

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,)	Supreme Court File No.
)	20220343
)	
Plaintiff and Appellee,)	Cass County No.
)	09-2021-CR-02504
)	
v.)	
)	
Arthur Prince Kollie,)	APPELLANT’S BRIEF
)	
Defendant and Appellant.)	

**Appeal from the criminal judgment entered October 28,
2022 in Cass County district court, East Central Judicial
District, North Dakota, the Honorable John
C. Irby presiding**

APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED

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JURISDICTION

[¶ 1] The Defendant, Arthur Prince Kollie, 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 Mr. Kollie constitutional right to a public trial.
- II. Whether improper jury instructions resulted in obvious error requiring reversal Mr. Kollie’s murder conviction.
- III. The district court erred in denying Mr. Kollie’s motion to vacate based on a violation of the Separation of Powers and Double Jeopardy.

IV. Whether the district court committed reversible error by denying Mr. Kollie due process when incorrectly admitting evidence in violation of Rule 401, 402, and 801 of the North Dakota Rules of Evidence.

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 is a criminal matter on direct appeal from South Central Judicial District, Cass County Criminal Judgment. This case was before the district court in *State v. Kollie*, 09-2021-CR-02504. The original criminal information was filed with the court on June 7, 2021. R1. The Defendant was originally charged with Count I: attempted murder pursuant to N.D.C.C. § 12.1-16-01(1), a class AA felony; Count II robbery, with a dangerous weapon, pursuant to N.D.C.C. § 12.1-22-01(1), a class B felony; and Aggravated Assault with a dangerous weapon pursuant to N.D.C.C. § 12.1-17-02(1)(b), a class C felony.

[¶ 5] Several amendments to the information were made. R23; R162; R180. On June 10, 2021, the State made a motion to amend the information from attempted murder to murder, in violation of 12.1-16-01(1)(a) and (b) which was granted. R19; R22. On August 29, 2022, the State made a motion to amend count three, aggravated assault. R158. The State had improperly stated the culpability level in the original information as, “**willfully** caused

bodily injury or substantial bodily injury.” *emphasis added* R158. The amendment corrected the culpability level to, “**knowingly** caused bodily injury or substantial bodily injury.” *emphasis added* R162.

[¶ 6] The Third Amended Information was presented to the court during the first day of voir dire, September 6, 2022. The State asserted they simply wanted to change the to wit language removing the dangerous weapon language. R349:45. Without telling the court or defense counsel they also removed the dangerous special offender section (N.D.C.C. § 12.1-32-09.1) and the four-year minimum mandatory required for an armed offender. R162; R180.

[¶ 7] Mr. Kollie was initially assigned Attorney Mottinger. R16. On September 22, 2021, Attorney Mottinger moved to withdraw and the court granted that motion on September 28, 2021. R54; R56. On October 11, 2021 Attorney Thornton was assigned to represent Mr. Kollie. R57. On October 12, 2021, Mr. Kollie was found fit to proceed. R60. A preliminary hearing was held on October 25, 2021. R330. After the court found probable cause Mr. Kollie entered a not guilty plea. R330:23; 25-26. A short time later, against his attorney’s advice, Mr. Kollie changed his plea. R331:2; 4-5.

[¶ 8] On November 29, 2021 Mr. Kollie, through his attorney moved to withdraw his guilty pleas. R74. That same day Attorney Thornton moved to withdraw as counsel. R70. The court granted Mr. Thornton’s request to

withdraw on December 21, 2021. R84. On January 7, 2022, Attorney Baumann was assigned to represent Mr. Kollie. R89.

[¶ 9] A motion hearing on Mr. Kollie’s request to withdraw his pleas was held on January 18, 2022. R342. The following day the order granting Mr. Kollie motion to withdraw his pleas was filed. R95.

[¶ 10] Attorney Baumann motioned to withdraw and was denied. R119; R126. Ultimately Mr. Kollie proceeded to a jury trial with Attorney Baumann on September 6, 2022 through September 15, 2022.

[¶ 11] The Jury found Mr. Kollie guilty of “Murder, as charged in the Information.” R296. The jury also found him guilty of Robbery and Aggravated Assault. R297; 298.

[¶ 12] Sentencing in this case was held on October 28, 2022. R345. Mr. Kollie was sentenced on Count I to life without the possibility of parole, on Count II to ten years with 500 and 12 days credit, and on Count III five years with credit for 500 and 12 days of time previously served. R345:17-18. The criminal judgment was filed on November 25, 2022. R256. Mr. Kollie timely filed a notice of appeal.

STATEMENT OF FACTS

[¶ 13] At roughly 7:00 am on June 4, 2021, in Fargo, Patrick Peterson came across Mr. Kollie and Jane Doe in between Target and Party City. R335:27. He testified he saw Jane Doe laying on the ground, and then the Defendant standing beside her. R335:28. Mr. Peterson testified Mr. Kollie

shirt was covered in dried blood, that he saw his had on her neck. He called 911 and Mr. Kollie left the area. R335:29; R353:26.

[¶ 14] Jane Doe taken to Sanford emergency room. R335:29. Jane Doe suffered multiple stab wounds, was declared brain dead on June 7, 2021. An autopsy was conducted on June 11, 2021. R355:47,71.

[¶ 15] Multiple bench conferences were held off the record or without a viable recording throughout jury selection and the trial. *See* R352:89,90, 104-105, 115; R343:71, 81, R336:14-15; R357:63; R358:6, 16.

[¶ 16] On day six of the trial the state rested its case. Mr. Baumann made a Rule 29 motion. R356:87. Mr. Baumann renewed the Rule 29 motion the next day and it was denied. R357:33. The State, over the defense's objection, was allowed to reopen their case in chief and produce additional evidence. R357:38.

[¶ 17] Over the Defendant's objection, Jane Doe's father testified and was allowed to play a video of the victim. The State said:

Yes. So 83 and 84, Judge, if we're just about 84, the purpose of that would be, I can mention that it's a very brief video and audio of her speaking about, I guess, her view on life. And the theme of it really is just that you matter. And I wanted that to supplement what Mr. R.P. has described of who she was. We've seen this grainy video across the parking lot that doesn't really humanize who she was and how she may have interacted with other people.

R355:100. The court ruled in response to the defense's objection, "in due of Marsy's Law and so forth, I will overrule the objection on this, and those will

be received.” *Id.* Jane Doe’s mother testified directly after also about Jane Doe’s character. The objection was then sustained.

[¶ 18] The information and jury instructions given combine two subsections of murder with different culpability levels. R180:1; R294:20. The jury verdict for Count 1 stated: guilty of the crime of murder, as charged in the information. R296.

LAW AND ARGUMENT

I. Whether the district court created a structural error by denying Mr. Kollie’s constitutional right to a public trial.

Standard of Review

[¶ 19] 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 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 (N.D. 2017). 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 (N.D. 2015)). The trial court conducted multiple bench conferences without a contemporaneous record of the

proceeding. Some of the bench conferences appeared to have a summary afterward but not all of them. The court did not go through the *Waller* factors prior to the closure nor did the Defendant waive his right to a public trial at any time. *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

[¶ 20] 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 the public trial violations occurred. This was a structural error requiring reversal.

[¶ 21] This Court discussed when a bench conference is held in view of both the public and jury, despite their inability to hear the discussion, “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 N.D. 42, ¶ 20; 956 N.W.2d 772, 785 (N.D. 2021). In this instance no record was made which created a closed proceeding on any and all evidentiary or other matters conducted at the conferences. Without a record there is a substantial prejudice to the Defendant that a public trial is meant to ensure. But demonstrating actual harm is ultimately unnecessary in the context of a structural error. *State v. Watkins*, 2017 ND 165, ¶ 12, 898 N.W.2d 442 (N.D. 2017). The prejudice to Mr. Kollie in this

case is compounded because he was not at the conferences and has no way to review what was discussed, what objections were raised, or how the trial court resolved disputed matters. The public at large also has no way to ensure that Mr. Kollie was treated fairly, that the Judge and Prosecution acted professionally and responsibly, which are some of the aims of the public trial right. Therefore Mr. Kollie convictions should be reversed.

II. Whether improper jury instructions resulted in obvious requiring reversal Mr. Kollie's murder conviction.

Standard of Review

[¶ 22] The court has an obligation to correctly advise the jury on the law of the case. *State v. Reich*, 298 N.W.2d 468, 471 (N.D. 1980). When read as a whole, if an instruction is erroneous, relates to a subject central of the case, and affects the substantial rights of the accused, it is grounds for reversal. *State v. Pfister*, 264 N.W.2d 694 (N.D. 1978). If an instruction is not objected to this Court reviews it for obvious error. *State v. Pulkrabek*, 2017 N.D. 203; 900 N.W.2d 798, 799 (N.D. 2017). “This Court exercises its “power to notice obvious error cautiously and only in exceptional circumstances when the accused has suffered serious injustice.” *City of Mandan v. Sperle*, 2004 ND 114, ¶ 11, 680 N.W.2d 275 (citing *State v. Mathre*, 1999 ND 224, ¶ 5, 603 N.W.2d 173).” *Id.*

[¶ 23] The jury instructions state:

“A person who intentionally or knowingly causes the death of another human being is guilty of murder or if the person willfully causes the

death of another human being under circumstances manifesting extreme indifference to the value of human life.”

R294:20. These alternative charges are listed as one essential element, which is clearly erroneous.

[¶ 24] Conduct under a requires a higher level of culpability that can be negated through intoxication or lack of criminal responsibility. There was evidence of a positive drug test and alcohol use. Conduct under b would not be negated with voluntary intoxication. “Under N.D.C.C. § 12.1-16-01(1)(b), a person does not intend to cause the death of another human-being, but rather death is a consequence of the defendant’s willful conduct.’ *Borner*, at ¶ 18. “In other words, extreme indifference murder results in an unintentional death from behavior manifesting an extreme indifference to the value of human life.” *Id.* By combining the two alternative charges the defendant was not assured a unanimous verdict. Which is an obvious error that effected his substantial rights require reversal of his conviction.

III. The district court erred in denying Mr. Kollie’s motion to vacate based on a violation of the Separation of Powers and Double Jeopardy.

Standard of Review

[¶ 25] An indictment is multiplicitous if it charges the same crime in two counts. *U.S. v. Chipps*, 410 F.3d 438, 447 (8th Cir. (S.D.). 2005).

Multiplicity is a violation of the United States Constitution, the North Dakota Constitution, and North Dakota statutes. The Fifth Amendment of the United States Constitution provides that “[n]o person shall ... be subject

for the same offence to be twice put in jeopardy of life or limb...” U.S. Const, amend. V. The North Dakota Constitution provides that “[n]o person shall be twice put in jeopardy for the same offense...” N.D. Const, art. I, §12. The North Dakota Century Code provides:

No person can be twice put in jeopardy for the same offense, nor can any person be subjected to a second prosecution for a public offense for which that person has once been prosecuted and convicted, or acquitted, or put in jeopardy, except as a provided by law for new trials.

N.D.C.C. §29-01-07.

[¶ 26] When the same conduct violates multiple statutes statutory this Court must determine whether the legislature intended each violation be a separate offense. *Garrett v. United States*, 471 U.S. 773, 778, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985). “If the “legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct under *Blockburger [v. United States]*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)], a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.” *Missouri v. Hunter*, 459 U.S. 359, 368-69, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).” *State v. Moos*, 2008 ND 228 ¶13; 758 N.W.2d 674 (N.D. 2008).

[¶ 27] Aggravated assault is a lesser included charge of murder. The state’s own witnesses, the Coroner, specifically stated: “that this asphyxia, these injuries that were the result of strangulation were -- were complicated

by the multiple sharp-force injuries...People don't stand still when they're receiving all these injuries. They're going to probably be moving. They're going to be fighting." R355:80, 89-90. The comprehensive revision of North Dakota's criminal code "emphasizes merger and concurrent sentences as do the Proposed Federal Code and the American Bar Association standards. The emphasis is based on the therapeutic theory of penology. The treatment plan should prepare the offender for a smooth merger into outside society rather than the sort of a consecutive sentence." A Hornbook to the North Dakota Criminal Code, 50 N.D.L.Rev. 639, 658 (1974); *see also id.* at HIT 20-21.

111. Therefore Mr. Kollie's request to vacate either his aggravated assault conviction or his murder conviction should not have been denied.

IV. Whether the district court committed reversible error by denying Mr. Kollie due process when incorrectly admitting evidence in violation of Rule 401, 402, and 801 of the North Dakota Rules of Evidence.

Standard of Review

[¶ 28] This Court has determined that a trial court has broad discretion in deciding whether to admit evidence or exclude evidence. *State v. Wangstad*, 2018 ND 217, ¶ 6, 917 N.W.2d 515. A trial court's decision on the admission or exclusion of evidence will be reversed on appeal only for an abuse of discretion. *Id.* "A district court abuses its discretion in evidentiary rulings when it acts arbitrarily, capriciously, or unreasonably, or it misinterprets or misapplies the law." *State v. Kalmio*, 2014 ND 101, ¶ 10; 846 N.W.2d 752 (N.D. 2014).

[¶ 29] Argument by counsel must be confined to facts in evidence and the proper inferences that flow therefrom. *Allen v. Kleven*, 306 N.W.2d 629, 635 (N.D. 1981). Remarks by counsel that are made for the purpose of arousing sympathy or prejudice are improper and counsel must refrain from such action. *Andrews v. O’Hearn*, 387 N.W.2d 716, 731 (N.D. 1986); *Smith v. Riedienger*, 95 N.W.2d 65, 72 (N.D. 1959). In this case the prosecution did not make the statements in a closing argument but rather solicited testimony, direct evidence, based on character for the purpose of arousing sympathy or prejudice. Therefore, the trial court abused its discretion and committed reversible error by allowing both Jane Doe’s father and mother to testify on her character. Additionally, the court committed reversible error by allowing the prosecution to play a video of the decedent to for the express purpose of humanizing her to the jury. This is an improper purpose as it neither tends to prove or disprove a material fact at issue.

CONCLUSION

[¶ 30] Mr. Kollie’s right to a public trial was violated when portions of the case were conducted off the record and outside the hearing of the public. Improper jury instructions combining two alternative charges resulted in obvious error of a nonunanimous verdict requiring reversal Mr. Kollie’s murder conviction. Double jeopardy precludes the conviction of both Count 1 and 3 and the district court erred in denying the Defendant’s motion to vacate. Finally, the district court allowed direct evidence to be presented

based on character for the purpose of arousing sympathy or prejudice denying Mr. Kollie a right to a fair trial.

[¶ 31] WHEREFORE the Defendant respectfully requests the Court to reverse the verdict and judgment of conviction in the above captioned case.

Dated this 21st day of February 2023

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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: February 21, 2023

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Arthur Prince Kollie,)	Certificate of Service
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)	
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's Brief

And that said copies were served upon:

Cass County Assistant State's Attorney,
sa-defense-notices@casscountynd.gov

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

Arthur Prince Kollie #69278, c/o NDSP, 3100 E Railroad Ave, Bismarck, ND
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by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: February 21, 2023

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