20220049
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 15, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Wendy Davis-Heinze, Defendant-Appellant.	)	**Supreme Court No. 20220049** **District Court No. 02-2021-CR-00031**

BRIEF OF PLAINTIFF-APPELLEE

APPEAL FROM CRIMINAL JUDGMENT DATED 02/02/2022

BARNES COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
HONORABLE JAY SCHMITZ, PRESIDING

Tonya Duffy, ND ID # 07553
Barnes County State's Attorney
230 4th Ave. NW
Valley City, ND 58072
e-service: states_attorney@barnescounty.us
Phone: (701) 845-8526
Fax: (701) 845-8543

Attorney for Plaintiff/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes

North Dakota Rules

STATEMENT OF THE ISSUES

[¶ 1] Whether the evidence received was sufficient to support the jury's verdicts.

[¶ 2] Whether there was a violation of the 6th Amendment right to a public trial.

STATEMENT OF THE CASE

[¶ 3] Appellant, Wendy Davis-Heinze ("Davis-Heinze") was charged with 1 count of Reckless Endangerment, in violation of N.D.C.C. § 12.1-17-03, a class C Felony, by a Criminal Information dated January 27, 2021.

[¶ 4] A jury trial was held December 1-2, 2021. At the conclusion of the trial, the jury returned a guilty verdict for the Class C Felony Reckless Endangerment charge. Sentencing was held on February 2, 2022.

[¶ 5] A notice of appeal and order for transcripts was filed on February 7, 2022.

STATEMENT OF THE FACTS

[¶ 6] This case began with a 911 call regarding Davis-Heinze chasing Martin Heinze ("Martin") with a gun on January 26, 2021. (R171:47) Martin was described by the dispatcher as being "in distress" during his 911 call. (R171:47)

[¶ 7] Martin testified in this trial, as well. Martin described how he knew Davis-Heinze, as she had been previously married to Martin's brother. (R171:65) Martin described the events of January 26, 2021 and told the jury it happened west of Sibley. (R171:66) The locations of the events were more thoroughly explained to the jury using State's Exhibit 22. (R171:66) Martin testified that he was feeding cattle and had just fed the feeder calves when he observed Mick Harrison's car drive up the driveway really fast. (R171:75) Martin stated this car was driving really fast and lost control a little bit, subsequently stopping in front of the shop near him. (R171:75-76) Martin stated he was sitting in the tractor when this vehicle stopped. R171:76) Martin described how he watched Davis-Heinze go to the shop door and then back to the car she had exited. (R171:78) Martin stated he expected Davis-Heinze to drive over and yell at him like she has done in the past, but instead Davis-Heinze reached in (the car), grabbed a gun and pointed it at Martin. R171:78)

[¶ 8] Martin stated Davis-Heinze pointed a gun that he believed to have a sawed-off butt handle, straight up at his head. (R171:78) Martin stated Davis-Heinze was standing, then walked towards him. (R171:79) Martin testified the first thing that went through his head was "I'm going to die." (R171:79) Martin called 911 right away and stated "I don't know how it could be thought of in any different direction than I was going to die that day." (R171:79) Martin testified that Davis-Heinze never took the gun off his head as she continued to walk towards him. (R171:80) Martin described how he raised the bucket up

to shield himself in case she shot, put the tractor in reverse and was trying to grab his headset to call 911 at the same time. (R171:80) Martin eventually put the tractor in its highest gear and reversed the full throttle as fast as (the tractor) would go. (R171:81)

[¶ 9] Martin described driving the tractor through a yard, down a driveway and eventually out to Highway 26, all in reverse, in an attempt to get away from Davis-Heinze. (R171:82-83) Once Martin reached Highway 26, he drove towards Sodbusters and saw Davis-Heinze turn out of Tony's driveway with the car, again going really fast. (R171:84) Martin described how Davis-Heinze was right at the back of his tractor with her car, hit the tractor, while the barrel of her gun was still pointed at the back of Martin's head. (R171:85) Martin continued to describe the event by stating he used the turning brakes inside the tractor to avoid gunshot and to make the tractor swing as much as possible. (R171:86-87)

[¶ 10] Martin testified that the event came to a stop next to a tree row (while using State's Exhibit 22) near Al Bender's shop. (R171:87) Martin stated Davis-Heinze still had the gun at the back of his head, as he hit the right turning brake, made a complete circle with the tractor, and then drove it into the passenger side of Davis-Heinze's car. (R171:88) Martin stated he put the bucket of the tractor down on top of the car to make the car stay still. (R171:88) Martin testified that he was scared and continued to think "I'm going to die right now." (R171:89)

[¶ 11] Martin testified that after he put the bucket onto Davis-Heinze's car, he told 911 that he had a hunting rifle with him and that he did not want to use it. (R171:90) Martin testified that Davis-Heinze got out of the car, and again, had her weapon pointed at him. (R171:90) Martin testified that he had his rifle zoomed in and all he could see was Davis-Heinze's eye through his scope. (R171:90) Martin testified that he figured he had no more

time to wait, and pulled the trigger. (R171:90) Martin didn't know if this shot was a misfire or had hit the tractor, but he loaded his last shell into the rifle. (R171:91) Martin testified that "when the gun came back at my head again, I fired again…. And I knew I was in a lot of trouble... I was out of bullets." (R171:91) Martin explained he hadn't known Davis-Heinze to fire yet but was worried that she had bullets when he didn't, and still believed he was going to die. (R171:91-92)

[¶ 12] Martin testified that he spoke to law enforcement once they arrived on scene; speaking with Deputy Kiefert and Deputy Morten first. (R171:93) Martin read the jury the statement that he had provided to law enforcement, which was also submitted as State's Exhibit 25. (R171:94)

[¶ 13] The jury also heard from Tony Heinze ("Tony") who corroborated the beginning events that Martin had previously described. Tony told the jury how he saw a car go down his driveway, quickly, or as Tony described it, "and it was really going." (R171:110) Tony described how Martin was backing down the road with his tractor with his loader kind of up in the air… and it wasn't more than a couple minutes after that a car went down the road… and I don't know how they made it to the corner… I mean, it was going. (R171:110) Tony continued to corroborate what Martin had already described and testified how Martin was on his way down the road… the car was right behind him. (R171:110-111) After seeing this and thinking someone might be hurt, Tony got in his ranger and followed the snow tracks he could see on the road, eventually finding Martin. (R171:112) Tony stated that Martin had said Wendy was on a warpath and that he appeared to be shaken up; Tony had never seen Martin that scared before. (R171:113)

[¶ 14] The jury next heard from Deputy Doug Kiefert ("Deputy Kiefert") of the Barnes County Sheriff's Department. (R171:120) Deputy Kiefert has been in law enforcement since 1983. (R171:121) Deputy Kiefert described his previous interactions with Davis-Heinze and described how she "escalated to the point where she was out of control" over a conversation involving a cow or a bull. (Tr. pg. R171: 124) Deputy Kiefert described his initial encounter with Martin and stated "he was pretty shook up… he was upset and kind of jittery about the incident." (R171:128) Deputy Kiefert also described numerous exhibits, specifically 1-21 and 30-36 that included pictures he took from the course of his investigation. (R171:131) Deputy Kiefert also talked about the weapon Davis-Heinze had; he stated "It was not a standard firearm. It was altered substantially. And the description he gave was black, silvery surface, and he called it a sawed-off shotgun with, you know, no stock on the back. I guess there was a reason that he thought that it was a shotgun. It turned out to be a .22, but I understand why he thought it was a shotgun… it was an old like Enfield or a Springfield bolt-action .22 that takes like a nine-round mag in the bottom. A typical hundred dollar .22 that you'd buy years ago. Somebody had cut the back stock off of it and they had cut the barrel down. And then there was like a fake suppressor that was probably about I'm guessing 10,12 inches long or a little longer that was attached to the barrel. So when you looked at the barrel end of it, it did appear to be a shotgun, not a rifle. (R171:151-152) Deputy Kiefert testified that he inspected the gun and stated he believed it was functional. Deputy Kiefert examined the firearm and stated "the bolt worked and the firing pin drops… it wasn't disabled that I could tell. And the trigger functioned and everything worked on it." (R171:152) Deputy Kiefert, when asked if it was fired if it could be used to kill somebody, replied "Oh, definitely." (R171:152)

[¶ 15] Chief Deputy Pat Sand ("Chief Deputy Sand") also testified regarding his role in the investigation of this case. Chief Deputy Sand arrived at Davis-Heinze's residence and observed a car with damage to it. (R171:165) Chief Deputy Sand made contact with Davis-Heinze at her residence. (R171:166) Davis-Heinze told Chief Deputy Sand about how she had gone over to Tony's farmstead, which was near her residence, to talk to Martin about drug activity. (R171:167) Davis-Heinze further corroborated Martin's statements about Martin leaving in a tractor but described the events drastically different than Martin had. (R171:167) Chief Deputy Sand asked Davis-Heinze whether she had a firearm, which she brought out for him to observe. (R171:168) Chief Deputy Sand described the .22 as strange looking, as well as it having a suppressor looking thing on the end of it. (R171:170-171) Davis-Heinze told Chief Deputy Sand that she used it as a noisemaker, which Chief Deputy Sand interpreted to mean as a weapon that would fire. (R171:171) Chief Deputy Sand noted that the appearance of a bend in this firearm was possible from the suppressor not being on the rifle tight. (R171:175) Chief Deputy Sand also testified that he didn't know when the firearm got bent; it could have been the day of the event, sometime prior to the event, or after Davis-Heinze returned to her house. (R171:176) Chief Deputy Sand concluded his testimony by saying "the first time it happens to you, it doesn't matter what it is, it's big. The largest gun that you'll ever see no matter what the caliber is, is the first one that ever gets pointed at you." (R171:180)

[¶ 16] Deputy Nathan Morten ("Deputy Morten") also testified about his involvement in this case. Deputy Morten was wearing a body cam during this investigation, the video of which was offered and admitted as State's Exhibits 28 and 29. (R171:187) Deputy Morten described his interactions with Martin and noted that Martin appeared to be scared.

(R171:191) Deputy Morten described the conversation he had with Martin, and the way Martin had described the events Davis-Heinze had done to Martin. (R171:193)

[¶ 17] The State concluded the presentation of evidence on the second day of trial. (R172:206) A Rule 29 motion was made by Attorney Douglas, which the Court denied. (R172:212) Davis-Heinze called some witnesses, including Davis-Heinze, and eventually the case was submitted to the jury. (R172:353)

[¶ 18] The jury later submitted a request to hear the 911 call again, which was played for them in the courtroom. (R172:354) The jury also asked a question on a sheet of paper, at which point the Court asked Counsel to approach and step outside the presence of the jury for a brief discussion. (R172:354) The jury later returned a verdict of guilty against Davis-Heinze as charged and also with the special firearm finding. (R172:357-358)

ARGUMENT

I. THE EVIDENCE RECEIVED BY THE JURY WAS SUFFICIENT TO SUSTAIN THE CONVICTIONS IN THIS CASE.

a. Standard of Review

[¶ 19] The standard of review for sufficiency of the evidence is as follows:

> i. When the sufficiency of evidence to support a criminal conviction is challenged, this Court merely reviews the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. When considering insufficiency of the evidence, we will not reweigh conflicting evidence or judge the credibility of witnesses.... A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.
>
> ii. State v. Nakvinda, 2011 ND 217, ¶ 12, 807 N.W.2d 204 (citations omitted). "When the verdict is attacked and the evidence is legally sufficient to

sustain the verdict, we will not disturb the verdict and judgment even though the trial included conflicting evidence and testimony." Id. (citing Hochstetler v. Graber, 78 N.D. 90, 93, 48 N.W.2d 15, 18 (1951)). State v. Galvez, 2015 ND 14, ¶ 18, 858 N.W.2d 619, 624.

b. **The Evidence Received by the Jury was Sufficient to Support Davis-Heinze's Conviction.**

[¶ 20] In an appeal challenging the sufficiency of the evidence, this Court "look[s] only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction." State v. Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484, 487–88. "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." Id.

[¶ 21] In State v. Meier, 422 N.W.2d 381 (N.D. 1988), the Court determined that because a gun might be loaded, even though the defendant thought it was not, the merely pointing the gun created the potential for harm. In this case, Davis-Heinze pointed the gun at Martin numerous times. Also, Deputy Kiefert believed the gun to be operable. Chief Deputy Sand had a differing opinion in that the barrel might be bent, but noted that he really had no idea when the barrel became bent. Chief Deputy Sand noted it could have been bent during the altercation with Martin and also after Davis-Heinze returned to her home.

[¶ 22] In this case, the jury heard a substantial amount of evidence in various forms. The jury watched body cam video from law enforcement, the jury saw pictures taken as evidence, the jury saw the weapon that Davis-Heinze used, the jury heard from law enforcement, the jury heard from Tony – a witness to the event, and most importantly, the jury heard from Martin, the victim in this case. The jury also heard from Davis-Heinze, as

well as two of her children, who she called as witnesses, but did not see any of the events that Martin endured. The jury received a substantial amount of evidence and based on how long they deliberated, it appears they weighed it all thoroughly. The verdict in this case must be viewed in the light most favorable to the prosecution, and when viewed as such, shows that a rational fact finder would have found Davis-Heinze guilty of the offense. Disturbing this verdict on appeal would be absolutely unwarranted.

II. THE COURT DID NOT MAKE PRE-CLOSURE FINDINGS AS REQUIRED UNDER WALLER, AND ALTHOUGHT IT IS A VIOLATION OF DAVIS-HEINZE'S 6TH AMENDMENT RIGHTS, THE VIOLATION IS TRIVIAL, AND SHOULD NOT REQUIRE A REVERSAL.

a. Standard of Review

[¶ 23] When considering on appeal a defendant's claim that his right to a public trial was violated, we first consider whether the claim of error was preserved at trial. State v. Olander, 1998 ND 50, ¶¶ 8, 14, 575 N.W.2d 658 (explaining that whether an issue is preserved by timely objection, forfeited, or waived determines the standard of review for the issue). We then consider the threshold question of whether there was a closure implicating the public trial right. State v. Morales, 2019 ND 206, ¶ 16, 932 N.W.2d 106. If there was a closure, we determine whether the trial court made pre-closure Waller findings sufficient to justify the closure. Id. at ¶ 25. We review the court's findings under the clearly erroneous standard and its application of the law to those findings de novo. See Klem, 438 N.W.2d at 802-03; State v. Hall, 2017 ND 124, ¶ 12, 894 N.W.2d 836 (reviewing district court's speedy trial conclusion de novo and associated findings for clear error). State v. Pulkrabek, 2022 ND 128, ¶ 7.

[¶ 24] In criminal cases, errors not raised in the district court may be either forfeited errors or waived errors. State v. Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (citing Olander,

1998 ND 50, ¶ 14, 575 N.W.2d 658). "Forfeiture is the failure to timely assert a right, while waiver is the intentional relinquishment of a right." Id. We review forfeited errors under N.D.R.Crim.P. 52(b) for obvious error. Id. The structural error doctrine applies to a narrow class of rights, including three Sixth Amendment rights defining the framework of a trial: the right to counsel, the right to self-represent, and the right to a public trial. State v. Rogers, 2018 ND 244, ¶ 5, 919 N.W.2d 193. Because a structural error affects the framework within which a trial proceeds, it renders the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Morales, 2019 ND 206, ¶ 14, 932 N.W.2d 106. The structural error doctrine serves the purpose of "ensur[ing] insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." Id. (quoting Weaver v. Massachusetts, —— U.S. ——, 137 S. Ct. 1899, 1907, 198 L.Ed.2d 420 (2017)). Errors that affect the entire adjudicatory framework "defy analysis by 'harmless-error' standards." Rogers, at ¶ 4 (quoting Puckett v. United States, 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)). An impact on the trial's outcome is not necessary in the case of structural errors. Morales, at ¶ 14. A difficulty in "assess[ing] the effect of the error" is inherent in the very nature of a structural error. Rogers, at ¶ 4 (quoting United States v. Marcus, 560 U.S. 258, 263, 130 S.Ct. 2159, 176 L.Ed.2d 1012 (2010)).

[¶ 25] "Violation of the right to a public trial is a structural error." Morales, 2019 ND 206, ¶ 15, 932 N.W.2d 106 (citing Rogers, 2018 ND 244, ¶ 5, 919 N.W.2d 193). This Court has repeatedly said structural errors require automatic reversal regardless of whether they were forfeited or waived, including when the error is invited. Morales, at ¶ 15; Rogers, at ¶ 3; State v. Rende, 2018 ND 56, ¶ 8, 907 N.W.2d 361; State v. Decker, 2018 ND 43, ¶ 8, 907

N.W.2d 378; Watkins, 2017 ND 165, ¶ 12, 898 N.W.2d 442; see State v. White Bird, 2015 ND 41, ¶ 24, 858 N.W.2d 642. State v. Pulkrabek, 2022 ND 128, ¶ 7.

b. **A Bench Conference is Not a Closure, and Therefore Does Not Require 6th Amendment Scrutiny.**

[¶ 26] "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).

[¶ 27] Davis-Heinze's argument that the brief conference held outside the presence of the jury constituted a closure of the courtroom is incorrect. First, there is also an allegation that Davis-Heinze was not present for the discussion. While the State agrees the record is silent on this, the State submits that Davis-Heinze was present. The writer of this brief was present for this conference and submits Davis-Heinze was present, as well. The State acknowledges that there was not a transcript created of the discussion. While problematic in retrospect, the State submits this conference was likely less than a minute in duration, possibly even less than 30 seconds. It was an incredibly brief conference in which the Court told the State, Davis-Heinze, and her counsel how he intended to rule on the question. As the State recalls, all parties agreed and returned to the courtroom. Again, understanding the lack of transcript of this conference is problematic, the State submits this was not a closure of the courtroom, and instead was a bench conference. This wouldn't have been any different if the parties had walked to the back of the courtroom and had the same brief discussion.

c. **Should the Court Find the Conversation Between Counsel, Davis-Heinze, and the Judge was a Closure of the Court and in Turn a Violation of Davis-Heinze's 6th Amendment Rights, the State Submits this Violation was Trivial and Does Not Require a Reversal.**

[¶ 28] Should the Court find the discussion outside the presence of the jury was a closure of the courtroom and in turn, a violation of Davis-Heinze's 6th Amendment rights, the State submits this still does not require an automatic reversal.

[¶ 29] But while the public trial right confers significant protections on criminal defendants, it is not absolute. See, e.g., Waller, 467 U.S. at 45, 104 S.Ct. 2210; Peterson, 85 F.3d at 42. The U.S. Supreme Court has recognized that the right "may yield to competing interests." (citing Waller, 467 U.S. at 45, 104 S.Ct. 2210). In *Waller*, the Court articulated four requirements for a valid courtroom closure: (1) "the party seeking to close the [proceeding] must advance an overriding interest that is likely to be prejudiced"; (2) "the closure must be no broader than necessary to protect that interest"; (3) "the trial court must consider reasonable alternatives to closing the proceeding"; and (4) the court "must make findings adequate to support the closure." 467 U.S. at 48, 104 S.Ct. 2210.

[¶ 30] But courts across the country have concluded that, in certain instances, even if a trial court fails to make the necessary findings under *Waller*, the Sixth Amendment is not necessarily violated "every time the public is excluded from the courtroom." Peterson, 85 F.3d at 40; see also State v. Northcutt, 381 Mont. 81, 358 P.3d 179, 183 (2015). Indeed, many jurisdictions have held that some closures are simply so trivial that they do not rise to the level of a constitutional violation. See, e.g., Peterson, 85 F.3d at 42. People v. Lujan, 2020 CO 26, ¶¶ 15-16, 461 P.3d 494, 498.

[¶ 31] In this case, the State acknowledges the Court did not address the factors as (potentially) required under *Waller*. However, the State submits that even if a *Waller* analysis was required, the violation of Davis-Heinze's 6th Amendment rights was so small, it was trivial. As such, the triviality standard should be applied and adopted by this Court.

[¶ 32] In Peterson, the Second Circuit became the first court to establish this "triviality" approach. In that case, the trial court closed the courtroom during the testimony of an undercover officer. Id. at 41. After the conclusion of the officer's testimony, the trial court inadvertently neglected to reopen the courtroom while the defendant briefly took the stand. Id. Once defense counsel realized that the courtroom had remained closed, she moved for a mistrial, which the trial court denied. Id. at 41–42. The Second Circuit affirmed the trial court's decision, holding that "even an unjustified closure may, on its facts, be so trivial as to not violate" a defendant's public trial right. Id. at 40.

[¶ 33] In reaching this holding, the Second Circuit explained that the triviality standard "does not dismiss a defendant's claim on the grounds that the defendant was guilty anyway or that he did not suffer 'prejudice' or 'specific injury.'" Id. at 42. Rather, it considers "whether the actions of the court and the effect that they had on the conduct of the trial deprived the defendant—whether otherwise innocent or guilty—of the protections conferred by the Sixth Amendment." Id. Lujan, 2020 CO 26, ¶¶ 17-18, 461 P.3d 494, 498.

[¶ 34] When determining whether a closure was so trivial that it did not violate a defendant's public trial right, courts look to the totality of the circumstances surrounding the closure. See Braun v. Powell, 227 F.3d 908, 918–19 (7th Cir. 2000); Kelly v. State, 195 Md.App. 403, 6 A.3d 396, 407 (2010). Factors to be considered include the duration of the closure, the substance of the proceedings that occurred during the closure, whether the proceedings were later memorialized in open court or placed on the record, whether the closure was intentional, and whether the closure was total or partial. See, e.g., Peterson, 85 F.3d at 43; United States v. Perry, 479 F.3d 885, 890–91 (D.C. Cir. 2007); Kelly, 6 A.3d at 407. No one factor is determinative when considering whether a closure was trivial. See,

e.g., Peterson, 85 F.3d at 43; Kelly, 6 A.3d at 408. Moreover, the list of factors that we provide is non-exhaustive; other considerations may be relevant in determining whether a courtroom closure was trivial. See Kelly, 6 A.3d at 407 n.10; State v. Schierman, 192 Wash.2d 577, 438 P.3d 1063, 1082 (2018).

[¶ 35] The jurisdictions that have adopted the Second Circuit's triviality framework continue to recognize the importance of the right to a public trial. But they nevertheless acknowledge that certain courtroom closures do not implicate the values furthered by the public trial right, and thus do not warrant reversal. As one court recently explained in embracing the triviality standard, "we must ... avoid enforcing the public trial right in a manner so rigid and mechanistic that we do more harm than good to the values underlying that right." Schierman, 438 P.3d at 1081. That court further noted that "**a rule requiring automatic reversal for every erroneous closure, no matter how inconsequential to the ultimate fairness of the trial, is more likely to diminish than promote public confidence in the judiciary**." Id. (emphasis added)

[¶ 36] The triviality standard, on the other hand, does not consider the effect that the closure had on the outcome of the trial, but rather "looks to whether the closure implicated the protections and values of the Sixth Amendment." Kelly, 6 A.3d at 406. In other words, the triviality framework considers whether a closure amounted to any error at all. Peterson, 85 F.3d at 42.

[¶ 37] Under the triviality standard, we look to the closure at issue and consider whether it implicated the protections and values of the public trial right; namely, (1) "to ensure a fair trial," (2) "to remind the prosecutor and judge of their responsibility to the accused and

the importance of their functions," (3) "to encourage witnesses to come forward," and (4) "to discourage perjury." Peterson, 85 F.3d at 42.

[¶ 38] In this case, like in Lujan, all of the facts point to a finding of an error that amounts at best, to a triviality level of a 6th Amendment violation. Addressing the four triviality factors, the State first submits that (1), Davis-Heinze was ensured and provided a fair trial. Had the conference at issue here been a conference in which one party had not been present, there could be an argument that Davis-Heinze did not have a fair trial. However, all parties were present for this brief discussion. As such, Davis-Heinze was provided a fair trial.

[¶ 39] In addressing factor (2), the State submits that the prosecutor and the judge were both aware of their responsibilities to the accused and reminded of their functions. Unlike in Lujan, the Court and defense counsel had what the State would describe as a non-contentious relationship. There were not arguments between defense counsel and the Court during the trial. The prosecutor and the judge remained aware of their responsibilities to Davis-Heinze throughout the entirety of her trial and as such, there was not a violation of this factor.

[¶ 40] Related to factor (3), whether this brief conference outside of the courtroom had an effect on encouraging witnesses to come forward, the State submits this did not happen. Like in Lujan, the conference occurred after the presentation of evidence was over, and therefore, could not have an effect on witnesses coming forward.

[¶ 41] In addressing factor (4), whether the closure implicated the value of discouraging perjury, the State submits the same response as factor 3. Since the presentation of evidence was already concluded, the conference could not have had an effect on discouraging perjury.

[¶ 42] Numerous courts have now held that certain deliberate closures are trivial. The closure here, again if it is found to be such, is really the definition of trivial. Remanding this case back for a new trial due to a hard-line rule would further diminish public confidence in the judiciary.

CONCLUSION

[¶ 43] There was sufficient evidence to uphold the verdict's received in Davis-Heinze's case.

[¶ 44] Should the Court find the brief conference between the parties was a closure of the courtroom, the Court should find that this closure was trivial, adopt the triviality standard, and as such, find this violation does not warrant a remand for a new trial.

[¶ 45] Based on the foregoing, the State respectfully asks this Court to affirm the jury's verdict in this case and deny Davis-Heinze's request for a new trial.

Dated the 15th day of June, 2022.

/s/ Tonya Duffy

Tonya Duffy, ND ID # 07553
Barnes County State's Attorney
230 4th Ave. NW
Valley City, ND 58072
e-service: states_attorney@barnescounty.us
Phone: (701) 845-8526
Fax: (701) 845-8543

Attorney for Plaintiff/Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Petitioner/Appellee v. Wendy Davis-Heinze, Respondent/Appellant.	)))))))))	**Supreme Court File No. 20220049** **Barnes Co. File No. 02-2021-CR-00031** **CERTIFICATE OF COMPLIANCE**

Pursuant to North Dakota Rules of Appellant Procedure 32(e), I certify the Appellee's Brief is not in excess of thirty-eight (38) pages. The document consists of twenty-three (23) pages, including the cover page, table of contents, table of authorities, the written brief, the certificate of electronic service and the certificate of compliance.

/s/ Tonya Duffy

Tonya Duffy, ND ID # 07553
Barnes County State's Attorney
230 4th Ave. NW
Valley City, ND 58072
e-service: states_attorney@barnescounty.us
Phone: (701) 845-8526
Fax: (701) 845-8543

Attorney for Plaintiff/Appellee

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Petitioner/Appellee v. Wendy Davis-Heinze, Respondent/Appellant.	)))))))))	**Supreme Court File No. 20220049** **Barnes Co. File No. 02-2021-CR-00031** **CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that on June 15, 2022, I served an electronic copy of Appellee's Brief and Certificate of Compliance, via e-mail through the Supreme Court File and Serve System upon:

Kiara Kraus-Parr, Attorney for Appellant
527 Demers Avenue
Grand Forks, ND 58201
email: service@krausparrlaw.com

Clerk of North Dakota Supreme Court
email: supclerkofcourts@ndcourts.gov

/s/ Tonya Duffy

Tonya Duffy, ND ID # 07553
Barnes County State's Attorney
230 4th Ave. NW
Valley City, ND 58072
e-service: states_attorney@barnescounty.us
Phone: (701) 845-8526
Fax: (701) 845-8543

Attorney for Plaintiff/Appellee