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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Appellee,	)	**Supreme Court No. 20130341**
vs.	)	**District Court No. 18-2012-CR-01101**
CODY JOE BOULDUC,	)	
Appellant.	)	

APPELLANT'S BRIEF

Appeal from the Criminal Judgment, Entered September 30, 2013, in District Court, Northeast Central Judicial District, State of North Dakota, The Honorable Debbie Kleven Presiding.

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[¶ 5] Whether the court committed obvious error when it denied Boulduc the right to represent himself at trial.

[¶ 6] Boulduc joins in the issues raised by co-defendants Allen and Nathan Ratliff and incorporates those issues and arguments by reference.

[¶ 7] STATEMENT OF THE CASE

[¶ 8] Cody Boulduc appeals from criminal judgments entered after a jury found him, along with Nathan and Allen Ratliff, guilty of robbery, burglary, two counts of aggravated assault, theft, and felonious restraint. (App. at 18-23; 29-36; 41-49).

[¶ 9] On May 4, 2012, the State filed its criminal information. (App. at 3). The offenses allegedly occurred around 5:30 a.m. on April 30, 2012, stemming from a home invasion. (App. at 15-16). Boulduc's case was joined with Nathan and Allen Ratliff's cases for trial. (App. at 4; doc # 40). The information was amended on March 5, 2013 to add additional witnesses. (App. at 4-5; doc # 45; 15-17).

[¶ 10] The court held a jury trial on June 24 through June 28, 2013. During the State's case-in-chief, Boulduc asked the court to fire his counsel

and allow him to re-call a witness to the stand so he could cross-examine her. See Trial Tr. Vol. III, p. 511:4-18. The court denied his request. Id. At the close of the State's case, Boulduc joined in the Ratliffs' motion for a judgment of acquittal. See Trial Tr. Vol. IV, 734:17-750:10. The court denied the defendants' motion. Id.

[¶ 11] After the case was submitted to the jury, the jury returned three questions. (App. at 10; docs ## 266-68; 286). The jury first asked about the timeline the State used in its closing argument. (App. at 10, doc # 286). The court did not allow the jury to see the demonstrative exhibit in the jury room. (App. at 10, doc # 266). Next, the jury asked for video equipment, presumably to watch the surveillance video. (App. at 10, doc # 267). After addressing some of the technical issues with getting the surveillance video to play on the court's equipment, the court sent the equipment back into the jury room. Trial Tr. Vol. V, 868:1 – 871:20.

[¶ 12] About 45 minutes later, the court went back on the record to address an issue raised by the State. Trial Tr. Vol. V, 871:21 – 875:24. The State informed the court that the video sent back to the jury room contained audio that was not played during trial. Id. While the court was discussing with counsel how to proceed, the jury reached its verdicts. Trial Tr. Vol. V, 875:24-876:13. Before receiving the verdicts, the court brought the jury into

the courtroom and polled the jurors about the audio. Id. The court asked each juror whether the audio impacted their deliberations. See Trial Tr. Vol. V., 877:3-879:2. After each of the jurors said the audio did not impact their decision, the jury returned guilty verdicts on all six counts. (App. at 18-23).

[¶ 13] Before sentencing, the defendants filed a motion for judgment of acquittal and a motion for new trial. (App. at 24-28). The motion for new trial addressed the jury's receipt of the video and audio in the jury room. (App. at 27-28, ¶ 2). The court denied the motion for a judgment of acquittal, concluding there was sufficient evidence to sustain the verdicts. (App. at 63-64). The court also denied the motion for new trial, concluding the defendants failed to object to the admissibility of the video with audio, the defendants failed to produce evidence that they were prejudiced, and that it was not obvious error for the court to send the audio to the jury. (App. at 51-56).

[¶ 14] Boulduc was sentenced on September 30, 2013. (App. at 29-36). The judgments with respect to counts 2 through 6 were amended on October 29, 2013 to make it clear that they ran concurrently with each other but consecutively to case 18-08-K-00601. (App. at 41-49). Boulduc filed a notice of appeal on October 28, 2013, the day before the judgment was amended. (App. at 50).

[¶ 15] Boulduc's appeal has been consolidated with Nathan and Allen Ratliff's appeals (Nos. 20130346 and 20130332, respectively). Boulduc argues the court committed obvious error when it allowed the jury to consider evidence in its deliberations that was not introduced at trial. He also argues the court committed obvious error when it refused to allow him to represent himself at trial. Finally, Boulduc joins in the issues raised by the Ratliffs.

[¶ 16] Boulduc requests this Court reverse the court's judgment and order a new trial.

[¶ 17] STATEMENT OF THE FACTS

[¶ 18] Carmen Jones owns a trailer located in Grand Forks, North Dakota. Trial Tr. Vol. II, 658:6-12. Before the date of the incident, Jones installed video security cameras in her trailer. Trial Tr. Vol. II, 77:24-78:1.

[¶ 19] On April 30, 2012, three masked men wearing dark clothes broke into Jones's trailer around 5:30 a.m. Trial Tr. Vol. I, 66:16-67:8. The security system recorded the break-in. Trial Tr. Vol. II, 664:17-21. Jones and her husband, Sherman, were home watching television. Trial Tr. Vol. I, 65:13-17. Two men took Sherman into the hallway. Trial Tr. Vol. I, 85:20-86:1. One man put Sherman's face down on the floor, duct taped his hands and mouth, and hit him about five times with a tire thumper. While this was

happening, the third man threatened Carmen, asking where she kept their medications, money and jewelry. Trial Tr. Vol. II, 668:12-20. The man also hit Carmen, duct taped her hands and mouth, and killed her dog. See Trial Tr. Vol. II, 665:19-25; 674:11-21. The men took a number of items from the trailer, including medications, money, jewelry, televisions, and a bag. See generally, Trial Tr. Vol. II, 677:3-689:19. After they left, Carmen was able to free herself. Trial Tr. Vol. II, 692:7-23. She helped her husband get free from his restraints and called the police. Id.

[¶ 20] Law enforcement arrested Allen and Nathan Ratliff, and Cody Boulduc for this incident. All three men were charged with robbery, burglary, two counts of aggravated assault, theft, and felonious restraint. (App. at 15-17).

[¶ 21] During the trial, the Joneses testified that three men forced themselves into the home, bound them, and shoved their faces down so neither could see what was going on, and struck or kicked them. Trial Tr. Vol. I, 73:18-22. The Joneses were not able to identify which man struck each of them. See Trial Tr. Vol. I, 67:9-10. Carmen testified only one man attacked her. Sherman testified that two of the men were with him, but only one struck him. See Trial Tr. Vol. I, 69:4-10. Sherman testified that he thought he lost consciousness during the assault. Trial Tr. Vol. I, 69:25-

70:2. Sherman testified he believed all three men were armed with night sticks or billy clubs. Trial Tr. Vol. 1, 67:11-14. At trial, no one positively identified any of the defendants as the masked men.

[¶ 22] During trial, Boulduc attempted to fire his attorney and question witnesses himself. Trial Tr. Vol. III, p. 511:4-18. The court denied his request. Id.

[¶ 23] During deliberations, it came to the Court's attention that a copy of exhibit 8, the surveillance video with a previously un-played audio track was sent back to the jury room. While the court was discussing the matter with counsel, the jury reached its verdict. Trial Tr. Vol. V., 877:3-879:2. The court brought the jurors back into the courtroom and polled them about what they heard and whether they had considered the audio. Id. After determining the audio did not affect the deliberations, the court received the jury's guilty verdicts on each count.

[¶ 24] Before sentencing, the defendants jointly filed a motion for new trial under N.D.R.Crim.P. 33, arguing the submission of the audio to the jury required a new trial. The defendants also filed a motion for judgment of acquittal under N.D.R.Crim.P. 29 based on insufficient evidence to sustain the verdicts. (App. at 24-28). Both motions were denied. (App. at 51-64). Boulduc was sentenced and now appeals.

[¶ 25] JURISDICTIONAL STATEMENT

[¶ 26] The district court had jurisdiction under N.D. Const. art. VI, § 8 and N.D.C.C. § 27-05-06. The Supreme Court has jurisdiction over this appeal under N.D. Const. art. VI, §§ 2, 6; and N.D.C.C. § 29-28-06. Under N.D.R.App.P. 4(b), Boulduc's appeal is timely.

[¶ 27] ARGUMENT

[¶ 28] Boulduc argues the court committed at least two obvious errors that require reversal and a new trial. First, as raised in the motion for new trial, the court committed obvious error in allowing the video with audio into the jury room during deliberations. Although the court polled the jury, the court should have declared a mistrial. Second, Boulduc argues the court committed obvious error when the court denied him the right to represent himself at trial. Boulduc requests this Court reverse the judgment and order a new trial.

I. THE COURT COMMITTED OBVIOUS ERROR WHEN IT ALLOWED THE JURY TO REVIEW EVIDENCE THAT WAS NOT PRESENTED AT TRIAL DURING DELIBERATIONS.

[¶ 29] The court committed obvious error when it allowed the jury to review evidence that was not presented at trial during deliberations. Although the court polled the jury and none of the jurors indicated they

considered the audio, the court should have declared a mistrial. Boulduc requests this Court reverse the judgment and order a new trial.

A. This Issue is Preserved for Review.

[¶ 30] First, this Court must consider whether Boulduc's issue is properly preserved for appeal. The defendants submitted a motion for new trial under N.D.R.Crim.P. 33(a). (App. at 27-28). A motion for new trial must specify alleged defects and errors warranting a new trial with particularity. State v. Middleton, 2012 ND 181, ¶ 5, 820 N.W.2d 738; N.D.R.Crim.P. 33(a). While a motion for new trial is not a prerequisite for appeal, a defendant who files a motion for new trial and later appeals "is limited on appeal to the grounds presented to the district court in the motion." Middleton, at ¶ 5 (citations omitted). Here, in specifying their alleged errors and defects, the defendants argued:

> During the trial the prosecutors introduced a surveillance video to the jury showing the perpetrators. The video shown during trial did not contain any audio. During deliberations the jury asked the Court to view the surveillance video. Prosecution provided a copy of the surveillance video to the jury that contained audio that had never been introduced to the Court. The audio contained police officers discussing this case including how they apprehended the defendants. The police audio was extremely prejudicial to the Defendants and may have biased the jury, who was in the midst of determining the outcome of the case.

(App. at 27, ¶ 2). Because the parties raised the issue of the audio being improperly sent to the jury, this issue is preserved for review.

B. Standard of Review.

[¶ 31] While the issue was preserved for review, the question remains whether the issue is (1) harmless error, (2) reversible error that was objected to, or (3) obvious error warranting relief even though it was not objected to at the time. See N.D.R.Crim.P. 52 cmt. ¶ 2.

[¶ 32] No one disputes the video was stipulated to and received into evidence. (App. at 52). No one disputes that at trial, the jury was presented the video without audio. See id. After the jury asked to view the video again, the court provided the jury with video equipment. Id. Shortly after the video was viewed again, counsel voiced concern over the fact that the video contained audio that was not previously played in the courtroom. Id. The audio consisted of a discussion between law enforcement officers about the apprehension of the suspects in this case. See Mot. New Trial Tr. 4:10-13.

[¶ 33] After the concern was raised, the court discussed it with defense counsel. Id. While that discussion was taking place, the jury reached its verdicts. Id. Before taking the verdicts, the court polled each juror to determine whether the audio impacted their decision. Id. Each responded

that it did not. Id. It is undisputed that the first time the court was made aware of the issue was after the jury had already received and reviewed the exhibit. Id. The defendants did not object to the exhibit containing both audio and video in the final pretrial conference, at trial when it was offered and played, or when the jury asked to see it during deliberations. Id.

[¶ 34] When a party does not object, this Court may only review the matter for obvious error. N.D.R.Crim.P. 52(b). The standard for review when a defendant does not object requires a showing of "obvious error which affects substantial rights of the defendant." State v. Jones, 557 N.W.2d 375, 378 (N.D. 1996) (quoting State v. Theil, 411 N.W.2d 66, 70 (N.D. 1987); N.D.R.Crim.P. 52(b)). The Court exercises the power to recognize obvious error cautiously and only to prevent an unjust conviction or in exceptional circumstances where the defendant has suffered a serious injustice. Middleton, 2012 ND 181, ¶ 7, 820 N.W.2d 738; State v. Glass, 29 N.D. 620, 151 N.W. 229, 234 (1915); City of Fargo v. McLaughlin, 512 N.W.2d 700, 703 (N.D. 1994). Obvious error is: (1) error, (2) that was plain, and (3) affects substantial rights." State v. Chacano, 2013 ND 8, ¶ 9, 826 N.W.2d 294. The Court also examines the entire record and the probable effect of the error in light of all the evidence. State v. Desjarlais, 2008 ND 13, ¶ 6, 744 N.W.2d 529. When that error impacts substantial

rights, the Court has "discretion to correct the error and should correct it if it seriously affects the fairness, integrity or public reputation of judicial proceedings." Id. Obvious error "must be a clear deviation from an applicable legal rule under current law." Id. at ¶ 10 (quotations omitted).

C. The Court Should Have Declared a Mistrial.

[¶ 35] Boulduc argues the court should have declared a mistrial after learning that evidence not previously submitted to the jury had been given to the jury during deliberations. Boulduc argues the failure to declare a mistrial is obvious error. Boulduc requests this Court reverse the judgment and order a new trial.

[¶ 36] Here, the court stated the defendants failed to object to the admissibility of the video. In State v. Hernandez, 2005 ND 214, ¶ 12, 707 N.W.2d 449, the Court held "[a] party may not assert alleged irregularities during a trial unless the party objects when they occur and allows the trial court an opportunity to take appropriate action to remedy any prejudice that may result from the alleged irregularities." A party's failure to object to the admission of evidence is a waiver of the right to later complain on appeal that the evidence should not have been admitted. State v. Lee, 2004 ND 176, ¶ 9, 687 N.W.2d 237. The basis for the rule is to prevent litigants from

inviting reversible error and then complaining about it only if the party is unsuccessful on the merits. Hernandez, at ¶ 12.

[¶ 37] Here, because the defendants did not object, the court held the defendants waived the right to complain about the error now. (App. at 54). The court noted the defendants did not object at the final pretrial conference, when the video was offered, and when the jury asked to replay the video during deliberations. (App. at 54). The court did not consider that the parties all agreed the video should be presented to the jury. The defendants did not agree to allow the audio to be presented to the jury. This is evidenced by the fact that the State, in publishing the video and offering it into evidence, did not play it with sound. More telling is the fact that the State raised this issue to the Court after learning of the submission of the audio to the jury. The State obviously recognized that the jury had something that was not presented at trial and should not be considered. While there is evidence that the video was disclosed to the defendants in discovery, there is no indication that the State ever intended to present anything more than the video without the audio at trial. See Mot. New Trial Tr. 8:10-9:21.

[¶ 38] The court analogized the evidence presented in Lee and Hernandez to this situation. In Lee, the defendant argued the trial court erred in denying his motion for acquittal because an audiotape was admitted into

evidence without objection, and the statements on the audiotape were hearsay. 2004 ND 176, ¶ 8, 687 N.W.2d 237. In Lee, the audiotape was admitted and then published to the jury. Id. at ¶ 4. Lee did not object, and did not complain about it until after the State rested its case. Id. at ¶ 6. Then, Lee complained the tape was hearsay in his Rule 29 motion. Id. The court denied the motion, ruling that the 911 call was admissible as an utterance. Id. On appeal, the Court emphasized the tape was played only after Lee did not object. Id. at ¶ 12. Concluding Lee failed to establish obvious error, the Court upheld the court's judgment. See id. at ¶¶ 17, 19.

[¶ 39] The Supreme Court addressed a similar concern in Hernandez, 2005 ND 214, 707 N.W.2d 449. In Hernandez, the defendant allegedly left an unsigned, handwritten letter in Spanish on the victim's mother's door. Id. at ¶ 2. At trial, "[t]he State introduced an unredacted English translation of the letter. Id. On appeal, Hernandez argued the trial court erred in admitting into evidence the unredacted English translation of the letter because it contained prior uncharged sexual misconduct. Id. at ¶ 10. At trial, the letter was introduced into evidence without objection. Id. at ¶ 11. Additionally, before the exhibits were submitted to the jury, the court specifically mentioned the State had redacted portions of some exhibits. Id. "The court then asked defense counsel whether there were any objections to the

exhibits, and counsel responded that he did not have any objections." Id. As in Lee, the Court reviewed the matter under N.D.R.Crim.P. 52(b) and determined the letter's admission into evidence was not obvious error. Hernandez, at ¶ 15.

[¶ 40] This case presents a different proposition. Here, the parties stipulated to playing the video before any witnesses testified. Trial Tr. Vol. 1, 59:20-61:18. The trial court "received" the video exhibit not once, but twice. Id. at 60:20-21; 61:17-18. The video (without audio) was played in court to the jury after the first but before the second time the court "received" it. (App. at 52, ¶ 2); see also Trial Tr. Vol. I, 60:20-21; 61:17-18. The defendants did not object to the playing of the video without audio, nor receipt of the video only as evidence. During deliberations, the jury asked for a video equipment watch the video again. Shortly thereafter, the State brought the matter to the court's attention that the jury had audio that was not played at the trial. Trial Tr. Vol. V, 871:25-873:10. While the court and counsel were discussing what to do, the jury reached a verdict. Trial Tr. Vol. V, 875:24-876:1.

[¶ 41] Before receiving the verdicts, the court suggested to counsel that it should ask the jury whether they listened to the audio and if they

considered it. Id. at 875:4-23. The exchange between the court and the jurors is as follows:

THE COURT:	Juror No. 14, it came to my attention that the video that was sent in and was offered into evidence had some audio. The audio was not played during the trial and was not offered. Did the jury listen to the audio portion in the jury room?
JURY FOREPERSON:	We heard bits and pieces, but we did slow motion pause; so after we did that, we weren't able to hear anything.
THE COURT:	So was anything that was on that audio discussed in your deliberations?
JURY FOREPERSON:	No, ma'am.
THE COURT:	And as it turns out, it's my understanding -- I believe Detective Simon said the way he made that was to just transfer it to DVD format by kind of re-copying it; so any audio wasn't even from the scene. So I just want to know if that was discussed at all, the audio.
JURY FOREPERSON:	No. We just heard, like, moving around. It wasn't really, like, words.
THE COURT:	Okay. It was not considered --
JURY FOREPERSON:	Yeah.
THE COURT:	-- is that correct?
JURY FOREPERSON:	Correct.

THE COURT:	Okay. Juror No. 13, did you consider any of the audio portion in your deliberations?
JUROR NO. 13:	No, I didn't really understand anything being said.
THE COURT:	Juror No. 12?
JUROR NO. 12:	No, I did not.
THE COURT:	Juror No. 11?
JUROR NO. 11:	Couldn't even hear it.
THE COURT:	Juror No. 10?
JUROR NO. 10:	I didn't hear it.
THE COURT:	Juror No. 9?
JUROR NO. 9:	No, Your Honor.
THE COURT:	Juror No. 8?
JUROR NO. 8:	No, ma'am.
THE COURT:	Juror No. 7?
JUROR NO. 7:	No, Your Honor.
THE COURT:	Juror No. 5?
JUROR NO. 5:	No.
THE COURT:	Juror No. 4?
JUROR NO. 4:	No.

THE COURT: Juror No. 3?

JUROR NO. 3: No.

THE COURT: Or, Juror No. 2?

JUROR NO. 2: No, ma'am.

THE COURT: Then, the jury has reached a verdict in these cases; is that correct, Juror No. 14?

JURY FOREPERSON: That's correct.

Trial Tr. Vol. V, 877:3-879:2. Based on that exchange, the court concluded the defendants were not prejudiced on the audio submitted to the jury during deliberations. (App. at 55, ¶ 9).

[¶ 42] In denying the defendants' motion for a new trial, the district court also reviewed the submission of the audio for obvious error. (App. at 55-56, ¶¶ 9-12). The court ruled that the defendants' assertion that the evidence "may have been" prejudicial failed to meet the burden of showing obvious error. (App. at 56, ¶ 12). Consequently, the court denied the defendants' motion for new trial. (App. at 56, ¶ 13).

[¶ 43] Under N.D.C.C. § 29-22-04, the jurors may take with them to deliberations and consider the following materials:

1. All papers or things . . . which have been received as evidence in the cause . . . ;

2. . . . [T]he written instructions as the court may direct;

3. Notes of the testimony, or other proceedings on the trial, taken by jurors themselves or any of them . . . ; and

4. Forms of verdict approved by the court.

Id. Of the three cases citing this statute, only one is instructive here. In State v. Boehler, 542 N.W.2d 745 (N.D. 1996), the defendant argued the court erred in not providing video equipment to the jury so they could review videotape evidence. Id. at 746. Boehler had objected to the videotape because it contained medical information. Id. After his objection, the parties agreed the medical information on the video should be excluded from evidence. Id. After that decision, Boehler asked that the videotape be given to the jury for use in its deliberation. Id. The court denied Boehler's request because the jury would be able to use the volume controls and hear evidence that the jury did not hear in the courtroom. Id. at 746-47. The Supreme Court concluded that while properly admitted exhibits should go to the jury, Boehler was seeking to allow the jury to consider evidence that was not properly admitted or presented to the jury in the courtroom. See Boehler, at 747. The Court determined the trial court's decision "was the product of a rational mental process." Id. Consequently, the Court upheld the district court's decision. Id.

[¶ 44] Under N.D.C.C. § 29-22-04(1), it is improper for the jury to receive or consider evidence that was not introduced at trial. This case presents the exact situation the court in Boehler tried to prevent: the jury from reviewing evidence that was not presented in the courtroom. Id. at 746-47. Boehler does not, however, answer the question regarding what to do if the jury gets ahold of evidence it should not have. State v. Lindeman 64 N.D. 518, 254 N.W. 276 (1934), answers that question.

[¶ 45] In Lindeman, the defendant was charged with trafficking liquor. Id. at 281. Some bottles of liquor and a box—which were not introduced and received as evidence—inadvertently made it into the jury room. Id. at 278. In Lindeman, as in here, many of the jurors asserted to the court in affidavits that they did not consider the improper evidence. Id. at 278-79. Nevertheless, the Court held, "[i]t is well settled that the reception of evidence by the jury in a criminal case outside of that produced at the trial will vitiate the verdict." Id. at 280. Even though the jurors stated they did not consider the improper evidence, the Court reversed the judgment and ordered a new trial. Id. at 281.

[¶ 46] Simply put, the audio was not presented or received for the jury's consideration in this case. Unlike the situations in Lee or Hernandez where the defendant knew about the specific information contained in the

exhibits, defendants' counsel believed the exhibit only included the video. See Mot. New Trial Tr. 13-15. The district court was made aware of the fact that exhibit 8 contained audio concerning law enforcement's discussion of the apprehension of these defendants before the jury reached a verdict. Allowing evidence to go back to the jury room that was not presented in court is error under N.D.C.C. § 29-22-04. That error is plain from the record presented here. Finally, under Lindeman, that error is prejudicial and affects substantial rights, even when the jury claims not to have considered it. The district court should have declared a mistrial before receiving the verdicts.

[¶ 47] Boulduc requests this Court recognize this as obvious error, reverse the judgment, and order a new trial.

II. THE COURT COMMITTED OBVIOUS ERROR WHEN IT DENIED BOULDUC HIS RIGHT TO REPRESENT HIMSELF.

[¶ 48] Boulduc argues the court committed obvious error when the court denied him his constitutional right to represent himself at trial. While not contained in his motion for new trial, Boulduc argues the trial court's error of constitutional magnitude has caused him to suffer a serious injustice. Boulduc respectfully requests this Court review this issue under N.D.R.Crim.P. 52(b), find that obvious error has occurred, reverse the district court's judgment and order a new trial.

A. Obvious Error Review is Appropriate Even Though This Issue Was Not Raised in the Motion for New Trial.

[¶ 49] As a threshold matter, this Court must address whether an obvious error review is appropriate for this issue. See Middleton, 2012 ND 181, ¶ 7, 820 N.W.2d 738 (declining to review issues for obvious error when the issues were not raised in defendant's motion for new trial that did not cause the defendant to suffer a serious injustice); see also N.D.R.Crim.P. 52(b). Boulduc argues the denial of his right to self-representation caused him to suffer a serious injustice, and this Court should review his issue for obvious error.

[¶ 50] In Middleton, Middleton's counsel filed a motion for new trial under N.D.R.Crim.P. 33(a), alleging only that he should get a new trial "in the interest of justice." Id. at ¶ 3. Middleton did not point to specific errors or defects warranting a new trial. See id. On appeal, Middleton raised issues that were not included in his motion. Id. at ¶ 4. The State argued those issues were not preserved for appeal. Id. Ultimately, the Supreme Court agreed with the State. Id. at ¶ 6.

[¶ 51] After declining to review Middleton's issues, the Court cleared up some ambiguities concerning whether obvious error review is appropriate when issues are not raised in a motion for new trial filed with the trial court. Id. at ¶ 7. The Court explained some of its decisions "may lead to the

conclusion that [the Court] will apply obvious error to any issue that was raised on appeal but not raised in the motion for a new trial." Id. The Court stated it will not always review for obvious error. Id. Instead, the Court held it will only apply obvious error "'to prevent an unjust conviction,' . . . or to 'exceptional situations where the defendant has suffered serious injustice.'" Middleton, at ¶ 7. From what was presented, the Court concluded Middleton's issues did not meet the criteria; and therefore, the Court declined to review them for obvious error. Id.

[¶ 52] In reaching its conclusion, the Court cited several opinions discussing the stringent standard of review in obvious error cases. Id. (citing McLaughlin, 512 N.W.2d at 703; State v. Kopp, 419 N.W.2d 169, 173 (N.D. 1988); and Glass, 29 N.D. 620, 151 N.W. at 234). In McLaughlin, the issue raised on appeal was the evidentiary use of McLaughlin's independent chemical test in a DUI case. McLaughlin, at 701-02. McLaughlin did not object at trial, filed a Rule 33 motion that did not raise the issue, and argued for the first time on appeal that the State's commentary about his chemical test was improper. Id. The Court noted that obvious error is exercised cautiously and only in "exceptional situations where the defendant has suffered serious injustice." Id. The Court also noted that the probability of the error affecting a person's substantial rights is reviewed in light of all of

the other evidence presented. See id. The Court held that in light of the other evidence presented, it not obvious error. Id.

[¶ 53] In Glass, 29 N.D. 620, 151 N.W. at 229, the Court held that a party was barred by waiver and estoppel from taking a different position on appeal than the defendant raised in a motion for new trial. Id. The Court also held that waiver and estoppel could be set aside "in order to prevent an unjust conviction . . . ." Id. at 234. The Court determined Glass's position on appeal was in direct contradiction to what he raised below, and his alleged error was a technicality that did not affect his substantial rights. See id. at 235.

[¶ 54] In Kopp, 419 N.W.2d at 172, Kopp filed a motion for new trial based on newly discovered evidence. The district court denied her motion, and she appealed, arguing (1) she was denied due process; (2) the court should have granted her a new trial based on newly discovered evidence; and (3) the verdict was contrary to the greater weight of the evidence. Id. In deciding whether the issues were properly before the Court, the Court ruled without explanation that because the due process claim was such a novel issue and it was not raised below, the Court would not review it for obvious error. Id. at 173. Presumably, the Court declined to review the due process issue for obvious error because it was not raised below, it was a novel

argument and not properly supported with persuasive authority and legal reasoning. See, e.g., State v. Demarais, 2009 ND 143, ¶ 143, ¶ 18, 770 N.W.2d 426 (holding that parties alleging a constitutional violation "must provide persuasive authority and reasoning, and without supportive reasoning or citations to relevant authorities an argument is without merit."). The Court also determined that the weight of the evidence argument was not a good candidate for obvious error review "when there is ample evidence to support the jury verdict." Id. The Court only addressed the argument related to the newly discovered evidence. Id.

[¶ 55] In Glass and McLaughlin, the Supreme Court actually conducted a Rule 52(b) analysis but did not find obvious error. See Glass, 29 N.D. 620, 151 N.W. at 234; McLaughlin, 512 N.W.2d at 703. The Court in those cases noted that the power to recognize obvious error should be exercised cautiously in cases where the defendant has suffered a serious injustice or to overturn an unjust conviction. Glass, at 234; McLaughlin, at 703. The purported difference between those cases and Kopp is that Kopp's argument was new, novel, and did not appear to be well supported.

[¶ 56] This case is more like Glass and McLaughlin where the Court actually conducted a Rule 52 analysis than Middleton and Kopp. Boulduc's claimed error is plain, clear on the record, and concrete. It relates to well-

defined constitutional principles of criminal procedure. Unlike in Middleton, where the issues concerned discovery motions and vague allegations of prosecutorial misconduct, Boulduc's argument is directly related to a very clear and fundamental Sixth Amendment right. Unlike in Kopp, where the Court declined to hear a novel constitutional issue, the alleged error here impacts Boulduc's substantial rights and is a significant deviation from the applicable legal standards. Boulduc's issue is ripe for obvious error analysis because the court should have been very aware of its obligations regarding the right to self-representation in the first instance. The relevant exchange between the Court and Boulduc is as follows:

> CODY BOULDUC: Your Honor, if I move to fire my attorney, can I subpoena Ms. Slominski back up to the - -
>
> THE COURT: I can't allow you to fire your attorney at this time. It's too late in the proceedings. You have the right to be represented by an attorney, and you asked for a court-appointed attorney. We provided that.
>
> If you want to represent yourself, it takes a whole nother [sic] hearing for the Court to determine whether you're able to do that, and so I'm not going to allow it.
>
> CODY BOULDUC: There's no way that Ms. Slominski can be subpoenaed back up to the stand either?
>
> THE COURT: No. She's been excused.

CODY BOULDUC: Thank you.

Trial Tr. Vol. III, p. 511:4-18. Unlike the novel argument raised in Kopp, the court's denial of Boulduc's right to self-representation is so fundamental that Boulduc has suffered a "serious injustice." This Court should review this issue under Rule 52(b)'s obvious error framework.

B. Standard of Review.

[¶ 57] The standard for review for obvious error is recited above in paragraph 34, and incorporated by reference herein. Claims of a violation of a constitutional right are reviewed de novo. State v. Jones, 2011 ND 234, ¶ 11, 817 N.W.2d 313; State v. Torkelson, 2008 ND 141, ¶ 41, 752 N.W.2d 640; State v. Ochoa, 2004 ND 43, ¶ 15, 675 N.W.2d 161; State v. Keyes, 2000 ND 83, ¶ 2, 609 N.W.2d 428); State v. Wicks, 1998 ND 76, ¶ 17, 576 N.W.2d 518; State v. Harmon, 1997 ND 233, ¶ 16, 575 N.W.2d 635.

C. The Court should have Allowed Boulduc to Represent Himself at Trial.

[¶ 58] Boulduc argues the trial court committed obvious error when it denied him his constitutional right to represent himself at trial. This denial was in error, the error was plain, and it affected Boulduc's substantial rights. This Court should reverse the judgment and order a new trial.

[¶ 59] Under the Sixth Amendment to the United States Constitution and Article I, section 12 of the North Dakota Constitution, a defendant has the fundamental constitutional right to be represented by counsel at all of the proceedings. A defendant has a mutually exclusive corollary right to self-representation. See Ochoa, 2004 ND 43, ¶ 15, 675 N.W.2d 161; Owens v. State, 1998 ND 106, ¶ 24, 578 N.W.2d 542; State v. Poitra, 1998 ND 88, at ¶ 8, 578 N.W.2d 121; Harmon, 1997 ND 233, ¶ 16, 575 N.W.2d 635; State v. Hart, 1997 ND 188, ¶ 6, 569 N.W.2d 451; see also Faretta v. California, 422 U.S. 806, 807 (1975). Typically, a defendant may discharge counsel at any time, with or without reason. See N.D. R. Prof. Conduct 1.16(a)(4) cmt. 5-6.

[¶ 60] "Criminal defendants who proceed pro se necessarily relinquish many of the benefits associated with the right to counsel, and in order to proceed pro se, they must voluntarily, knowingly and intelligently relinquish the benefits of counsel." State v. Dvorak, 2000 ND 6, ¶ 10, 604 N.W.2d 445. Before a defendant can proceed pro se, the court should make a specific, on-the-record determination concerning whether the right to counsel was knowingly, voluntarily, and intelligently waived. See id. To that end, the Court should make the defendant aware of the dangers and disadvantages of self-representation before determining whether the waiver is voluntary, knowing, and intelligent. See State v. Jensen, 2010 ND 3, ¶¶

11-18, 777 N.W.2d 847; see also Dvorak, at ¶ 9; Harmon, 1997 ND 233, ¶ 13 n.1, 575 N.W.2d 635; Faretta, 422 U.S. at 818-21.

[¶ 61] Here, Boulduc sought to discharge his appointed counsel. Trial Tr. Vol. III, p. 511:4-18. Boulduc did not seek the appointment of substitute counsel or a continuance. Id. There is no evidence in the record or otherwise that Boulduc was a questionably competent or mentally ill. There is no evidence Boulduc was likely to abuse the dignity of the courtroom, disrupt proceedings, or ignore the applicable rules of procedure. See, e.g., State v. Curtis, 2009 ND 34, ¶ 15, 763 N.W.2d 443; Hart, 1997 ND 188, ¶ 6, 569 N.W.2d 451 (holding that the right to self-representation is not a right to abuse the courtroom or ignore the court's procedural rules).

[¶ 62] In Faretta, 422 U.S. at 807, the Supreme Court suggested there are only three potential grounds for denial of a person's unequivocal request for self-representation. First, the Faretta Court stressed that the defendant's request to represent himself was made before the date of trial. Id. Second, the Court noted that the judge may terminate self-representation by a defendant who engages in "serious or obstructionist misconduct." Id. at 834, n.46. Finally, the Court noted a judge may refuse to allow self-representation when the defendant is unable to make a knowing and intelligent waiver of the right to counsel. Id. at 835-36. That said, the Faretta

Court did not require a defendant to have specialized technical or legal knowledge or unusual intelligence before a defendant may represent himself. See id. After Godinez v. Moran, 509 U.S. 389 (1993) and Indiana v. Edwards, 554 U.S. 164 (2008), the Supreme Court recognized a fourth possible ground to deny a self-representation request: severe mental illness that limits the person's ability to represent himself. See 3 LaFave et al., Criminal Procedure, § 11.5(d) (3d. ed. 2013). In this case, the timeliness of Boulduc's request is the only potentially applicable ground for denying his request; the remaining grounds will not be discussed.

[¶ 63] The court's denial of Boulduc's request appears to be based on timeliness. Some commentators have suggested that at some point, a request "might be so disruptive of the orderly schedule of proceedings as to justify rejection. . . ." 3 LaFave, et al., Criminal Procedure, § 11.5(d). Courts around the country, however, are split on when that occurs. In North Dakota, the Supreme Court briefly addressed timeliness of a demand for self-representation in State v. Torkelson, 2008 ND 141, ¶ 43, 752 N.W.2d 640. In Torkelson, the Court held that a request for self-representation must be clear, unequivocal, and timely made. Id. at ¶¶ 42-43. Citing decisions from the 11th and 8th Circuit, the Court stated:

> The right to self-representation is unqualified only if it is demanded before trial. See United States v. Young, 287 F.3d

> 1352, 1354 (11th Cir. 2002); United States v. Wesley, 798 F.2d 1155 (8th Cir. 1986). If the request for self-representation is not timely because it is made after the trial begins, it is within the court's discretion to grant the request; however, the court must balance the defendant's interests and the potential disruption and delay, and the court's decision will not be reversed on appeal unless the court abused its discretion. Wesley, at 1156.

Torkelson, at ¶ 43 (emphasis added). Ultimately, the Court in Torkelson held that Torkelson's request for self-representation was equivocal. Id. at ¶ 45. Because of that equivocation, the Court in Torkelson concluded that the Court was not required to conduct a Faretta colloquy and did not abuse its discretion in denying Torkelson's request for self-representation. Id.

[¶ 64] Here, the court certainly interpreted Boulduc's statement as an unequivocal request to fire his attorney. The court did not even let him finish his request before denying it. Trial Tr. Vol. III, p. 511:4-18. Moreover, Boulduc clearly asked whether he could call the witness back up to the stand. See id. He did not mention a continuance, substitute counsel, or any delay. See id. There is no indication that Boulduc was disruptive. He even thanked the court after his requests were denied. Id. The court did not ask why Boulduc wanted to fire his counsel or what questions he may have had for the witness. See id. In other words, the court did not determine what Boulduc's interests were at the time he made his request.

[¶ 65] Next, the court indicated it would require a separate hearing to determine whether Boulduc was capable of self-representation. This is inaccurate. The court must ensure Boulduc's waiver of counsel and election to represent himself is voluntarily, knowingly and intelligently made but there is no requirement for a separate hearing. When a defendant seeks to represent himself at trial, the court must provide the defendant with enough information to make an intelligent decision based on a range of case-specific factors like education, sophistication, the complexity of the charge, and the stage of the proceeding. Jones, 2011 ND 234, ¶ 13, 817 N.W.2d 313 (quoting Iowa v. Tovar, 541 U.S. 77, 88 (2004)). That said, however, there is no formula or script the court must follow before allowing self-representation. See id. This could have been accomplished in minutes right then and there.

[¶ 66] Courts around the country have discussed the balancing inquiry that should occur when a defendant seeks self-representation once the trial begins. For instance, in State v. Bean, 762 A.2d 1259, 1264-65 (Vt. 2000), the Vermont Supreme Court adopted a nonexclusive list of factors to consider in balancing midtrial requests for self-representation:

> When such a midtrial request for self-representation is presented the trial court shall inquire sua sponte into the specific factors underlying the quest thereby ensuring a meaningful record in the event that appellate review is later

> required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request.

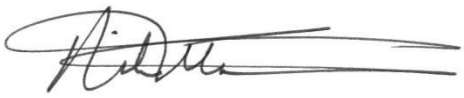
Bean, at 1264-65 (quoting People v. Windham, 560 P.2d 1187, 1191-92 (Cal. 1977) and citing State v. Brown, 676 A.2d 513, 525 (Md. 1996)).

[¶ 67] It is difficult to conduct the balancing analysis because the court did not inquire into Boulduc's rationale, despite the requirement under North Dakota law to balance those interests. It would have been even better for the court to engage in a Bean/Windham/Brown analysis before denying Boulduc his right to self-representation. Here, the court did not engage in that analysis, which is a clear deviation from a current rule of law. The court's error in denying Boulduc his constitutional right is plain, and affects Boulduc's fundamental rights. Boulduc respectfully requests this Court reverse the district court's judgment and order a new trial.

[¶ 68] CONCLUSION

[¶ 69] For the foregoing reasons, Boulduc respectfully requests this Court reverse the district court's judgment and order a new trial.

[¶ 70] Dated: March 21, 2014.



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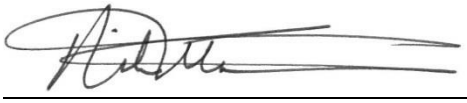
[¶ 71] **CERTIFICATE OF COMPLIANCE**

[¶ 72] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 14-point font, proportional typeface and that the total number of words does not exceed 8,000 from the portion of the brief entitled "Statement of Issues" through the signature block. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

[¶ 73] Dated, March 21, 2014.



Nicholas Thornton (ND # 06210)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
	)	**Supreme Court No: 20130341**
Appellee,	)	**Dist. Ct. No. 18-2012-CR-01101**
VS.	)	
	)	**CERTIFICATE OF**
CODY JOE BOULDUC,	)	**SERVICE**
Appellant.	)	

[¶ 1] Undersigned counsel hereby certifies that on **March 21, 2014,** the following documents were electronically filed with the Office of the Clerk of the North Dakota Supreme Court:

a. **Appellant's Brief (in .docx and .pdf);**
b. **Appellant's Appendix;**
c. **Certificate of Service; and**
d. **Correspondence to the Supreme Court (Filing Fee).**

Copies of these documents were electronically served on all separately represented parties at the e-mail addresses listed below under N.D.R.Ct. 3.5:

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[¶ 2] These documents, along with a copy of **N.D.R.App.P. 24**, were also served by U.S. Mail on the Appellant at his last known address:

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North Dakota State Penitentiary
P.O. Box 5521
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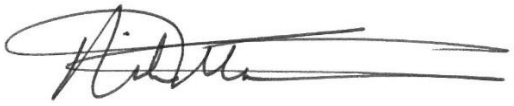
[¶ 3] This service was made under N.D. Sup. Ct. Admin. Order 14; N.D.App.P. 25; and N.D.R.Ct. 3.5.

[¶ 4] Dated: March 21, 2014.



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