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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File No. 20220049**
Plaintiff and Appellee,	)	**Barnes County No. 02-2021-CR-031**
v.	)	
Wendy Michelle Davis-Heinze,	)	**APPELLANT'S BRIEF**
Defendant and Appellant.	)	

Appeal from the criminal judgment entered February 2, 2022 in Barnes County district court, Southeast Judicial District, North Dakota, the Honorable Jay A. Schmitz presiding

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, Codes

JURSIDICTION

[¶ 1] The Defendant, Wendy Michelle Davis-Heinze, timely appealed the final criminal judgment arising out of the district court. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI, § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

"An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court created a structural error by denying Ms. Davis-Heinze constitutional right to a public trial.

II. Whether there was sufficient evidence to convict Ms. Davis-Heinze.

ORAL ARGUMENT

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

STATEMENT OF CASE

[¶ 4] This appeal is a criminal matter on direct appeal from Southeast Judicial District, Barnes County Criminal Judgments. This case was before the district court in *State v. Davis- Heinze*, 02-2021-CR-031. The initial criminal information was filed with the court on January 27, 2021. R1. Ms. Davis-Heinze was charged with one count of reckless endangerment under circumstances manifesting an extreme indifference to the value of human life, in violation of N.D.C.C. § 12.1-17-03, a class C felony.

[¶ 5] On January 28, 2021, the initial appearance was held in this case. *See* R159. On April 30, 2020. Ms. Davis-Heinze was appointed Attorney Carlson on February 3, 2021. R20. A contested Preliminary hearing was held on March 16, 2021. The state cited to *State v. Meier*, 422 N.W.2d 381, 384 (N.D. 1988) to support a finding of probable cause where an unloaded gun can be used to create "potential harm". R163:24. The Court issued an Order finding probable cause, but noted the State offered no evidence that Ms. fired a shot or that the gun was loaded. R:40:3, ¶¶5-6.

[¶ 6] Ms. Carlson, on July 20, 2021, filed a motion to withdraw. two days later a hearing was held on the matter and the court granted the motion. R167:7. Attorney Douglas took over the case on July 29, 2021. R72. A request for a speedy trial was made on August 25, 2021. R84. The court granted the motion on September 9, 2021. R88. Ms. Davis-Heinze then proceeded to trial on December 1 and 2, 2021.

[¶ 7] On the second day of trial, Ms. Davis-Heinze made a Rule 29 motion for acquittal. R171:207. The trial court denied the motion. R171:212. The jury ultimately found Ms. Davis-Heinze guilty. R132; 133. Ms. Davis-Heinze was sentenced on February 4, 2022, to thirty (30) months of with credit for 240 days followed by three years of supervised probation. R169:23. Ms. Davis-Heinze timely filed a notice to appeal on February 8, 2022. R146.

STATEMENT OF FACTS

[¶ 8] The afternoon of January 26, 2021 a report came into dispatch that Ms. Davis-Heinze was chasing after Martin Heinze. R172:47, 115. Mr. Heinze testified that he was in his tractor and Ms. Davis-Heinze saw him, grabbed what he thought was a sawed-off shotgun from her car and pointed at him. R172:78, 98. He testified that she walked at him pointing the gun and he raised the bucket of his tractor and reversed. R172:80. He shot his rifle twice at her. R172:101. Mr. Heinze testified that Ms. Davis-Heinze got in her car, pursued him and held the gun in one hand pointing at him while he drove. R172:99. He testified that she hit the tractor hitch and the tire, but did no damage. R172:100. Mr. Heinze testified that he brough the bucket loader down on Ms. Davis-Heinze car crushing the roof and the passenger side. R172:101; R171:242.

[¶ 9] Deputy Kiefert testified that he seized a .22 caliber rifle with a bent barrel he believed was operable, but he did not test it. R172:155. Deputy Sand, who was at one time a member of the tactical team, testified and put

into his report stated the .22 barrel was bent and that it was not operable. R172:154, 181. Ms. Davis-Heinze son testified that he the Christmas before the incident offense he was swinging the .22 gun and hit the barrel on the ground and bent it. R171:231-232.

[¶ 10] Ms. Davis-Heinze testified that she did not have a gun, did not point it at Mr. Heinze, did not chase or hit Mr. Heinze's tractor. R171:238. She also testified that the .22 at her home was not in shooting condition. R171:246.

[¶ 11] During the trial the jury asked questions. The court and attorneys for the State and the Defendant had a conference outside the courtroom which was not recorded or transcribed. R171:354: ln 17-21.

LAW AND ARGUMENT

I. Whether the district court created a structural error by denying Ms. Davis-Heinze constitutional right to a public trial.

Standard of Review

[¶ 12] The standard of review for a structural error has been well established. A structural error, which "affect[s] the framework within which the trial proceeds," defies a harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 309-310 (1991). No objection by defense counsel was made regarding the various closures. However, this Court has recognized three categories of error that arise in criminal cases when the alleged error has not been raised in the district court: forfeited error, waived error, and structural

error. *State v. Watkins*, 2017 ND 165, ¶ 12, 898 N.W.2d 442. And a violation of a structural error, as in this case the right to public trial, is "so intrinsically harmful as to require automatic reversal." *Watkins*, at ¶ 12. (*citing Neder v. United States*, 527 U.S. 1, 7 (1999), and *State v. White Bird*, 2015 ND 41, ¶ 24, 858 N.W.2d 642). The trial court in this case conducted a conference possibly regarding how to deal with a jury question. The court did not go through the *Waller* factors prior to the closure nor did the Defendant waive her right to a public trial at any time. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

[¶ 13] This Court, relying on *Waller*, has stated that the trial court must 1.) advance an overriding interest that is likely to be prejudiced; 2.) show how the closure is no broader than necessary to protect that interest; 3.) consider reasonable alternatives to closing the proceeding; and 4.) make findings adequate to support the closure. The court did not do this therefore a public trial violation occurred. This was a structural error requiring reversal of Ms. Davis-Heinze's conviction.

[¶ 14] "Matters traditionally addressed during private bench conferences or conferences in chamber generally are not closures implicating the Sixth Amendment. *State v. Smith*, 876 N.W.2d 310, 329 (Minn. 2016). But "[i]t is the type of proceeding, not the location of the proceeding, that is determinative." *Id.*" *State v. Martinez*, 2021 ND 42, ¶ 20; 956 N.W.2d 772 (N.D. 2021) The bench conference regarding a jury question during

deliberations is not an administrative matter that would not implicate the public trial right.

[¶ 15] This Court discussed when a bench conference is held in view of both the public and jury, despite their inability to hear the discussion, "the public trial right would be satisfied by prompt availability of a record of those proceedings." *Martinez* at ¶ 17. In this instance the conference appeared to take place outside the courtroom, not in view of the public, and potentially not with the Defendant present. A defendant has a right to be present in the courtroom at every stage of trial. *State v. Klose*, 2003 ND 39, ¶ 32, 657 N.W.2d 276; N.D.R.Crim.P. 43(a). By holding the discussion regarding the jury question outside the courtroom and apparently without Ms. Davis-Heinze being personally present the court created violated Rule 43 and created a structural error requiring reversal of her conviction.

[¶ 16] No record was made of the discussion had in private which created a closed proceeding on any matters conducted at the in chambers conference. Even if the conference had been a bench conference done in public view there was no transcript available creating a structural error, therefore Ms. Davis-Heinze's conviction must be revered.

II. Whether there was sufficient evidence to convict Ms. Davis-Heinze.

Standard of Review

[¶ 17] Rule 29 of the North Dakota Rules of Criminal Procedure establishes that "[a]fter the prosecution closes its evidence or after the close

of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." *State v. Kautzman*, 2007 ND 133, ¶10, 738 N.W.2d 1. The appellate standard of review regarding a claim of insufficiency of evidence is well-established. In *State v. Herzig*, the Court stated: "To successfully challenge the sufficiency of the evidence on appeal, the defendant must show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt." *State v. Herzig*, 2012 ND 247, ¶ 12, 825 N.W.2d 235. "A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor." *State v. Knowels*, 2003 ND 180, ¶ 6, 671 N.W.2d 816.

[¶ 18] In order to find Ms. Davis-Heinze guilty beyond a reasonable doubt of reckless endangerment under circumstances manifesting extreme indifference to the value of human life the State had to prove:

> 1) On or about January 26, 2021, in Barnes County, North Dakota;
> 2) The Defendant, Wendy Davis-Heinze, created a substantial risk of serious bodily injury or death to Martin Heinze;
> 3) The Defendant created the risk under circumstances manifesting the Defendant's extreme indifference to the value of human life; and
> 4) The Defendant engaged in the conduct recklessly.

R131:7. The jury instructions also explained:

> There is risk if the **potential for harm exists**, whether or not a particular person's safety is actually jeopardized.

emphasis added, Id.

[¶ 19] The State did not provide sufficient evidence the gun was operable or any evidence that it was loaded at the time of the alleged crime. Therefore, the State did not prove element two, Ms. Davis-Heinze created a substantial risk to Mr. Martin Heinze. The State in their closing incorrectly argued to the jury they did not need to prove that the gun was operable, merely that it was pointed at Mr. Heinze and he felt threatened. R171:318. The district court noted at Ms. Davis-Heinze's sentencing that, "The gun itself, I don't even know. I don't know that it was loaded. I don't know that it could have fired a bullet in the condition it looked to be in. She did not fire a shot." R169:20. Given the court's assessment of the evidence it should have granted the motion for acquittal because the evidence was not sufficient to support element two.

[¶ 20] It is likely the State will rely on *State v. Meier*, the facts are significantly different in this case. *See State v. Meier,* 422 N.W.2d 381 (N.D. 1988). In *Meier* the case turned on if a gun was loaded during the offense. The Court ultimately determined that because the gun might be loaded, when the defendant thought it was not, merely pointing it created the potential for harm. The essential difference with this case is that an inoperable gun is considerably different than an unloaded gun. An inoperable

gun cannot create a potential for harm under the same reason put forth in *Meier*.

[¶ 21] Even if this Court were to consider the facts similar, perhaps a defendant could make the gun operable again, *Meier* incorrectly interpreted N.D.C.C. § 12.1-17-03. The case should be overturned.

[¶ 22] Statutory interpretation is a question of law, which is fully reviewable on appeal. *State v. Corman*, 2009 ND 85, ¶ 15, 765 N.W.2d 530. The caselaw is an inaccurate statement of the law and allows the State to file improper charges, moving a criminal case past the safeguard of a preliminary hearing, as it did in this case. *State v. Meier,* 422 N.W.2d 381 (N.D. 1988).

[¶ 23] At the preliminary hearing in this matter the complaining witness testified that Ms. Davis-Heinze had what appeared to be a sawed-off shotgun, but did not shoot at him. R163:16, 18, 19, 20. The State argued that Ms. Davis-Heinze pointing a weapon at Mr. Heinze multiple times and his belief that he was going to die created a potential for harm manifesting an extreme indifference to the value of human life. However, as Attorney Carlson argued at the prelim those facts support a charge of terrorizing, not reckless endangerment under extreme indifference.

[¶ 24] The Court in its order finding probable cause noted, "the State offered no evidence that the defendant ever fired a shot during the incident; in fact, there was no evidence that the gun was even loaded." Under any

construction of the language "potential for harm" when referring to a firearm, its ability to function is a necessary condition. There is no potential for harm by pointing a nonworking gun at an individual.

[¶ 25] The Court in *Meier* explained that "Whether a defendant knew his actions could not cause harm is a question of fact reserved for the trier of fact. In this case it is clear that the court was not convinced that Meier knew the gun was not loaded." *Meier* at 384 (N.D. 1988). The Court's misstep in *Meier* is focusing on the subjective knowledge of the defendant and not the objective facts of a gun which is unloaded, or in this case inoperable and unloaded. A jury could certainly find that a gun was loaded even if the defendant claimed it was not. The condition of the weapon is an objective fact, the defendant's subjective knowledge of the weapon's condition is irrelevant to whether the weapon had the objective **potential to cause harm**.

[¶ 26] Similarly, a jury could find the defendant knew the gun was loaded even if he claimed he thought it was empty. But some evidence must be presented in order for jury to come to that conclusion. Merely pointing a gun does not meet the necessary burden placed in the statute, "potential for harm". The dissent in *Meier* explains thoroughly why the majority opinion is incorrect and the Court should adopt that reasoning moving forward.

CONCLUSION

[¶ 27] WHEREFORE the Defendant respectfully requests the Court to find there was insufficient evidence to convict her of the crime of reckless endangerment under circumstances manifesting extreme indifference. In the alternative the Court should correct the structural error of an impermissible court closure and reverse the judgment of the trial court and Ms. Davis-Heinze's conviction.

Dated this 16th day of May, 2022

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CERTIFICATE OF COMPLIANCE

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

Dated: May 16, 2022

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Plaintiff and Appellee,	)	**Barnes County No.**
	)	**02-2021-CR-00031**
v.	)	
	)	
Wendy Michelle Davis-Heinze,	)	**CERTIFICATE OF**
	)	**SERVICE**
Defendant and Appellant.	)	

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

Appellant Brief

And that said copies were served upon:

Tonya Duffy, State's Attorney, states_attorney@barnescounty.us

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

Wendy Davis-Heinze, #65930
Dakota Women's Correctional and Rehabilitation Center,
440 Mckenzie Street, New England, ND58647

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

Dated: May 16, 2022.

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