

IN THE SUPREME COURT
 STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20180366
)	
vs.)	
)	
Bradley Joe Morales,)	District Court No. 51-2017-CR-01865
)	
Defendant/Appellant.)	
)	

APPEAL FROM THE DISTRICT COURT CRIMINAL JUDGMENT
 IN AND FOR THE COUNTY OF WARD, STATE OF NORTH DAKOTA,
 NORTH CENTRAL JUDICIAL DISTRICT
 HONORABLE DOUGLAS L. MATTSON
 JUDGE OF THE DISTRICT COURT, PRESIDING

BRIEF OF APPELLEE

Rozanna C. Larson #05294
 Ward County State's Attorney
 Ward County Courthouse
 PO Box 5005
 Minot ND 58702-5005
 Telephone (701) 857-6480
51wardsa@wardnd.com
 Attorney for Plaintiff/Appellee

TABLE OF CONTENTS

Table of Authorities	3
Statement of the Issue	¶1
Statement of the Case.....	¶2
Statement of the Facts	¶9
Law and Argument	¶22
I. The District Court did not commit structural error	¶22
A. Closure of the courtroom during the April 16, 2018, hearings	¶23
B. Any lack of <u>Waller</u> analysis was trivial and did not violate the defendant’s right to a fair trial.....	¶29
II. The Court did not commit reversible error in granting the State’s Motion to Dismiss Case No. 51-2017-CR-01797.....	¶47
III. The District Court did not create reversible error by denying the defendant to represent himself	¶55
Conclusion	¶59

TABLE OF AUTHORITIES

Cases:

<u>Arizona v. Fulminante</u> , 499 U.S. 279 (1991).....	¶22
<u>Ayala v. Speckard</u> , 131 F.3d 62 (2d Cir. 1997)	¶28
<u>Bassette v. Thompson</u> , 915 F.2d 932 (4th Cir. 1990).....	¶55
<u>Carson v. Fischer</u> , 421 F.3d 83 (8th Cir. 2005)	¶28
<u>Guzman v. Scully</u> , 80 F.3d 772 (2d Cir. 1996).....	¶29
<u>Healy v. Healy</u> , 397 N.W.2d 71 (N.D. 1986)	¶48
<u>McKaskle v. Wiggins</u> , 465 U.S. 168 (1984).....	¶57
<u>Peterson v. Williams</u> 85 F. 3d 39 (2d Cir. 1996)	¶29
<u>State ex rel. Koppy v. Gaff</u> , 484 N.W. 2d 855 (N.D. 1992)	¶48
<u>State v. Decker</u> 2018 ND 43, 907 N.W.2d 378.....	¶22
<u>State v. Frohlich</u> , 2007 ND 45, 729 N.W.2d 148.....	¶51
<u>State v. Garcia</u> , 1997 ND 60, 561 N.W.2d 599	¶22
<u>State v. Tweeten</u> , 2004 ND 90, 679 N.W.2d 287	¶48
<u>United States v. Dunlap</u> , 577 F.2d 867 (4th Cir. 1978)	¶55
<u>United States v. Salinas</u> , 693 F.2d 348 (5th Cir. 1982)	¶48
<u>United States v. Singleton</u> , 107 F.3d 1091 (4th Cir. 1997).....	¶55, 56
<u>Waller v. Georgia</u> , 467 U.S. 39 (1984)	¶7, 15, 22, 23, 24, 27, 28, 29, 38, 46

Statutes, Rules or Other Authorities:

N.D.C.C. §12.1-06-01 ¶50

N.D.R.Crim.P. 3(c) ¶53

N.D.R.Crim.P. 7(e) ¶51

N.D.R.Crim.P. 48..... ¶50

STATEMENT OF THE ISSUE

[¶ 1] I. The District Court did not create structural error and did not deny the defendant the right to a public trial.

II. The District Court did not error in granting the State's Motion to Dismiss.

III. The District Court did not deny the defendant's constitutional right to represent himself.

STATEMENT OF THE CASE

[¶ 2] On August 15, 2017, the defendant went to the residence of Jane Doe and their children. Tr. p. 339-340. The defendant let himself into the residence. Tr. p. 339. An argument ensued for approximately three hours.

[¶ 3] The defendant became enraged. The defendant then proceeded to go downstairs and get a knife from the butcher block on the kitchen counter. Tr. p. 343. Jane Doe ran past him and the defendant pursued her. Tr. p. 129. The defendant stabbed Jane Doe in the neck as she reached the back patio door. During the course of the defendant's contact with law enforcement he made numerous inculpable statements, admissions of guilt to stabbing Jane Doe, and statements showing a history of violence towards Jane Doe. Tr. pp. 117; 128-129; 170-177; 343-347; 391-404.

[¶ 4] On August 16, 2017, the defendant was charged with attempted murder and unlawful possession of a controlled substance in file 51-2017-CR-01797. On August 16, 2018, the defendant made his initial appearance. On August 21, 2017, Attorney Ashley Gulke was assigned to represent the defendant. On August 22, 2017, Jane Doe passed away as a result of her injuries. The State filed a motion to dismiss the attempted murder charge on August 22, 2017. On August 23, 2017, a new complaint was filed charging the

defendant with Jane Doe's murder, and arrest warrant was issued and served on the defendant. Index #1 and #2. On August 24, 2017, the defendant made his initial appearance in file 51-2017-CR-01865. Ms. Gulke appeared on behalf of the defendant as a friend of the court. New counsel, Attorney Raissa Carpenter, was assigned to the defendant on August 28, 2017. Index #8. On October 12, 2017, Attorney Carpenter filed a motion to withdraw as counsel. Index #35. The motion was granted on October 13, 2017. Index #42. On October 22, 2017, Attorney Borgen was assigned as counsel for the defendant. Index #43. On October 30, 2017, Attorney Borgen filed a motion to withdraw as counsel. Index #47. A written order was issued on November 17, 2017, allowing Attorney Borgen to withdraw. Index #52. On November 13, 2017, Attorney Steven Mottinger was assigned as counsel for the defendant. Index #51.

[¶ 5] On February 15, 2018, the preliminary hearing was held. Probable cause was found, and the matter was bound over for arraignment. During the preliminary hearing, the defense counsel indicated that the defendant would be demanding a speedy trial, and requested a trial date as close to the April 25, 2018 pretrial conference date as possible. PH Tr. pp 15-16. On February 20, 2018 a trial notice was issued, setting the trial for five days, commencing on April 16, 2018. Index #66. On February 26, 2018, a formal speedy trial demand was filed. Index # 68. On March 9, 2018, defense counsel filed a motion to continue the trial for four to five weeks. Index #68.

[¶ 6] A hearing on the motion to continue was held in open court on March 15, 2018. The Court ruled that due to what was being published on social media and other places, the Court was issuing an order limiting extra judicial comment and would file a written order. Id. On March 15, 2018, the Court issued a written order. Index #102. Additionally, during

the March 15, 2018 hearing, the Court made it explicitly clear to the defendant that he had counsel, and that any filings would be filed through his attorney. MH Tr. p. 17. The Court ordered a hearing. The hearing was scheduled for March 27, 2018. The hearing was held in closed court. The issue discussed was Attorney Mottinger's continued representation of the defendant.

[¶ 7] A pretrial conference was held on April 16, 2018. The hearing served several purposes, to address the motion to suppress filed by defense, the motion in limine filed by the State and the pretrial conference. The hearing began in open court. The courtroom was closed for the motion to suppress and motion in limine portion. The Court went through the Waller analysis on the record prior to the courtroom closing. MH Tr. pp 8-12. A written order followed on April 30, 2018. Index #156.

[¶ 8] The jury found the defendant guilty of Jane Doe's murder.

STATEMENT OF THE FACTS

[¶ 9] Jane Doe and the defendant had been in a long-term relationship, and had three children in common. Tr. pp. 49-54. The relationship had ended, but Jane Doe and the defendant were co-parenting their children. Id. On August 15, 2017, the defendant went to the residence of Jane Doe and their children. Tr. p. 339-340. The defendant let himself into the residence through a broken door, which he had previously broken. Tr. p. 339. The defendant went to the bedroom of Jane Doe and demanded to look through her phone. Jane Doe refused to give the defendant her phone. Tr. p. 340. An argument ensued for approximately three hours. Towards the end of the argument, an unidentified male called Jane Doe's phone. Tr. pp. 341-342.

[¶ 10] The defendant became enraged, and told the male he was beating Jane Doe and the male better come over and help Jane Doe. Tr. pp. 342-343. The defendant then proceeded to go downstairs and get a knife from the butcher block on the kitchen counter. Tr. p. 343. The defendant went outside to get his shoes. Tr. p. 344. While outside he heard Jane Doe running down the stairs. Id. The defendant reentered the residence. Id. Jane Doe ran past him and the defendant pursued her. Tr. p. 129. The defendant stabbed Jane Doe in the neck as she reached the back patio door. Jane Doe was able to unlock the patio door prior to receiving her fatal wound. Tr. p. 345. Jane Doe ran back to the front door, where she collapsed. Tr. p. 345. A neighbor entered into the residence through the back door after Jane Doe unlocked it. Tr. pg. 64. The neighbor and defendant attempted to render aid to Jane Doe. Tr. p. 65-66. The neighbor called 911. Tr. p. 66. Law enforcement responded with other emergency personnel. Tr. p. 67-68. Law enforcement arrived and separated the defendant from Jane Doe. Tr. pp. 117-118; 170-171. During the course of the defendant's contact with law enforcement, he made numerous inculpable statements, admissions of guilt, and statements showing a history of violence towards Jane Doe. Tr. pp. 117; 128-129; 170-177; 343-347; 391-404.

[¶ 11] On August 16, 2017, the defendant was charged with attempted murder and unlawful possession of a controlled substance in file 51-2017-CR-01797. On August 16, 2018, the defendant made his initial appearance. On August 21, 2017, Attorney Ashley Gulke was assigned to represent the defendant. On August 22, 2017, Jane Doe passed away as a result of her injuries. The State filed a motion to dismiss the attempted murder charge on August 22, 2017. On August 23, 2017, a new complaint was filed charging the defendant with Jane Doe's murder, and arrest warrant was issued and served on the

defendant. Index #1 and #2. On August 24, 2017, the defendant made his initial appearance in file 51-2017-CR-01865. Ms. Gulke appeared on behalf of the defendant as a friend of the court.

[¶ 12] New counsel, Attorney Raissa Carpenter, was assigned to the defendant on August 28, 2017. Index #8. On October 12, 2017, Attorney Carpenter filed a motion to withdraw as counsel. Index #35. The motion was granted on October 13, 2017. Index #42. On October 22, 2017, Attorney Borgen was assigned as counsel for the defendant. Index #43. On October 30, 2017, Attorney Borgen filed a motion to withdraw as counsel. Index #47. A status conference was scheduled at the Court's request to address the motion to withdraw. The status conference was held on November 2, 2017. During the hearing, the Judge stated that he would be allowing Attorney Borgen to withdraw, but would issue a written order regarding the withdrawal. A written order was issued on November 17, 2017, allowing Attorney Borgen to withdraw. Index #52. On November 13, 2017, Attorney Steven Mottinger was assigned as counsel for the defendant. Index #51.

[¶ 13] On February 15, 2018, the preliminary hearing was held. Probable cause was found, and the matter was bound over for arraignment. During the preliminary hearing, the defense counsel indicated that the defendant would be demanding a speedy trial, and requested a trial date as close to the April 25, 2018 pretrial conference date as possible. PH Tr. pp 15-16. On February 20, 2018 a trial notice was issued, setting the trial for five days, commencing on April 16, 2018. Index #66. On February 26, 2018, a formal speedy trial demand was filed. Index # 68. On March 9, 2018, defense counsel filed a motion to continue the trial for four to five weeks. Index #68.

[¶ 14] A hearing on the motion to continue was held on March 15, 2018. The hearing was held in open court. During the hearing the Court stated that it was the Court's job to ensure a fair and impartial jury and a fair trial. MH Tr. pp 4-5. The Court went on to state that due to what was being published on social media and other places, the Court was issuing an order limiting extra judicial comment and would file a written order. Id. On March 15, 2018, the Court issued a written order. Index #102. Additionally, during the March 15, 2018 hearing, the Court made it explicitly clear to the defendant that he had counsel, and that any filings would be filed through his attorney. MH Tr. p. 17. The defendant was to refrain from making any more filings. Id. The defendant continued to write to the court. Index #124. The Court ordered a hearing. The hearing was scheduled for March 27, 2018. The hearing was held in closed court. The issue discussed was Attorney Mottinger's continued representation of the defendant.

[¶ 15] A pretrial conference was held on April 16, 2018. The hearing served several purposes, to address the motion to suppress filed by defense, the motion in limine filed by the State and the pretrial conference. The hearing began in open court. The courtroom was closed for the motion to suppress and motion in limine portion. The Court went through the Waller analysis on the record prior to the courtroom closing. MH Tr. pp 8-12. A written order followed on April 30, 2018. Index #156.

[¶ 16] Trial commenced on May 17, 2018. The courtroom was closed during trial to address a note given to the bailiff by a juror. Tr. p. 16. The court equated the closure to a bench conference, but the closure made the bench conference easier to hold. Id. The courtroom was closed a second time, for essentially a continuation of the suppression hearing regarding Officer Noyes' body camera footage. Tr. p. 102. The courtroom was

closed in order address a limiting instruction on the second morning of the trial. The Court stated that it anticipated evidence coming in that morning, and wished to discuss the limiting instruction and when it was to be given with the State and Defense. Tr. p. 188. As the limiting instruction was being agreed upon, the defendant interrupted the court and objected to the statement being played. Tr. p. 197. The Court instructed the defendant to take his seat, but the defendant refused and continued to argue with the Court. Id. The defendant demanded to represent himself. Id. The State objected, indicating that it would cause a mistrial. Tr. pp. 197-198. The defendant stated that is what he wanted, to reschedule the trial and do it over. Tr. p. 198. The defendant became irate, and demanded that he be allowed to represent himself. Tr. pp. 199-208.

[¶ 17] The court several times attempted to regain control over the conversation, but the defendant continued to be irate. Tr. pp. 199-208. The Court informed the defendant that trial had begun, and his right to self-representation was now limited. Tr. pp. 206-207. The defendant's behavior continued, with him now demanding to leave the courtroom. Tr. pp. 199-208. The court ordered the defendant returned to the jail for an hour, then brought back to the courtroom. Tr. p. 208. The defendant then stated "If the jury comes in here, they are going to know what's - I'm going to let them know what's going on". Tr. p 209. l. 2-3. The defendant was removed at the Court's order and trial was recessed for approximately one hour. Tr. pp. 209-210.

[¶ 18] Upon court reconvening, the defendant was put on notice that the Court would remove the defendant from the trial if he continued to engage in disruptive behavior. The defendant's behavior and the limiting instruction were discussed. Tr. pp. 210-223. The court also discussed that the defendant was to be given an opportunity to speak to his

attorney after his attorney's direct or cross-examination of a witness, to see if there were any questions the defendant wanted asked. Tr. p. 218. It would then be up to the defendant's attorney what questions were asked. Id.

[¶ 19] The next courtroom closure occurred at the request of the defendant. On the third day of trial the defendant made a request to speak to the Court in a closed courtroom, so he could make a record. Tr. p. 362. The court asked if there was anything else "we have in open court to bring about?" Tr. p. 362. Nothing else was brought to the Court's attention and the courtroom was closed. After the courtroom was closed, the Court ensured the defendant was requesting the courtroom be closed. The defendant through his counsel stated he was. Tr. p. 362. The closure of the courtroom was for a short period of time, wherein the court, defense counsel and the defendant discussed how the defendant was to behave while he was on the stand.

[¶ 20] The last closure was due to the defendant's concern that a juror had observed him at the elevator wearing shackles. It was determined that the Court would Voir Dire the jury to see if it had been any of the jurors who had seen defendant that morning. It was decided after a discussion between the Court, Defense and the State that the entire jury would be brought in and asked general questions regarding seeing the defendant that morning or access any media accounts of the case. Defense agreed with the Court that the general questions should be done in open court, however if any juror should indicate they had seen anything, follow up questions would be asked individually, in closed court. The State objected and requested all questioning be done in open court. The Court found that in order to ensure that individual jurors would be candid, specific follow up would be done in closed court.

[¶ 21] The courtroom was opened, the general questions asked. One juror indicated that they had observed the defendant that morning. The courtroom was closed and the juror was asked the specific questions. She indicated she could still be fair and impartial. The courtroom was opened back up. Closing arguments were given and the case was given to the jury for deliberations. The jury found the defendant guilty of Jane Doe's murder.

LAW AND ARGUMENT

I. The District Court Did Not Commit Structural Error

[¶ 22] “Structural errors are violations of the framework of the trial, rather than mere procedural errors.” State v. Decker, 2018 ND 43, ¶7, 907 N.W.2d 378 citing Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 302 (1991). “The rights implicated in structural errors are not absolute” Id. citing State v. Garcia, 1997 ND 60, ¶20, 561 N.W.2d 599 (ruling right to a public trial “is not absolute and must give way in rare instances to other interests essential to the fair administration of justice.”). The United States Supreme Court has identified four factors that must be present when a courtroom is closed to avoid structural error in Waller v. Georgia. The factor include the claiming party must advance an overriding interest that is likely to be prejudiced; the closure must be no broader than necessary to protect the interest; the trial court must consider reasonable alternatives, and the trial court must make findings adequate to support the closure. Waller v. Georgia, 467 U.S. 39, 49 n. 9, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984).

A. Closure of the Courtroom During the April 16, 2018, Hearings

[¶ 23] The Court conducted the proper analysis and considered the four Waller factors when the courtroom was closed during the motion to suppress hearing. The Court then supplemented his oral findings with a written order. The closure of the suppression hearing

was no broader than necessary. The April 16, 2018 hearing covered three issues: a motion to suppress, a 404b hearing, and the pretrial conference, which included additional issues the defendant wished to discuss with the court. The hearing began at 1:00 pm, and was open to the public. In open court, the Court heard and addressed the defendant's arguments that he had an absolute right to waive a jury trial and instead proceed with a court trial; and that the filing of an information was incorrect, and his case should have been heard by a grand jury. After addressing those issues, the Court closed the courtroom for the motion to suppress and 404b evidence portion of the hearing.

[¶ 24] The State objected to the closure, citing Waller v. Georgia, and requested the court make the specific findings required under Waller. Defense counsel stated that the Court, State and Defense were "dealing with a double edged sword" in balancing the defendant's right to a public trial and his right to a fair trial. MH Tr. p. 9. Defense Counsel further argued that there is concern for the defendant's chance to receive a fair trial if the evidence and items discussed in the hearing were reported by the media.

[¶ 25] The Court referenced his previous order limiting extra judicial comment due to extensive media coverage of the case. The court found that the defendant's right to a fair and impartial trial and State's right to the same, were impacted by the media coverage of the case. MH Tr. pp 10-11. The Court found that due to the demand for a speedy trial by the defendant, any media coverage from the April 16, 2018, hearing would be close to the trial. The trial was scheduled to begin approximately one month from the pretrial conference. The Court further found that due to the nature of the hearing, evidence would be presented that may or may not be admissible. MH Tr. p. 11. This evidence included graphic video, numerous inculpable statements from the defendant, and admissions of past

violence against Jane Doe. The court determined that the public's right to know had to be balanced against the defendant's right to a fair and impartial jury. The court informed counsel he would follow up his statements regarding the courtroom closure with a written motion, stating due to the reporting so far he didn't feel there was much choice. MH Tr. p. 12.

[¶ 26] The Court went through the proper analysis in closing the suppression hearing to the public. The Court was seeking to protect the defendant's overriding interest to the right to a fair and impartial trial. The Court clearly determined that there needed to be a balance between the right to a public trial and the right to a fair trial. The court then determined that the motion to suppress hearing, given the information that was going to be covered, which included numerous inculpable statements and graphic video, the courtroom needed to be closed in order to safeguard the defendant's right to a fair trial.

[¶ 27] The courtroom was not closed more than was necessary to safeguard the right to a fair trial. The beginning of the hearing was held in open court. Any issues not involving the motion to suppress and the 404b notice, were argued and addressed in open court. This case is distinguishable from Waller. Unlike in Waller, where the entire hearing was closed, the closure in this hearing was narrowly tailored. Only the portion of the hearing where the defendant's inculpable statements, admission of earlier violence and video evidence would be reviewed was closed to the public. As stated above, the other issues the defendant wished to address were done in open court. In Waller, the prosecution indicated that the courtroom should be closed due to general privacy concerns.

[¶ 28] The court had considered reasonable alternatives. A gag order had been issued. The court referenced the gag order and the request for a speedy trial. The unique

circumstances of the over reporting, including the affidavits of the defendant's previous arrested for domestic violence being included in articles, the short time frame for case filings and hearings due to the speedy trial demand, and defendant's assertions that he was not getting a fair trial due to the media coverage left the court with no other reasonable option other than to close the courtroom during the suppression and 404b portion of the hearing. Additionally, the defense did not offer any suggestions for alternatives to closing the courtroom. In Carson v. Fischer, the 8th Circuit Court of Appeals found that ". . . [A] trial judge does not need to consider alternatives to a limited closure *sua sponte*". Carson v. Fischer, 421 F.3d, 83, 90 (8th Cir. 2005) See Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir. 1997). The Court made adequate findings on the record, and further supplemented its finding with a written order issued on April 30, 2018. The Waller test has been satisfied in the April 16, 2018 hearings.

B. Any Lack of Waller Analysis Was Trivial And Did Not Violate The Defendant's Right To A Fair Trial

[¶ 29] The Sixth Amendment provides that an accused has a right to a public trial. Waller v. Georgia, 467 U.S. 39, 49 n.9, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984). "But this does not mean that the sixth Amendment is violated every time the public is excluded from a courtroom. There are situation in which even a significant sealing of a courtroom is constitutionally justified." Peterson v. Williams 85 F. 3d 39 (2d. Cir. 1996) see also Waller, 467 U.S. at 44-48. "A trial can be closed if exigent circumstances require it." Peterson, 85 F. 3d at 41-42, see Guzman v. Scully, 80 F.3d 772, 774 (2d Cir. 1996). "A triviality standard, properly understood, does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer "prejudice" or "specific injury" Id. at 42. "It looks, rather, to whether the actions of the court and the effect that they had

on the conduct of the trial deprived the defendant – whether otherwise innocent or guilty – of the protections conferred by the sixth Amendment” Id. In Waller v. Georgia, the United States Supreme Court determined four values that the right to a public furthers, to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their functions, to encourage witnesses to come forward and discourage perjury” Peterson at 85 F. 3d at 43, citing Waller v. Georgia, 467 U.S. at 46-47.

[¶ 30] The courtroom was closed to the public at several points during the defendant’s trial. The first was due to a note given to the Judge by the bailiff’s regarding a request from a juror to speak to the Court. After closing the courtroom, the Court stated that the closure was for the narrow purpose of addressing the note. The Court further stated that the closure was akin to a bench conference, but it was more convenient to allow counsel to remain at counsel tables. Tr. p 16. The Juror wanted to share with the Court and counsel that he had family members who worked at Trinity Hospital. During voir dire, several potential jurors had been questioned in private when they had indicated a connection to Trinity Hospital. The inquiry was due to Jane Doe’s ties to Trinity and her time in Trinity hospital after receiving her fatal wound. Neither the State nor Defense Counsel had concerns with the juror remaining a member of the jury. The courtroom was opened back up and the trial commenced with the reading of the amended information.

[¶ 31] The courtroom was closed again to further discuss the video of Officer Noyes. The video was one of the subjects of the defendant’s motion to suppress. The Court had ruled to allow the video in, but had ordered that the video would be played with a mosaic. In order that the audio could be heard, but the video would not be seen with clarity, due to the graphic nature. The closure is a continuation of the discussion of the evidence during the

motion to suppress. The defendant and the State again requested the video be played without the mosaic. The Court denied the request. The courtroom was reopened and the trial continued.

[¶ 32] The courtroom was closed the morning of the second day of trial. The next witness to testify would be Detective Cole Strandemo. The Court wanted to discuss a limiting instruction regarding Strandemo's testimony. Tr. p 118. It was anticipated that Strandemo's testimony would bring into evidence the defendant's statements about prior acts of violence towards Jane Doe. The courtroom was closed so the language of the limiting instruction as well as when the instruction would be read could be discussed. Id.

[¶ 33] There was no violation of the defendant's right to a fair trial, the first value was not infringed upon. The Court closed the courtroom to ensure that defense counsel, the State and the Court could have a candid conversation about the limiting instruction. The instruction would be given to ensure that the jury did not simply convict the defendant of the current charge because he had been violent towards Jane Doe in the past. The Ruling from the April 26, 2018 motion hearing had excluded prior convictions of domestic violence. The ruling allowed the defendant's statements to Detective Strandemo, regarding slapping around Jane Doe that evening and he had broken Jane Doe's front door in an earlier dispute to be discussed. The Court was seeking to protect the defendant's right to a fair trial by discussing both the language to be used in the limiting instruction, as well as when the instruction would be given.

[¶ 34] The second value, that the court and the State remember their responsibility towards the defendant, and the importance of their roles, was not infringed upon. The Court, State and Defense worked to ensure the language of the limiting instruction protected the

defendant's right to a fair trial. The closure allowed the State, Court and Defense to be candid with each other in developing the limiting instruction language and discussing the placement of the instruction. The Court, as well as defense counsel and the State were measured in what they stated in open court, due to the extensive media coverage, the extrajudicial statements order and the defendant's reaction to court proceedings. The defendant was prone to lash out in anger and continue to make statements long after instructed to cease by the Court should he not get his way. Some of the statements made by the defendant to Detective Strandemo were coming in as testimony, against the objection of the defendant. The Court had ruled in its written order after the April 16, 2018, hearing that the prior convictions were not admissible, but the defendant's statements regarding abuse towards Jane Do that night would be allowed in. During the discussion of the limiting instruction regarding Detective Strandemo's testimony, the defendant became so irate and out of control, the Court was forced to recess for an hour. Tr. pp. 208-212. Court was reconvened, the limiting instruction agreed to and the trial was resumed.

[¶ 35] During this hearing there was no testimony given and no evidence received. The value of promoting witnesses to come forward as well as the value to discourage perjury were not infringed. The limiting instruction was discussed and agreed to by the Court, State and Defense. The values were not infringed upon.

[¶ 36] The next courtroom closure occurred at the request of the defendant. On the third day of trial the defendant made a request so he could make a record. Tr. p. 362. The court asked if there was anything else "we have in open court to bring about?" Tr. p. 362. Nothing else was brought to the Court's attention and the courtroom was closed. After the

courtroom was closed, the Court ensured the defendant was requesting the courtroom be closed. The defendant through his counsel stated he was. Tr. p. 362.

[¶ 37] The closure of the courtroom was for a short period of time, wherein the court, defense counsel and the defendant discussed how the defendant was to behave while he was on the stand. Earlier, on the second day of trial, the defendant had engaged in a yelling match with the judge while discussing a limiting instruction in the closed courtroom. The behavior of the defendant became such that the Court sent him back to the jail so he could have an opportunity to collect himself. Tr. pp. 208-210. The Court stated that during the break (from 9:43 am to 11:09 am) the Court would be looking at whether or not the trial would continue with the defendant in absentia. Tr. p. 210.

[¶ 38] Although the Waller factors were not addressed when the courtroom was closed, the values laid out in Waller were not infringed by the closure. The closure did not impact the defendant's right to a fair trial. The defendant requested to speak to the court in order to make a record of his beliefs of the trial thus far and to discuss procedurally how he would take the stand. The Court had ordered on the second day of trial that Morales would be allowed to give his attorney questions he believed should be asked, and if appropriate, his attorney would ask them. There was no impact on the defendant's right to a fair trial.

[¶ 39] The second value, to remind the court and the prosecution of their responsibility was not infringed upon. No testimony was being received in the closed courtroom, only a discussion of the defendant's interpretation of the Court's rulings and on the upcoming procedure for his testimony. The Court ensured to remind the defendant of the proper decorum when the jury was present. The Court also ensured that the defendant The closed courtroom did not infringe on the third value of encouraging witnesses come forward. The

same can be said for the fourth value, to discourage perjury. No testimony was being taken. No evidence was being presented. The jury was not present. The matters being discussed were procedural in nature and the defendant's interpretations of the Court's rulings throughout the trial.

[¶ 40] Before trial resumed on the fourth day of trial, the defendant through his counsel stated his concern that jurors had observed him in his shackles as he was making his way to the courtroom. The Court asked the Deputy present in the courtroom what restraints the defendant was wearing. Tr. p. 524. The Deputy informed the Court the defendant was wearing ankle restraints, and handcuffs which were attached to a leather belt. Id. The Deputy could not say that the individuals were jurors, but did indicate that there were two individuals who entered into the courthouse while the defendant was waiting for the elevator with deputies. Id. The Court then closed the courtroom while the Court addressed the defendant's statement regarding the jurors seeing him. During the closure of the courtroom, the Court stated that the jury should be voir dired to see if they saw the defendant. A review of the case law showed that when the viewing of the defendant in shackles is outside of the courtroom, brief and accidental, it is not inertly prejudicial. Tr. p 528.

[¶ 41] It was determined that the Court would Voir Dire the jury to see if it had been any of the jurors who had seen defendant that morning. It was decided after a discussion between the Court, Defense and the State that the entire jury would be brought in and asked general questions regarding seeing the defendant that morning or access any media accounts of the case. Defense agreed with the Court that the general questions should be done in open court, however if any juror should indicate they had seen anything, follow up

questions would be asked individually, in closed court. The State objected and requested all questioning be done in open court. The Court found that in order to ensure that individual jurors would be candid, specific follow up would be done in closed court.

[¶ 42] The courtroom was opened back up and the jury was brought back in. A juror did report that the juror had seen the defendant that morning. The rest of the jury was excused, except for that juror and the courtroom was closed for the voir dire of the juror. The juror was questioned, stated she saw the defendant when she looked up. She further stated that she did not see anything that would impact her ability to be fair and impartial. The juror was returned to the jury room, the courtroom was opened, the jury was returned to the courtroom and the State began their closing arguments.

[¶ 43] None of the four values were impacted by the closure of the courtroom. The closure did not impact the defendant's right to a fair trial. The Court closed the courtroom due to the defendant alleging that jurors had observed him in shackles that morning. The defendant wanted a mistrial due to the alleged observation. The defendant's right to a fair trial was being protected by the closure, as during the closure the questions and working of the questions to be posed to the jury were discussed. The procedure of questioning the jury and the questions themselves were discussed and agreed upon. The only disagreement was the State's objection that any specific questions be asked in closed court. The Court sided with defense and ruled that the general questions to the jury would be asked in open court and any specific follow up would be done in a closed courtroom. There was no impact on the defendant's right to a fair trial.

[¶ 44] The second value, to remind the court and the prosecution of their responsibility was not infringed upon. In closing the courtroom, the Court was seeking to protect the

defendant's right to a fair trial. Over the objection of the State, the Court closed the courtroom, after speaking with defense, indicating that any juror how saw something would be more truthful in closed court. The Court, throughout the courtroom closure, was focused on ensuring the defendant received a fair and impartial trial. The courtroom was closed so the Court, Defense and the State could discuss the defendant's allegations that juror members had observed him in shackles that morning and compile the questions that would be posed to the jury to ensure that they could still be fair and impartial.

[¶ 45] The closed courtroom did not infringe on the third value of encouraging witnesses come forward. The general questions of whether or not a jury member saw the defendant that morning was done in open court. The juror that did see the defendant, raised her hand to the question. The follow up question were done in closed court, outside the presence of the other jurors. The juror member who saw the defendant had already come forward. The third value was fulfilled and not infringed upon. The same can be said for the fourth value, to discourage perjury. In open court the juror indicated she had observed the defendant that morning. Only the specifics of what she observed were stated in closed court. The purpose of the courtroom closure was to ensure that the jury had not observed anything that would impact their ability to be fair and impartial.

[¶ 46] The closure of the courtroom was not during testimony, nor during the reception of other evidence. The courtroom was closed while points of procedure and protocol were discussed. In other courthouses, such issues would be discussed in chambers. However, current chambers do not allow for a recording of the proceedings. Instead, the courtroom is cleared and the matters are discussed where a record can be properly made and preserved. The values promoted by the 6th amendment were not infringed upon while the courtroom

was closed in the defendant's trial. While the Waller factors were not discussed, the six amendment was not violated as the closure were trivial. Due to the triviality of the courtroom closure, the matter should not be reversed and remanded. The case should be affirmed

II. The Court Did Not Commit Reversible Error in Granting the State's Motion to Dismiss Case No. 51-2017-CR-01797

[¶ 47] The Trial Court in this case was not the Court who dismissed the defendant's attempted murder charge in case number 51-2017-CR-01797. As such, it is inappropriate for it to be brought as an appeal in this case. However, the State will address is, should this Court wish to contemplate the matter.

[¶ 48] The Court did not err in granting the State's motion to dismiss. The standard of review of a districts court's decision on a motion to dismiss is abuse of discretion. State v. Tweeten, 2004 ND 90, ¶7, 679 N.W.2d 287. "A trial court abuses its discretion when it acts in an arbitrary, unreasonable or unconscionable way." Id. citing Healy v. Healy, 397 N.W.2d 71, 75 (N.D. 1986). "Generally, the prosecuting attorney is considered to be in the best position to evaluate the charges and the evidence to determine if prosecution should continue. State ex rel. Koppy v. Gaff, 484 N.W. 2d 855, 858 (N.D. 1992), citing United States v. Salinas, 693 F.2d 348, 350 (5th Cir. 1982).

[¶ 49] On August 16, 2017, the defendant stabbed Jane Doe in the neck. The defendant was charged with attempted murder and possession of a controlled substance in 51-2017-CR-01797. On August 16, 2017, the defendant made his initial appearance in the case. On August 22, 2017, Jane Doe succumbed to her injuries. The State filed a motion to dismiss the Attempted Murder charge. Additionally, the State filed a complaint charging the defendant with Murder. The Judge in Master Calendar on August 16, 2017, was the

Honorable Stacy Louser. The Judge in Master Calendar on August 23, 2017, was the Honorable Douglas Mattson.

[¶ 50] Rule 48 of the North Dakota Rules of Criminal Procedure set out the rules for dismissals of a case.

“The prosecuting attorney may not dismiss an indictment, information or complaint except on motion and with the court’s approval. A motion to dismiss must be supported by a written statement concisely stating the reason for the motion. The statement must be filed with the clerk and be open to public inspection. The prosecuting attorney may not dismiss a criminal case during trial without the defendant’s consent.”

N.D.R.Crim.P. 48. The State clearly followed the rule and gave a written statement stating why the State was dismissing the charge. Jane Doe had passed away due to her injuries, and the defendant would be charged with Murder. In light of the change in circumstance, Attempted Murder was no longer an appropriate charge. The appropriate charge became Murder. The murder charge is a new offense. It is not a lesser included offense to attempted murder, nor is attempted murder a lesser included offense to murder. Attempted murder is an intentional crime. It requires the defendant to intentionally engage in conduct. N.D.C.C. §12.1-06-01. In this case the murder charge was charged as Murder – Extreme Indifference to Human Life, which has a culpability level of willfully, and does not require an intentional act.

[¶ 51] Rule 7 of the North Dakota Rules of Criminal Procedure govern amendments to an information. Rule 7(e) allows for an Information to be amended unless a difference or additional offense is charged. N.D.R.Crim.P. 7(e). State v. Frohlich held that the conviction of a defendant for attempted murder and reckless endangerment were appropriate because the amendment to the information did not change the offense culpability. State v. Frohlich, 2007 ND 45, 729 N.W.2d 148.

[¶ 52] In this case, the culpability level of the offense changed. Due to that change, it would not be proper to amend the complaint to charge completely new offense with a different culpability level. Furthermore, the State dismissed Count 2: Possession of a Controlled Substance, Count 2 was not recharged.

[¶ 53] Rule 3(c) of the North Dakota Rules of Criminal Procedure states “The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. . .” N.D.R.Crim.P. 3(c). The State filed a new complaint against the defendant, charging a completely new offense. Additionally, the defendant had already had his initial appearance on the attempted murder charge. The proper way to proceed was to dismiss the attempted murder charge and file a new complaint with the new charge of murder. The defendant would then have an initial appearance on the new charge, allowing the defendant to be fully informed of the new charge and penalties he faced. The charge of Murder, a double A felony is a serious charge. To ensure that the defendant was aware of the charge, the elements of the offense, and that he would make an initial appearance on the new charge in an expedient manner, the attempted murder charge was dismissed and a new charge of murder was filed.

[¶ 54] The defendant has made no showing of prejudice, nor has the defendant made any showing that the district court acted in an arbitrary, unreasonable or unconscionable way. There was no demand for a change of Judge and no Judge shopping in the State’s motion to dismiss. A new charge was filed, and was assigned to the Judge in Master Calendar. The circumstances and evidence of the case had changed, requiring a different charge to be filed against the defendant. The time between the defendant’s initial appearance for

attempted murder and his initial appearance for Murder was approximately one week. The State filed the charge of Murder after it had been informed of Jane Doe's death. It did not delay in the filing the murder charge and filing a motion to dismiss the attempted murder charge. The defendant's case was not prejudiced. The district court did not err in dismissing the case.

III. The District Court Did Not Create Reversible Error by Denying the Defendant to Represent Himself.

[¶ 55] It is in the sound discretion of the trial court to grant or deny a request of a defendant to represent themselves after the trial has begun.

“ . . . [I]f a defendant proceeds to trial with counsel and asserts his right to self-representation only after trial had begun, that right may have been waived, and its exercise may be denied, limited or conditioned. Accordingly, after trial has begun with counsel, the decision whether to allow the defendant to proceed pro se rests in the sound discretion of the trial court.”

United States v. Singleton, 107 F.3d 1091, 1096 (4th Cir. 1997). See Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990); United States v. Dunlap, 577 F. 2d 867, 868 (4th Cir. 1978).

[¶ 56] The Court found that trial had already begun, and the defendant's right to represent himself were restricted. The Court attempted to direct the defendant's attention to United States v. Singleton, but was interrupted several times by the defendant. While the Court attempted to explain its ruling and the reasoning behind it, the defendant continued to interrupt the Court and was uncooperative with proceeding. The Court ruled that the defendant's conduct and behavior was the reason he did not want the defendant to proceed pro se. The Court instructed defense counsel to conduct the examinations of the witnesses that defense counsel felt was appropriate, then consult with the defendant to see if there

were any other questions, within the confines of the rules of evidence, that the defendant wanted asked. Tr. p 209. The defendant's conduct continued to be uncooperative, and the Court ordered the defendant returned to the jail for an hour long recess. Vol. III pg. 208-210.

[¶ 57] After the recess, the Court informed the parties that defense counsel would be consulting with the defendant to see what additional questions the defendant wished posed to witnesses. The Court went on to inform the defendant that the Indigent Defense Counsel did not provide standby counsel. Vol. III pg. 211. The Constitution does not mandate that courts provide standby counsel. Id. at 1100. See: McKaskle v. Wiggins, 465 U.S. 168, 183 (1984). The Court ruled that the trial would proceed with the defendant having counsel. Vol. III pg. 213.

[¶ 58] The defendant's demand to represent himself was untimely, and conditioned the representation in a way that minimized disruption to the trial, in the same way the trial court did in Singleton. The Court did not abuse its discretion in denying the defendant's request to represent himself during trial.

CONCLUSION

[¶ 59] The trial court did not commit structural error in closing the courtroom during the motion to suppress hearing and the subsequent continuing discussion on the Court's order relating to evidence admissibility at trial. Any other closure of the courtroom during the trial were trivial. As such the trial court's rulings should be sustained.

Respectfully submitted this 19 day of February, 2019



Rozanna C. Larson #05294
Ward County State's Attorney
Ward County Courthouse
PO Box 5005
Minot ND 58702-5005
(701) 857-6480
51wardsa@wardnd.com
Attorney for Plaintiff/Appellee

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20180366
)	
vs.)	
)	
Bradley Joe Morales,)	District Court No. 51-2017-CR-01865
)	
Defendant/Appellant.)	
)	

AFFIDAVIT OF SERVICE

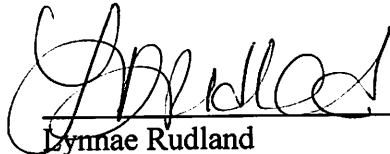
Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 19th day of February, 2019, this Affiant provided a true and correct copy of the following documents in the above entitled action:

BRIEF OF APPELLEE

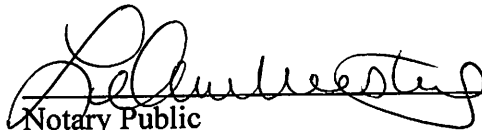
By ELECTRONIC SERVICE to the following:

KIARA COSTA KRAUS-PARR
ATTORNEY AT LAW
kiara@kpmwlaw.com
service@kpmwlaw.com

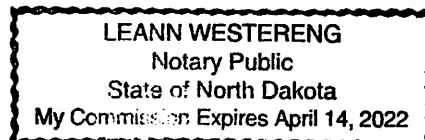


Lynnae Rudland

Subscribed and sworn to before me this 19th day of February, 2019, by Lynnae Rudland



Notary Public



IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20180366
)	
vs.)	
)	
Bradley Joe Morales,)	District Court No. 51-2017-CR-01865
)	
Defendant/Appellant.)	
)	

AFFIDAVIT OF SERVICE

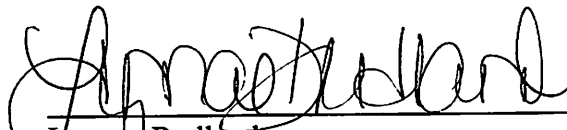
Lynnae Rudland, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 15th day of February, 2019, this Affiant provided a true and correct copy of the following documents in the above entitled action:

BRIEF OF APPELLEE and APPENDIX OF APPELLEE

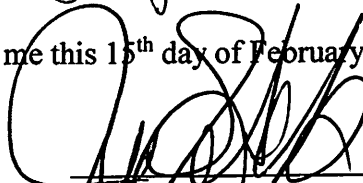
By ELECTRONIC SERVICE to the following:

KIARA COSTA KRAUS-PARR
ATTORNEY AT LAW
kiara@kpmwlaw.com
service@kpmwlaw.com



Lynnae Rudland

Subscribed and sworn to before me this 15th day of February, 2019, by Lynnae Rudland



Notary Public

