20220070
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JUNE 13, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
State of North Dakota,	)	**20220070**
	)	
Plaintiff and Appellee,	)	**Burleigh County No.**
	)	**08-2021-CR-01079**
v.	)	
	)	
Demoris Omar Frederick,	)	**APPELLANT'S BRIEF**
	)	
Defendant and Appellant.	)	

Appeal from the criminal judgment entered March 1, 2022 in Burleigh County district court, South Central Judicial District, North Dakota, the Honorable Pam Nesvig presiding

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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JURSIDICTION

[¶ 1] The Defendant, Demoris Omar Frederick, timely appealed the final criminal judgment arising out of the district court. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI, § 6, 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.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court created a structural error by denying Mr. Frederick's constitutional right to a public trial.

II. Whether the district court created a reversable error by conducting voir dire off the record, making a transcript of the jury selection unavailable

ORAL ARGUMENT

[¶ 3] Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

STATEMENT OF CASE

[¶ 4] This is a criminal matter on direct appeal from South Central Judicial District, Burleigh County Criminal Judgment. This case was before the district court in *State v. Frederick*, 08-2021-CR-01079. The original criminal information was filed with the court on April 7, 2021. R1. The Defendant was originally charged with Count I: Conspiracy to Commit Murder N.D.C.C. § 12.1-16-01, a class AA felony; Count II: Attempted Murder, in violation of N.D.C.C. § 12.1-16-01, a class A felony. R1.

[¶ 5] Several amendments to the information were made including several requests to reduce bond. R21; R42; R51; R60; R63; R70; R91; R104; R119; R286; R291; R272. Bond reduction was denied repeatedly, based largely on the nature of the charges against Mr. Frederick. On November 5, 2021 the State made a motion to amended the information from murder to aggravated assault, in violation of N.D.C.C. § 12.1-17-02(1)(b), in both counts. R120. Bond was lowered after that amendment and Mr. Frederick was released from pretrial custody. R272; 275.

[¶ 6] Mr. Fredrick was initially assigned Attorney Glass. R10. on April 12, 2021, Attorney Morrow took over representing Mr. Fredrick. R12. A speedy trial request was made on April 25, 2021. On August 24, 2021 the state request to continue the trial because Mr. Fredrick's co-defendant

requested to continue her trial, and the State wanted to trial both parties together. The trial that was originally set for September 1, 2021 was moved to November 17, 2021. Mr. Frederick filed a motion to dismiss for violation of speedy trial on October 21, 2021. R107. The Court denied the request to dismiss the case. R112.

[¶ 7] The Jury trial began on November 17, 2021 and lasted three days. The Jury asked two questions in writing and the trial court responded in writing R236; 237; 296:3-5. The Jury acquitted Mr. Frederick on count I, conspiracy to commit aggravated assault and found him guilty of Count II aggravated assault with a dangerous weapon. R234; 235.

[¶ 8] Sentencing in this case was held on February 28, 2022. R275. Mr. Frederick was sentenced to five years, three years suspended, credit for 320 days of time previously served and two years of supervised probation. R275:15: ln 18-21. The criminal judgment was filed on March 1, 2022. R256. Mr. Fredrick timely filed a notice of appeal.

STATEMENT OF FACTS

[¶ 9] On March 9, 2021, R.B. was at his home in Bismarck, North Dakota. R297:38. He testified that Mr. Frederick came by his house because he wanted to discuss an argument Ms. Wickham and R.B. had. R297:39; 41. R.B. testified that Mr. Frederick stated that Ms. Wickham had sent people to take care of him, wipe him off the face of the earth. R297:45: ln 10. R.B.

testified that Mr. Frederick cut him with a knife on the top of his head and on his arm. R297:51.

[¶ 10] On the second day of trial the state rested its case. R302:176. the jury was given a break, no mention of closing the doors appeared in the transcript, and Mr. Morrow made a Rule 29 motion. R302:177. The court ultimately denied the Defendant's motion. R302:181. Mr. Frederick called Nadine Walker, his girlfriend and ride at the time of the alleged incident. R302:186. She testified that R.B. was holding a machete at one point, but she did not see or hear anything that indicated a physical attack took place. R302:190; 194. Mr. Morrow renewed the Rule 29 motion and it was denied. R302:209.

[¶ 11] During the case the court held portions of the trial privately in a closed courtroom. *See* R297:5; 11. Also, during the trial there were bench conferences held with no record taken. See R297:11, 80. The court held discussions on jury instructions not in public and off the record, both opening and closing, opening statements, closing arguments, and jury selection, including exercising of peremptory challenges, off the record. R287:5; 11; 20; 21; R302: 212-213.

LAW AND ARGUMENT

I. Whether the district court created a structural error by denying Mr. Frederick's constitutional right to a public trial.

Standard of Review

[¶ 12] 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). No objection by defense counsel was made regarding the closures. However, 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 (N.D. 2017). And 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 (N.D. 2015)). The trial court conducted two bench conferences without a contemporaneous record of the proceeding. The first sidebar seemed to involve the jury selection process and the second an evidentiary matter. R297:11, 80. The court indicated it would go on the record officially during a pretrial conference on the first day of trial. R297:4. The court indicated that it incorporated all of the parties' requests regarding jury instructions. R297:5; ln 10-12. No previous conversation about jury instructions was transcribed, indicating the conversations occurred privately and off the record. Additionally, the record specifically notes the courtroom was closed after jury selection to take care of pretrial matters that had been delayed because Mr. Frederick was late. R297:11-20. The court did not go

through the *Waller* factors prior to the closure nor did the Defendant waive his right to a public trial at any time. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

[¶ 13] This Court, relying on *Waller*, has stated that the trial 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. The court did not do this therefore the public trial violations occurred. This was a structural error requiring reversal of Mr. Frederick's conviction.

[¶ 14] Twice during trial the court held bench conferences in view of the public, but out of their hearing with no record of what transpired. *See* R297:11, 80. This Court discussed when a bench conference is held in view of both the public and jury, despite their inability to hear the discussion, "When the public and jury can view a bench conference, despite being unable to hear what is said, a record being promptly made available satisfies the public trial right." *State v. Martinez*, 2021 N.D. 42, ¶ 20; 956 N.W.2d 772, 785 (N.D. 2021). In this instance no record was made which created a closed proceeding on any and all evidentiary or other matters conducted at the conferences. Without a record there is a substantial prejudice to the Defendant that a public trial is meant to ensure. But demonstrating actual harm is ultimately

unnecessary in the context of a structural error. *State v. Watkins*, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (N.D. 2017).

[¶ 15] Justice Sotomayor's dissent from the denial of certiorari in *Smith v. Titus*, explains that the Supreme Court's precedent in *Presley v. Georgia* does not allow for a distinction between substantive and administrative closures. *Smith v. Titus,* 141 S. Ct. 982 (2021); *Presley v. Georgia*, 558 U.S. 209, 212–213, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). In the underlying case in *Titus* the Minnesota Supreme Court found in chambers and sidebar conferences were administrative in nature because they covered an issue of evidentiary boundaries, therefore they did not implicate the right to a public trial. *State v. Smith*, 876 N.W.2d 310, 330 (2016). This Court has recently held, contrary to Minnesota's decision, that pretrial conferences conducted in a non-public setting does implicate the right to a public trial. *State v. Pulkrabek*, 2022 ND 128, ¶ 14 (N.D. 2022).

[¶ 16] Justice Sotomayor further explained in her dissent that *Presley*'s holding found ""the Sixth Amendment right to a public trial extends beyond the actual proof at trial"…As such, *Waller* 's four-factor test "provide[s] standards for courts to apply before excluding the public from *any stage* of a criminal trial." *Presley*, 558 U.S., at 213, 130 S.Ct. 721 (emphasis added)."" *Smith v. Titus,* 141 S. Ct. 982, 985 (2021). *Titus* also points out that the Minnesota Supreme Court relies on *Norris*, which was decided 25 years before *Presley* to reach its conclusion. *Titus* at p. 985; *United States v. Norris*,

780 F.2d 1207 (5th Cir. 1986). However, *Presley* categorically applies the right for public trials to any stage of a criminal trial, therefore any subjective distinction between what is a substantive and what is an administrative part of the trial is unnecessary and improper.

[¶ 17] In footnote 6 of *Titus* Justice Sotomayor explains why sidebars are not violations of the public trial right by quoting this Court's decision in *State v. Morales*, 2019 ND 206, ¶17, 932 N.W.2d 106 (N.D. 2019). ("a bench conference is held in view of both the public and the jury, despite their inability to hear what is said, the public trial right is satisfied by prompt availability of a record of those proceedings"). *Smith v. Titus*, 141 S. Ct. 982 n. 6 (2021). The prejudice to Mr. Frederick in this case is compounded because he was not at the conferences and has no way to review what was discussed, what objections were raised, or how the trial court resolved disputed maters. The public at large also has no way to ensure that Mr. Frederick was treated fairly, that the Judge and Prosecution acted professionally and responsibly, which are some of the aims of the public trial right.

[¶ 18] In *Richmond Newspapers, Inc.* the Supreme Court reviewed the historical context of the public trial right, "Sir Thomas Smith, writing in 1565 about "the definitive proceedings in causes criminall," explained that, while the indictment was put in writing as in civil law countries:

> "All the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as*

> *to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide*." T. Smith, De Republica Anglorum 101 (Alston ed. 1972) (*emphasis added*)."

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 566 (1980). The Supreme Court quoted this again in *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 507 (1984). Part of the historical understanding of a public trial was the ability to see and hear the proceedings. While sidebars or bench conferences cannot be heard they can be seen and a prompt availability of the transcript in that situation would satisfy the underlying reasons for a public trial, promoting the legitimacy of the criminal justice system and fair treatment of defendants. In the present case, the lack of a recording of what occurred at the bench conferences creates a structural error of the right to a public trial that must be reversed.

II. Whether the district court created a reversable error by conducting voir dire off the record, making a transcript of the jury selection unavailable.

[¶ 19] The interpretation of a court rule, like the interpretation of a statute, is a question of law. *Carlson v. Workforce Safety Ins.*, 2009 ND 87, ¶ 22, 765 N.W.2d 691. The Court applies the rules of statutory construction and looks at the language of the rule to determine its meaning. *State v. Ferrie*, 2008 ND 170, ¶ 8, 755 N.W.2d 890. Words are given their plain, ordinary, and commonly understood meaning and the rule is construed as a whole. *Id.* Administrative Jury Standard 7(d) requires that voir dire is held on the record for felony jury trials. N.D.Sup.Ct.Admin.R. 9; App. Jury Stand. 7(d).

[¶ 20] This Court has previously held that if the State fails to provide a means of obtaining a transcript the defendant is entitled to a new trial. *See State v. Decker*, 181 N.W.2d 746, 748 (N.D. 1970) ("Mr. Decker is entitled to a new trial for the reason that the State has failed to provide him with a means of obtaining a transcript of the proceedings leading up to and including his sentencing"); *State v. Hapip*, 174 N.W.2d 717, 719 (N.D. 1970) ("After carefully considering all of the above statutes, we have concluded that a party…has a statutory right to have the proceedings upon the trial taken down by a reporter..."); *State v. Spiekermeier*, 256 N.W.2d 877 (N.D. 1977) (The Court reversed and set aside restitution because there was not a sufficient record.).

[¶ 21] The Court in *Entzi* reviewed the specific issues of voir dire not being recorded and determined it did not entitle the Defendant to a new trial. *State v. Entzi*, 2000 N.D. 148; 615 N.W.2d 145 (N.D. 2000). However, *Entzi* distinguished its holding from *Hapip*, *Decker*, and *Spiekermeier* it did not overrule them. The main distinction between the cases, as pointed out in footnote 1 of *Entzi*, was no statute or rule required taking a record of voir dire. *State v. Entzi*, 2000 N.D. 148; 615 N.W.2d 145 n.1 (N.D. 2000) ("Rule 11(f), N.D.R.Crim.P., however, requires a verbatim record of proceedings at which a defendant enters a plea."). Therefore, at the time of *Entzi*, the Defendant had to request the recording of voir dire. Since *Entzi* the Court has promulgated Administrative Rule 9, specifically Jury Standard 7(d) requiring

a record be made in all felony cases. In light of that change, the holding in *Entzi* no longer applies. By conducting voir dire of a felony jury trial off the record, the trial court did not comply with Administrative Jury Standard 7(d). The holdings from *Hapip*, *Decker*, and *Spiekermeier* control and require reversal of Mr. Frederick's conviction and a new trial.

[¶ 22] The *Hapip* Court also noted the United States Supreme Court's guidance on waiver; a silent record is insufficient. "Presuming a waiver from a silent record is impermissible; the record must show that there was an affirmative waiver by the defendant — anything less is not a waiver. *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)." *Hapip* at p. 719. Because the record does not affirmatively show that Mr. Frederick waived his right to a recorded voir dire his conviction must be reversed and a new trial granted.

CONCLUSION

[¶ 23] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court and Mr. Frederick's conviction.

Dated this 13th day of June, 2022

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CERTIFICATE OF COMPLIANCE

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: May 13, 2022

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v.	)	
	)	
Demoris Omar Frederick,	)	CERTIFICATE OF
	)	SERVICE
Defendant and Appellant.	)	

[¶ 1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief

And that said copies were served upon:

Tessa Vaagen, Assistant Burleigh County State's Attorney, bc08@nd.gov

by electronically filing said documents through the court's electronic filing system. Also served upon:

Demoris Frederick #48630, c/o JRCC, 2521 Circle Drive, Jamestown, ND, 58401

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

Dated: June 13, 2022.

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