos's pro se filing as grounds for the evaluation. (*Id.* at 109-14). Thus, it is fair to infer that the district court did not hold a trial on June 1, 2020, because it expected to receive and grant a motion to evaluate Vlahos's competency, as well as with the ongoing COVID-19 guidance from this Court. (*See id.* at 108, 109-14).

For four reasons, the State has not sought to supplement the record on appeal to determine exactly how the court communicated this continuance to the parties, despite Rule

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[6]https://www.courts.state.wy.us/wp-content/uploads/2020/05/Campbell-Co.-Covid-19-Operating-Plan.pdf.

48's mandatory consequence of dismissal for speedy trial violations. *See* Wyo. R. App. P. 3.04; W.R.Cr.P. 48(b)(5). First, the record shows that Vlahos never filed a written objection, a point which Vlahos concedes on appeal. (*See* Appellant's Br. at 18); *see* W.R.Cr.P. 48(b)(4)(C) (requiring a defendant objecting to "show in writing how the delay may prejudice the defense"). Second, the impact of the COVID-19 pandemic obviously remained omnipresent on June 1, 2020; had the district court actually held a jury trial then, the court would have contravened this Court's guidance and been an extreme outlier for the entire country. *See COVID-19 Operating Plan*, at *1. Third, the district court's email tends to show that, even if the COVID-19 situation was not present, it could not have held a trial because it had information before it that Vlahos may have been incompetent. (*See* R. at 108, 109-14). Fourth, if this Court has additional concerns with the arguable gap in the record for how this continuance came about, it may remand the matter to the district court to supplement the record on its own initiative. Wyo. R. App. P. 3.04.

Rule 48 allows a defendant's trial to take place outside the 180-day limit if it is in the due administration of justice and it will not substantially prejudice the defendant. W.R.Cr.P. 48(b)(4)(B)(iii). To the extent the delay for the June 1, 2020 trial date was caused by COVID-19 concerns, COVID-19 constitutes a reason for delay that was required in the due administration of justice. W.R.Cr.P. 48(b)(4)(B)(iii).

This Court has not squarely addressed whether COVID-19 can constitute a continuance that is "[r]equired in the due administration of justice and the defendant will not be substantially prejudiced[.]" *Id.* In *Cotney*, this Court did not reach whether COVID-19 delays were permissible under Rule 48 because the appellant did not invoke

the rule, but this Court weighed a COVID-19 delay neutrally under the constitutional analysis. *Cotney*, ¶¶ 18, 24, 503 P.3d at 65, 67. In *Rogers*, this Court did not analyze the propriety of a COVID-19 extension under Rule 48 because the defendant did not object below. *Rogers*, ¶ 24, 498 P.3d at 72. However, a number of other courts have squarely held that decisions not to hold public jury trials during COVID-19 provided sufficient cause for continuances under similar speedy trial statutes. *See, e.g.*, *United States v. Olsen*, 21 F.4th 1036, 1040-41, 1046-49 (9th Cir. 2022) (finding "ends of justice" continuance under 18 U.S.C. § 3161(h)(7)(A) met because "surely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health"); *State v. Brown*, 964 N.W.2d 682, 688-92 (Neb. 2021) (affirming finding that COVID-19 constituted a "good cause" delay under Neb. Rev. Stat. § 29-1207(4)(f)).

Moreover, as evidenced by the district court's email, trial likely did not occur on June 1, 2020, because the court expected to receive the State's request for a competency evaluation. (R. at 108). Such a continuance is necessary and excluded. *See Castellanos*, ¶¶ 53-59, 366 P.3d at 1295-97 (applying W.R.Cr.P. 48(b)(3)(A)). Even without a formal motion pending before it from the parties, a court cannot proceed with trial if there is any reason before it to question the defendant's competency to stand trial. *See id.* ¶ 55, 366 P.3d at 1296; *see also Merlak v. State*, 2021 WY 95, ¶ 15, 493 P.3d 187, 192 (Wyo. 2021), *overruled in part on other grounds by Snyder v. State*, 2021 WY 108, 496 P.3d 1239 (Wyo. 2021).

Although Vlahos does not cite to this Court's opinion in *Osban v. State*, the record does not show the district court violated the principle from *Osban* by not commencing Vlahos's trial on June 1, 2020. (*See generally* Appellant's Br.); *Osban v. State*, 2019 WY 43, 439 P.3d 739 (Wyo. 2019). In *Osban*, this Court required that a trial court must "wait for the defendant's response before ordering a continuance in the 'due administration of justice'" under Rule 48(b). *Osban,* ¶¶ 15-16, 439 P.3d at 743-44. The overwhelming control that COVID-19 maintained over every aspect of life in June 2020 was such that it is unthinkable that the district court would not have informed counsel of the obvious situation: the court could not hold Vlahos's trial as scheduled. *Id.*; *see Olsen*, 21 F.4th at 1040-49. This Court's and the district court's COVID-19 orders and plans remained readily available for Vlahos's counsel to file an objection to a COVID-19 delay. *COVID-19 Operating Plan*, at *1; W.R.Cr.P. 48(b)(4)(C). However, as the district court's email shows, it is more likely that no trial occurred on June 1, 2020, because the court expected a competency evaluation motion, which the State filed a few days later. (R. at 108, 109-14).

A fair reading of the record shows that this week of delay, from the trial date of June 1, 2020 to the June 8, 2020 competency stay, was caused by a potential competency issue, in addition to COVID-19. These reasons are valid under Rule 48. W.R.Cr.P. 48(b)(3)(A), (b)(4)(B)(iii). To the extent this Court finds the record unclear, the State requests that this Court not impose the "harsh result" of dismissal with prejudice based on this short period of time until it orders the record be supplemented to fully ascertain (1) why no trial occurred on June 1, 2020 and (2) Vlahos's responses to the proposed delay, if any. *See Carabajal v. State*, 2020 WY 104, ¶ 43, 469 P.3d 389, 401 (Wyo. 2020); Wyo. R. App. P. 3.04.

d. District Court Period 4: June 8, 2020 to September 8, 2020

This period began on June 8, 2021, with the district court's order issuing a stay of the proceedings for Vlahos to receive a competency evaluation. (R. at 115-18). This period ended on September 8, 2020, when the district court accepted Dr. Atiles's finding that Vlahos was competent to proceed. (Sept. 8, 2020 Competency Hr'g Tr. at 2-3). This period of time is excluded from the Rule 48 calculation. W.R.Cr.P. 48(b)(3)(A).

e. District Court Period 5: September 8, 2020 to February 8, 2021

This period of time represents the time it took from the end of the competency suspension, September 8, 2020, to when the district court was able to place Vlahos's trial back on its calendar, set for February 8, 2021. (Sept. 8, 2020 Competency Hr'g Tr. at 2-3; R. at 148). "As a practical matter, a trial cannot be set to begin the moment a suspension of proceedings is lifted." *Castellanos*, ¶ 65, 366 P.3d at 1298. This Court has held that such post-competency re-setting of cases on a calendar are made in the due administration of justice and do not count against the 180-day deadline. *Id.* ¶ 66, 366 P.3d at 1298 (finding no error in a similar delay lasting over five months). Coincidentally, the delay in placing Vlahos's trial back on the calendar also lasted about five months, and thus, did not violate Rule 48. *Id.*; (Sept. 8, 2020 Competency Hr'g Tr. at 2-3; R. at 148).

f. District Court Period 6: February 8, 2021 to February 22, 2021

This period began on February 8, 2021, when the district court continued trial because its court reporter was experiencing symptoms consistent with COVID-19. (Trial Continuance Hr'g Tr. at 2-6). Although the court reset Vlahos's trial for April 28, 2021,

this period was cut short on February 22, 2021, when the court granted the request from Vlahos's counsel for a second competency evaluation. (R. at 192-93, 194-97).

This continuance was properly granted under Rule 48(b)(4)(B)(i) because Vlahos's counsel consented to the continuance given the situation. (Trial Continuance Hr'g Tr. at 5); W.R.Cr.P. 48(b)(4)(B)(i). This continuance was also required in the due administration of justice under Rule 48(b)(4)(B)(iii) because the district court did not want to require the court reporter to attend and risk potential COVID-19 spread, and no other court reporter was available. (Trial Continuance Hr'g Tr. at 2-6); W.R.Cr.P. 48(b)(4)(B)(iii). This Court should evaluate the district court's hesitance to require his court reporter to attend the trial after a negative test, despite experiencing COVID-19 symptoms, under "the COVID-19 pandemic circumstances and conditions that existed at the time the continuances were ordered." *Brown*, 964 N.W.2d at 692 (citation omitted). Thus, where the district court was aware of the potential false negatives involved with COVID-19 testing at the time, this Court should not find the district court erred. *Id.*; *see also State v. Billingsley*, 961 N.W.2d 539, 543-44 (Neb. 2021) (finding no statutory speedy trial violation where part of delays were caused by the prosecutor testing positive for COVID-19); *Glover v. State*, 557 P.2d 922, 926 (Okla. Crim. App. 1976) (finding no constitutional speedy trial violation where, among other continuances, a "preliminary hearing was continued once due to illness of the prosecutor, [and] once due to the unavailability of a court reporter"); (Trial Continuance Hr'g Tr. at 2-6).

g. District Court Period 7: February 22, 2021 to May 13, 2021

This period lasted from the February 22, 2021 competency evaluation stay order to the May 13, 2021 competency hearing. (R. at 192-93, 194-97; May 13, 2021 Competency Hr'g Tr. at 30-32). This period of time is excluded under Rule 48. W.R.Cr.P. 48(b)(3)(A).

h. District Court Period 8: May 13, 2021 to June 14, 2021

This period began when the district court found Vlahos competent to proceed on May 13, 2021. (May 13, 2021 Competency Hr'g Tr. at 30-32). Even before the hearing occurred, the district court had set another trial date: June 14, 2021. (R. at 239). This period of time is excluded under Rule 48(b)(3)(A) because the district court needed time to place Vlahos's case back on its calendar. *Castellanos*, ¶¶ 65-66, 366 P.3d at 1298.

i. District Court Period 9: June 14, 2021 to July 12, 2021

This final period of delay began with the district court's trial setting on June 14, 2021. (R. at 239). Vlahos's counsel sought a continuance of this date for medical travel. (R. at 234-35; May 13, 2021 Competency Hr'g Tr. at 31-32). The court granted this continuance. (R. at 236). It set a trial date for July 12, 2021. (*Id.* at 246). Vlahos's trial began on July 12, 2021. (*See* Trial Tr. Day 1 at 1, 37-38, 92). This final continuance was permissible because it was made on Vlahos's motion. W.R.Cr.P. 48(b)(4)(A). "Because an attorney 'is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is also charged against the defendant.'" *Castellanos*, ¶ 73, 366 P.3d at 1300 (quoting *Vermont v. Brillon*, 556 U.S. 81, 91 (2009)).

Vlahos takes specific issue with this continuance. (Appellant's Br. at 22, 25). He argues that the district court prejudiced him by stacking his June 14, 2021 trial second,

behind the Mills trial. (*Id.*; *see* R. at 239). Vlahos speculates that, had his attorney not moved for a delay, the Mills trial would have delayed his case. However, it was Vlahos's attorney's motion that delayed his trial until after June 14, 2021. (R. at 234-35). Rule 48 evaluates the continuances that do occur, rather than hypothetical scheduling decisions that later become moot, and Vlahos cites no precedent to the contrary. *See* W.R.Cr.P. 48.

Even if this Court were to speculate about whether the district court's stacking Vlahos's case second would have delayed the trial, the district court noted in a hearing that it adamantly intended to hold both Vlahos's trial and the Mills trial in the week of June 14, 2021, where it scheduled five days to address both. (May 13, 2021 Competency Hr'g Tr. at 31-32). Even if a delay had occurred, this Court has repeatedly held that a crowded docket can justify a continuance. (R. at 45-46, 103); *see Vargas v. State*, 2014 WY 53, ¶ 9, 322 P.3d 1282, 1284 (Wyo. 2014) (citation omitted); *Vlahos v. State*, 2003 WY 103, ¶ 21, 75 P.3d 628, 634 (Wyo. 2003) (noting that a second continuance was appropriate for the due administration of justice where a trial setting "was a stacked setting, and one of the other cases was tried on that date"). Ultimately, the two-month turnaround from the end of the competency stay on May 13, 2021 to trial on July 12, 2021 was swift and permissible under Rule 48. *Castellanos*, ¶¶ 65-66, 366 P.3d at 1298; W.R.Cr.P. 48(b)(3)(A), (b)(4)(A).

2. Vlahos's general argument for why the delays prejudiced him under Rule 48 lacks merit.

In attempt to establish substantial prejudice under Rule 48(b)(4)(B)(iii), Vlahos argues that the district court prejudiced him by denying his pro se request to continue the trial after the court relieved his public defender. (Appellant's Br. at 23-26). He focuses on

the fact that, because the district court did not grant his pro se continuance, he was precluded from calling additional witnesses and presenting additional evidence. (*Id.*).

At the outset, this Court should decline to consider Vlahos's argument because it is not a cogent speedy trial claim supported by citation to case law. *Dahl v. State*, 2020 WY 59, ¶ 25 n.4, 462 P.3d 912, 917 n.4 (Wyo. 2020) (citations omitted) (noting that this Court declines to consider a claim without "cogent argument or pertinent authority to support it"). Instead, it presents the opposite contention, namely that the district court should have further delayed the trial to give him more time to prepare. *Id.*; (Appellant's Br. at 23-26).

If considered, this argument would properly be made under a separate issue which Vlahos has not raised: a claim that the district court abused its discretion by denying his pro se continuance motion. *See Pickering*, ¶¶ 77-82, 464 P.3d at 259-60. Here, the record shows that the district court's decision not to grant the continuance was reasonable. *Id.* ¶ 78, 464 P.3d at 259-60. Vlahos's counsel sought to be relieved from representation because Vlahos demanded he introduce irrelevant evidence. (Mot. to Relieve the Public Defender Hr'g Tr. at 5-35). At trial, Vlahos attempted to use this evidence, which the district court rejected because it found that Vlahos likely fabricated the proffered receipts. (Trial Tr. Day 2 at 66-95). Additional time for Vlahos to prepare similarly meritless evidence would not have been warranted. The district court properly denied this continuance. (R. at 361); *Pickering*, ¶¶ 77-82, 464 P.3d at 259-60.

In sum, although substantial time elapsed from the November 2019 arraignment and the July 2021 trial, all delays were the result of COVID-19, competency evaluations, or the actions of Vlahos's attorneys. All of these delays were either excludable from the 180-day

calculation under Rule 48(b)(3) or were justified in exceeding the 180-day limit under Rule 48(b)(4). None of these delays show any period of time where the district court was inattentive to Vlahos's case or "acted with[out] due regard for Rule 48's requirements." *Castellanos*, ¶¶ 63-64, 366 P.3d at 1298 (collecting and comparing cases). Consequently, the district court did not violate Vlahos's right to a speedy trial under Rule 48.

B. The district court did not violate Vlahos's constitutional right to a speedy trial.

Vlahos also invokes his constitutional speedy trial right. (Appellant's Br. at 26-34). In evaluating constitutional speedy trial claims under both the United States and Wyoming Constitutions, this Court applies the four factors outlined by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). *Cotney*, ¶ 19, 503 P.3d at 65-66. These four factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) the prejudice to the defendant. *Id.* (citation omitted).

1. The length of the delay is sufficient to review the other three *Barker* factors.

The constitutional speedy trial clock begins at the time of arrest, information, or indictment, whichever occurs first. *Id.* ¶ 20, 503 P.3d at 66. The constitutional clock "continues until the defendant is convicted, acquitted or a formal entry is made on the record of his case that he is no longer under indictment." *Id.* Although no "precise length of delay" automatically constitutes a constitutional violation, as a threshold, a "delay of over 365 days presumptively triggers review of the remaining *Barker* factors." *Id.*

The State filed charges before Vlahos's arrest, and thus, the constitutional clock begins on the date of filing, October 25, 2019. *Id.*; (R. at 22-23). The jury convicted Vlahos

on July 13, 2021. (*Id.* at 346). Thus, the constitutional speedy trial clock in this case is 627 days. (*Id.* at 22-23, 346). This length exceeds 365 days, and therefore, this Court should consider the other three *Barker* factors. *Cotney*, ¶ 20, 503 P.3d at 66.

2. The reasons for all delays are neutral or weigh against the defendant under *Barker*.

This Court weighs delays attributable to the State against those caused by the defendant. *Cotney*, ¶ 21, 503 P.3d at 66 (citation omitted). "Any delay caused by the defendant's counsel is also charged against the defendant." *Id.* Delays attributable to factors such as overcrowded courts and their schedules are more neutral reasons for delay and are not weighed heavily against the State. *Id.* A delay attributable to a competency evaluation is neutral. *Castellanos*, ¶ 72, 366 P.3d at 1300 (citation omitted). Where the *Barker* test attributes differing weights to the reasons for the delay, this Court reviews what caused the specific periods of delay. *Barker*, 407 U.S. at 531; *see Cotney*, ¶¶ 22-24, 503 P.3d at 66-67; *Castellanos*, ¶¶ 75-86, 366 P.3d at 1300-02.

a. Circuit Court Period: October 25, 2019 to November 15, 2019

In a span of three weeks, from October 25, 2019 to November 15, 2019, the State filed the charge, Vlahos was arrested, the circuit court bound the charge over, and the district court held arraignment. (R. at 3, 6, 13-14, 22-23; Nov. 15, 2019 Arraignment Hr'g Tr. at 1, 28-30). This prompt process was "reasonable and necessary[,]" thus constituting a neutral reason for delay. *Cotney*, ¶¶ 22-24, 503 P.3d at 66-67 (citation omitted).

b. District Court Period 1: November 15, 2019 to April 6, 2020

This span covers arraignment to the initial trial date. (Nov. 15, 2019 Arraignment Hr'g Tr. at 1; R. at 45-46). The district court set this trial date within a reasonable amount of time after arraignment, and thus, it is neutral. *See Cotney*, ¶¶ 19-21, 503 P.3d at 65-66.

c. District Court Period 2: April 6, 2020 to June 1, 2020

This period of time begins on April 6, 2020, when no trial occurred, and ends on June 1, 2020, the district court's second trial date. (R. at 45-46, 103). As discussed above, the district court did not hold trial on April 6, 2020, because of COVID-19, which is weighted neutrally. *General Order 2020-04*, at *1-3; *Cotney*, ¶ 24, 503 P.3d at 67. Also, because the Office of the Public Defender requested this COVID-19 delay, this Court could weigh it against Vlahos. *General Order 2020-04*, at *1-3; *see Cotney*, ¶ 21, 503 P.3d at 66.

d. District Court Period 3: June 1, 2020 to June 8, 2020

This brief time period began on the scheduled trial date of June 1, 2020, and ended June 8, 2020, when the court stayed the case for a competency evaluation. (R. at 103, 115-18). Again, the district court could not hold a trial on June 1, 2020, due to COVID-19, which makes this delay neutral. *Cotney*, ¶ 24, 503 P.3d at 67; *see COVID-19 Operating Plan*, at *1. Moreover, it also likely did not hold a trial on June 1, 2020, because Vlahos's pro se filing raised questions about his competency to proceed, which is also neutral. (*See* R. at 104-09); *Cotney*, ¶ 23, 503 P.3d at 67; *Castellanos*, ¶¶ 81-85, 366 P.3d at 1301-02.

e. District Court Period 4: June 8, 2020 to September 8, 2020

This delay, lasting from June 8, 2020 to September 8, 2020, constitutes the district court's first suspension of proceedings for a competency evaluation. (R. at 115-18; Sept.

8, 2020 Competency Hr'g Tr. at 2-3). This Court weighs delays for competency evaluations neutrally. *Cotney*, ¶ 23, 503 P.3d at 67; *Castellanos*, ¶¶ 81-85, 366 P.3d at 1301-02.

f. District Court Period 5: September 8, 2020 to February 8, 2021

This period of time represents the time from when the district court ended the competency stay to the date when it was able to place the case back on its trial calendar. (Sept. 8, 2020 Competency Hr'g Tr. at 2-3; R. at 148). Like other neutral categories, this delay is "assigned to the State but not weighted heavily." *Castellanos*, ¶ 85, 336 P.3d at 1302; *see Cotney*, ¶ 21, 503 P.3d at 66 (citation omitted) (defining "more neutral reasons for delay" as delays that "should not be weighed as heavily against the State").

g. District Court Period 6: February 8, 2021 to February 22, 2021

This short period began on February 8, 2021, when the district court continued the trial because its court reporter was experiencing symptoms consistent with COVID-19; it ended on February 22, 2021, when the court issued another competency stay at the request of Vlahos's counsel. (Trial Continuance Hr'g Tr. at 2-6; R. at 192-93, 194-97). This Court has held that general delays in jury trials due to COVID-19 are weighed neutrally. *See Cotney*, ¶ 24, 503 P.3d at 67. It should extend this concept to the specific situation presented here: where a necessary court personnel member could have placed the parties, jury, and public at risk of COVID-19 spread, and no other court reporter was available. *See id.*; *see also Glover*, 557 P.2d at 926. Again, evaluating the delay under COVID-19 conditions that existed at the time the continuances were ordered, it would have been dangerous to require the court reporter to attend. *Brown*, 964 N.W.2d at 692.

h. District Court Period 7: February 22, 2021 to May 13, 2021

This period constitutes the district court's second competency stay. (R. at 194-97; May 13, 2021 Competency Hr'g Tr. at 30-32). This delay is neutral under *Barker*. *Cotney*, ¶ 23, 503 P.3d at 67; *Castellanos*, ¶¶ 81-85, 366 P.3d at 1301-02.

i. District Court Period 8: May 13, 2021 to June 14, 2021

This timeframe constitutes the time from the district court's second competency hearing on May 13, 2021, to June 14, 2021, when the court rescheduled Vlahos's trial. (May 13, 2021 Competency Hr'g Tr. at 30-32; R. at 239). This delay is neutral. *Castellanos*, ¶ 85, 336 P.3d at 1302; *see Cotney*, ¶ 21, 503 P.3d at 66.

j. District Court Period 9: June 14, 2021 to July 13, 2021

This final delay was between the June 14, 2021 trial date, when no trial occurred, to the July 13, 2021 guilty verdict. (R. at 239, Trial Tr. Day 1 at 1, 37-38, 92; Trial Tr. Day 2 at 165-69). The district court granted a continuance at the request of Vlahos's counsel for counsel's out-of-state medical travel. (R. at 234-35, 236, 246; *see* May 13, 2021 Competency Hr'g Tr. at 31-32). "Any delay caused by the defendant's counsel is also charged against the defendant." *Cotney*, ¶ 21, 503 P.3d at 66 (citation omitted).

In sum, this final month of delay is attributable to Vlahos. *Id.* At worst, the other previous delays weigh neutrally because they were caused by COVID-19 or competency issues. *See id.* None of these delays weigh heavily against the State. *See id.*

3. Except for his initial filing, Vlahos never asserted his speedy trial right.

The third factor looks to a defendant's assertion of his speedy trial right. *Cotney*, ¶ 19, 503 P.3d at 65-66. "Although a defendant is not required to assert his right to a speedy trial, the vigor with which the defendant asserted his right is an important consideration in determining the reasonableness of any delay." *Id.* ¶ 26, 503 P.3d at 67 (citation omitted).

In a pretrial motion filed before his district court arraignment, Vlahos invoked the right to a speedy trial in writing. (R. at 32). Beyond this routine omnibus motion, neither Vlahos nor his counsel objected or opposed any of the district court's calendaring. To the contrary, Vlahos or his counsel repeatedly either agreed to or caused delays. The Office of the Public Defender requested the initial COVID-19 trial suspensions. *General Order 2020-04*, at *1-3. Vlahos's pro se motion for a hearing initiated his first competency evaluation. (R. at 104-18). Vlahos did not object to the continuance due to the potential COVID-19 concerns involving the court reporter. (Trial Continuance Hr'g Tr. at 5). His counsel initiated the second competency evaluation. (R. at 192-97). Vlahos's counsel moved to continue the trial beyond June 2021 due to a medical appointment. (*Id.* at 234-35). And the week before trial, after the district court granted the motion for Vlahos's counsel to be relieved, Vlahos moved pro se to further continue the trial. (R. at 319). Vlahos never asserted his speedy trial right against any of the delays with "vigor[;]" instead, he caused or acquiesced to these delays. *Cotney*, ¶ 26, 503 P.3d at 67 (citation omitted).

Vlahos contends that he asserted his speedy trial right throughout the proceeding by citing to his own statements he made to Dr. Atiles in his competency evaluations.

(Appellant's Br. at 31-32). Vlahos's argument on this point is undeveloped, and he cites to no case law holding that a defendant's statements in competency evaluations can demonstrate a defendant's speedy trial posture. (*Id.*); *see Dahl*, ¶ 25 n.4, 462 P.3d at 917 n.4. Thus, this Court should decline to consider it. *Dahl*, ¶ 25 n.4, 462 P.3d at 917 n.4.

Moreover, the record is clear that Vlahos's statements in his competency evaluations meant that he wanted to proceed with trial, whereas his trial counsel was recommending a plea agreement. (*See* R. at 143, 211-12 (confidential file)). Vlahos's expression of his desire to proceed with trial—and not plead guilty—has no relevance to his invocation of when that trial would happen. (*See id.*). Because Vlahos never objected or opposed the district court's scheduling delays, this *Barker* factor weighs against him. *Cotney*, ¶ 26, 503 P.3d at 67 (citation omitted).

4. The delay did not prejudice Vlahos.

In analyzing the fourth *Barker* factor, whether a defendant was prejudiced by a lack of speedy trial, this Court reviews for three forms of prejudice: "(1) lengthy pretrial incarceration; (2) pretrial anxiety; and[] (3) impairment of the defense." *Cotney*, ¶ 27, 503 P.3d at 67 (citation omitted). "Where, as here, the defendant claims prejudice, he has the burden to demonstrate and substantiate such prejudice." *Mathewson v. State*, 2019 WY 36, ¶ 65, 438 P.3d 189, 211 (Wyo. 2019) (citation omitted).

Before addressing the three forms of prejudice, the State addresses Vlahos's prejudice argument that does not fit into those three forms. (Appellant's Br. at 32-33). Vlahos cites to the competency evaluation reports to argue that two evaluations were a "waste of time" because he believed himself to be competent. (*Id.*). However, Vlahos

provides no case law holding that a defendant's personal belief that a competency evaluation is unnecessary constitutes prejudice under the constitutional speedy trial right. (*Id.*). Thus, this Court should not consider this argument. *See Dahl*, ¶ 25 n.4, 462 P.3d at 917 n.4. If this Court were to entertain this argument, subjecting courts to speedy trial second-guessing when a court orders competency evaluations, it would undermine the ability of courts to meet their continuing duty to monitor and evaluate competency, which requires even *sua sponte* evaluations when a defendant shows indicia of incompetence but subjectively believes he is competent. *See Merlak*, ¶ 15, 493 P.3d at 192.

Here, the district court granted two requests for competency evaluations, one from the State and one from Vlahos's trial counsel, because Vlahos's behavior showed he might not be competent. (R. at 109-18, 192-97). Although the ultimate conclusions from Dr. Atiles found Vlahos competent, her evaluations were not unequivocal, showing that the district court's ordering the evaluations were reasonable. (R. at 144 (confidential file); *see generally* May 13, 2021 Competency Hr'g Tr.). Speedy trial law conforms to a trial court's ongoing duty by weighing competency delays neutrally, thus permitting these evaluations to occur. *Id.*; *see Castellanos*, ¶ 72, 366 P.3d at 1300. For example, in *Hauck v State*, this Court found no constitutional speedy trial violation in a 607-day delay where it held "it was reasonable for the trial court to continue to find Hauck incompetent and suspend proceedings[.]" *Hauck v. State*, 2001 WY 119, ¶ 15, 36 P.3d 597, 601 (Wyo. 2001). Vlahos's personal beliefs about his own competence cannot show speedy trial prejudice.

a. Vlahos's pretrial incarceration lasted only six days.

Vlahos does not argue that any "lengthy pretrial incarceration" prejudiced him, and no such argument could succeed. *Cotney*, ¶ 27, 503 P.3d at 67 (citation omitted); (*see* Appellant's Br. at 32-34). The district court gave Vlahos credit for eighty-five days of time served, but the seventy-nine days of Vlahos's custody between the guilty verdict and sentencing do not apply to the *Barker* inquiry. (Sentencing Hr'g Tr. at 1, 22; Trial Tr. Day 2 at 169); *Betterman v. Montana*, 578 U.S. 437, 446-49 (2016). The record shows only six days of pretrial custody: two days for Vlahos's first arrest and release and four days for his arrest on a bond revocation warrant until the district court imposed a higher bond. (R. at 13-14, 18-19, 26, 29-30, 65, 72; Feb. 7, 2020 Arraignment Hr'g Tr. at 10).

b. Vlahos cannot demonstrate extraordinary or unusual pretrial anxiety.

"Pretrial anxiety is the factor of least significance, as there will always be a certain amount of pretrial anxiety in a criminal case. As a result, a defendant must demonstrate extraordinary or unusual pretrial anxiety." *Tate v. State*, 2016 WY 102, ¶ 39, 382 P.3d 762, 771 (Wyo. 2016) (citation omitted). Vlahos only cites to ordinary forms of pretrial anxiety: inability to provide for his family, restrictions on travel, and that "he also faced prosecution for other alleged crimes." (Appellant's Br. at 33-34). His family and travel-related claims are not "extraordinary or unusual" forms of anxiety. *Tate*, ¶ 39, 382 P.3d at 771. His other pending charges also do not rise to extraordinary or unusual pretrial anxiety. *See Crebs v. State*, 2020 WY 136, ¶ 48, 474 P.3d 1136, 1149 (Wyo. 2020).

c. No impairment of the defense arose from the delay.

"Impairment of the defense is the most important of [the three *Barker* prejudice] interests[.]" *Tate*, ¶ 39, 382 P.3d at 770-71 (citation omitted). Vlahos does not attempt to argue that these delays impaired his defense. (*See* Appellant's Br. at 32-34). Accordingly, Vlahos cannot show any prejudice under *Barker*.

5. A balancing of the *Barker* factors shows that the district court did not violate Vlahos's constitutional speedy trial right.

Because Vlahos has "failed to establish prejudice under the fourth factor, … the other three *Barker* factors **must weigh heavily** in his favor to establish a speedy trial violation." *Crebs*, ¶ 49, 474 P.3d at 1149 (citation omitted). Here, the other three factors do not weigh heavily in Vlahos's favor. *Id.* The State concedes that the first factor weighs in Vlahos's favor because the time duration from charging to conviction was 627 days, but this Court has approved similarly lengthy delays where multiple competency evaluations are at issue. (R. at 22-23, 346); *Hauck*, ¶ 15, 36 P.3d at 601 (affirming despite delay of 607 days). At worst, the delays in this case are neutral because all were caused by COVID-19, competency evaluations, or Vlahos's request for delay; thus, the second *Barker* factor does not weigh in Vlahos's favor. *Cotney*, ¶ 21, 503 P.3d at 66. The third *Barker* factor weighs against Vlahos because he never objected to any of the district court's continuances. *Id.* ¶ 26, 503 P.3d at 67. Vlahos cannot show prejudice under the fourth factor, and none of the other three *Barker* factors weigh heavily in his favor. *Crebs*, ¶ 49, 474 P.3d at 1149. Therefore, the "drastic remedy of dismissal with prejudice is not justified in this case[,]" and Vlahos's constitutional speedy trial claim fails. *Id.* (citation omitted).

II. Vlahos's claim about a juror viewing his statements on social media is waived, and alternatively, does not establish plain error.

Vlahos asserts that the district court should have excused Juror O.H. because Juror O.H. saw part of the video Vlahos posted on social media between the first and second days of his trial. (Appellant's Br. at 35-44). Contradictorily, in the same argument, Vlahos claims that the district court somehow prejudiced him by ordering Juror O.H. not to consider his out-of-court statements because, he contends, this caused Juror O.H. "to ignore Mr. Vlahos'[s] innocence[.]" (*Id.* at 42-44).

Because Vlahos did not object or ask the district court to remove Juror O.H., this Court should find this issue waived. If it does not find waiver, it should apply plain error to review this issue. The district court did not commit plain error when it permitted Juror O.H. to remain on the jury after seeing Vlahos's statements during the recess. Finally, this Court should not consider Vlahos's prejudice contention for lack of cogent argument and citation to pertinent authority.

A. Standard of Review

Ordinarily, when a criminal defendant objects below to the ability of a juror to serve on a panel, this Court applies an abuse of discretion review. *Castellanos*, ¶ 102, 366 P.3d at 1306. However, as discussed below, the State argues that this Court should apply waiver to this issue. *See Peña*, ¶ 50, 294 P.3d at 23.

If this Court does not apply waiver, it should apply plain error to this situation because Vlahos did not raise an objection below. *See Pickering*, ¶¶ 34-39, 464 P.3d at 250-51. To show plain error, an appellant must demonstrate (1) that the "record clearly

reflects the alleged error"; (2) that the alleged error is "a clear and obvious violation of a clear and unequivocal rule of law"; and (3) that the alleged error adversely affected the appellant's "substantial rights resulting in material prejudice." *Hicks v. State*, 2021 WY 2, ¶ 10, 478 P.3d 652, 657 (Wyo. 2021) (citation omitted).

B. Vlahos waived this issue by not objecting to the composition of the jury below.

This Court's case law imposes a strict requirement of issue preservation for questions about juror impropriety. *See Peña*, ¶¶ 45-53, 294 P.3d at 22-24. If juror "impropriety becomes known to a litigant or to his attorney during trial," and the "defendant or his counsel knows of potential impropriety in connection with the jury during trial, and fails to object before the return of the verdict, he waives any right to a new trial based on that impropriety." *Id.* ¶ 50, 294 P.3d at 23.

Vlahos declined the district court's offer of an opportunity to question Juror O.H. and did not object to him remaining on the jury panel, and nothing about his status as a pro se litigant removed him from the contemporaneous objection rule. (Trial Tr. Day 2 at 13). Because Vlahos did not object to Juror O.H.'s continued presence on the jury, "he waives any right to a new trial based on that [alleged] impropriety." (*Id.*); *Peña*, ¶ 50, 294 P.3d at 23. Nothing about this Court's decision in *Peña* absolves a criminal defendant from the duty to object merely because the State has raised the issue. *See id.* ¶¶ 45-53, 294 P.3d at 22-24; (Trial Tr. Day 2 at 4-14). Further, although Vlahos discusses *Peña* at length, he makes no attempt to argue why waiver should not apply to his claim. (*See* Appellant's Br.

at 40-41). Consequently, this Court should find this issue waived and decline to consider this issue. *Peña*, ¶ 50, 294 P.3d at 23.

C. No plain error occurred because the Juror O.H. was able to disregard Vlahos's video.

If this Court does not apply waiver to this claim, it should apply plain error review because Vlahos made no objection below. (Trial Tr. Day 2 at 13); *see Pickering*, ¶¶ 34-39, 464 P.3d at 250-51. Because Vlahos cannot bear his burden to establish all three prongs of plain error, his claim fails. *Hicks*, ¶ 10, 478 P.3d at 657.

1. The record is clear enough to show the district court should not have excused Juror O.H. *sua sponte*.

The first prong of plain error requires an appellant to show that the "record clearly reflects the alleged error[.]" *Id.* (citation omitted). Here, the State concedes that the trial transcript is sufficiently clear to show that the district court made no error on the basis of the facts before it. *Id.*

2. Vlahos cannot show a clear and obvious violation of a clear and unequivocal rule of law.

Under the second prong of its plain error analysis, this Court evaluates whether the alleged error is "a clear and obvious violation of a clear and unequivocal rule of law[.]" *Hicks*, ¶ 10, 478 P.3d at 657 (citation omitted). Although this Court's case law on jurors viewing materials outside of the courtroom is generally "clear and unequivocal[,]" because Juror O.H. demonstrated his ability to disregard Vlahos's video, this issue is not a "clear and obvious violation" of this Court's jurisprudence that the district court should have addressed *sua sponte*, without Vlahos's objection. *Id.*; *see Wyant v. State*, 2020 WY 15,

¶ 8, 458 P.3d 13, 17 (Wyo. 2020) (citation omitted) (holding that plain error "must be so 'plainly erroneous that the judge should have noticed and corrected the mistake'" *sua sponte*).

Vlahos frames his argument as one of juror misconduct. (Appellant's Br. at 35-44). In this Court's juror misconduct case law, the "law is well settled that it is improper for a juror to have any out-of-court communications with witnesses, the court, parties, or counsel concerning a case[or to] make any attempt to obtain additional evidence other than what is presented in the courtroom." *Skinner v. State*, 2001 WY 102, ¶ 12, 33 P.3d 758, 763 (Wyo. 2001) (citation omitted). Juror misconduct typically involves intentional conduct by jurors to contact the parties or independently investigate. *See id.* ¶ 10, 33 P.3d at 762 (reviewing juror who questioned defense counsel about an issue); *Eaton v. State*, 2008 WY 97, ¶ 83, 192 P.3d 36, 74-75 (Wyo. 2008) (addressing situation where juror traveled to the crime scene "to take a look for himself").

Here, Juror O.H.'s inadvertent exposure more closely resembles this Court's case law on exposure to pretrial publicity. *See Pickering*, ¶¶ 41-46, 464 P.3d at 252-53. Juror O.H. did not affirmatively seek to communicate with Vlahos or engage in any investigation on his own. (Trial Tr. Day 2 at 11-12). Juror O.H. merely went to the "Gillette Area Classified" page to look for car parts and saw Vlahos's video for "a couple of minutes" before shutting it off. (Trial Tr. Day 2 at 11-12, 45-47). Although this Court does not appear to have addressed media exposure mid-trial, other courts have essentially applied the same pretrial exposure analysis to determine the effect of mid-trial publicity. *See* 75B Am. Jur. 2d *Trial* § 1425, Westlaw (database updated February 2022).

In *Peña v. State*, a case on which Vlahos relies, this Court noted the distinction between juror misconduct and improper juror exposure. *Peña*, ¶¶ 45-53, 294 P.3d at 22-24; (*see* Appellant's Br. at 40-41). The *Peña* Court decided the case on waiver, where the defendant did not object at trial to alleged jurors overhearing counsel's private statements. *Id.* ¶ 46, 294 P.3d at 22. The *Peña* Court noted that the alleged impropriety was "not a case of juror misconduct, but rather a question of whether jurors or potential jurors may have been exposed to information which could have improperly influenced them." *Id.* ¶ 50, 294 P.3d at 23. However, the *Peña* Court went on to note that, for purposes of the waiver rule, the difference between juror misconduct and exposure had no distinction. *Id.* Here, because Juror O.H. did not affirmatively seek to communicate or investigate, this is not "case of juror misconduct, but rather a question of whether [he] may have been exposed to information which could have improperly influenced them." (Trial Tr. Day 2 at 11-12); *Peña*, ¶ 50, 294 P.3d at 23.

Whether reviewed as juror exposure to publicity or juror misconduct, the outcome of this case remains the same, albeit for a different reason than the logic of *Peña*: no error occurred because Juror O.H. affirmed his ability to disregard the video and decide the case on the evidence presented. (Trial Tr. Day 2 at 12-13). When reviewing a juror's exposure to publicity, the "test that courts 'apply to determine if a prospective juror should be dismissed for cause is whether or not that juror would be able to render a fair and impartial verdict based upon the evidence adduced at trial and the court's instructions.'" *Pickering*, ¶ 42, 464 P.3d at 252 (citation omitted); *see also* Wyo. Stat. Ann. § 7-11-106. Similarly, when reviewing juror misconduct, this Court has required trial courts to hold a hearing to

evaluate "the circumstances and nature of the improper contact," noting that "a mere showing of improper communication is not sufficient[.]" *Skinner*, ¶ 13, 33 P.3d at 763 (citation omitted). This Court has found no violation where the juror in question "stated that he could be fair and impartial and would base his decision solely on the evidence presented in the courtroom." *Id.* ¶ 14, 33 P.3d at 763-64.

In Vlahos's case, far from committing a "clear and obvious" violation of either juror misconduct or juror exposure doctrines, the district court correctly handled the situation and committed no error whatsoever. *Hicks*, ¶ 10, 478 P.3d at 657 (citation omitted). It held a hearing, outside of the presence of the other jurors, where it was able "to determine the circumstances of the improper contact and the extent of the prejudice, if any, to the defendant[.]" *Skinner*, ¶ 13, 33 P.3d at 763 (citation omitted); (Trial Tr. Day 2 at 10-14). It learned from Juror O.H. about what little content he saw in the video. (Trial Tr. Day 2 at 10-14). After Juror O.H. replied affirmatively to the State's question on whether he could set aside what he saw on Vlahos's video, the district court again confirmed that Juror O.H. would decide the case solely on the facts that he saw and heard in the courtroom. (*Id.* at 12-13); *Skinner*, ¶ 14, 33 P.3d at 763-64; *Pickering*, ¶ 42, 464 P.3d at 252; Wyo. Stat. Ann. § 7-11-106. Because Vlahos cannot meet his burden to show how the district court committed a "clear and obvious" violation of his right to be tried by an impartial jury, his plain error claim fails. *Hicks*, ¶ 10, 478 P.3d at 657 (citation omitted).

3. No prejudice arose from this juror issue.

Vlahos also cannot satisfy the third prong of plain error because he cannot show that the alleged error adversely affected his "substantial rights resulting in material prejudice."

Hicks, ¶ 10, 478 P.3d at 657 (citation omitted). "An error is prejudicial if there is a reasonable probability the verdict would have been more favorable to the appellant had the error not occurred." *Id.* ¶ 36, 478 P.3d at 662 (citations omitted).

Juror O.H.'s explanation of what little he saw of Vlahos's video shows why no prejudice occurred. (Trial Tr. Day 2 at 12). Because these statements came from Vlahos himself, any content that Juror O.H. saw would have been favorable, rather than inculpatory. (*Id.*). Juror O.H. only watched a "couple of minutes" of this video, which Juror O.H. noted "didn't bother" him. (*Id.*). Juror O.H. only saw Vlahos "just describing his receipts" and "just saying he was innocent[.]" (*Id.*). Vlahos was likely reiterating his claims that Walmart employees had falsified evidence and that other receipts he possessed showed he paid for the goods in question. (*See id.* at 4, 12, 66-95; Mar. 6, 2020 Pretrial Conference Tr. at 9). The district court did not permit the jury to evaluate his proffered receipts because it found Vlahos likely had fabricated this evidence. (Trial Tr. Day 2 at 66-95). Thus, even if Juror O.H. somehow considered the video, this added out-of-court content would have favored Vlahos's innocence, not his guilt. (*Id.* at 12, 66-95). This added information did not risk a "reasonable probability the verdict would have been more favorable to" Vlahos. (*Id.*); *Hicks*, ¶ 36, 478 P.3d at 662 (citation omitted).

Further, this out-of-court video had no potential to undermine the unassailable evidence of Vlahos's guilt. *See Bogard v. State*, 2019 WY 96, ¶ 72, 449 P.3d 315, 332 (Wyo. 2019). The security videos demonstrably showed his repeated misuse of Walmart's self-checkout counters to shoplift. (*See* Ex. 19). Based on Juror O.H.'s descriptions, Vlahos's social media statements could not have undermined this strong evidence. (*Id.*).

Vlahos's argument on prejudice lacks coherence. (Appellant's Br. at 42-44). Despite arguing in the same issue that Juror O.H. committed juror misconduct by viewing his video, the State generally understands Vlahos's argument to be the following: because Vlahos asserted his innocence in the video, the district court somehow erred by ordering Juror O.H. to disregard this video. (*Id.*). This claim lacks cogent legal argument because it essentially posits that if a juror observes a defendant asserting innocence outside of the courtroom, a court cannot instruct the juror to disregard it. (*Id.*); *see Dahl*, ¶ 25 n.4, 462 P.3d at 917 n.4. Vlahos does not cite to any authority to support this unusual argument and this Court should decline to consider it. (Appellant's Br. at 42-44); *Dahl*, ¶ 25 n.4, 462 P.3d at 917 n.4.

If this Court were to consider Vlahos's prejudice argument, it would find it unmeritorious. The district court was not required to permit Juror O.H. to consider Vlahos's social media statements because "the juror's duty [is] to limit his consideration to the evidence, arguments, and law presented in open court." *Eaton*, ¶ 83, 192 P.3d at 74-75 (citation omitted). The district court did not interfere with the presumption of innocence because this Court "presume[s] the jury followed the [trial] court's instructions." *Fox v. State*, 2020 WY 88, ¶ 13, 467 P.3d 140, 143 (Wyo. 2020) (citation omitted). Here, the district court's instructions clearly required the jury to evaluate Vlahos's guilt under the presumption of innocence and the reasonable doubt standard, instructions which this Court presumes the jurors followed. *Id.*; (Trial Tr. Day 2 at 130-39; R. at 328-45).

There is no reasonable probability that had the district court excused Juror O.H. *sua sponte*, the jury would have returned a not guilty verdict. *Hicks*, ¶ 36, 478 P.3d at 662 (citation omitted). Thus, Vlahos fails to show prejudice, and this plain error claim fails. *Id.*

CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that this Court affirm Vlahos's conviction and sentence in all respects.

DATED this 18th day of April 2022.

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CERTIFICATE REGARDING ELECTRONIC FILING

I, Timothy P. Zintak, hereby certify that the foregoing BRIEF OF APPELLEE was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 18th day of April 2022, on the following party:

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The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

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