20170279
FILED
IN THE OFFICE OF THE
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MARCH 19, 2018
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
State of North Dakota,	)	**20170279**
	)	
Plaintiff and Appellee,	)	**Ward County Criminal No.**
	)	**51-2015-CR-01459**
	)	
v.	)	
	)	
	)	
Alexander Justin Pittenger,	)	**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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The first Jury Trial held in this case was conducted on July 18, 2016 through July 22, 2016. The transcript of that trial is referred to as [Jury 1 Tr.] in this brief. After a mistrial the second Jury Trial, began on January 9, 2017 and concluded February 6, 2017. The transcript of that trial is referred to as [Jury 2 Tr.] in this brief. A Status Conference was held on July 15, 2016 regarding a motion in limine filed by Attorney Bradshaw. The transcript of that hearing is referred to as [SC Tr.] in this brief.

JURISDICTION

[¶ 1] The Defendant, Alexander Pittenger, timely appealed the district court's 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 N.D. Const. art. VI, § 6, and N.D.C.C. §§ 29-28-03; 06.

STATEMENT OF THE ISSUES

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

II. Whether the District Court erred by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn.

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. Alexander Pittenger, 51-2015-CR-01459. The initial complaint was filed with the court on June 29, 2015. The Defendant was charged with one count of Gross Sexual Imposition, GSI, in violation of section 12.1-20-03, a class A Felony, and one count of Corruption or Solicitation of a Minor, a class A misdemeanor, in violation of section 12.1-20-05. Mr. Pittenger was represented by Attorney Bradshaw and Attorney McMillan through both of his jury trials.

[¶ 4] The State moved to dismiss count one, GSI, after the first jury trial and proceeded with a single count of Corruption or Solicitation of a Minor. Mr. Pittenger was found guilty and sentenced to 300 days in custody. Mr. Pittenger had credit for 153 days previously served and 31 days of good time credit. Mr. Pittenger must register as a sex offender, complete two (2) years of supervised probation after release from custody, and pay fines and fees totaling $625.00.

[¶ 5] The Amended Criminal Judgment was filed in this case on September 14, 2017. On July 25, 2017, Attorney McMillan timely filed notice of appeal, on behalf on Mr. Pittenger, from the original Criminal Judgment filed on July 13, 2017.

STATEMENT OF FACTS

[¶ 6] Mr. Pittenger was originally charged with one count of Gross Sexual Imposition, GSI, and one count of Corruption or Solicitation of a Minor on June 29, 2015. Mr. Pittenger through his counsel filed a discovery request with the State on July 21, 2015. This case was first set for trial commencing on February 29, 2016. The State requested a continuance and in conjunction with Mr. Pittenger's first attorney's retirement, the court granted the request. The trial was rescheduled for May 9, 2016. The State later requested that trial date be continued once again. The court denied the request for continuance.

[¶ 7] On May 9, 2016, Mr. Pittenger, through his counsel, alleged Brady violations and the court agreed. The trial was then continued to remedy the discovery violation, to July 18, 2016. Attorney Bradshaw filed three motions in limine, the State agreed to limit certain testimony at trial during a motion hearing held on May 3, 2016. The court filed an order with respect to the third motion on July 18, 2016. Doc ID# 108. The

court granted defense counsel's request to limit prior criminal convictions of Mr. Pittenger, specifically any information regarding violation of a protective order.

[¶ 8] The first jury trial commenced on July 18, 2016. Mr. Pittenger was represented by Attorney Bradshaw and Attorney McMillan. Over the course of a four-day jury trial there were numerous side bars, speaking objections, witnesses removed from the court room and the jury removed from the courtroom. On day one of the trial the jury was sent out of the courtroom, Jury 1 Tr. Vol. 1 p. 61. Day one also included a lengthy sidebar. Id. at p74.

[¶ 9] On day two of the trial there were several sidebars some required removal of the witness. Jury 1 Tr. Vol. 2 pp. 24, 36. Additionally, on day two the jury was sent out of the courtroom twice. Id. at pp.40, 84. The second time the jury was removed was in response to the State specifically eliciting information, or a response, from their witness regarding the protection order that the court previously ruled upon. Id. at p.82 ln 4-6.

[¶ 10] The State argued, at that time, that they did not violate the letter of the Judge's order, which was only regarding the conviction not any of the bad acts surrounding the conviction. Id. at pp. 82- 86, 88. The court agreed with the State regarding its poor wording of the order and further clarified nothing to do with the restraining order should be discussed. Id. at pp. 90-92. The jury was again removed from the courtroom on day three. Jury 1 Tr, Vol. 3 p. 106.

[¶ 11] On day four the State requested a mistrial because exhibits accepted into evidence were left on a table overnight. Jury 1 Tr, Vol. 4 pp.11-12. The Jury was again removed. Id. at p.11. Agent Maixner stated he was investigating a "stalking and harassment case," in response to the defense's line of question regarding Jane Doe's decreasing lack

of specificity in her statements. Id. at. pp. 129-130. State's limiting instruction to Agent Maixner regarding prohibited testimony was that he should not "address the restraining order unless there was some question **directly related** to Defense Counsel.". Id. at p. 135, ln 18-23. The court ordered a mistrial. emphasis added Id. at p. 149.

[¶ 12] After the mistrial the State moved for dismissal of count one of the information and proceeded to retry count two. The second Jury Trial, began on January 9, 2017 and concluded February 6, 2017. Mr. Pittenger raised the issue of double jeopardy and requested a jury instruction. Additionally, before the second trial began on January 9, 2017 the State requested, over the objection of Mr. Pittenger, that the courtroom be closed for Jane Doe's testimony. Jury 2 Tr. Vol. 1. pp. 17-18. The Court subsequently granted that court closure. Mr. Pittenger renewed his objection to a closed courtroom just prior to Jane Doe's testimony. Jury 2 Tr. Vol. 3. pp. 37 ln. 8-19; 38 ln. 5-8. At the close of the jury trial on February 6, 2017, Mr. Pittenger was found guilty of Corruption or Solicitation of a Minor. Mr. Pittenger, though his counsel, timely appealed that conviction.

LAW AND ARGUMENT

I. The district court created a structural error by denying Alexander Pittenger's constitutional right to a public trial.

Standard of Review

[¶ 13] 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.

[¶ 14] 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). When a structural error is objected to and subsequently raised on direct appeal, the defendant is entitled to relief without any inquiry into harm. Weaver v. Massachusetts, 137 U. S. 1899 (2017). Further, this Court held that a violation of the right to a public trial is a structural error "so intrinsically harmful as to require automatic reversal." State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (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 Jane Doe was a minor, seventeen years old, the courtroom should be cleared. Jury 2 Tr. Vol. 3. p. 37. 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.

[¶ 15] 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).

[¶ 16] The proper remedy for a violation of the right to a public trial depends on when an objection was raised. If the objection was made at trial and the issue is raised on direct appeal, the defendant is generally entitled to automatic reversal regardless of the error's actual "effect on the outcome." Neder v. United States, 527 U.S. 1, 7 (1999). The United States Supreme Court recently reiterated that remedy stating, "a new trial generally will be granted as a matter of right." Weaver v. Massachusetts, 137 S. Ct. 1899, 1913 (2017).

[¶ 17] 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 this case, the district court directed the courtroom be closed during the State's presentation of evidence, its case in chief. Mr. Pittenger had properly objected, citing that he desired members of his family to attend the trial. Jury 2 Tr. Vol. 1. pp. 17-18. The court did not go through the factors from Waller, therefore, the barring of individuals from the courtroom during Ms. Doe's testimony denied Mr. Pittenger his right to a public trial, which is reversible error.

[¶ 18] The state argued but did not present case law or statute that closing a courtroom is required when any minor testifies. Jury 2 Tr. Vol. 1. pp. 17-18. 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 Jane Doe's testimony.

[¶ 19] Mr. Pittenger repeatedly objected, through his counsel, to the denial of the right to a public trial. Jury 2 Tr. Vol. 1. pp. 17-18; Jury 2 Tr. Vol. 3. p. 79, ln 12. The court overruled Mr. Pittenger's objection and closed the courtroom. The court after the Jury was removed indicated that Mr. Pittenger had the ability to directly confront his accuser. Jury 2 Tr. Vol. 3. p. 79, ln 16. The lower court in this case confused the two distinct Sixth Amendment rights. Defense counsel corrected the court and again stated it was Mr. Pittenger's right to a public trial that was at issue. Id. However, the district court closed the courtroom and did not go through the necessary factual findings.

[¶ 20] The Court very recently in Weaver reiterated its position that when a structural error is objected to and subsequently raised on direct appeal, the defendant is entitled to relief without any inquiry into harm. Weaver v. Massachusetts, 137 U. S. 1899 (2017) This is due to the very nature of a structural error. Some errors, such as a public-trial error, are considered structural because 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 Ms. Doe's testimony, nor did it make any accommodations to allow the public to be present, it violated Mr. Pittenger's right to a public trial. This Court must reverse the district court and Mr. Pittenger's conviction because Mr. Pittenger timely made his objection and he does not have to show prejudice when a structural error occurs.

II. Whether the District Court erred by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn.

[¶ 21] The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits successive prosecutions and punishments for the same offense. The Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. State v. Linghor, 2004 ND 224, ¶ 19, 690 N.W.2d 201. North Dakota constitutional and statutory provisions provide protections consistent with the Fifth Amendment. See N.D. Const. art. I, § 12; N.D.C.C. § 29-01-07. It is well settled that, in a jury trial, jeopardy attaches when the jury is empaneled and sworn. State v. Berger, 235 N.W.2d 254, 257 (N.D. 1975). Jeopardy attached in this case when the jury was empaneled and sworn in the first jury trial. Jury 1 Tr. Vol. 1. p. 15 ln. 8-9.

[¶ 22] "The Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." Abney v. United States, 431 U.S. 651, 660-61 (1977). The Double Jeopardy Clause exists because "'the State with all its resources and power should not be

allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" Id. at 661-62 (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)). Furthermore, a defendant has a "valued right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949). In the case before the Court Mr. Pittenger had a right to have his trial completed before the tribunal empaneled and sworn on July 18, 2016.

[¶ 23] Nevertheless, when a trial ends before a verdict, the pronouncement that jeopardy has attached only begins the analysis as to whether the double jeopardy clause bars retrial. See Linghor, at ¶ 20. The double jeopardy clause does not always prohibit retrial when the first trial has terminated before a verdict is rendered. "Before a second-jeopardy situation can exist, there must first have been an initial period of jeopardy which has terminated." State v. Allesi, 216 N.W.2d 805, 813 (N.D. 1974).

[¶ 24] However, the Double Jeopardy Clause does not prohibit retrial in every case where the first trial has terminated after jeopardy attached but before a verdict is rendered. Linghor, at ¶ 20. Whether a defendant may be retried depends on whether a mistrial was properly granted. State v. Voigt, 2007 ND 100, ¶ 12, 734 N.W.2d 787. The basic controlling principles in determining whether a mistrial was properly granted are manifest necessity and the ends of public justice. Id.

[¶ 25] The "Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a

continuation of the proceedings." United States v. Jorn, 400 U.S. 470, 485 (1971). Each case in which a double jeopardy violation is asserted must turn upon its own facts. See Berger 235 N.W.2d at 258; Allesi, 216 N.W.2d at 814. While there is no "mechanical formula" for determining whether termination of a criminal trial is supported by manifest necessity, as stated by Illinois v. Somerville, 410 U.S. 458, 462 (1973), this Court identified a list of nonexclusive factors to consider:

> "(1) whether counsel were afforded an opportunity to be heard on the issue; (2) whether alternatives to a mistrial were explored; and (3) whether the judge's decision was made after sufficient reflection. While this enumeration is not etched in stone--each case is different, and the situations that may arise are simply too diverse to render a mechanical checklist desirable--these factors often serve as a useful starting point."
>
> Voigt at ¶ 13 (quoting United States v. Keene, 287 F.3d 229, 234 (1st Cir. 2002)).

[¶ 26] The predominant question on appeal is "whether the district judge's declaration of a mistrial was reasonably necessary under all the circumstances." United States v. Brown, 426 F.3d 32, 37 (1st Cir. 2005). The trial court indicated that the totality of the sidebars, jury removal from the courtroom, and curative instructions cause a manifest necessity of a mistrial. Additionally, the mistrial was necessary because reversal on appeal would be a certainty if a conviction occurred. Order for Mistrial Doc ID# 136.

[¶ 27] Mistrials declared with the defendant's consent generally do not bar later prosecutions unless the defendant was goaded into doing so by misconduct attributable to the government. State v. Voigt, 2007 ND 100, ¶ 18, 734 N.W.2d 787. In the present case, the court determined there had been, cumulatively, an untenable prejudice to Mr. Pittenger, and a fair trial was no longer possible. While the defendant does not disagree, as they moved for the mistrial that the court ultimately granted, the court was incorrect that it was brought about by defense counsel's own actions. See Order for Mistrial Doc ID# 136. It

was in fact the State's witnesses and their desire to push the boundaries of the trial court's previous order that resulted in the excluded information once again being disclosed to the jury. Agent Maixner stated he was investigating a "stalking and harassment case," in response to the defense's line of question regarding Jane Doe's decreasing lack of specificity in her statements. Jury 1 Tr, Vol. 4 pp. 129-130.

[¶ 28] Reviewing the State's first prompting of information that was prohibited, the jury was removed in response to the prosecution specifically eliciting information, or a response, from their witness regarding the protection order that the court had previously ruled upon Jury 1 Tr, Vol. 2 p. 82 ln 4-6. The State reasoned, at that time, that they did not violate the letter of the Judge's order, which was only regarding the conviction not any of the bad acts surrounding the conviction. Id. at pp. 82-86, 88. However, Mr. Pittenger's motion in limine indicated prior bad acts and convictions. Additionally, at the Status Conference held regarding the third motion in limine, attorneys for Mr. Pittenger argued the prejudicial nature of the circumstances of investigating the violation of a protection order not just the conviction. SC Tr. pp. 4 ln. 8; 5 ln. 8; 6 ln. 6. The court agreed with the State regarding its poor wording of the order, but further clarified that nothing to do with the restraining order should be discussed at the trial, as that was its original intent. Jury 1 Tr, Vol. 2 pp. 90-92. The trial court then gave a curative instruction to the jury.

[¶ 29] Later the State's witness on cross-examination did exactly what the court instructed the witness not do, speak about the circumstances regarding the protection order. Upon inquiry by the court, the limiting instruction to Agent Maixner regarding prohibited testimony reveals that the prosecution was actively attempting to get in information that the court told them not to address. The State left it up to their witness to decide what was

or was not allowed per the judge's order. Agent Maixner was told that he should not "address the restraining order unless there was some question **directly related** to Defense Counsel." emphasis added Id. at p. 135, ln 18-23. At best their witness was not properly prepped at worst he was instructed to ignore the judge's order if he thought he could get away with it. The State had already sought a mistrial earlier on the same day as Agent Maixner testimony. The subsequent request for mistrial by Mr. Pittenger was therefore goaded by the government in this case.

[¶ 30] Mr. Pittenger is entitled to a double jeopardy defense if the issue is a factual dispute. "Under N.D.C.C. § 29-16-01(3), an issue of fact arises upon a plea of once in jeopardy. Issues of fact must be tried by a jury. N.D.C.C. § 29-16-02. Under Rule 31(e)(2), N.D.R.Crim.P., 'When a defendant interposes the defense…of having been once in jeopardy, and evidence thereof is given at trial, the jury, if it so finds, shall declare that fact in its verdict.'" State v. Kelly, 2001 ND 135, ¶ 7, 631 N.W.2d 167. Whether or not double jeopardy attaches is a question of fact in this instance, specifically weather or not the government goaded the defense into requesting a mistrial, it is not a purely legal conclusion. Therefore, Mr, Pittenger should have been allowed to present evidence of this factual dispute to the tribunal.

CONCLUSION

[¶ 31] The district court created a structural error by denying Alexander Pittenger's constitutional right to a public trial. The district court erred by determining as a matter of law jeopardy no longer attached after the jury was empaneled and sworn and by allowing Mr. Pittenger to be twice put to trial for the same offense.

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

Dated this 19th day of March, 2018

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IN THE SUPREME COURT

OF NORTH DAKOTA

State of North Dakota,	)	
	)	**#51-2015-CR-1459**
Appellee,	)	**#20170279**
	)	
VS.	)	
	)	**CERTIFICATE OF SERVICE**
Alexander Pittenger,	)	
	)	
	)	
Appellant.	)	

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

Appellant Brief
Appendix

And that said copies were served upon:

Marie Ann Miller, Assistant State's Attorney, 51wardsa@wardnd.com

by email at the above address.

Dated: March 19, 2018

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