

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20170389
)	
Plaintiff and Appellee,)	Ward County Criminal No.
)	51-2014-CR-01616
)	
v.)	
)	
Mark Allen Rogers,)	APPELLANT'S BRIEF
)	
Defendant and Appellant.)	

**APPEAL FROM THE CRIMINAL JUDGMENT IN WARD
COUNTY DISTRICT COURT, NORTH CENTRAL JUDICIAL
DISTRICT, NORTH DAKOTA THE HONORABLE STACY J.
LOUSER, PRESIDING.**

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N.D.C.C. § 12.1-32-02(1)(a)	¶¶1, 9

Transcript References:

The court held a hearing as to Mr. Roger’s competency and followed by a change of plea in this case on March 28, 2017. The transcript of that hearing is referred to as [Tr.] in this brief. The sentencing hearing in this matter was conducted on October 23, 2017. The transcript of that trial is referred to as [Sent. Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Mark Rogers, timely appealed the district court's amended final criminal judgment. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, "[a] final judgment entered under this chapter may be reviewed by the Supreme Court of this state upon appeal as provided by rule of the Supreme Court." The district court had jurisdiction under N.D.C.C. § 29-32.1-01. This Court has appellate jurisdiction under.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the District Court created a structural error by denying Mark Rogers' constitutional right to a public trial.

II. Whether the District Court erred by ordering Mr. Rogers pay \$2,674.90 in restitution.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from North Central Judicial District, Ward County Criminal Judgment. This case was before the district court in State v. Mark Rogers, 51-2014-CR-01616. The initial complaint was filed with the court on July 22, 2014. The Defendant was charged with one count of Gross Sexual Imposition, GSI, in violation of section 12.1-20-03, a class A Felony. Mr. Rogers was appointed Attorney Martin on July 28, 2014.

[¶ 4] A jury trial was scheduled on February 10, 2015. Mr. Rogers did not appear for trial. He was subsequently arrested on a warrant and extradited back to North Dakota in November of 2016. On November 15, 2016, Attorney Raissa Carpenter was appointed to represent Mr. Rogers. Mr. Rogers requested a competency evaluation. A competency

hearing was held on March 28, 2017. The court determined Mr. Rogers was competent to proceed and Mr. Rogers then changed his plea. A pre-sentence investigation report was ordered, and a sentencing hearing was held on October 23, 2017. The court ordered Mr. Rodgers into the custody of ND DOCR for seventeen (17) years with five (5) years suspended and five (5) years of supervised probation and fees of \$125 and restitution in the amount of \$2,674.90.

[¶ 5] The Amended Criminal Judgment was filed in this case on March 7, 2018. On April 9, 2018, an Amended Notice of Appeal was timely filed, on behalf on Mr. Rogers.

STATEMENT OF FACTS

[¶ 6] Mr. Rogers was charged with one count of Gross Sexual Imposition, GSI, on July 22, 2014. RoA Index # 1. The victim in this case was a minor, not yet 15. Id. A jury trial was first set on February 10, 2015. RoA Index # 29. Mr. Rogers did not appear for a status conference on January 23, 2015. Tr. p. 68; RoA Index # 41. He was subsequently arrested on a warrant and extradited back to North Dakota in November of 2016. RoA Index # 44. Attorney Raissa Carpenter was appointed to represent Mr. Rogers. RoA Index # 51.

[¶ 7] Mr. Rogers requested a competency evaluation. A competency hearing was held on March 28, 2017. The trial court closed the proceedings during the competency hearing, although the court allowed the victim's mother and victim witness advocate to remain for the hearing. Tr. pp. 2-3, 43. An individual attempted to enter the courtroom during this hearing and was not allowed inside. Tr. p. 42.

[¶ 8] The court determined Mr. Rogers was competent to proceed. Tr. p. 50. Mr. Rogers changed his plea to guilty. It is unclear if the court was open to the public at the

time of the change of plea. Tr. p. 43. The Court accepted the guilty plea and sentencing was held on October 23, 2017. A restitution hearing was held on January 12, 2018 concerning the costs involved in extraditing Mr. Rogers to North Dakota.

LAW AND ARGUMENT

I. The district court created a structural error by denying Mark Rogers’ constitutional right to a public trial.

Standard of Review

[¶ 9] Jurisdiction. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶ 10] The standard of review for a structural error has been well established. A structural error, which “affect[s] the framework within which the trial proceeds,” defies a harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 309-310 (1991). This Court has recognized three categories of error that arise in criminal cases when the alleged error has not been raised in the district court: forfeited error, waived error, and structural error. State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442. This Court held that a violation of a structural error, as in this case the right to public trial, is “so intrinsically harmful as to

require automatic reversal.” Watkins, at ¶ 12. (*citing* Neder v. United States, 527 U.S. 1, 7 (1999), and State v. White Bird, 2015 ND 41, ¶ 24, 858 N.W.2d 642). The firm directive held in Presley v. Georgia, 558 U.S. 209, 214-15 (2010), that “trial courts are required to consider alternatives to closure” and “take every reasonable measure to accommodate public attendance at criminal trials,” were not followed in this case. The Court simply indicated that because the victim was a minor the courtroom should be closed. Tr. pp. 42-43. The court’s duty if a courtroom is to be closed, is to go through the appropriate factors first laid out in Waller v. Georgia, 467 U.S. 39, 48 (1984) and reiterated in Presley v. Georgia. The court must 1.) advance an overriding interest that is likely to be prejudiced; 2.) show how the closure is no broader than necessary to protect that interest; 3.) consider reasonable alternatives to closing the proceeding; and 4.) make findings adequate to support the closure. None of these findings were placed onto the record. Therefore, the trial court committed reversible error.

[¶ 11] The United States Supreme Court on numerous occasions has stated that a public-trial violation is structural because of the “difficulty of assessing the effect of the error.” United States v. Gonzalez-Lopez, 548 U.S. 140, 149 at n.4. (2006). The right to a public trial has other goals, in addition to protecting a defendant against unjust conviction, it promotes the rights of the press and of the public at large. *See, e.g.,* Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty., 464 U. S. 501, 508–510 (1984). In this instance the trial court closed the court at several hearings and indicated they removed press at the sentencing hearing. It is unknown if the individual denied access at the March 28 hearing was a member of the press or a member of the public at large.

[¶ 12] The proper remedy for a violation of the right to a public trial is “a new trial generally will be granted as a matter of right.” Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017). In this instance the proper remedy would be to reverse the acceptance of the court’s acceptance of Mr. Rogers’ change of plea. Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials. Presley v. Georgia, 558 U.S. 209 (2010). There was no evidence presented that any accommodation was made for public attendance of the March 28 hearing.

[¶ 13] The Court’s decision in Presley v. Georgia, found that the right to a public trial includes jury selection as well as to other portions of the trial. Presley, 558 U. S. 209, 213–215 (2010). In Waller v. Georgia, the U.S. Supreme Court found that improper closure had occurred at a suppression hearing. The remedy was to remand the case to have a suppression hearing that properly comported with the sixth amendment right to a public trial. Waller v. Georgia, 467 US 39 (1984). In this case, the district court directed the courtroom be closed at some point prior to Dr. Lisota’s testimony. Tr. p. 2. The court appeared to close the courtroom during the change of plea portion of the hearing, citing the privacy interests of the minor victim. Tr. p. 43. The court did not go through the factors from Waller, therefore, the barring of individuals from the courtroom during any of the March 28 hearing denied Mr. Rogers his right to a public trial, which is a reversible structural error.

[¶ 14] The court and the state both indicated but did not present case law or statute that closing a courtroom is required when any minor victim is involved or because of privacy concerns. This case is not unlike the Waller case where the prosecution stated general privacy concerns as a reason to close the suppression hearing.

The U.S. Supreme Court found that was too broad and wholly insufficient to support the closure, as, perhaps, the whole hearing did not need to be closed. As in this case, steps to conceal an individual's identity could have been taken to safeguard privacy and comply with the public trial requirement.

[¶ 15] Due to the unique nature of a structural error, such as a public trial error, they have effects that “are simply too hard to measure.” Sullivan v. Louisiana, 508 U.S. 275, 281–282 (1993). The U.S. Supreme Court has recognized that “the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance.” Waller v. Georgia, 467 U. S. 39, 49, n. 9 (1984). Therefore, “a requirement that prejudice be shown ‘would in most cases deprive [the defendant] of the [public-trial] guarantee, for it would be difficult to envisage a case in which he would have evidence available of specific injury.’” Id. quoting United States ex rel. Bennett v. Rundle, 419 F. 2d 599, 608 (CA3 1969). Because the trial court did not indicate why it was necessary to close the court to the public, nor did it make any accommodations to allow the public to be present, it violated Mr. Rogers’ right to a public trial. This Court must reverse the district court and Mr. Rogers’ conviction because the district court improperly closed the March 28 hearing from the public.

II. Whether the District Court erred by ordering Mr. Rogers pay \$2,674.90 in restitution.

[¶ 16] When reviewing a trial court's restitution order, this Court is limited to whether the district court acted within the limits set by statute, which is similar to an abuse of discretion standard. State v. Bingaman, 2002 ND 210, ¶4, 655 N.W.2d 57. A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned

determination, or if it misinterprets or misapplies the law. Id. In determining if a court abused its discretion in coming to a reasonable restitution order, “[T]he factual situation at hand must be examined to determine whether the trial judge acted according to reason.” State v. Tupa, 2005 ND 25, ¶9, 691 N.W.2d 579.

[¶ 17] The trial court accepted a binding change of plea at the March 28 hearing for case number 51-2015-CR-00426, regarding Mr. Rogers’ bail jumping charge. Tr. p. 69. That case was specifically left open to address repayment for Mr. Rogers’ extradition. Id. The case was to be left open until the sentencing in the case currently before the court, as the cost of extradition was to be determined at that time. Id. The sentencing hearing in this case took place on October 23, 2017, roughly seven (7) months after the bail jumping case was resolved. Sent. Tr. p. 1. At the sentencing hearing the prosecution did not present any evidence of the costs to extradite Mr. Rogers. The bail jumping case was then closed without reimbursement being addressed. Swapping over the costs of extradition to the case currently before the court was arbitrary to “fix” the mistake made by the state when it did not present those costs to the court seven (7) months after being asked to do so. The costs are more appropriately linked the bail jumping case which is why the court held “restitution” in that case open for approximately seven (7) months. Because the court arbitrarily assigned the extradition costs to the open case and not to the bail jumping case they abused their discretion.

[¶ 18] The trial court left restitution in this case, CR-1616, open, even though at the sentencing hearing the court determined Mr. Rogers would not be able to pay the forfeited bond, waived reimbursement to indigent defense, and most other fees associated with the case. Sent. Tr. pp. 56-58. At the October sentencing hearing, Mr. Rogers was in

a wheelchair. Ms. Carpenter indicated to the court that he was disabled and not able to pay those costs. Id. The Court indicated that they knew Mr. Rogers would not pay them. Id. at 58. The court then held a restitution hearing on January 12, 2018. The court ordered Mr. Rogers to pay the costs of extradition, \$2,674.90, as restitution in the case before this Court. The court then filed an Amended Final Judgment to reflect that change. RoA Appendix A-1.

[¶ 19] Extradition costs had already been waived by not addressing them at the October sentencing hearing. The court found it to be appropriately in the bail jumping case which is evidenced by the length of time the court left “restitution” open in that case. However, once the court realized that the bail jumping case had been closed and no “restitution” had been assigned, it arbitrarily designated the extradition costs to the open case and not to the closed bail jumping case. This arbitrary conduct was an abuse of their discretion and a reversible error.

[¶ 20] Extradition costs are not restitution. Extradition costs, if they are ordered, should be ordered under N.D.C.C. § 12.1-32-02(1)(a) not § 12.1-32-02(1)(e). By calling the costs associated with extradition restitution the court misinterpreted or misapplied the law. It also creates an artificial victim, Ward County. The County can not be a victim entitled to restitution they are a government entity whose purpose is to represent the people of the State of North Dakota in prosecution of crimes. Victims do not prosecute crimes. To hold Ward County out as a victim, entitled to restitution, is a misapplication of the law and therefore an abuse of discretion by the trial court. The district court’s order for restitution for costs of prosecution should be reversed.

CONCLUSION

[¶ 21] The district court created a structural error by denying Mr. Rogers' constitutional right to a public trial. The district court abused its discretion by ordering \$2,674.90 be paid as restitution in this case.

[¶ 22] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court.

Dated this 16th day of May, 2018

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IN THE SUPREME COURT
OF NORTH DAKOTA

State of North Dakota,)	
)	#51-2014-CR-01616
Appellee,)	#20170389
)	
VS.)	
)	CERTIFICATE OF SERVICE
Mark Allen Rogers,)	
)	
)	
Appellant.)	

The undersigned, being of legal age, being first duly sworn deposes and says that on May 16, 2018, she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Aaron Birst, Special Assistant State's Attorney, aaron.birst@ndaco.org

by electronically filing said documents via email. Also served upon:

Mark Rogers #48272, c/o JRCC, 2521 Circle Dr, Jamestown, ND 58401

by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: May 16, 2018

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The undersigned, being of legal age, being first duly sworn deposes and says that
on May 23, 2018, she served true copies of the following documents:

Appellant's Brief-revised
Appellant's Appendix-revised

And that said copies were served upon:

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Dated: May 23, 2018

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