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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Susan K. Coons, Defendant-Appellant.	)	Supreme Court No. 20220289 Criminal No. 51-2021-CR-00725

BRIEF OF PLAINTIFF-APPELLEE

Appeal from Criminal Judgment Entered on May 12, 2022
In District Court, Ward County, State of North Dakota
The Honorable Gary H. Lee, Presiding

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

[¶1] STATEMENT OF THE ISSUES PRESENTED

I. Did the trial judge err when he held a private hearing during the Voir Dire that only included some of the jurors and excluded most of the jurors and all of the public?

II. Should Defendant Susan Coons be granted a new trial because the trial judge made the prejudicial statement that she lost the probate trial?

STATEMENT OF PURPOSE OF ORAL ARGUMENT REQUEST

[¶2] Oral argument is requested to assist the Court in answering any questions that may clarify the arguments in this brief or to rebut arguments made by Appellant during Appellant's oral argument.

NATURE OF PROCEEDINGS

[¶3] This is an appeal taken by Defendant of a Criminal Judgment entered May 12, 2022. Defendant was found guilty following a jury trial of one count of Unauthorized Use of Personal Identifying Information and one count of Forgery.

The case below was 51-2021-CR-00725.

[¶4] Trial was presided over by Hon. Gary H. Lee. The State was represented by Tiffany M. Sorgen of the Ward County State's Attorney's Office. Defendant was represented by Lynn M. Boughey. Defendant was present at all stages of the proceeding.

[¶5] Defendant was sentenced on August 30, 2022 and Criminal Judgment entered September 9, 2022. Defendant filed a timely notice of appeal on September 28, 2022.

STATEMENT OF THE FACTS

[¶6] Susan K. Coons was charged by way of Amended Information dated April 6, 2022 with one count of Forgery and one count of Unauthorized Use of Personal Identifying Information.

[¶7] The crux of the case was that Defendant had forged a life estate deed transferring valuable real property within Ward County from William Coons (deceased 2019) to herself, and had utilized the computer simulated or generated signatures of various individuals, as well as of a notary public, to accomplish this feat.

[¶8] This matter proceeded to trial in the North Central Judicial District Court for Ward County, Hon. Gary H. Lee presiding.

[¶9] Jury selection commenced and was concluded May 10, 2022. During voir dire, three potential jurors were interviewed outside the hearing of the rest of the jury pool. This was due to their having heard media coverage or possessing knowledge that caused them to have preconceived notions about the case, and they were interviewed separately so as not to taint the remainder of the jury pool. The defense not only acquiesced to these interviews, but actually demanded they occur outside the hearing of the rest of the pool. (May 10, 2022 R19:21-22; 25:20; 42:4-5; 44:20-45:7; 54:13-17; 55:20-56:1; 56:11-13).

[¶10] The rest of the jury pool remained in one courtroom and the three individually questioned jurors were seen in a smaller courtroom across the hallway. A record of these interviews was made and submitted with the transcripts of the rest of the proceedings. (May 10, 2022 R63:21-74:21).

[¶11] The jury was selected and impaneled and given opening instructions on May 10, 2022. Part of these instructions were "If counsel or I have made any comments or statements concerning the evidence which you find are not supported by the evidence, you

should disregard them and rely upon your own recollection and observation." (May 10, 2022 R10:3-6). Further, Judge Lee instructed the jury during opening instructions "No ruling or statement or remark which I may make during the course of this trial is intended to indicate any opinion by me as to what the facts are, for you alone determine the facts." (May 10, 2022 R10:22-25).

[¶12] Prior to the testimony of witnesses commencing, Judge Lee held a conference on the record with counsel outside the presence of the jury. He wished to reiterate the sentiments of a letter he had sent to counsel a few days prior regarding the matter not turning into a "trial within a trial" and not relitigating previously decided civil matters. (May 10, 2022 R:23:8-28:20).

[¶13] Proofs were opened on May 10, 2022 and closed on May 11, 2022. On May 11, 2022 during the defense cross-examination of State's witness Det. Taylor Schiller, defense counsel made mention of a prior probate proceeding. Judge Lee interjected, stating:

> "Let me stop this. That probate file, that is over. It's done. Your client lost in the probate proceeding, and she did not appeal it. It is a final judgment…. So I- so there's no point in going back and relit- she can't relitigate that. She cannot relitigate the fact that she lost in the probate proceeding." (May 11, 2022 R43:3-9).

[¶14] Defense counsel capitulated and stated that he would instead ask his line of questioning through his own client's testimony. (May 11, 2022 R43:19-20).

[¶15] Once again, Judge Lee expressed his concern of delving into the quagmire of prior litigation:

> "We've had these discussions outside the presence of the jury and I'll say it now. I don't know how far we can get into these civil matters, and I don't want this to become a trial within the trial of the civil proceedings." (May 11, 2022 R44:7-10).

[¶16] Prior to the noon lunch recess, outside the hearing of the jury, counsel were afforded the opportunity to make a record regarding the morning's proceedings. Defense did not

make a record regarding the comments of the Court. (May 11, 2022 R124:9-13). The only mention defense counsel made of the Court's comments was shortly before the close of proofs, being an oblique reference during argument over an objection held out of the presence of the jury regarding an exhibit the State sought to introduce. (May 11, 2022 R186:22-187:2). Defense made no objection to the Court's comments, nor made a record regarding same.

[¶17] Closing arguments and jury deliberation were held on May 12, 2022.

[¶18] The jury returned verdicts of guilty on the lesser included offense of Forgery and on the original charge of Unauthorized Use of Personal Identifying Information on May 12, 2022.

[¶19] Defendant was sentenced on August 30, 2022 and Criminal Judgment entered September 9, 2022. Defendant filed a timely notice of appeal on September 28, 2022.

[¶20] ARGUMENT

I. Did the trial judge err when he held a private hearing during the Voir Dire that only included some of the jurors and excluded most of the jurors and all of the public?.

A. Standard of Review.

[¶21] The standard of review is obvious error.

[¶22] "'Because [defendant] fails to preserve the issue with a timely objection, we review this forfeited error only for obvious error.'" State v. Morales, 2019 ND 206 ¶24, 932 N.W.2d 106, citing State v. Pemberton, 2019 ND 157, ¶8, 930 N.W.2d 125; State v. Watkins, 2017 ND 165, ¶12, 898 N.W.2d 442.

[¶23] "To establish obvious error, the defendant must demonstrate (1) an error, (2) that was plain, and (3) affected his substantial rights." Id., citing Pemberton, at ¶8. "To constitute obvious error, the error must be a clear deviation from an applicable legal rule under current law." *Id.*

[¶24] If the defendant establishes obvious error, an appellate court has discretion whether to correct the error "and should correct it if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" State v. Morales, 2019 ND 206 ¶24, 932 N.W.2d 106, quoting State v. Olander, 1998 ND 50, ¶16, 575 N.W.2d 658.

B. The trial court did not err by conducting certain of voir dire with selected members of the jury panel outside the hearing of the rest of the panel.

[¶25] The Sixth Amendment to the United States Constitution guarantees a right to speedy and public trial. Further, North Dakota Constitution § 12 guarantees the right to a speedy and public trial. Voir dire falls within the scope of public trials under the Sixth Amendment. State v. Decker, 2018 ND 43, 907 N.W.2d 378.

[¶26] Defendant claims a Waller type violation by three individual potential jurors being questioned outside the presence of the remaining jury pool. However, the predicate to determine if the Waller (Waller v. Georgia, 467 U.S. 39 (1984)) test should even be applied, it must first be determined if a closure took place. Factors to consider when determining whether a closure occurred include whether all or even a significant portion of the public was excluded; whether the defendant, his family, his friends, or any witnesses were excluded; and whether any individuals actually excluded were known to the defendant. State v. Taylor, 869 N.W.2d 1, 11 (Minn. 2015).

[¶27] Defendant alleges that these interviews were conducted excluding the public. However, they were simply conducted outside the hearing of the rest of the jury pool so as to not prejudice the remaining venire. The jury pool itself was invited to remain in the courtroom where voir dire had taken place or wander wherever they desired. They were advised of where the questioning would be taking place. (May 10, 2022 R63:12-17).

[¶28] Further, a record was made of the questioning of those three potential jurors. Defendant was present for these interviews. When the public and jury can view a bench conference, despite being unable to hear what is said, a record being promptly made available satisfies the public trial right. State v. Martinez, 2021 ND 42 ¶20, 956 N.W.2d 772. Matters traditionally addressed during private bench conferences or conferences in chambers generally are not closures implicating the Sixth Amendment. Id. But it is the type of proceeding, not the location of the proceeding, that is determinative. Id.

[¶29] As the trial court did not order a closure of the courtroom, there is no need to go into a Waller analysis. Consequently, the Supreme Court must only review for obvious error.

[¶30] Individual, private questioning of members of a jury panel is a time-honored tradition of trial courts and a necessary component of the process of voir dire. In some instances, it may be the only way to prevent the taint of an entire panel from the disclosure by one potential juror of pre-trial publicity or information that may influence biases or prejudices. Such was the case in this matter. Two of the potential jurors questioned individually had read media accounts of the case and had formed opinions as to Defendant's guilt. The third questioned had personal information pertaining to another matter involving Defendant and had also pre-judged the case. By preventing these three individuals from airing their information to the remainder of the jury panel, the ends of justice and a fair and impartial trial for Defendant were upheld rather than countermanded. Defendant cannot therefore establish there was a deviation from applicable law affecting a substantial right.

[¶31] On a public policy note, should the Supreme Court determine that individual, private questioning of potential jurors violate a defendant's right to a public trial and therefore require that all voir dire be conducted in an open, public- and more often than not, microphoned- setting, it may have a chilling effect on both juror participation in the process. Jurors may not be willing to frank and honest in their responses during voir dire in an effort to avoid embarrassment. Some may avoid jury duty altogether.

[¶32] The district court committed no error by questioning certain members of the jury panel outside the hearing of the rest of the jury pool. No remedy or action by the Supreme Court is needed.

[¶33] II. Should Defendant Susan Coons be granted a new trial because the trial judge made the prejudicial statement that she lost the probate trial?

A. Standard of Review.

[¶34] The standard of review is obvious error.

[¶35] Failure to raise the issue of judicial bias in district court precludes review of that question on appeal and limits review to obvious error. State v. Dailey, 2006 ND 184 ¶6, 721 N.W.2d 29, citing Delzer v. United Bank, 484 N.W.2d 502, 509 (N.D. 1992) and State v. Bertram, 2006 ND 10, 17. Error is not obvious unless there is a clear deviation from an applicable legal rule under current law, which affects substantial rights, and requires [defendant] to show the error was prejudicial, or affected the outcome of the proceedings. State v. Dailey, 2006 ND 184 ¶6, citing Delzer v. United Bank, 484 N.W.2d 502, 509 (N.D. 1992) and State v. Bertram, 2006 ND 10, 17, 708 N.W.2d 913. The burden is on the defendant to establish this. Id.

[¶36] Defendant herein failed to raise the issue of judicial bias in the district court. No record was made by Defendant when given the opportunity to do so following the comments made by the Court. The only mention of the Court's comments were by defense counsel when setting forth his objection to a proposed exhibit by the State, which can hardly be said to be an objection to the Court's comments or raising an issue of alleged judicial bias. Therefore, Defendant has failed to raise the issue below precluding review on appeal and limits the Supreme Court to analyze the matter under an obvious error standard of review.

B. Defendant should not receive a new trial because the trial judge's statements were not prejudicial and were designed solely to prevent counsel from going into collateral and immaterial matters, which is within the legal discretion of the court.

[¶37] Error is not obvious unless there is a clear deviation from an applicable legal rule under current law, which affects substantial rights, and requires [defendant] to show the error was prejudicial, or affected the outcome of the proceedings. State v. Dailey, 2006 ND

184 ¶6, 721 N.W.2d 29, citing Delzer v. United Bank, 484 N.W.2d 502, 509 (N.D. 1992) and State v. Bertram, 2006 ND 10, 17, 708 N.W.2d 913. The burden is on the defendant to establish this. Id.

[¶38] "The test generally applied to determine if remarks by the court to the jury are improper or coercive is to examine them in the light of the totality of the circumstances to see if they had a coercive effect on the jury." State v. Austin, 2007 ND 30 ¶22, 727 N.W.2d 790, quoting State v. Hartsoch, 329 N.W.2d 367, 371 (N.D. 1983).

[¶39] Given the totality of the circumstances, Defendant has in no way made a showing that Judge Lee deviated from an applicable legal rule under current law affecting Defendant's substantial rights. Defendant has further not made a showing that any "error" was prejudicial or affected the outcome of the proceedings.

[¶40] Defense cites to N.D.R.Ev. 605 setting forth that a judge presiding over a trial may not testify in that trial as a witness. However, Judge Lee was not testifying in this trial as a witness. He was not sworn, subject to examination or cross-examination, or any of the hallmarks of being a witness. Judge Lee simply made a declaratory statement regarding a matter of law. The trial judge is required to clarify the law for the jury as part of his role. As expressed by Judge Lee in this very trial "[b]eing a judge is like being a baseball umpire. It's fair, it's foul; it's safe, it's out; it's a ball, it's a strike. Call it, call it out loud, and keep the game moving and played fairly. And that's my role here." (May 10, 2022 R12:2-6).

[¶41] A trial judge should make no remarks which would show bias on his or her part in favor of any party to the lawsuit. Other than that, however, the trial judge is allowed great latitude and discretion in conducting the trial and, except for obvious abuse of that discretion, his or her conduct of the trial will not be grounds for reversible error. The trial judge is the one who determines how the trial should be conducted. It is within his or her

discretion to keep the trial of the case within reasonable bounds and, where counsel for the defendant is going into collateral and immaterial matters, it is within the legal discretion of the trial court to keep the questioning in bounds. State v. Majetic, 2017 ND 205 ¶24, 901 N.W.2d 356.

[¶42] "In *Bilbrey*, 349 N.W.2d at 4, this Court concluded the district court's comment that a defendant's exhibit could potentially confuse the jury was 'neither indicative of bias nor a prejudicial adverse comment on the quality of [the defendant's] evidence, but was an admonitory reminder to counsel for both parties to refrain from further incursions into collateral and immaterial matter.'" State v. Majetic, 2017 ND 205 ¶25, 901 N.W.2d 356, *internal citations omitted.*

[¶43] Judge Lee had advised counsel outside the presence of the jury that he was not going to allow a "trial within the trial" or the relitigation of past civil proceedings, including the probate proceeding alluded to during defense counsel and Judge Lee's comments. However, defense counsel felt compelled to inquire regarding same of the State's witness during cross-examination. That line of questioning is what drew Judge Lee's comment. Essentially, defense counsel invited any error, and therefore is barred from complaining of same on appeal.

[¶44] The State does not concede any error took place, but rather that Judge Lee was merely shepherding defense counsel from delving into collateral and immaterial matters, as is the duty of the trial judge.

[¶45] Defense counsel further posits that the jury could have possibly confused Judge Lee's comment as a jury instruction. However, this comment occurred in the morning of the second day of the trial. Opening jury instructions were given in the morning of the first day of trial, and closing jury instructions were given on the morning of the third day of

trial. The proximity of Judge Lee's comment to either set of jury instructions is not close enough to think that a reasonable juror would consider it a part of said instructions. Further, as it is Defendant's burden to establish that the Court committed obvious error that affected a substantial right and affected the outcome of the proceedings, and this has not been done. This Court should not consider this argument.

[¶46] Defendant is not entitled to a new trial based on the above analysis.

CONCLUSION

[¶47] The trial court made no substantial errors that necessitate a retrial in this matter. The judgment below should be affirmed.

Dated this 19th day of January, 2023.

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CERTIFICATE OF COMPLIANCE

[¶48] I hereby certify that this Appellee's Brief, consisting of 17 pages, complies with the page limitations set forth in N.D.R.App.P. 32(a)(8)(A).

Dated this 19th day of January, 2023.

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State of North Dakota, Plaintiff-Appellee, vs. Susan K. Coons, Defendant-Appellant.	)	Supreme Court No. 20220289 District Court No. 51-2021-CR-00725

AFFIDAVIT OF SERVICE

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 19th day of January, 2023, this Affiant provided a true and correct copy of the following documents in the above entitled action:

BRIEF OF PLAINTIFF-APPELLEE

By electronic service to the following:

BENJAMIN C PULKRABEK
ATTORNEY FOR APPELLANT
pulkrabek@lawyer.com

LeAnn Westereng

Subscribed and sworn to before me this 19th day of January, 2023, by LeAnn Westereng

Notary Public

LYNNAE RUDLAND
Notary Public
State of North Dakota
My Commission Expires April 26, 2026