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FILED
IN THE OFFICE OF THE
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SEPTEMBER 16, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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State of North Dakota,	*	
	*	
Plaintiff/Appellee,	*	
	*	
v.	*	**Supreme Court No. 202100362**
	*	
Jonathan Garrett Linner,	*	
	*	
Defendant/Appellant.	*	

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APPEAL OF CRIMINAL JUDGMENT
DATED DECEMBER 15, 2021
WALSH COUNTY DISTRICT COURT FILE 50-2020-CR-00107
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE BARBARA L.WHELAN PRESIDING

****

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

I. Linner waived his right to a public trial and Linner's substantial rights were not violated by the closure of the courtroom for limited voir dire.

II. The State's voir dire was proper, was not prejudicial and did not violate Linner's due process.

III. The trial court had authority to issue an order prohibiting contact with the minor children.

STATEMENT OF THE CASE

[¶1] In May 2020, Jonathan Garrett Linner (hereinafter "Linner") was charged by Criminal Information with Continuous Sexual Abuse of a Child, in violation of N.D.C.C. § 12.1-20-03.1, a AA felony, in Walsh County District Court.

[¶2] On November 17, 2020, a preliminary hearing was held and Judge Whelan found probable cause for the charge. Linner entered a not guilty plea and proceeded to trial in this matter. The jury trial began on August 2, 2021 and ended on August 6, 2021. The jury returned a verdict finding Linner guilty of Continuous Sexual Abuse of a Child, a Class AA felony.

[¶3] A pre-sentence investigation was ordered by the District Court and sentencing occurred on December 15, 2021. The District Court sentenced Linner to life without the possibility of parole with the North Dakota Department of Corrections and Rehabilitation. Linner filed his notice of appeal on December 30, 2021.

STATEMENT OF FACTS

[¶4] In September 2018, the Walsh County Sheriff's Office and the North Dakota Bureau of Criminal Investigation became involved in a terrorizing investigation that involved allegations of child sexual abuse. Trial T. Aug. 3rd, 2021, p.135, lines 11-17. The youngest daughter in the family had reported to a school counselor, that her dad had a gun and had threatened her Mom with it because Mom had caught the victim, age 14, in bed with Linner. Id. Mom was later interviewed and stated that she had caught the victim in bed with Linner. Trial T. Aug.3rd, 2021, p. 141, lines 17-24. After Mom discovered them in bed together Linner pointed a gun at Mom and threatened to blow her head off if she contacted law enforcement. Trial T. Aug. 4th, 2021, p. 190, lines 12, 21-22. The child victim was interviewed and did not disclose any sexual abuse at that time. Trial T. Aug. 3rd, 2021, p.142, lines 7-8.

[¶5] Linner was arrested and charged with Terrorizing. Linner pled guilty to Terrorizing with a dangerous weapon and was sentenced to the North Dakota Department of Corrections. In May 2020, the child victim came forward and disclosed details regarding Linner's sexual abuse of her that began when she was approximately 7 years old and continued until the night Mom found them in bed together. Trial T. Aug. 3rd, 2021, p. 142, line 22, p.144, lines 17-25, p. 364, lines 10, 14-23, The sexual abuse started out infrequently, but then increased over time and when she was 13 to 14 years old, began occurring approximately 4 to 5 times per week. Trial T. Aug.3rd, 2021, p.367, lines18-21, p.369, lines 16-17. The sexual abuse included penile-vaginal penetration, penile-mouth penetration and anal

penetration involving the penis and anus. Trial T. Aug. 3rd, 2021, p. 372, lines 7-13, p. 379, lines 5-21.

ARGUMENT

I. Linner waived his right to a public trial and Linner's substantial rights were not violated by the closure of the courtroom for limited voir dire.

A. The standard of review

[¶6] "In criminal cases, errors not raised in the district court may be either forfeited errors or waived errors." State v. Martinez, 2021 ND 42, ¶ 4, 956 N.W.2d 772. (citing, State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442). "Forfeiture is the failure to timely assert a right, while waiver is the intentional relinquishment of a right." Id. "A defendant's waiver of the right to a public trial must be knowing, intelligent and voluntary." Martinez at ¶ 13. "A de novo standard of review applies to whether facts rise to the level of a constitutional violation." Id. at ¶ 19 (citation omitted). Forfeited errors are reviewed under N.D.R.Crim.P. 52(b) for obvious error. Id. at ¶ 4. The court then considers whether there was a closure implicating a public trial right. Id. at ¶ 19. In reviewing a court's decision to close a public trial, this Court reviews the trial "court's findings under the clearly erroneous standard and its application of the law to those findings de novo." State v. Pulkrabek, 2022 ND 128 ¶7, 975 N.W.2d 572.

B. Defendant waived his right to public voir dire

[¶7] In Martinez, this Court concluded 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." Id. at ¶ 13 (emphasis added). In addition, this Court stated, "the exclusion of the public without a knowing, intelligent, and voluntary waiver or *Waller* findings articulated in the record before the closures negatively affects the fairness, integrity, and the public reputation of our criminal justice system. Id. at ¶ 42. (citation omitted).

[¶8] In this case, Linner acknowledged that the trial court obtained a voluntary, knowing and intelligent waiver of his right to a public trial and the record is clear that the trial court did obtain an express waiver. R154:50-53. Therefore, based on the record Linner voluntarily, knowingly and intelligently waived his right to a public trial in this case. "Although an express waiver on the record may preclude a defendant's assertion of error on appeal, the district court should not automatically approve waivers without considering the broader interests in open courts and public trials by conducting pre-closure *Waller* analysis." Id. at ¶ 15. The trial court in this case did not automatically approve Linner's express waiver, but had also considered the *Waller* factors and made findings regarding the closure and approved the stipulation of the parties regarding the limited closure of voir dire and the jury questionnaire. R154:46-50 Linner argues that the trial court failed to consider reasonable alternatives to closure, however the trial court did consider reasonable alternatives. (See, R154:50:5-17). The trial court advised that she could not think of anything that

would be a more reasonable alternative, considered the layout of the courtroom and asked the parties for suggestions. (Id.) Neither the State, nor Linner suggested any other alternatives. (Id.) In Martinez, this Court held that when a party "has identified no reasonable alternatives to closure on appeal, and we can think of none, we find no error in the district court's finding no reasonable alternatives to closure". at ¶50. Linner has not identified any reasonable alternatives to closure in his appeal. Therefore, the trial court considered reasonable alternatives, did not find any and therefore did not err when it failed to find reasonable alternatives to closure in this case.

[¶9] Linner now argues on appeal that the jury questionnaire he requested and specifically agreed to was overbroad. R59, R60, R96. However, Linner waived his right to a public trial with respect to the questions contained within the jury questionnaire and cannot now claim that his right to a public trial was violated. The trial court weighed the *Waller* factors with respect to the proposed questions, approved those questions and found that they advanced the overriding interest in determining whether potential jurors have a bias based upon their experiences with sexual abuse, sexual assault, and/or abuse of a child.

[¶10] Linner argues also that the trial court erred when it entertained other questions from jurors during the closed voir dire sessions. The trial court did address and respond to some of those questions posed by potential jurors. At no time, did Linner object to any of these questions raised during the closed voir dire. In order for this Court to determine a public trial right was violated by

addressing other questions, there has to first be a determination that a closure occurred that implicated that right. Id. at ¶ 19. (citations omitted). For instance, in most circumstances bench conferences are not closures implicating the Sixth Amendment, nor are the public's opportunity to view exhibits. Id. at ¶20. (citations omitted). Specifically, Linner says the court erred when it addressed medical concerns of the jurors or travel concerns. However, these circumstances are not circumstances that implicate a public trial right. The trial court routinely addresses potential jurors travel plans and medical issues prior to trial and makes determinations to exclude a juror or not. The trial court was performing an administrative function with respect to the juror's circumstances. Linner did not object at any time to the trial court addressing these issues. The trial court did not err because these circumstances raised by Linner regarding these other questions do not constitute a closure that implicated that right.

[¶11] Even if the trial court erred in addressing these questions by potential jurors and the closure was broader than intended, the error did not affect the substantial rights of Linner. "An alleged error does not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law." State v. Patterson, 2014 ND 193 ¶4, 855 N.W.2d 113 (Citations omitted). "In order to affect substantial rights, an error must have been prejudicial, or affected the outcome of the proceeding." Id. (Citations omitted). The burden is on the defendant to show the alleged error was prejudicial. Id. Linner has not met his burden of showing that the questions addressed by the trial court were prejudicial to him or affected the outcome of the proceeding.

[¶12] The closure of the courtroom for limited voir dire did not violate Linner's Sixth Amendment right to a public trial. Linner provided a knowing, intelligent and voluntary waiver of his right to a public trial. The trial court made sufficient pre-closure *Waller* findings in this case.

II. The State's voir dire was proper, was not prejudicial and did not violate Linner's due process.

A. Standard of review

[¶13] When a defendant does not object to alleged errors at trial, this Court's review is limited to determining if the prosecutor's conduct prejudicially affected a defendant's substantial rights, so as to deprive him of a fair trial. Patterson at ¶ 3. "This Court exercise[s] our authority to notice obvious error cautiously and only in exceptional circumstances in which the defendant has suffered a serious injustice." Id.

B. The State's voir dire

[¶14] Both parties must be permitted to participate in the examination of prospective jurors. N.D.R.Crim.P. 24(a)(2). "To implement this right to an impartial jury, subdivision (a) permits an examination of prospective jurors to determine whether any juror is biased for or against either party, or whether the juror's status or views are such that bias may be inferred." N.D.R.Crim.P. 24, Explanatory Note. The purpose of voir dire is to search for the individual, 'good' juror and eliminate the individual 'bad' one. City of Mandan v. Fern, 501 N.W.2d 739, 746 (N.D. 1993). "Hunches are a legitimate tool in that pursuit – but bias,

prejudice and bigotry are not." Id. In that pursuit of the 'good' juror, it is the role of a skilled attorney to question a juror about their "particularized experience, background and education." Id.

[¶15] Linner argues that the State's voir dire resulted in an unfair trial and a deprivation of due process. At no point during the State's voir dire, did Linner object to the nature of any questions or statements the State made during voir dire. Therefore, this Court's review is limited to determining if the State's conduct prejudicially affected Linner's substantial rights and denied him a fair trial. Patterson at ¶ 3. "An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention." N.D.R.Crim.P. 52(b). Obvious error is 1) error, 2) that is plain, and 3) affects substantial rights. Patterson at ¶ 4. "In order to affect 'substantial rights', an error must have been prejudicial, or affected the outcome of the proceeding." Id. "The burden is upon the defendant to show the alleged error was prejudicial." Id. "Even if the defendant meets his burden of establishing obvious error affecting substantial rights, the determination whether to correct the error lies within the discretion of the appellate court, and the court should exercise that discretion only if the error 'seriously affects the fairness, integrity or reputation of judicial proceedings'." Id. (citations omitted).

[¶16] Linner does not point to any case law to support its allegations that the State's voir dire regarding questions relating to education of the jury regarding the charges and medical evidence regarding child sexual abuse was improper, resulting in prosecutorial misconduct. "Claims of improper argument

are generally not grounds for reversal because it is presumed the jury will follow the trial court's admonition and disregard improper statements." Id. at ¶ 13. Furthermore, this Court presumes the jury followed the court's instructions. Id. at ¶ 15. The opening instructions to the jury provided:

> The following things are not evidence, and you must not consider them as evidence in deciding the facts of the case. Number one, statements and arguments by the attorney, Number two, questions and objections of the attorneys, Number three, anything you may have seen or heard when the court is not in session, even if what you see or hear is done or said by one of the parties or one of the witnesses. R109:4:1-7

In the closing instructions to the jury, the trial court advised the jury to keep the opening instructions in mind during their deliberations and provided them with a written copy of all the instructions. In the closing instructions to the jury, the trial court advised:

> An attorney is an officer of the court. It is the attorney's duty to present evidence on behalf of their client, to make proper objections, and argue fully their client's cause. However, the argument or other remarks of an attorney, …must not be considered by you as evidence. If counsel or I have made any statements concerning the evidence, which you find are not warranted by the evidence, you should wholly disregard them and rely upon your own recollection or observations. If counsel has made any statements as to the law which is not warranted by these instructions, you should wholly disregard those statements. R109:13-1-10

[¶17] Linner also argues that the State's voir dire misrepresented the burden of proof, by saying if the jury "believed beyond a reasonable doubt", instead of stating "proof" and by asking if the defendant should have a leg up. Linner argues that these statements by the State undermined the presumption of innocence and shifted the burden of proof. However, Linner takes this statement out of context of the questions actually asked by the State. During the voir dire, the State stated the following:

> So, just like Mr. Jones gets an opportunity to spend quite a bit of time deciding and asking you about your ability to serve as a juror in this case and to be fair and impartial in your understanding of certain things, the State of North Dakota has that same right. In fact, I have the responsibility, on behalf of the State, to make sure we pick a fair and impartial juror in this case who is fair not only to Mr. Linner but also to the State of North Dakota. So does that seem like a fair proposition to each of you? Okay. Is there anyone who thinks that the defendant should have a leg up, so to speak, in this jury selection process, because it is the State of North Dakota against Mr. Linner? R153:352:10-24
>
> I just can't stress enough, just like the defendant wants to be sure that you will be fair to him and vote him not guilty if the State does not prove its case, on behalf of the State, I want to be sure that you will be fair to the State's evidence and be willing to convict Mr. Linner if I prove the case beyond a reasonable doubt to you. So is there anybody that would –that doesn't agree with that? Doesn't agree that –do you think that Mr. – do you think that the defendant should have a leg up in these proceedings in being able to pick a jury at ll during the jury selection process and because the State has brought these charges against him? Anybody believe that? R153:409:13-24.

The State did not improperly shift the burden of proof to Linner with these statements and questions. In fact, the State properly recited its burden of proof, when it described the burden. The State was trying to determine if any of the jurors thought that the defendant had more of a right to a fair and impartial jury than the state did and referred only to the process of jury selection and not to the trial itself.

[¶18] A review of the record in this case reflects that there were many times where burden of proof was correctly stated to the jury. The court stated the correct burden of proof in both the opening and closing instructions to the jury. Linner's defense counsel stated the correct burden of proof a number of times during the course of the trial, as did the State during opening and closing arguments. In addition, the court, after Linner's defense counsel's voir dire,

specifically addressed the burden of proof in this case and provided the jury with the law related to the burden of proof. (See Trial Transcript, Aug 3rd, 2021, p.61-63.)

[¶19] "Any prejudice from the prosecutor's rebuttal closing argument was minimized by the jury instructions." Patterson at ¶ 14. The jury in this case is presumed to follow the court's instructions. Therefore, the court's instructions cured any error or improper statements made by the State in this case. "Court's instructions cured any error and any possible prejudice." Id. at 15. In addition, in considering obvious error this Court will examine the entire record and the probable effect of the actions alleged to be error in light of all the evidence." Id. at 16. (citation omitted). In considering the record and all the evidence presented by the State in this case, there was strong evidence against Linner in this case. The alleged errors in this case did not have a significant impact on the jury's verdict in this case and did not affect Linner's right to a fair trial.

III. The trial court had authority to issue an order prohibiting contact with the minor children.

[¶20] Linner argues that the trial court did not have authority to issue an order not allowing contact with his minor children, based upon this court's decision in State v. Wilder. 2018 ND 93, 909 N.W.2d 684. The legislature has since specifically authorized no contact in N.D.C.C. § 12.1-32-02(1)(k), to specifically allow for a court to "prohibit the person from contacting the victim during the term of imprisonment." In addition, the court was also authorized

pursuant to N.D. Const. art. I, § 25, to protect victims, including family members, from intimidation, harassment, and abuse and to be reasonably protected from the accused.

[¶21] The State sought to enforce the victim's and her family members rights at sentencing in this case and requested a no contact order be issued by the court as part of the judgment in this case. (Sentencing T., Dec. 15, 2021, p.16, lines 5-18). Therefore, the State asks that this Court uphold the trial court's order regarding prohibition of contact by Linner with the victim and other children in this case.

CONCLUSION

[¶22] Linner waived his rights to a public trial and his substantial rights were not violated by the closure of the courtroom for limited voir dire. The State's voir dire was proper, was not prejudicial and did not violate Linner's due process. The trial court had authority to issue an order prohibiting contact with the minor children. For these reasons, the State respectfully requests that the North Dakota Supreme Court AFFIRM the verdict of the jury and judgment of the District Court.

The State requests oral argument to answer any questions the Court may have and to respond to the argument of counsel.

[¶23] Dated this 16th day of September, 2022.

Respectfully submitted,

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IN THE SUPREME COURT STATE OF NORTH DAKOTA

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State of North Dakota Plaintiff/Appellee, **v.** Jonathan Garrett Linner Defendant/Appellant.	* * * * * * * * *	**Supreme Court Nos. 20210362** **Walsh County Court # 50-2020-CR-107** **CERTIFICATE OF COMPLIANCE**

****

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

Dated this 16th day of September, 2022.

Respectfully submitted:

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IN THE SUPREME COURT STATE OF NORTH DAKOTA

****

State of North Dakota, Plaintiff/Appellee, **v.** Jonathan Garrett Linner, Defendant/Appellant.	* * * * * * * * * *	**Supreme Court Nos. 20210362** **Walsh County Court # 50-2020-CR-107** **CERTIFICATE OF SERVICE**

****

[1] Kelley M.R. Cole, Walsh County State's Attorney, hereby certifies that on the 16th date of September, 2022, she served a copy of the following document:

- Brief of Appellee; Oral Argument Requested;
- Appendix;
- Certificate of Compliance:

Upon the attorney for the Appellant, Elizabeth Brainard, by sending an electronic copy to her E-service email fargopublicdefender@nd.gov

Dated this 16th day of September, 2022.

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Jonathan Garrett Linner,

Defendant/Appellant.

Supreme Court Nos. 20210362

Walsh County Court # 50-2020-CR-107

CERTIFICATE OF SERVICE

****

[1] Kelley M.R. Cole, Walsh County State's Attorney, hereby certifies that on the 19th date of September, 2022, she served a copy of the following document:

- Brief of Appellee; Oral Argument Requested;

Upon the attorney for the Appellant, Elizabeth Brainard, by sending an electronic copy to her E-service email fargopublicdefender@nd.gov

Dated this 19th day of September, 2022.

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