20220031

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUNE 30, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota, Plaintiff and Appellee, v. Chad Trolon Isaak, Defendant and Appellant.	)	**Supreme Court File No. 20220031** **Morton County No. 30-2019-CR-00326** **APPELLANT'S BRIEF**

Appeal from the criminal judgment entered December 29, 2021 in Morton County district court, south central judicial district, North Dakota, the Honorable David Reich presiding

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Kiara C. Kraus-Parr
ND Bar No. 06688
Kraus-Parr Law, pllc
527 Demers Ave
Grand Forks, ND 58201
Office: (701) 772-8991
E-file: service@krausparrlaw.com
Attorney for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules, Codes

JURSIDICTION

[¶ 1] The Defendant, Chad Trolon Isaak, 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. Isaak's constitutional right to a public trial.

II. Whether the district court created a structural error by improperly limiting the public's access to public trial documents.

III. Whether Rule 43 and the constitutional right to be personally present was violated during jury selection.

IV. Whether the district court created a reversable error by conducting voir dire off the record, making a transcript of the jury selection unavailable.

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, Morton County Criminal Judgment. This case was before the district court in *State v. Isaak*, 30-2019-CR-00326. The criminal complaint was filed with the court on April 5, 2019. R1. The original criminal information was filed November 25, 2019. R106. The Defendant was charged with four counts of murder, in violation of N.D.C.C. § 12.1-16-01, a class AA felony; one count of burglary in violation of N.D.C.C. § 12.1-22-02, a class B felony; one count of unlawful entry or concealment inside a vehicle, in violation of N.D.C.C. § 12.1-22-04, a class C felony, and one count of unauthorized use of a motor vehicle in violation of N.D.C.C. § 12.1-23-06, a class A misdemeanor. R106.

[¶ 5] On April 5, 2019, the first expanded media request was made. R3. Additional requests were made in May of 2019 and July and December of 2021. R17; R463; R473; R487. Mr. Isaak retained Attorney Robert Quick and a subsequent notice of appearance was filed. R10. A stipulation to continue the preliminary hearing was filed on May 8, 2019. R20. The court made

several orders regarding expanded media coverage in May of 2019, June of 2020, and July and December of 2021. R.29; R239; R471; R478; R500; R1510.

[¶ 6] Mr. Isaak filed a written waiver of his preliminary hearing and pleaded not guilty. R46. A motion to suppress and a motion for change of venue were filed on November 12, 2019. R60; R61; R69; R70. Judge Hill was assigned the case on December 2, 2019. R109. The Defendant through counsel requested a change of judge on December 11, 2019. R143. Judge Reich was assigned the next day. R145. A stipulated request to continue the motion hearing was filed on January 22, 2020 and granted the next day. R167; R169.

[¶ 7] On April 15, 2020 an emergency order relating to the COVID pandemic and the need to continue trials set in April and May was filed. R171. A motion to suppress hearing was held on July 1, 2020. R1529. The trial court ultimately denied Mr. Isaak's motion to suppress and change of venue. R241; R242; R243. The State made pretrial motions to close public access to publicly filed trial documents. R268; R269. On April 6, 2021, the trial court made a blanket order restricting public documents inconsistent with Administrative Rule 41. N.D. Sup. Ct. Admin. R. 41 § 5(f); R341. On April 13, 2021 the court amended their previous order but still closed all autopsy photos without complying with Administrative Rule 41.

[¶ 8] On April 29, 2021, Attorney Robert Quick filed a motion to withdraw. R345. A hearing was held on the motion. *See* R1521. The court

granted the motion to withdraw on May 7, 2021. R366. On May 10, 2021 Attorney Heck filed a motion to withdraw including Attorney Walstad, Attorney Hushka, and Attorney Bruce Quick from the Vogel Law firm. R368. In the alternative, defense counsel asked to continue the jury trial in the same motion. *Id.* The court denied the motion to withdraw but granted a continuance for the jury trial. R373. Prior to trial jury questionaries were sent out. R1523:11.

[¶ 9] A pretrial conference was held on July 16, 2021. The trial court indicated that communication regarding hearing occurred the previous day without a record. R1523:5. The court and parties agreed that individual voir dire was necessary in this case. R1523:10; 11; 24. Challenges for cause were made based on the questionaries. R1523:54-57; 60-61. The jury trial was ultimately held on August 2 through August 20, 2021. Voir dire was conducted between August 2 and August 3, 2021. R1533; R1535. Parts of the jury selection and the trial were conducted privately, off the record, and/or outside of the presence of Mr. Isaak. R1533:327;328; R1535;172;173; 174; R1541;182; R1542:138-138; R1543:72; R1545:182; R1546:161; R1547:94; R1548:98-99.

[¶ 10] On the fifth day of trial, August 6, 2021, the Defendant, through his counsel, objected to the submission of autopsy photos at trial. R1539: 9-12. The trial court noted, "…I was informed this morning that there has been requests for exhibits that have been received into evidence. They -- there was

a pretrial order that addressed those that -- but once they come into evidence, they are essentially public records." R1539:12. The court discussed sealing the public trial records and solicited a request to seal from the parties. R1539:13.

[¶ 11] On August 6 and again on August 18, 2021, the State made motions to close public access to public trial documents. R514; R535. On August 9 and 20, 2021, the trial court made blanket orders restricting public documents inconsistent with Administrative Rule 41 and the *Waller* factors. N.D. Sup. Ct. Admin. R. 41 § 5(f); *Waller v. Georgia*, 467 U.S. 39, 48 (1984); R519; R538.

[¶ 12] On the twelfth day of trial, August 17, 2021, the State rested its case. R1546:230. The jury was admonished and given a break. R1546:231. Mr. Quick made a Rule 29 motion. *Id.* The State resisted, and the trial court denied the Defendant's motion. *Id.* The motion was renewed and denied the following day. R1547:117. The Jury returned guilty verdicts for all counts on August 23, 2021. R543.

[¶ 13] Sentencing in this case was held on December 28, 2021. R1524. some portion of the hearing was held off the record. R1524:6. On Counts 1 through 4, the murder of Lois Cobb, William Cobb, Adam Fuehrer, and Robert Fakler. Mr. Isaak was sentenced to consecutive life without the possibility of parole sentences. R1524:42-43. The court also sentenced for Count 5, burglary, to ten years concurrent with Count 1. R1524:43. For Count

6, unlawful entry into or concealment within a vehicle, he was sentenced to five years concurrent with Count 1 and Count 5. *Id.* Count 7, unauthorized use of a motor vehicle, he was sentenced to 360 days and with credit for 360 days time served. *Id.* The criminal judgment was filed on December 29, 2021. R1512. Mr. Isaak timely filed a notice of appeal. R1516.

STATEMENT OF FACTS

[¶ 14] The parties stipulated to several facts before the presentation of evidence in this case. The RJR Maintenance & Management (RJR) is a business located at 1106 32nd Avenue Southeast in Mandan, Morton County, North Dakota. Robert Fakler, William Cobb, Lois Cobb, and Adam Fuehrer were found and died on April 1, 2019 at RJR. They agreed that Robert Fakler died from stab wounds to the chest. William Cobb dies from gunshot wounds to the head and chest with stab wounds to the chest and abdomen. Lois Cobb died from multiple stab wounds, cutting wounds, and a gunshot wound to the chest. Adam Fuehrer died from gunshot wounds to the chest and abdomen. R1537:68.

[¶ 15] RJR employee Justin Bockheim came to work on the morning of April 1, 2019 and discovered the Robert Fakler's body. R1537:74;79. He called 911 and law enforcement arrived and began an investigation. R1537:79; 84; 131; 144; R1538:156. The other three victims were found in the shop. R1537:113; 126; 145; 146. BCI Agent Alex Droske created a virtual walk through of the RJR crime scene. R1538:160;161. The video was entered into

evidence and published to the jury. R1538:182. BCI Agent Patrick Lenertz reviewed crime scene photos to do blood stain pattern analysis. 1538:236. The crime scene photos were admitted into evidence through Agent Lenertz and published to the jury. 1538:237-239. On the sixth day of trial a stipulation to admission of 37 graphic photographs was made. R1540:10. The State then indicated it filed a motion to seal those 37 explicit images and defense counsel agreed. Mr. Isaak was not personally questioned with regard to the stipulation. R1540:11.

[¶ 16] Law enforcement collected video from various businesses near RJR to follow the suspected individual dressed in black or dark colored clothes on March 25, 2019 and April 1, 2019. R1541. Officer Tyler Henry complied the video from the various sources and created the State's timeline. R1541:151; 155; 156. Mr. Zachmeier testified that he twice saw, on April 1 and a week prior, on video surveillance near RJR somebody dressed in full black wearing a facemask walking in and across the parking lot on the south side of McDonald's. He testified that the person disappeared behind the McDonald's and a couple seconds later came out on the north side of the building at the white pickup. 1541:36. Angela Davis, a McDonald's employee testified she saw an individual, believed to be the person who killed the RJR employees, dressed in dark-colored clothing and a camouflaged mask walk across the road to a white pickup truck in the McDonald's parking lot. R1540:198.

[¶ 17] A be on the lookout (BOLO) advisory was made for the white pickup. Officer Krohmer received the BOLO on April 3, 2019. R1542:207. Officer Krohmer thought it looked like Mr. Isaak's truck and went to his home to confirm that. R1542:208; R1543:9. Law enforcement compared photos of the suspected white truck and Mr. Isaak's truck. R1542:132; R1543:17. Law enforcement testified they believed it was the same truck and Mr. Isaak was the unidentified individual in the videos. R1542:132-136; 1543:19. Mr. Isaak was ultimately arrested and charged based on these initial identifications.

LAW AND ARGUMENT

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

Standard of Review

[¶ 18] 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. See R1533:328; R1539:27; R1541;182; R1542:138-138; R1543:72; R1545:182; R1546:161; R1547:94; R1548:98-99. 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).

[¶ 19] The court held bench conferences in view of the public, but out of their hearing with no record of what transpired. This Court has previously discussed bench conferences as it relates to the public trial right, "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 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).

[¶ 20] The common law right to a public trial was included in the Constitution because of the "Anglo-American distrust for secret trials," *In re*

Oliver, 333 U.S. 257, 268, 68 S.Ct. 499, 505 (1948), The Court of Star Chamber, conducting trials in secret, was perceived as a threat to liberty. *Id.* at 269. The guarantee has always been known as a safeguard against the use of the court system as instruments of persecution. *Id.* at 270, 68. A public trial is a check on the possible abuse of judicial power and "The constitutional guarantee of a public trial is to ensure that the accused is fairly dealt with and not unjustly condemned." *Estes v. Texas*, 381 U.S. 532, 533 (1965); *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir. 1949).

[¶ 21] Some of the off the record bench conferences were later summarized on the record. However, this does not address or satisfy the public's skepticism to secret or closed proceedings. Justice Sotomayor's dissent from the denial of certiorari in *Smith v. Titus*, explains why a summary after the fact cannot cure an unconstitutional closure:

> "The court thus implied that an unconstitutional courtroom closure can be cured by contemporaneous publication of the substance of the closed proceedings. That premise is false, as *Waller* made abundantly clear: Even though "the transcript of the [closed] suppression hearing was released to the public" in *Waller*, this Court nevertheless found that the defendant's Sixth Amendment right to a public trial had been violated. 467 U.S., at 43, 48, 104 S.Ct. 2210."

Smith v. Titus, 141 S. Ct. 982, 985-86 (2021). Additionally, even one improper closure requires reversal of the conviction. *State v. Martinez*, 2021 N.D. 42, ¶ 12; 956 N.W.2d 772 (N.D. 2021) ("one structural error is sufficient to require reversal…").

[¶ 22] At the pretrial conference on July 16, 2021, held over Zoom the Court stated, "Before we start this morning, is there anything anyone would like to bring to my attention? I sent out just a very brief outline of the things that I wanted to cover yesterday, and also just addressed them now, but anything else before we get started this morning?" R1523:5. There are no documents filed the day before this hearing nor is there any record of a status conference on July 15, 2021. Based upon the court's description there were pretrial discussions held off the record in a closed setting. 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 public trial violations occurred. These repeated violations of the right to a public trial created structural error requiring reversal of Mr. Isaak's conviction.

II. Whether the district court created a structural error by improperly limiting the public's access to public trial documents.

[¶ 23] The State made pretrial motions to close public access to publicly filed documents. R268; R269. On April 6, 2021, the trial court made a blanket order restricting public documents inconsistent with Administrative Rule 41. N.D. Sup. Ct. Admin. R. 41 § 5(f); R341. On April 13, 2021 the court amended their previous order, but still closed all autopsy photos without

complying with Administrative Rule 41 or the *Waller* factors. On August 6, roughly a week into the trial, and again on August 18, 2021, the State made overly broad motions, expressing a general privacy issue, patient privacy, and potential juror taint to close public access to evidence admitted at trial and used to convict Mr. Isaak. R514; R535. On August 9 and 20, 2021, the trial court again made blanket orders restricting public documents inconsistent with Administrative Rule 41 and the *Waller* factors. N.D. Sup. Ct. Admin. R. 41 § 5(f); *Waller v. Georgia*, 467 U.S. 39, 48 (1984); R519; R538. The redaction of Mr. Isaak's planner was never considered as an alternative to closure. Additionally, the court's repeated admonishment to the jury to avoid media coverage was already occurring to avoid improper jury taint, therefore closure was not necessary. These are simple solutions to address the purported need for closure, but the trial court did not do the appropriate analysis and so an improper closure resulted.

[¶ 24] Before the court, either on its own motion or by a party, restricts or closes public trial documents it must follow Administrative Rule 41§ 5(f), which is as follows (emphasis added):

> (B) The court must decide whether there are sufficient grounds to **overcome the presumption of openness** of case records and prohibit access according to applicable law.
> (C) In deciding whether to prohibit access the court must consider that the presumption of openness may only be overcome by an overriding interest. The court must articulate this interest along with specific findings sufficient to allow a reviewing court to determine whether the closure order was properly entered. Considerations of harm should include:
> (i) the risk of injury to individuals,

(ii) individual privacy rights and interests,
(iii) proprietary business information, and
(iv) public safety.
The court should also consider applicable law. Where possible, explicit standard legal tests should be applied to such decisions.

(D) The **closure of the records must be no broader than necessary** to protect the articulated interest. **The court must consider reasonable alternatives to closure**, **such as redaction or partial closure**, and **the court must make findings adequate to support the closure**. The court may not deny access only on the ground that the record contains confidential or closed information.

(E) In **restricting access the court must use the least restrictive means that will achieve the purposes of this rule and the needs of the requestor.**

[¶ 25] Restricting public access to court records during a criminal trial has been previously addressed. The Court in *Press Enterprise Co.* found the failure to release the voir dire transcript was a violation of a public trial. *See Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984). After a jury was empaneled, the defendant requested the release of the voir dire transcript. The defense counsel and prosecutor argued release of the transcript would violate the jurors' right to privacy, however the Supreme Court found that the presumption of openness was not rebutted in the case. "Even with findings adequate to support closure, the court's orders denying access to the voir dire transcript failed to consider whether alternatives were available to protect the prospective jurors' interests." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 502 (1984). A publicly available record of the Court's proceeding, including publicly filed documents such as evidentiary exhibits, is an essential part of the right to a public trial.

[¶ 26] The Court improperly relies upon N.D.C.C. §§ 44-04-18.7 and 44-04-17.1 to justify closure of public trial records. These statutes deal with the classification of autopsy photos or documents in law enforcement or prosecutor's possession as not public records. There is also an exception to the ability to make a public document request from those agencies while an investigation is ongoing or pending. This does not apply to evidence offered, admitted, and published in a public criminal trial to secure the conviction of an individual.

[¶ 27] In a factually similar case the Court of Appeals of Florida, Second District, overturned a lower court's ruling that prevented all members of the public, including the media, from viewing and inspecting crime scene photographs, autopsy photographs, and a crime scene videotape that were admitted into evidence in open court. *Sarasota Herald-Tribune v. State*, 924 So.2d 8 (Fla. Dist. Ct. App. 2006). The prosecution attempted to use a public records exception for the medical examiner's office and general privacy concerns of the victim's family, however, the Florida Appeals Court recognized the difference between a public record held in an investigative agency and documents submitted by the State at a public trial as evidence to convict the Defendant of murder. "…the privacy interests of persons who are family or friends of the victims of well-publicized crimes would seem to be a difficult interest to balance against the interests favoring public trial. "

Sarasota Herald-Tribune at p.13 (Fla. Dist. Ct. App. 2006). Judge Casanueva's concurrence further explains,

> "The United States Supreme Court, in *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947), explained that what takes place in an open courtroom is public property and that those who see and hear what transpires therein can report it with impunity. Following from this notion of public property is the belief that, particularly in criminal matters, a responsible press is essential to effective judicial administration. *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559-60, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)."

Sarasota Herald-Tribune at p.17 (Fla. Dist. Ct. App. 2006). Administrative Rule 41 mirrors the *Waller* factor analysis not by chance, but with purpose. The denial of the right to access public trial documents, particularly exhibits used to convict an individual is no different than refusing to release a transcript, an order on suppression, or disclosing the terms of plea agreement. All are violations of the right to a public trial and should require an automatic reversal.

III. Whether Rule 43 and the constitutional right to be personally present was violated during jury selection.

Standard of Review

[¶ 28] Mr. Isaak's defense counsel did not make a timely objection to the court holding substantive portions of voir dire without the defendant being present. However, this Court can review the violations under the obvious error standard. To establish obvious error, the defendant has the burden to show that: (1) it was error, (2) it was plain, and (3) it affected his

substantial rights. *State v. Morales*, 2019 ND 206, ¶ 24, 932 N.W.2d 106 (N.D. 2019).

[¶ 29] North Dakota has recognized the constitutional right of a defendant to be personally present during the whole of a trial. *State v. Schasker*, 60 N.D. 462; 235 N.W. 345 (N.D. 1931). N.D.Crim.P. Rule 43 requires a defendant's personal appearance, so does the Sixth Amendment, via the confrontation clause, and N.D. Const. art. I, § 12. The right may be affirmatively waived by the defendant or waived through his conduct. No such waiver occurred during this trial. It is clear from the record that Juror 64 was excused outside of Mr. Isaak's presence and off the record. R1533: 327-328. The court said, "The individual is not coming back tomorrow because the individual indicated that something happened with their daycare person, so they don't have reliable daycare, and it would be a day-to-day thing and a hardship to report. And so I excused that person. That was Juror No. 64." R1533:328.

[¶ 30] The following administrative rules control the process of jury selection. And they show it was clear error to excuse Juror 64 outside of Mr. Isaak's presence, without the ability to question their hardship requests, if that was the reason for the removal, and off the record.

N.D.Sup.Ct.Admin.R. 9; App. Jury Stand. 6(b):

> Eligible persons who are summoned may be excused from jury service only if: 2) They request to be excused because their service would be a continuing hardship to them or to members of the public (d) Requests

> for excuses and deferrals and their disposition must be written or otherwise made of record.
>
> N.D.Sup.Ct.Admin.R. 9; App. Jury Stand. 7(b):
>
> Counsel must be permitted to question panel members for a reasonable period of time.
>
> N.D.Sup.Ct.Admin.R. 9; App. Jury Stand. 7(d):
>
> In felony criminal cases, the voir dire process must be held on the record. In civil and misdemeanor criminal cases, the voir dire process will be held on the record unless waived by the parties on the record or in writing.

[¶ 31] The trial court dismissing Juror 64 affected the substantial constitutional and procedural rights of Mr. Isaak. The constitutional right of presence to confrontation and assistance with one's defense is subject to the harmless error beyond a reasonable doubt standard. *City of Mandan v. Baer*, 1998 N.D. 101 ¶ 12; 578 N.W.2d 559 (N.D. 1998). It is the State's burden to show that this release of Juror 64 without Mr. Isaak and no record was harmless beyond a reasonable doubt. Without a written waiver or a record the State cannot meet that standard. Therefore, Mr. Isaak's conviction must be reversed.

IV. Whether the district court created a reversable error by conducting voir dire off the record, making a transcript of the jury selection unavailable.

[¶ 32] The interpretation of a court rule, like the interpretation of a statute, is a question of law. *Carlson v. Workforce Safety Ins.*, 2009 ND 87, ¶ 22, 765 N.W.2d 691. The Court applies the rules of statutory construction and looks at the language of the rule to determine its meaning. *State v. Ferrie*,

2008 ND 170, ¶ 8, 755 N.W.2d 890. Words are given their plain, ordinary, and commonly understood meaning and the rule is construed as a whole. *Id.* Administrative Jury Standard 7(d) requires that voir dire is held on the record for felony jury trials. N.D.Sup.Ct.Admin.R. 9; App. Jury Stand. 7(d).

[¶ 33] Juror No. 64, 36, and 63 called in and requested to be released, this was done off the record outside of Mr. Isaak's presence. R1533: 328; R1535:172;173-174. This Court has previously held that if the State fails to provide a means of obtaining a transcript the defendant is entitled to a new trial. *See State v. Decker*, 181 N.W.2d 746, 748 (N.D. 1970) ("Mr. Decker is entitled to a new trial for the reason that the State has failed to provide him with a means of obtaining a transcript of the proceedings leading up to and including his sentencing"); *State v. Hapip*, 174 N.W.2d 717, 719 (N.D. 1970) ("After carefully considering all of the above statutes, we have concluded that a party…has a statutory right to have the proceedings upon the trial taken down by a reporter..."); *State v. Spiekermeier*, 256 N.W.2d 877 (N.D. 1977) (The Court reversed and set aside restitution because there was not a sufficient record.).

[¶ 34] The Court in *Entzi* reviewed the specific issues of voir dire not being recorded and determined it did not warrant the Defendant a new trial. *State v. Entzi*, 2000 N.D. 148; 615 N.W.2d 145 (N.D. 2000). However, *Entzi* distinguished its holding from *Hapip*, *Decker*, and *Spiekermeier* it did not overrule them. The main distinction between the cases, as pointed out in

footnote 1 of *Entzi*, was no statute or rule required taking a record of voir dire. *State v. Entzi*, 2000 N.D. 148; 615 N.W.2d 145 n.1 (N.D. 2000) ("Rule 11(f), N.D.R.Crim.P., however, requires a verbatim record of proceedings at which a defendant enters a plea."). Therefore, at the time of *Entzi*, the Defendant had to request the recording of voir dire. Since *Entzi* the Court has promulgated Administrative Rule 9, specifically Jury Standard 7(d) requiring a record be made in all felony cases. Additionally, Jury Standard 6 requires all requests for excuses and their disposition be written or record made. In light of these changes, the holding in *Entzi* no longer applies. By conducting voir dire of a felony jury trial off the record, the trial court did not comply with Administrative Jury Standard 7(d) or Standard 6. The holdings from *Hapip*, *Decker*, and *Spiekermeier* control and require reversal of Mr. Isaak's conviction and a new trial.

[¶ 35] The *Hapip* Court also noted the United States Supreme Court's guidance on waiver; a silent record is insufficient. "Presuming a waiver from a silent record is impermissible; the record must show that there was an affirmative waiver by the defendant — anything less is not a waiver. *Carnley v. Cochran*, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962)." *Hapip* at p. 719. Because the record does not affirmatively show that Mr. Isaak waived his right to a recorded voir dire his conviction must be reversed, and a new trial granted.

CONCLUSION

[¶ 36] WHEREFORE the Defendant respectfully requests the Court to reverse the criminal judgment of the trial court and Mr. Isaak's convictions.

Dated this 30th day of June, 2022

/s/ Kiara Kraus-Parr
ND Bar No. 06688
Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
(701) 772-8991
service@krausparrlaw.com
Attorney for the Appellant

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: June 30, 2022

/s/ Kiara Kraus-Parr
ND #06688
Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
(701) 772-8991
service@krausparrlaw.com
Attorney for Appellant

IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
State of North Dakota,	)	**20220031**
	)	
Plaintiff and Appellee,	)	**Morton County No.**
	)	**30-2019-CR-00326**
	)	
v.	)	
	)	
	)	
Chad Trolon Isaak,	)	**DECLARATION 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's Brief

And that said copies were served upon:

Gabrielle Goter, Morton County Assistant State's Attorney,
mortonsa@mortonnd.org

Austin Gunderson, Morton County Assistant State's Attorney,
mortonsa@mortonnd.org

Karlei Neufeld, Assistant Attorney General,
kkneufeld@nd.gov

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

Chad Isaak #65099, c/o NDSP, 3100 E Railroad Ave, Bismarck, ND 58506

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

Dated: June 30, 2022.

/s/Kiara Kraus-Parr
ND Bar No. 06688

Kraus-Parr Law, pllc
527 Demers Avenue
Grand Forks, ND 58201
P: (701) 772-8991
E: service@krausparrlaw.com
Attorney for Appellant