

## IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE,  v.  SUSAN K. COONS, DEFENDANT AND APPELLANT,	Supreme Court <b>20220289</b> Ward County District Court <b>51-2021-CR-00725</b>  <b>BRIEF</b>
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BRIEF OF APPELLANT, SUSAN K. COONS  
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Appeal from the Criminal Judgment

Entered on the May 12<sup>th</sup>, 2022

In District Court, Ward County, State of North Dakota

The Honorable Gary Lee

ORAL ARGUMENT REQUESTED

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### **STATEMENT OF THE ISSUES**

- **ISSUE 1: Did the trial judge err when he held a private hearing during the Void Dire that only included some of the jurors and excluded most of the jurors and all of the public.?**
- **ISSUE 2: Should Defendant Susan Coons be granted a new trial because the trial judge made the prejudicial statement that or she lost the probate trial?**

### **NATURE OF THE CASE**

- [¶1] The Complaint was filed on 04/27/2021
- [¶2] The Information was filed on 09/21/2021 and amended on 04/06/2022.
- [¶3] The jury trial started on May 10<sup>th</sup>, 2022, and ended on May 12<sup>th</sup>, 2022.
- [¶4] The guilty verdict on Count I and Count II was filed on 05/13/2022.
- [¶5] The Sentencing was canceled on 08/03/2022 and 08/19/2022.
- [¶6] Sentencing took place on 08/30/2022 and judgment was entered on 09/09/2022.
- [¶7] The Notice of appeal and order for transcript were filed on 09/28/2022 along with the notice of the filing of the appeal.
- [¶8] The transcript that was completed on 10/18/2022 contains the pretrial conferences, the Jury Trial– voir dire, the Jury Trial– day one, the jury trial– day two, and the jury trial– day three.
- [¶9] The Clerk’s Certificate of Appeal was filed on 10/25/2022.
- [¶10] The matter is now before the North Dakota Supreme Court.

### **STATEMENT OF FACTS**

[¶11] In this case, in Ward County North Dakota the Defendant/Appellant, Susan K. Coons (Ms. Coons), was charged, tried, and found guilty of the following charges:

1. Count I, the Jury found the Defendant Susan Coons guilty of the crime of Forgery.

2. Count II, the Jury found the Defendant Susan Coons guilty of the crime of unauthorized use of personal Identification.

[¶12] Ms. Coons trial on the above charges began on May 10<sup>th</sup>, 2022 and ended on May 12<sup>th</sup>, 2022. Before this trial a probate trial that involved the Estate of William Coons was tried. In the case before the Court, William Coons was the original owner of the real property described in Exhibit 1, which was referred to during the trial as a Certified Copy of an Estate deed, and Exhibit 2, which was referred to during the trial as the original Estate deed. In this Brief, Exhibit 1 and 2 will hereinafter be referred to as “Estate deeds 1 and 2”.

[¶13] During the trial of this case, the trial Judge mentioned the prior trial of the Probate of William Coons Estate and he made it clear in the following statement during the Trial in front of the Jury and Public that Ms. Coons lost probate trial.

Trial Transcripts dated May 11<sup>th</sup>, 2022 pg. 43, L 3-9.

3. THE COURT: Le me stop this. That probate file,
4. that is over. It's done. Your client lost in the probate
5. proceeding, and she did not appeal it. It is a final judgment.
6. MR. BOUGHEY: Your Honor, I understand --
7. THE COURT: So I -- so there's no point in going back
8. and relit -- she can't relitigate that. She cannot relitigate
9. the fact that she lost in the probate proceeding.

[¶14] Two other cases that are related to this case and will be tried at a later date in McKenzie County North Dakota involve criminal charges and a civil case.

[¶15] The Jury decision on Estate deeds 1 and 2 in this case as to whether they are valid deeds or forgeries with forged signatures will decide whether Ms. Coons is guilty or innocent.

[¶16] Ms. Coons, during the trial, testified the Estate deeds Exhibit 1 and 2 were valid deeds. The reason she gave for them being valid deeds is that she saw and was personally present when Yolanda Coons, Richard Harris, William Coons, and Jamie Livingston signed Estate Deeds which are Exhibit 1 and 2.

[¶17] Prior to the above testimony of Ms. Coons at the trial, the State called as witnesses, Yolanda Coons, Richard Harris, and Jamie Livingston and each of them was asked if they had signed Estate Deeds Exhibit 1 and 2. All three replied they had not signed Estate Deeds Exhibit 1 and 2.

[¶18] William Coons died in April 2019. This trial started on May 10<sup>th</sup> 2022. Therefore, the State had to find someone who knew and saw Mr. Coons sign his name during his lifetime. The State called his former wife Yolanda Coons, and his son Troy Coons because they had seen Mr. Coons sign his name many times during his lifetime. Both testified that the signature on the Estate Deeds Exhibit 1 and 2 was not the signature of William Coons.

[¶19] During the State's case, the State also called expert witnesses that examined Estate Deeds 1 and 2, Ms. Coons cell phone, and computer. Each expert explained their examinations to the Jury and what they learned from their examinations. The experts who examined both Deeds 1 and 2 explained to the jury what they learned from their examinations and why Estate Deeds 1 and 2 were forgeries. The experts who examined

Ms. Coons cell phone and computer explained to the jury what they found on Ms. Coons cell phone and computers.

[¶20] After the State rested its case, the defense made a Rule 29 Motion to dismiss the two charges against Ms. Coons. Since the State did not prove any value to the Life Estate, Count II was dismissed and changed to lesser included offense. That offense was a Class A Misdemeanor.

[¶21] As to Count 1 the Forgery charge, the Trial Court denied the defenses Rule 29 Motion to Dismiss.

[¶22] The defense then presented its case and rested. After resting the State again made a Rule 29 Motion to dismiss the two charges. The Court denied that Motion.

[¶23] The case was then given to the Jury. The Jury returned a verdict of Guilty to Counts I Forgery and to Count II Unauthorized use of Personal identification.

### **STANDARD OF REVIEW**

[¶24] When considering on appeal a defendant's claim that his right to a public trial was violated, we first consider whether the claim of error was preserved at trial. *State v. Olander*, 1998 ND 50, ¶¶ 8, 14, 575 N.W.2d 658 (explaining that whether an issue is preserved by timely objection, forfeited, or waived determines the standard of review for the issue). We then consider the threshold question of whether there was a closure implicating the public trial right. *State v. Morales*, 2019 ND 206, ¶ 16, 932 N.W.2d 106. If there was a closure, we determine whether the trial court made pre-closure Waller findings sufficient to justify the closure. *Id.* at ¶ 25. We review the court's findings under the clearly erroneous standard and its application of the law to those findings de novo. See *Klem*, 438 N.W.2d at 802-03; *State v. Hall*, 2017 ND 124, ¶ 12, 894 N.W.2d 836



(reviewing district court's speedy trial conclusion de novo and associated findings for clear error).

## **ARGUMENT**

### **ISSUE I**

- Did the trial judge err when he held a private hearing during Voir Dire that only included some of the jurors and excluded most of the jurors and all of the public.?**

[¶25] The following Trial Transcript was made during voir dire.

[¶26] Trial transcript May 10<sup>th</sup> 2022 pg. 63 L 12–25

12. THE COURT: All right. Ladies and gentlemen of the  
13. jury, we are going to go visit with some of the prospective  
14. jurors in private. We'll go to the room across the way. This  
15. may take a few minutes. Please feel free to stretch our legs,  
16. make phone calls, whatever you think you need to do. But we  
17. should be back in no more than about 10 or 15 minutes, okay?

[¶27] The following Transcript shows voir dire was being held in a private room with only a few of the jurors present.

[¶28] Trial Transcript May 11th 2022 Pg63 L 21-25

21. THE COURT: All right. We are back on the record  
22. outside of the presence of the jury in this matter of State of  
23. North Dakota v. Susan Coons. Ms. Coons is here. Her attorney,  
24. Mr. Boughey, is here. State is here with Ms. Sorgen and her

25. officer, and we have Juror Number 15.

[¶29] The following Trial Transcript shows when the Trial Judge, the Prosecutor, the Defense, the Attorney for the Defense, the Jury, and the Public got back together in the courtroom.

[¶30] Trial transcript May 10<sup>th</sup>, 2022 Pg 70 L 19-23.

19. THE COURT: Okay. We're back on the record in this  
20. Ward County file 51-2021-CR725. This is the matter of State of  
21. North Dakota v. Susan Coons. Ms. Coons is back with her  
22. Attorney, Mr. Boughty. The State is back with Ms. Sorgen. We  
23. have finished what's called voir dire.

[¶31] According to the State v. Martinez 2021 ND 42956 N.W.2d 772

“In Presley, the United States Supreme Court held that the Sixth Amendment public trial rights extends to jury selection. Presley, 558 U.S. at 213; see also Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 505 (1984)”

[¶32] According to Martinez [¶13]

“We now conclude that the right to a public trial can be waived according to the same standards of knowing, intelligent, and voluntary waiver that we have applied to other Sixth Amendment rights that implicate structural error such as the right to counsel and the right to a jury trial. Our prior statements to the contrary do not correctly state the law. We acknowledge there is some division among the federal circuits and our sister states on waiver of the right to a public trial. We find the following decisions persuasive in reaching our conclusion that a defendant's waiver of the right to a public trial must be knowing, intelligent, and voluntary.”

[¶33] In this case now before the court on the record, there is no knowing, intelligent and voluntary waiver by the Defendant Susan Coons of her right to a jury trial. Also, there was no objection by the defense to the courts holding a private room hearing during Voir Dire with only some of the Jurors present.

[¶34] According to Martinez [12]

“After stating structural errors are errors so intrinsically harmful as to require automatic reversal regardless of whether they were forfeited or waived, we said the closures in which the defendant failed to preserve the issue with a timely objection were forfeited errors that would be reviewed only for obvious error. at ¶ 24. We further conclude the closure was obvious error because the court did not make pre-closure Waller findings, the error necessarily affected the defendant’s substantial rights because it was a structural error, and therefore it was an obvious error. Id. at ¶¶ 25-26.”

[¶35] According to Martinez [22]

“To avoid violating the right to a public trial, a trial court must articulate its reasons for closing the courtroom on the record, before excluding the public, “and those reasons must be expressed in findings that enable a reviewing court to exercise its function.” Klem, 438 N.W.2d at 801. “Neither we nor the trial court can satisfy the constitutional command with post-closure rationale for why the closure would have been justified if the court had made the required findings.” Morales, 2019 ND 206, ¶ 23 (citing Klem, at 802). Trial courts are strictly required to make findings before a trial closure, and failure to make each of the findings requires reversal. Rogers, 2018 ND 244, ¶19.”

[¶36] According to Martinez [42]

“Here, we conclude that the exclusion of the public without a knowing, intelligent, and voluntary waiver or Waller findings articulated on the record before the closures negatively affects the fairness, integrity, and public reputation of our criminal justice system. Olander, 1998 ND 50, ¶ 28. Because these public trial violations began during jury selection and continued to occur during the trial, the remedy is a new trial. Rogers, 2018 ND 244, ¶3, 919 N.W.2d 193.

### **CONCLUSION**

[¶37] Because of what has been said above, this case must be remanded to the District Court with an Order for a new trial

### **STANDARD OF REVIEW**

[¶38] Having a fair trial is a constitutional issue and constitutional issues are fully reviewable by the North Dakota Supreme Court.

### **ISSUE II**

- **Should Defendant Susan Coons be granted a new trial because the trial judge made the prejudicial statement that or she lost the probate trial?**

### **ARGUMENT**

[¶39] During the trial, the trial judge made the following statement in:

[¶40] Trial Transcripts, May 11<sup>th</sup>, 2022 pg. 43 L3-9.

3. THE COURT: Let me stop this. That probate file,

4. that is over. It's done. Your client lost in the probate
5. proceeding, and she did not appeal it. It is a final judgment.
6. MR. BOUGHTY: Your Honor, I understand --
7. THE COURT: So I -- so there's no point in going back
8. and relit -- she can't relitigate that. She cannot relitigate
9. the fact that she lost in the probate proceeding.

[¶41] Such a statement by the judge could easily be considered evidence by the jury in deciding the guilt or innocence of Ms. Coons. A trial judge during a trial is never supposed to give statements during a trial, that could be used by the jury as evidence to convict the defendant.

[¶42] **Rule 605** of the North Dakota Rules of Evidence states:

**JUDGE'S COMPETENCY AS A WITNESS:** The judge presiding at the trial may not testify in that trial as a witness. A party need not object to preserve the issue.

[¶43] The above Rule prevents a trial judge from being a witness during a trial.

[¶44] There is a jury instruction that informs a jury that whatever a judge says isn't to be considered evidence. Such an instruction was never intended to allow a trial judge during a trial to make a statement that could be considered evidence in determining the guilt of the defendant.

[¶45] In this case, the trial judge during the trial was not sworn in but he certainly made a statement that could be considered testimony by the jury. To make matters worse, the jury could have considered the judges statement to be a jury instruction.

[¶46] In this case the trial judge made a statement during trial that Ms. Coons lost the probate case, such a statement indicates that trial judge bias and prejudice?

[¶47] According to *State v. Nunes*, 205 A2d 24 (1968): The right to have one's cause heard and determined by a judge who is reasonably free from prejudice is part of the fundamental right to a fair trial. *Whitaker v. McLean*, 118 F. 2d 596. In *Rideau v. Louisiana*, 373 U.S. 723, the court, asserting that defendants in criminal cases have certain minimal rights, said at page 726:

“Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge.” It would be sterile interpretation indeed to read these words as requiring anything less than that the \*27 judge be free from prejudice of such character as to impair the impartiality of the trial.

[¶48] A scholarly resume of the development of the law relating to judicial disqualification for prejudice is to be found in *Leonard v. Willcox*, 101 Vt. 195. One of the conclusions reached by the court therein illuminates the nature of the question raised in the instant case. The court, advertent to the question of when a judge's opinion as to the guilt of a defendant in a criminal case constitutes prejudice impairing the impartiality of the trial. Points out that the mere possession of an opinion as to guilt, standing alone, does not disqualify the judge. The court said at page 215: “it is the existence of bias or prejudice in his mind against the respondent which must be clearly shown. \*\*\* If bias or prejudice exists, so that impartiality is destroyed, its origin or reason is immaterial, and it does not matter whether it is warranted or unwarranted. “The Vermont court, in our opinion, states clearly the character of the prejudice that operates to disqualify a judge.

[¶49] According to *State v. Nordstrom*, 408 A2d 601 (1979): “Not only must the judges presiding over the courts be honest, unbiased, impartial, disinterested in fact, but it is of the utmost importance that all suspicion to the contrary must be jealously guarded against

and if possible be completely eliminated, if we are to give full effect to the dignity of the bench and maintain public confidence in its integrity and usefulness.”

### **CONCLUSION**

[¶50] The statement the trial judge made about Ms. Coons losing the probate case shows he had a bias and prejudice against Ms. Coons. Therefore Ms. Coons should be granted a new trial. For the above and forgoing reasons Ms. Coons should be granted a new trial.

### **ORAL ARGUMENT REQUESTED**

[¶51] At this time, we request an oral argument on behalf of Defendant/ Appellant Susan Coons to more fully explain how the laws, statutes, and rules apply to Ms. Coons case.

Dated this 28<sup>th</sup> day of December, 2022.

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IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE,  v.  SUSAN K. COONS, DEFENDANT AND APPELLANT,	Supreme Court <b>20220289</b> Ward County District Court <b>51-2021-CR-00725</b>  <b>BRIEF</b>
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STATE OF NORTH DAKOTA

[¶1] I certify that this appellant's and complies with the page limit of 38 for the brief set forth in N.D.R.App.P. 32(a)(8)(A). The brief in this matter consists of FIFTEEN (15) pages.

Dated this 28<sup>th</sup> day of December, 2022.

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IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA  
PLAINTIFF AND APPELLEE,

v.

SUSAN K. COONS  
DEFENDANT AND APPELLANT,

Supreme Court  
**20220289**  
Ward County District Court  
**51-2021-CR-00725**

**BRIEF**

[¶1] I certify that a true and correct copy of the following, specifically:

1. Brief
2. Certificate of Compliance
3. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

North Dakota Supreme Court  
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Dated this 27<sup>th</sup> day of November

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,	)	<b>Supreme Court No. 20220289</b>
	)	
Plaintiff and Appellee,	)	<b>District Court No. 51-2021-CR-00725</b>
	)	
vs.	)	
	)	
Susan K. Coons,	)	
	)	
Defendant and Appellant.	)	

**CERTIFICATE OF SERVICE**

[¶2] I hereby certify that on December 23, 2022, the following documents:

**Appellant's Brief and Certificate of Compliance**

were filed electronically with the Supreme Court through the E-Filing Portal and served upon:

**Tiffany M. Sorgen – 51wardsa@wardnd.com**

Dated this 23<sup>rd</sup> day of December, 2022.

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## IN THE SUPREME COURT OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE,	Supreme Court <b>20220289</b>
v.	Ward County District Court <b>51-2021-CR-00725</b>
SUSAN K. COONS, DEFENDANT AND APPELLANT,	<b>BRIEF</b>

[¶1] I certify that a true and correct copy of the following, specifically:

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2. Certificate of Compliance
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By electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

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[¶2] And state that the above referenced documents were served by placing true and correct copies of the same in an envelope addressed as follows:

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Dated this 28<sup>th</sup> day of December, 2022.

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