IN THE SUPREME COURT

STATE OF WYOMING

DANIEL IVAN VILLAFANA,	)	
	)	
Appellant,	)	
	)	
v.	)	No. S-22-0049
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This appeal arises from a criminal conviction and sentence in the District Court for the First Judicial District, Laramie County, Wyoming. (R. at 282-85). The district court filed the judgment and sentence on November 5, 2021. (*Id.*). A judgment and 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, Daniel Ivan Villafana timely filed his notice of appeal within thirty days of the order, on December 3, 2021. (R. at 290-91). 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 abuse its discretion by excluding testimony at sentencing?

II. Did the district court abuse its discretion by sentencing Villafana to prison rather than probation?

III. Are the sentences cruel or unusual under article 1, section 14 of the Wyoming Constitution?

STATEMENT OF THE CASE

I. Nature of the Case

Villafana pleaded guilty to two counts of second-degree sexual abuse of a minor. The district court imposed two consecutive sentences of five to seven years in prison. On appeal, Villafana raises three issues regarding his sentences.

Villafana first argues that the district court abused its discretion by excluding certain testimony and argument at the sentencing hearing. However, the district court properly excluded cumulative, irrelevant "victim-blaming" testimony and did not exclude any portion of Villafana's sentencing argument. To decide this issue, this Court should consider cases such as *Noel v. State*, 2014 WY 30, 319 P.3d 134 (Wyo. 2014), which explain the broad discretion given to sentencing courts.

Villafana also argues that the district court abused its discretion by sentencing him to two consecutive prison terms rather than probation. However, a sentencing court is free to exercise its own discretion and reject a request for probation. Moreover, sentencing courts have broad discretion to weigh various sentencing objectives. To decide this issue, this Court should review cases such as *Butler v. State*, 2015 WY 119, 358 P.3d 1259 (Wyo. 2015) and *Nicodemus v. State*, 2017 WY 34, 392 P.3d 408 (Wyo. 2017).

Finally, Villafana contends that his sentences are cruel or unusual under the Wyoming Constitution. However, the sentences are within the statutory range and proportional to Villafana's crimes. To resolve this issue, this Court should weigh the gravity of the offense and the harshness of the penalty using the test outlined in *Norgaard v. State*, 2014 WY 157, 339 P.3d 267 (Wyo. 2014).

II. Facts Relevant to the Issues Presented for Review

Between 2017 and 2018, Villafana engaged in a sexual "relationship" with K.K., his business partner's teenage daughter. (R. at 34). Villafana told police that he had intercourse with K.K. at least ten times over the course of thirteen months. (*Id.*). K.K. was fifteen years old and Villafana was twenty-eight. (*Id.* at 33).

Villafana met the victim's father in 2016 and they formed a business together. (*Id.* at 34). Over three and one-half years, the two men and their families became close. (*Id.*; PSE[1] at 5). Villafana began spending almost all of his time with K.K. and her family. (PSE at 5). He would also spend time with the business partner's children when their parents were busy. (*Id.*). While at work, her father would allow K.K. to "tag along" and Villafana was expected to take care of her. (PSI at 17). The father would encourage Villafana to "deal with" K.K. when he did not want to because Villafana and K.K. were closer in age. (PSE at 5). K.K.'s parents began joking that K.K. was like Villafana's wife and that she looked old enough to be his wife. (*Id.*). Around this time, the father also told Villafana that K.K. was having sex with adult men. (*Id.*). The father made inappropriate sexual jokes involving his daughter in front of her and Villafana. (*Id.*).

According to Villafana, K.K.'s parents would "push" her onto him. (October 14, 2021 Hr'g Tr. at 63). He reported that his business partners introduced him to cocaine and

[1] "PSE" refers to the psychosexual evaluation report authored by Dr. Amanda Turlington at Villafana's expense. "PSI" refers to the presentence investigation report authored by a Probation and Parole Agent.

they would go out drinking and clubbing together. (PSI at 17). On several occasions, K.K.'s parents dropped her off at Villafana's home to spend the night, even though they knew Villafana had been drinking and using drugs. (PSE at 6; PSI at 9). On one such occasion, Villafana had sex with K.K. and told her father, but "nothing changed." (PSE at 6). Her parents continued to bring K.K. to Villafana's home. (*Id.*). Villafana told police he never forced K.K. or gave her drugs; the sex was consensual. (R. at 34). However, Villafana also complained that the victim "took advantage of me." (PSI at 17).

K.K. recounted numerous sexual encounters to the police. (R. at 34-35). Villafana would "often" pick her up at school and they would have sex in his car. (*Id.* at 35). Once, K.K. stated that Villafana returned early from a business trip in order to spend the day with her in a hotel room. (*Id.*). They had sex multiple times while her family believed she was at work. (*Id.*). She also reported that they had sex once at her home after her parents had hosted a party "and everyone was drunk." (*Id.* at 36).

The "relationship" ended in December 2018 when K.K. learned she was pregnant and told her parents. (*Id.* at 34). She later underwent a surgical abortion to end her non-viable pregnancy. (October 25, 2021 Hr'g Tr. at 72-73).

Villafana theorized that K.K.'s father become upset when their business relationship soured and Villafana started his own business. (PSI at 17; PSE at 6). At that point, the father threatened to expose Villafana's sexual involvement with K.K. (PSI at 17). Villafana also reported that K.K.'s father began extorting him while the sexual abuse was ongoing. (PSE at 6-7). For over two years, the father told Villafana to buy K.K. clothing, shoes, and

other items. (*Id.*). Ultimately Villafana paid over $22,000 to K.K.'s parents, in part to cover her medical expenses. (October 25, 2021 Hr'g Tr. at 87).

III. Relevant Procedural History

A. Charges and Pleas

Villafana was charged with seven counts of second-degree sexual abuse of a minor under Wyo. Stat. Ann. § 6-2-315(a)(i). (R. at 9-14). In July 2021, Villafana and the State entered into a plea agreement. (*Id.* at 270). Villafana pleaded guilty to two counts of second-degree sexual abuse of a minor and the State dismissed the remaining five charges. (Change of Plea Tr. at 16). Under the plea agreement, the State agreed to recommend a sentence of fifteen to twenty years on each count, to run concurrently. (R. at 271). Villafana was free to argue for any sentence, including probation. (*Id.*).

B. Presentence Reports

Villafana participated in the preparation of a presentence investigation in September 2021. (*See* PSI). The probation agent found him to be of "Average Risk" to reoffend. (*Id.* at 18). She observed that Villafana "takes minimal accountability for his actions and blames the victim in this matter for his legal issues." (*Id.*). At the time the report was written, Villafana was not "taking full advantage of the sex offender treatment offered to him." (*Id.*). Based upon the circumstances of the crimes, the agent opined that Villafana was a risk to the community and therefore "an inappropriate candidate" for probation. (*Id.* at 18-19).

Villafana also underwent a psychosexual evaluation by a psychologist retained at his own expense. (*See* PSE). The report noted that Villafana views himself as "devoted to

work and to meeting responsibilities." (*Id.* at 11). Accordingly, he may "deny troublesome relationships with others" and "attempts to downplay any distressing emotions." (*Id.*). The report described Villafana as "[t]ending to be unwilling to self-examine his role in difficult situations" and "[d]riven to deny life's more tedious realities, including realistic limit setting and accountability for less-than-perfect outcomes." (*Id.*). Considering numerous factors, the psychologist found Villafana to be below average risk for sexual recidivism. (*Id.* at 12-15). She observed that placing Villafana in prison with higher risk individuals "is predicted to increase his risk." (*Id.* at 14). Instead, the psychologist recommended "minimal interventions." (*Id.*).

C. Sentencing

Villafana's sentencing hearing lasted several hours spanning two hearing dates. (*See* October 14, 2021 Hr'g Tr. *and* October 25, 2021 Hr'g Tr.). Villafana presented two witnesses at sentencing. (October 14, 2021 Hr'g Tr.). He also made a personal statement to the court. (*Id.* at 61). The State called the victim's father to substantiate the family's restitution claim. (*See* October 25, 2021 Hr'g Tr.).

Villafana first called Dr. Amanda Turlington, a licensed clinical psychologist who performed a psychosexual evaluation on Villafana. (October 14, 2021 Hr'g Tr. at 14-15). She assessed Villafana to be "below average risk" for sexual recidivism and for future violent criminal behavior. (*Id.* at 20-21). Dr. Turlington noted that those at below average risk "tend to do very well with community supervision" and "tend to be very compliant." (*Id.* at 19). She testified that she would have no concerns about Villafana if he was sentenced to community supervision. (*Id.* at 23). She explained that her conclusion differed

from the presentence investigation report, which said Villafana was not a good candidate for probation. (*Id.* at 18-19).

Based upon Villafana's risk level, Dr. Turlington recommended that he complete brief individual treatment lasting six to eighteen months. (*Id.* at 22). She did not recommend group therapy unless Villafana was placed in a group of similarly low-risk individuals. (*Id.*). Dr. Turlington observed that if Villafana was incarcerated and exposed to sex offenders at higher risk levels his own recidivism risk was statistically likely to increase rather than decrease. (*Id.* at 22-23).

During its cross-examination of Dr. Turlington, the State focused on whether Villafana had accepted responsibility for his crimes. (*Id.* at 24-49). The prosecutor asked Dr. Turlington her opinion regarding the circumstances of the sexual abuse and various statements Villafana had made about the abuse. (*See id.*). To refute Villafana's arguments, the State's questions highlighted many of the mitigating factors Villafana had advanced during the presentence investigation and Dr. Turlington's evaluation. (*Id.*). The prosecution mentioned that Villafana knew the victim had previously been the victim of sexual abuse; that the family would joke and refer to K.K. as Villafana's "wife"; that Villafana had told K.K.'s father they were having sex, but the parents still brought her to his home; that K.K. would "come on" to Villafana while he was drunk; that Villafana felt pressure from the family to have sex with K.K.; and that Villafana believed K.K.'s father had financially extorted him. (*Id.* at 28, 29-30, 40-41, 42, 44, 46).

The defense next called Shamar Pigg, Villafana's business partner and friend, whom Villafana considered to be a "brother." (*Id.* at 52, 69). Pigg testified that he, Villafana, and

the victim's father had become very close while growing a business together. (*Id.* at 53). The families were also close and did things together. (*Id.*). Pigg knew from the victim's father that K.K. had had a previous sexual relationship with another adult man. (*Id.* at 54).

At this point, the State objected to the defense questions as irrelevant. (*Id.*). Villafana's attorney argued that Pigg's testimony was relevant to "his understanding of the relationship, kind of the risk, and his observations about what happened with the family and Mr. Villafana." (*Id.* at 55). The district court sustained the State's objection to Pigg's testimony, stating:

> I concur wholeheartedly with the State, [counsel]. This is about whether your client, and he's now convicted of doing this—your client had sex with a teenage girl. This about how he's punished for that, this is about how he's sentenced for that. Blaming the victim, creating a situation in which the victim is looked at as some sort of seductress or an instigator, a child, that's wholly inappropriate and completely out of the context for a sentencing proceeding. If you want this individual to speak on behalf of your client and in support of your client, I will hear that, but I will not condone a presentation by the defense that paints the type of picture of this victim and this victim's family that it would appear you're attempting to paint.

(*Id.*).

Defense counsel reasserted, "I'm not victim blaming; however, I think it is important that the Court hear information regarding the relationship, how we got to this point. Those are mitigating factors to understand—." (*Id.* at 55-56). The district court interrupted, stating "No, they're not" and repeated the ruling to exclude additional testimony on the topic. (*Id.* at 56).

Villafana's attorney asked whether she would be permitted to "get into the conversations of financial problems. It's been brought up multiple times … Again I think

it's relevant—." (*Id.* at 56). The district court ruled that the extortion argument was "not material to the considerations the Court must focus on. Retribution, rehabilitation, deterrents, those are the things the Court focuses on, not whether after your client sexually abused this child somebody extorted him." (*Id.* at 56-57).

In response, defense counsel made a short proffer for the record. (*Id.* at 58). Without describing the specific testimony that Pigg was expected to give, she explained: "I would like to ask Mr. Pigg questions about his observations about comments the parents made about the relationship with the child. I think they are mitigating factors, indicate whether or not the family was accepting or condone[d] the relationship prior to it happening." (*Id.*). In response, the district court noted that it had already received significant mitigating evidence on that topic:

> And certainly you've incorporated that into the record—the documents that I've read in preparation for sentencing are replete with those suggestions. I mean, it's all in there between the presentence investigation report and Dr. Turlington's report. There's no question in my mind that Mr. Villafana believes that the conduct of the parents would have led—did lead him and would have led any reasonable individual potentially to conclude that somehow his sexual relationship with their daughter was okay with them. That doesn't make it not criminal, it doesn't make it [not] a felony, and because of that it's not material to the Court's considerations in sentencing. So while I appreciate your desire, [counsel], it will not be allowed.

(*Id.* at 58-59).

Pigg then offered testimony about Villafana's character and stated he had no concerns about Villafana being in the community. (*Id.* at 57-58). Next, Villafana made a brief statement to the district court. (*Id.* at 61-62). He apologized to the victim's family and acknowledged, "I do understand it's all my fault." (*Id.*).

Villafana's attorney then made her sentencing argument. (*Id.*). She began with "background information" about the crimes, reminding the district court that "K.K. had already had struggles" and the parents "would often push their fifteen year old daughter onto Mr. Villafana." (*Id.* at 63). At this point, the State objected to the argument that the victim's parents' conduct should be considered as a mitigating factor. (*Id.*). However, the court overruled the objection and allowed "this component of counsel's argument as context." (*Id.* at 63-64).

Defense counsel proceeded to argue the circumstances surrounding the sexual abuse, highlighting Dr. Turlington's testimony that "over time those boundaries [between Villafana and K.K.] loosened." (*Id.* at 64). Counsel argued that Villafana was not a predator or a pedophile and was not a continuing threat to K.K. or the community. (*Id.* at 62-69). She asked that the court impose ten years of supervised probation. (*Id.* at 68-69). The State did not make any more objections and no portion of counsel's argument was excluded. (*See id.* at 62-69).

At this point, the district court noted that the hearing had gone on longer than scheduled and continued the hearing to another day. (*Id.* at 71-76). Sentencing recommenced eleven days later on October 25, 2021. (*See* October 25, 2021 Hr'g Tr.). The State called the victim's father to give testimony and explain documents regarding $126,000 in claimed restitution. (*Id.* at 6-7).

Consistent with the plea agreement, the State then argued for two concurrent sentences of fifteen to twenty years each. (*Id.* at 81). The prosecutor described the "prolonged protracted" course of sexual abuse by Villafana against "[a] victim he was able

to access because of the trusting nature of his work and personal relationship with the victim's parents and with the victim." (*Id.*). She emphasized that the abuse "profoundly harmed the victim." (*Id.* at 82).

Defense counsel was then given a second opportunity to address the district court. (*Id.* at 84). Counsel argued that Villafana's was a "unique case" and asked the court to impose ten years of probation per charge, to run concurrently. (*Id.* at 94). She again alluded to the circumstances surrounding the sexual abuse, saying "Mr. Villafana's boundaries got too loose … it does go to show how this situation with this particular victim is a one-off situation and that Mr. Villafana is not a threat to the general community." (*Id.* at 89). She reiterated Villafana's low recidivism risk and Dr. Turlington's opinion that he was an appropriate candidate for probation rather than incarceration. (*Id.* at 89-90).

Based upon the arguments and evidence, the district court sentenced Villafana to five to seven years in prison on each count of sexual abuse, with the sentences to run consecutively. (*Id.* at 98). This appeal followed. (R. at 290-91).

IV. Rulings Presented for Review

During Villafana's sentencing hearing, the State objected once to defense counsel's questions to a witness. (October 14, 2021 Hr'g Tr. at 53-57). The questions related to the victim's sexual history and her family's condoning her sexual relationship with Villafana. (*Id.*). The district court sustained the objection. (*Id.* at 55). The court ruled that information about the victim's sexual history and her parents' involvement constituted "blaming the victim," which is "wholly inappropriate and completely out of the context for a sentencing

proceeding." (*Id.* at 55-57). It also ruled that a proposed line of questioning about extortion by the victim's parents was irrelevant and would not be allowed. (*Id.* at 56-57).

After considering the evidence in the record and the parties' sentencing arguments, the district court sentenced Villafana to two consecutive prison terms of five to seven years for two counts of second degree sexual abuse. (October 25, 2021 Hr'g Tr. at 98). In announcing the sentence, the court discussed the nature of Villafana's crimes and analyzed how each of the four sentencing factors applied. (*Id.* at 97-98).

The district court noted that the sexual abuse took place "over a period of months if not years," and was not a "one-off" incident as the defense suggested. (*Id.* at 95). Nevertheless, the court found Villafana was not a "predator." (*Id.* at 96). He "had sexual access to a vulnerable child. And instead of doing what an appropriate and responsible adult in this community should do … [he] took advantage of it." (*Id.*).

The district court agreed with the defense that Villafana did not "need much rehabilitation in the sex offender realm" and was not "a significant threat to our community." (*Id.* at 97-98). However, the court found punishment and deterrence to be important factors in Villafana's sentencing. (*Id.*). It considered probation, but concluded that Villafana needed "to be punished more than [he] would be punished by serving a term of probation." (*Id.* at 97). Addressing general deterrence, the court reflected: "People in this community need to understand … it's just not appropriate, it's felonious for an adult male to have sex with a child and that people who engage in that type of conduct and are found guilty will be incarcerated." (*Id.* at 97).

ARGUMENT

I. The district court did not abuse its discretion by refusing to admit testimony that the victim's family condoned Villafana's sexual abuse.

Villafana argues that the district court abused its discretion and acted in an arbitrary and capricious manner by refusing to hear certain evidence and argument regarding his relationship with the victim and her family. (Appellant's Br. at 11-17). He asserts that the information was relevant to the court's consideration of retribution, deterrence, rehabilitation, and the risk of recidivism. (*Id.* at 11, 15-16). However, the court received and considered significant evidence surrounding Villafana's relationship with the victim's family. At sentencing, the court allowed defense counsel to present her entire argument over the State's objection. The court did not abuse its discretion by excluding irrelevant, cumulative "victim-blaming" testimony at sentencing.

A. Standard of Review

"Sentencing decisions are within the discretion of the trial court[.]" *Newnham v. State*, 2021 WY 54, ¶ 3, 484 P.3d 1275, 1276 (Wyo. 2021). Rulings on the admissibility of evidence are also reviewed for an abuse of discretion. *Jones v. State*, 2019 WY 45, ¶ 14, 439 P.3d 753, 757 (Wyo. 2019). "As long as there is a legitimate basis for the district court's decision, [this Court] will not disturb it on appeal. *Barrett v. State*, 2022 WY 64, ¶ 48, — P.3d — (Wyo. 2022) (citations omitted).

B. The district court did not abuse its discretion by refusing to admit irrelevant, cumulative evidence.

The rules of evidence do not apply in sentencing hearings. Wyo. R. Evid. 1101(b)(3). Instead, sentencing courts are given broad discretion to "consider a wide

variety of factors about the defendant and his crimes." *Sam v. State*, 2019 WY 104, ¶ 9, 450 P.3d 217, 221 (Wyo. 2019). Courts also have the discretion to limit the information considered relevant to sentencing. (*See* W.R.Cr.P. 32(a)(1)) (allowing a court to dispense with or limit the scope of a PSI). [S]entencing judges "should give consideration to all circumstances—aggravating as well as mitigating." *Noel*, ¶ 42, 319 P.3d at 147 (citation omitted). "The court must consider the crime, its attendant circumstances, and the character of the defendant when assessing as reasonable sentence to be imposed." *Id.*

In this case, the district court refused to hear testimony from one witness on two subjects: whether the victim's family encouraged and condoned Villafana's sexual abuse and whether the family financially extorted Villafana after the fact. (October 14, 2021 Hr'g Tr. at 56-57). The court found that the testimony amounted to "blaming the victim," the information was irrelevant to sentencing considerations, and the record already contained considerable evidence on these topics. (*Id.* at 55-59). The decision to refuse this testimony was not an abuse of discretion because the proffered evidence was irrelevant and cumulative.

1. The proffered testimony was irrelevant and constituted inappropriate victim blaming.

"Victim blaming" occurs when a defendant attempts to lessen his responsibility for a crime by suggesting that the victim's conduct created the situation or set events in motion. *See Eaton v. State*, 2008 WY 97, ¶ 199, 192 P.3d 36, 117-18 (Wyo. 2008); *Buszkiewic v. State*, 2018 WY 100, ¶ 26, 424 P.3d 1272, 1280-81 (Wyo. 2018). Victim blaming

arguments are inappropriate because they are calculated to prejudice the fact-finder against a victim and distract from relevant considerations. *Buszkiewic*, ¶ 27, 424 P.3d at 1281.

The district court reasonably concluded that the testimony Villafana offered constituted "victim blaming." (October 14, 2021 Hr'g Tr. at 55). Defense counsel said that Pigg's observations would illuminate the "relationship" between Villafana and K.K. and "whether or not the family was accepting or condone[d] the relationship prior to it happening." (*Id.* at 58). In other words, Villafana wanted to produce evidence showing that the victim and her family set events in motion. He was deflecting culpability by suggesting that others led him to commit the crime. *See Eaton*, ¶ 199, 192 P.3d at 117-18. The district court correctly excluded such testimony as irrelevant, while still allowing Pigg to offer his favorable opinion about Villafana's conduct and character. (October 14, 2021 Hr'g Tr. at 55).

The district court also ruled that defense counsel could not question Pigg regarding payments Villafana made to the victim's family after the sexual abuse had ended. (*Id.* at 56-57). Counsel argued that Pigg's testimony about extortion was "relevant" to sentencing, but she did not make a record as to what Pigg would have said. (*Id.* at 56). The court found that the payments were "not material" to considerations of "[r]etribution, rehabilitation, deterrents." (*Id.*). It was already familiar with the payments because Villafana referenced "extortion" repeatedly in the PSI and PSE. (*Id.* at 12). The court did not abuse its discretion by rejecting extortion testimony, because it consisted of irrelevant evidence about the victim's family unrelated to the crime or its attendant circumstances. *See Noel*, ¶ 42, 319 P.3d at 147.

2. The proffered testimony was cumulative and unnecessary to the court's sentencing decision.

At sentencing, the district court has full discretion to admit or reject evidence. Wyo. R. Evid. 1101(b)(3); *Buckles v. State*, 500 P.2d 518, 523 (Wyo. 1972). However, even under the rules of evidence, courts are authorized to exclude needlessly cumulative evidence, even when it is relevant. Wyo. R. Evid. 403.

To the extent Pigg's testimony about K.K.'s family was relevant to understand the mitigating circumstances of the crime, the evidence was nevertheless cumulative. As the district court observed, the record was already "replete" with such evidence. (October 14, 2021 Hr'g Tr. at 58). The PSI and PSE both reflected Villafana's view that K.K.'s family pushed her onto him. (PSE at 6; PSI at 9). Both reports stated that the family made comments and jokes that K.K. was Villafana's "girlfriend" or "wife." (PSE at 6; PSI at 17). The reports showed that K.K.'s parents encouraged Villafana to speak to her on the phone, allowed him to pick her up at school, and would bring her to his house when they knew Villafana had been using drugs and alcohol. (PSE at 6; PSI at 9, 17). In fact, the State never contradicted Villafana's story. In refusing to consider Pigg's testimony on the subject, the court explained that it already understood Villafana's mitigation argument without Pigg's testimony. (October 14, 2021 Hr'g Tr. at 58-59).

Moreover, the district court overruled a later objection and allowed defense counsel to provide the same "context" evidence during her argument. (*Id.* at 63-64). Defense counsel was able to argue that K.K. "had a history of inappropriate boundaries" and that her parents "continued to push her on" Villafana. (*Id.* at 64). At the second sentencing

hearing, defense counsel made a second, uninterrupted argument and again emphasized "[t]his is a very unique situation that involved a whole family dynamic. This is a case where over time boundaries were loosened. The family would make jokes … and encourage the relationship." (October 25, 2021 Hr'g Tr. at 88-89).

The extortion testimony was also unnecessarily cumulative. Before any witnesses were called, the sentencing judge indicated she was familiar with the PSI and the PSE and Villafana's references to "extortion." (October 14, 2021 Hr'g Tr. at 12). In his statement to the district court, Villafana explained that he tried to take responsibility by helping the victim financially. (*Id.* at 61). And the State presented evidence through the victim's father that the family had received $22,000 in "restitution" payments from Villafana. (October 25, 2021 Hr'g Tr. at 17-18). Villafana's counsel was also able to argue, without objection, that Villafana had made payments to the victim's family in excess of their out-of-pocket medical expenses. (*Id.* at 86).

Villafana argues that the purpose of Pigg's proffered testimony was to show that the victim "has been greatly victimized by all of the adults in her life, and as a result of their behavior this relationship with Mr. Villafana was normalized, encouraged, and sometimes even forced … which is important to understand to properly determine what is appropriate retribution, rehabilitation, etc." (Appellant's Br. at 14). He further argues that the extortion testimony was relevant to "how Mr. Villafana found himself in this specific situation." (*Id.* at 15). But the record demonstrates that the court fully understood the facts and Villafana's arguments without cumulative testimony from a third party.

Indeed, the district court agreed with Villafana on many of these points. The court specifically found that Villafana was not a predator and did not "need much rehabilitation in the sex offender realm." (October 25, 2021 Hr'g Tr. at 96-97). Its decision to impose a prison sentence rested on general deterrence considerations and the need to punish Villafana for his repeated sexual abuse of a child. (*Id.* at 97). The proffered "context" testimony was irrelevant to these considerations.

Regarding restitution, the district court rejected the State's claim for over $126,000 in restitution and instead "concur[red]" with the defense. (*Id.* at 99). The court found that Villafana had already paid the victim's parents over $22,000 and "restitution has been satisfied." (*Id.*). Testimony from Pigg was unnecessary to validate the uncontroverted facts surrounding payments Villafana made. The evidence would have been merely cumulative.

The district court did not abuse its discretion by disallowing a portion of Pigg's testimony. The court already had ample undisputed evidence regarding the victim's family's conduct and the "extortion" Villafana paid to them. Excluding the cumulative evidence did not impede the court's evaluation of the crime and attendant circumstances. *See Noel*, ¶ 42, 319 P.3d at 147.

II. The district court did not abuse its discretion by sentencing Villafana to prison rather than probation.

Villafana next argues that the district court abused its discretion by imposing "a lengthy term of incarceration" rather than probation in his case. (Appellant's Br. at 17). However, the court considered probation as required and articulated a rational basis for imposing prison terms instead.

A. Standard of Review

When a challenged sentence falls within the legislatively proscribed sentencing range, this Court reviews the sentence for a "clear abuse of discretion." *Sen v. State*, 2017 WY 30 ¶ 32 n.7, 390 P.3d 769, 777 n.7 (Wyo. 2017) (citation omitted). This Court does not substitute its own judgment or "weigh the propriety of the sentence," but instead considers "whether there was a rational basis from which the district court could reasonably draw its conclusion." *Davis v. State*, 2020 WY 122, ¶ 21, 472 P.3d 1030, 1036 (Wyo. 2020) (citation omitted). "Because of the broad discretion given to the district court in sentencing, and our significant deference on appeal, this Court has demonstrated many times in recent years that it is a very difficult bar for an appellant to leap seeking to overturn a sentencing decision[.]" *Barrowes v. State*, 2019 WY 8, ¶ 12, 432 P.3d 1261, 1266 (Wyo. 2019) (citation omitted).

B. The district court considered probation, as required.

A district court is under no obligation to grant probation, but it must consider probation. *Butler v. State*, 2015 WY 119, ¶ 15, 358 P.3d 1259, 1264 (Wyo. 2015). However, even if a defendant is a low recidivism risk, the district court is "within its

discretion" to reject the risk assessment and rely on other factors. *Id.* If the court denies an application for probation, it "must include a written statement in the sentence recognizing the application was considered." *Id.* (citations omitted).

Here, the district court expressly stated that it considered probation to be "inappropriate" for Villafana. (R. at 283). The court met its obligation to consider probation and was within its discretion to impose a prison sentence despite the low recidivism risk.

C. The district court appropriately considered aggravating and mitigating evidence regarding Villafana and his crimes.

Recidivism was not the only sentencing factor the district court considered in Villafana's case. A sentencing court "should give consideration to all circumstances—aggravating as well as mitigating." *Noel*, ¶ 42, 319 P.3d at 147 (citation omitted). The "Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment). This Court has consistently held that sentencing courts may consider and weigh such objectives as punishment, deterrence, rehabilitation, and removal from society. *See Nicodemus*, ¶ 34, 392 P.3d at 416 (collecting cases).

In Villafana's case, the district court specifically considered and weighed these four objectives as they related to Villafana's crimes. The court agreed with much of the evidence presented by the defense. It found that Villafana was not a predator and did not need "much rehabilitation." (October 25, 2021 Hr'g Tr. at 97). Nevertheless, the court found that a prison sentence was appropriate when considering the objectives of punishment and general deterrence. (*Id.*). It stated "you do need to be punished more than you would be

punished by serving a term of probation." (*Id.*). The court also found it important to demonstrate to the community that sexual abuse of a child is the "type of conduct" that merits incarceration. (*Id.*). These findings were grounded in the evidence before the court and conformed to the sentencing objectives endorsed by this Court and the United States Supreme Court.

With no citation to legal authority, Villafana argues that "[a] non-violent, non-predatory defendant being sentenced to two consecutive terms of 5-7 years is a sentence that is unreasonable, arbitrary and capricious, and an abuse of discretion." (Appellant's Br. at 18). He focuses on rehabilitation and recidivism while ignoring other appropriate factors which the district court weighed in his case.

This Court rejected a similar argument in *Nicodemus*. *See Nicodemus*, ¶¶ 31-35, 392 P.3d at 416. Nicodemus, convicted of a murder he committed at the age of eighteen, argued that his life-without-parole sentence violated the Wyoming Constitution's prohibition against cruel or unusual punishment because his sentence was inconsistent with the principles of reformation and prevention. *Id.* ¶ 31, 392 P.3d at 416. He noted that article 1, section 15 of the Wyoming Constitution provides that the penal code must rest on principles of reformation and prevention, and argued that his sentence did not further those aims. *Id.* This Court disagreed and explained that these were not the only factors a sentencing court may consider. *Id.* ¶¶ 34-35, 392 P.3d at 416.

Here, the district court recognized that Villafana was not violent or a predator. (October 25, 2021 Hr'g Tr. at 96). Nevertheless, the court was within its discretion to impose a prison sentence based upon other sentencing objectives.

Villafana also suggests that the district court arbitrarily ignored or discounted mitigating evidence. (Appellant's Br. at 17-19). Similarly, in *Noel v. State*, the defendant challenged his consecutive sentences of incarceration, arguing that the district court did not consider mitigating evidence. *Noel*, ¶ 37, 319 P.3d at 147. This Court found that the sentencing court ruled only after considering the PSI, letters of support and testimony regarding the defendant's good character, expert testimony, victim statements, and evidence which contradicted the defendant's version of events. *Id.* ¶¶ 43-44, 319 P.3d at 148. This Court found that the sentencing court had considered mitigating factors but was also correct to consider "the aggravating factors presented by the prosecutor and the seriousness of Noel's conduct." *Id.* ¶¶ 47-48, 319 P.3d at 149.

In Villafana's case, the court did not abuse its discretion. It considered both mitigating and aggravating factors, weighed various sentencing objectives, and articulated a legitimate basis for its ruling.

III. Villafana's sentences are not cruel or unusual.

Villafana argues that his consecutive five-to-seven-year prison sentences are cruel or unusual in violation of article 1, section 14 of the Wyoming Constitution. (Appellant's Br. at 19). Although he recognizes that the sentences are likely proportional to the crime, he argues that this Court must consider the consequences to him of serving a prison sentence. (*Id.* at 21). However, this Court has never ruled that a sentencing court must consider such consequences. Villafana's sentences are not excessive or disproportionate and do not violate the Wyoming Constitution.

A. Standard of Review

Villafana did not object to his sentence below as being cruel, unusual, or otherwise illegal. (October 25, 2021 Hr'g Tr. at 101); *see* W.R.Cr.P. 35. Nevertheless, this Court reviews de novo the question of whether his sentences are cruel or unusual. *Norgaard*, ¶ 7, 339 P.3d at 270.

B. Villafana's sentences are not excessive or disproportionate to his crimes.

The Wyoming Constitution prohibits "cruel or unusual" punishment, while the United States Constitution prohibits "cruel and unusual" punishment. *Compare* U.S. Const. amend. VIII with Wyo. Const. art. 1, § 14. Villafana argues that the state constitution grants greater protection than the federal constitution because under the Wyoming wording an appellant need only show the punishment is cruel or unusual. (Appellant's Br. at 21). However, in *Norgaard* this Court specifically rejected that argument. *Norgaard*, ¶ 25, 339 P.3d at 274-75. It is "not enough for a proponent of a different interpretation of the

Wyoming constitutional provision prohibiting cruel or unusual punishment to point out that the language is different from the federal language." *Id.*

The prohibition against cruel or unusual punishment prohibits excessive and disproportionate punishment. *Norgaard*, ¶ 9, 339 P.3d at 271 (citing *Graham v. Florida*, 560 U.S. 48, 58–59 (2010)). In other words, a sentence cannot be "unusual or extreme." *Chapman v. State*, 2015 WY 15, ¶ 16, 342 P.3d 388, 393 (Wyo. 2015). To determine whether a sentence is proportional, this Court applies the United States Supreme Court's test from *Solem v. Helm*. *Id.* ¶ 11, 339 P.3d at 271. That test weighs three elements:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem v. Helm, 463 U.S. 277, 292 (1983). This Court engages in a limited analysis by considering the first element and then evaluating the last two elements only if it "find[s] the sentence is grossly disproportionate to the crime." *Norgaard*, ¶ 11, 339 P.3d at 271.

This Court applied the limited *Solem* test in *Oakley v. State*. *Oakley v. State*, 715 P.2d 1374, 1378-79 (Wyo. 1986). Examining the facts, this Court weighed the "threat to the victim and the culpability of the offender" against a ten-to-twenty-year sentence for armed robbery. *Id.* This Court concluded the sentence was "well within the acceptable range of the case criteria." *Id.*

Likewise, Villafana's five-to-seven-year sentences are not cruel or unusual considering the harm to K.K. and the extent of Villafana's culpability. Villafana confessed and pleaded guilty to having sexual intercourse with his teenage victim on multiple occasions. (R. at 34, 282-85). Evidence presented at sentencing showed that his victim

became pregnant, had to undergo a surgical abortion to end the non-viable pregnancy, and was traumatized. (October 25, 2021 Hr'g Tr. at 72-73, 82). The State argued for two concurrent fifteen-to-twenty year sentences. (*Id.* at 83-84). The district court sentenced Villafana to two consecutive five-to-seven year sentences. (*Id.* at 98). Villafana's sentences are well within the statutory range, less than what the State argued for, and proportionate to the gravity of the offense.

Villafana does not show that his sentence is "unusual or extreme in any regard." *Chapman*, ¶ 16, 342 P.3d at 393. In fact, he acknowledges that his sentence "likely passes constitutional muster" under this proportionality analysis. (Appellant's Br. at 21). Instead, he argues that this Court should consider the consequences of the sentences for "an individual with a below average risk of reoffending." (*Id.*).

At sentencing, Villafana's expert witness testified that placing Villafana in group therapy in prison would likely increase his risk of recidivism more than allowing him to participate in individual therapy, ostensibly while on probation. (October 14, 2021 Hr'g Tr. at 51; Appellant's Br. at 21-22). He argues that subjecting him to a prison environment which will make him more likely to commit crimes "is akin to torture." (Appellant's Br. at 22). He speculates that prison will inflict psychological pain and result "in a fundamentally changed person at the subconscious level." (*Id.* at 22). This incarceration, Villafana argues, is "also against the interests of society at large." (*Id.*). However, recidivism is not the sole factor a court must consider in crafting a sentence. And Villafana cites no authority for the proposition that a prison sentence is unconstitutional when it undermines the individual's

therapeutic goals. Ultimately, sentencing is a matter of discretion for the trial court. *Newnham*, ¶ 3, 484 P.3d at 1276.

The district court carefully balanced the severity of the offense and the harshness of a prison term in crafting Villafana's sentences. *See Solem,* 463 U.S. at 292. The court agreed that some sentencing objectives were not served by sentencing Villafana to prison. (October 25, 2021 Hr'g Tr. at 97). Nevertheless, the court appropriately ruled that some prison was proper under theories of punishment and general deterrence. Villafana's sentence is proportional and therefore not cruel or unusual under the Wyoming Constitution.

CONCLUSION

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

DATED this 2nd day of June 2022.

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CERTIFICATE REGARDING ELECTRONIC FILING

I, Kristen R. Jones, hereby certify that the foregoing BRIEF OF APPELLEE was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 2nd day of June 2022, on the following:

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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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