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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA, PLAINTIFF AND APPELLEE *v.* **ARTHUR PRINCE KOLLIE,** DEFENDANT AND APPELLANT	**SUPREME COURT NO. 20220343** DIST. CT. NO. 09-2021-CR-02504

APPEAL FROM CRIMINAL JUDGMENT
ENTERED ON OCTOBER 28, 2022
* * *
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE JOHN C. IRBY, PRESIDING

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶ 1] Whether bench conferences were courtroom closures implicating the public trial right.

[¶ 2] Whether the jury instructions, read as a whole, allowed the jury to find a unanimous verdict on Count 1.

[¶ 3] Whether murder and aggravated assault are the same offense.

[¶ 4] Whether the district court abused its discretion in admitting a video of Jane Doe alive.

STATEMENT OF THE CASE

[¶ 5] Kollie appeals from a criminal judgment entered after a jury found him guilty of murder, robbery, and aggravated assault. In June 2021, Kollie stabbed Jane Doe in an alley in south Fargo. The State charged him with attempted murder, robbery, and aggravated assault. (*Information*, R1). A few days later, Jane Doe died from her injuries, and the State moved to amend Count 1 to murder. (*Motion to Amend Information Count 1*, R19; *Amended Information*, R23).

[¶ 6] A preliminary hearing was held in October 2021. The district court found probable cause and bound the case over for trial. October 25, 2021 Preliminary Hearing Transcript ("Tr.") 23:22–24:1. Shortly after the hearing adjourned, Kollie asked the district court to reopen the record so he could plead guilty. October 25, 2021 Plea Hearing Tr. 2:9–3:8. Kollie pled guilty to all three counts, and the district court ordered a presentence investigation. October 25, 2021 Plea Hearing Tr. 7:21–8:2.

[¶ 7] In November 2021, Kollie moved to withdraw his guilty pleas. (*Motion to Withdraw Guilty Pleas*, R74). After a hearing in January 2022, the district court allowed Kollie to withdraw his guilty pleas. January 18, 2022 Tr. 45:17–46:9.

[¶ 8] The case was set back on for trial in September 2022. The jury found Kollie guilty on all three counts. (*Verdicts Counts 1–3*, R296–R298). Before sentencing, Kollie moved to vacate the murder conviction, or alternatively, the aggravated assault conviction on double jeopardy, separation of powers, and multiplicity grounds. *Motion to Vacate*, R304).

[¶ 9] The district court sentenced Kollie to life imprisonment without the possibility of parole. He now appeals.

STATEMENT OF FACTS

[¶ 10] On the morning of June 4, 2021, Jane Doe left father's home to ride her skateboard to her mother's home in south Fargo. Sept. 13, 2022 Vol. I Tr. 102:11–16. On her way, she was attacked by Arthur Kollie in an alley near Party City. Kollie stabbed Jane Doe 25 times and strangled her. Sept. 13, 2022 Tr. 80:12–13; 81:9–15.

[¶ 11] A garbage truck driver driving through the alley came upon Kollie standing by Jane Doe who was lying on the ground unconscious and bloody. Sept. 8, 2022 Tr. 28:8–10, 29:25–30:9. The garbage truck driver called 911, and Kollie fled the scene on foot. Sept. 8, 2022 Tr. 30:19–31:3.

[¶ 12] Kollie then attempted to hide the evidence of the attack. He took a shower at a truck stop. Sept. 13, 2022 Vol. II Tr. 42:21. He disposed of his backpack and ID

in a dumpster. Sept. 13, 2022 Vol. II Tr. 43:3–11. He changed clothes and threw away his bloodstained clothes at Walmart. Sept. 13, 2022 Vol. II Tr. 43: 13–16.

[¶ 13] Kollie was arrested later that day. The State charged him with attempted murder, robbery, and aggravated assault. (*Information*, R1).

[¶ 14] On June 7, 2021, Jane Doe died from her injuries. Sept. 13, 2022 Vol. I Tr. 53:3–6. The State moved to amend the Information and charged Kollie with murder. (*Motion to Amend Information Count 1*, R19; *Amended Information*, R23).

[¶ 15] The case proceeded to trial in September 2022. The jury found Kollie guilty on all three counts. He was sentenced to life imprisonment without the possibility of parole. He now appeals.

STANDARD OF REVIEW

[¶ 16] Kollie concedes did not preserve the public trial issue because he did not object to the sidebars. Appellant's Brief ("At. Br.") at ¶ 19. This Court reviews unpreserved errors only for obvious error. *State v. Pendleton*, 2022 ND 149, ¶ 5, 978 N.W.2d 641. "To establish obvious error, the defendant must demonstrate (1) an error, (2) that was plain, and (3) affected his substantial rights." *Id.* (internal quotation omitted).

[¶ 17] Kollie did not object to the jury instruction mentioned at ¶¶ 22–24 of his brief. If a party does not timely object to a proposed jury instruction, the issue is not preserved for review. *State v. Gaddie*, 2022 ND 44, ¶ 4, 971 N.W.2d 811 (internal citation omitted). This Court reviews an unpreserved jury instruction issue only for obvious error under N.D.R.Crim.P. 52(b). *Id.* (internal citation omitted).

[¶ 18] The standard of review for constitutional issues such as double jeopardy is de novo. *State v. Borland*, 2021 ND 52, ¶ 5, 956 N.W.2d 412.

[¶ 19] District courts are afforded broad discretion in evidentiary matters, and this Court will only reverse a district court's evidentiary ruling if the district court abused its discretion. *State v. Chase*, 2015 ND 234, ¶ 7, 869 N.W.2d 733. A district court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law. *Id.* (internal citation omitted).

LAW AND ARGUMENT

I. <u>The district court did not violate Kollie's right to a public trial.</u>

[¶ 20] Kollie argues several bench conferences held during the trial violated his right to a public trial. At. Br. at ¶ 19. When considering a defendant's claim that his right to a public trial was violated, this Court first considers whether the claim of error was preserved at trial. *State v. Pendleton*, 2022 ND 149, ¶ 4, 978 N.W.2d 641 (internal citations omitted). Next, this Court considers whether there was a closure implicating the public trial right. *Id.* Finally, if there was a closure, this Court considers whether the trial court made pre-closure *Waller* findings sufficient to justify the closure. *Id.*

A. Kollie has not demonstrated obvious error.

[¶ 21] Kollie concedes he did not object to the bench conferences as impermissible closures of the courtroom. At. Br. at ¶ 19. Because he did not object, this Court reviews only for obvious error. *Pendleton*, at ¶ 5. To establish obvious error, a defendant must show: "(1) an error, (2) that was plain, and (3) affected his

substantial rights." *Id.* Even if a defendant establishes obvious error, this Court has discretion to correct the error "and should correct it if it seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation omitted).

[¶ 22] Any alleged error was not plain. A "plain" error is a "clear" or "obvious" deviation from current law. *State v. Landrus*, 2022 ND 107, ¶ 10, 974 N.W.2d 676 (internal citation omitted). Kollie has not cited any authority demonstrating a clearly established rule against the use of sidebars. Absent a clearly established rule, there cannot be obvious error. Because Kollie has not established obvious error, this Court should affirm the criminal judgment.

B. The bench conferences at trial were not courtroom closures implicating the public trial right.

[¶ 23] This Court has said that "brief sidebars or bench conferences conducted during trial to address routine evidentiary or administrative issues outside the hearing of the jury ordinarily will not implicate the public trial right." *State v. Martinez*, 2021 ND 42, ¶ 20, 956 N.W.2d 772. "Contrary to what the 'administrative' label suggests, such proceedings are not limited to purely administrative procedures before the court, such as scheduling." *Pendleton*, at ¶ 6 (internal citation omitted). "For example, routine evidentiary rulings, objection rulings, or 'matters traditionally addressed during private bench conferences or conferences in chambers generally are not closures implicating the Sixth Amendment.'" *Id.* (cleaned up).

[¶ 24] During a bench conference, "the public remains present and is able to see and hear everything the jury is able to see and hear." *State v. Morales*, 2019 ND 206, ¶ 19, 932 N.W.2d 106. "Additionally, 'non-public exchanges between counsel and the court on such technical legal issues and routine administrative problems do not hinder the objectives which the Court in *Waller* observed were fostered by public trials.'" *Pendleton*, at ¶ 6 (cleaned up).

[¶ 25] Kollie cites several sidebars which he claims were closures of the courtroom in violation of the public trial right. At. Br. at ¶ 15. He does not explain in what way the court's use of sidebars hindered the objectives in *Waller*. Rather, he asserts that because they happened at all, the entire trial must be set aside.

[¶ 26] The first few sidebars Kollie cites happened during voir dire. One happened between parties' questioning of the venire panel. Sept. 7, 2022 Vol. II Tr. 89:22–90:1. The second was partially caught on the record and seemed to deal with the State's objection to questioning by Kollie's trial counsel. Sept. 7, 2022 Tr. 104:23–105:5. The third sidebar came at the end of the first day of voir dire. Sept. 7, 2022 Tr. 115:18–25. Immediately following the bench conference, the court announced it would adjourn for the evening. September 7, 2022 Tr. 116:1–4. It can be inferred from context that the purpose of this bench conference was to address scheduling.

[¶ 27] Kollie alleges another bench conference was a closure, citing pages 71 and 81 of the February 17, 2022 dispositional conference transcript at docket number 343 of the record on appeal. At. Br. at ¶ 15. No such pages exist.

[¶ 28] Kollie also cites a bench conference called at the trial court's request on the fifth day of the jury trial. Sept. 12, 2022 Tr. 14:22–15:9. The State had called Detective Josh Loos to testify about statements given to law enforcement by Kollie. At the pretrial conference, the court heard argument by Kollie's trial counsel who sought to exclude Kollie's statements to law enforcement due to an alleged *Miranda* violation. Immediately after the bench conference and as Detective Loos took the stand, the court asked:

> THE COURT: All right. Before we begin this, we did have a prior hearing on some of the stuff that's going to be testified to at this point in time. And other than the objections that were brought forth previously, are there any other objections at this time?

Sept. 12, 2022 Tr. 15:16–20.

[¶ 29] Another sidebar happened on the seventh day of trial. The State objected to a question by Kollie's trial counsel and asked to approach. Sept. 14, 2022 Vol. I Tr. 63:2–3. After a bench conference, the court overruled the objection. Sept. 14, 2022 Vol. I Tr. 63:5–8.

[¶ 30] The final sidebar occurred just after the State had rested its case following Kollie's case in chief. Sept. 14, 2022 Vol. II Tr. 16:11–14. The court then sent the jury home for the evening so the parties could address final jury instructions. Sept. 14, 2022 Vol. II Tr. 16:15–17:9. It can be inferred from context that the purpose of this sidebar was to address scheduling and whether to send the jury home for the evening.

[¶ 31] The sidebars here seem to have dealt with routine administrative and housekeeping matters such as scheduling. One sidebar on the fifth day of trial addressed an earlier evidentiary matter. This Court has held both scheduling and routine evidentiary rulings at a sidebar are not closures which implicate the public trial right. Therefore, the court's use of sidebars did not violate Kollie's right to public trial.

II. <u>**The district court did not commit obvious error in instructing the jury on Count 1.**</u>

[¶ 32] Kollie argues the jury instructions were erroneous because they stated the culpability for murder is "intentionally or knowingly" or "willfully . . . under circumstances manifesting extreme indifference to the value of human life." At. Br. at ¶ 24. Kollie did not object to the jury instructions at trial. Because the issue was not preserved at the district court, this Court only reviews for obvious error. *Gaddie*, 2022 ND 44, at ¶ 4. An error is not obvious unless the defendant demonstrates it is a clear or obvious deviation from an applicable legal rule. *Id.* If a defendant proves obvious error occurred, this Court has discretion whether to rectify it and will only do so when the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (internal quotation omitted).

> Jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. We view the instructions as a whole to determine if they correctly and adequately inform the jury. A court errs if it refuses to instruct the jury on an issue that has been adequately raised, but the court may refuse to give an instruction that is irrelevant or inapplicable.

State v. Pulkrabek, 2017 ND 203, ¶ 6, 900 N.W.2d 798 (quoting *State v. Martinez*, 2015 ND 173, ¶ 8, 865 N.W.2d 391). Section 12.1-01-03(1), N.D.C.C., provides "[n]o person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."

[¶ 33] The jury instructions here defined the offense of murder:

> 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). It explained the essential elements of murder are:

The State's burden of proof is satisfied if the evidence shows beyond a reasonable doubt, the following essential elements:

> 1) On or about June 4, 2021, in Cass County, North Dakota, the Defendant Arthur Prince Kollie, caused the death of [Jane Doe], a human being; and
>
> 2) Either:
>
>   a) The Defendant intentionally or knowingly caused the death of [Jane Doe]; or
>
>   b) The Defendant willfully caused the death of [Jane Doe] under circumstances manifesting extreme indifference to human life.

(R294:21). The instructions are proper because N.D.C.C. § 12.1-16-01 provides for one offense of murder.

[¶ 34] In *State v. Pulkrabek*, and *City of Mandan v. Sperle*, 2004 ND 114, 680 N.W.2d 275, this Court considered whether the trial court should have provided unanimity instructions to juries deciding charges which involved alternative means of proving a single criminal violation. In *Pulkrabek*, this Court considered the

federal and state history underpinning the theft statute and concluded the Legislative Assembly chose to enumerate alternative means of committing the crime of theft, rather than separate and distinct offenses. 2017 ND 203 at ¶¶ 10–15. In *Sperle*, this court this Court examined the language of a municipal disorderly conduct ordinance and concluded the ordinance plainly permitted the jury to find Sperle guilty of disorderly conduct through multiple alternative behaviors. 2004 ND 114 at ¶ 15.

A. The plain language of N.D.C.C. § 12.1-16-01 shows murder is one offense.

[¶ 35] Section 12.1-16-01(1), N.D.C.C., recognizes three definitions for murder differentiated by their culpability and uses "or" to set them apart. Had the Legislative Assembly intended to separate intentional and extreme indifference murder as separate and distinct offenses, it would have distinguished them by degree, as was done prior to 1973.

B. The legislative history of N.D.C.C. § 12.1-16-01 shows murder is one offense.

[¶ 36] Prior to 1973, North Dakota law proscribed two degrees of murder: first degree murder was a premeditated killing and second degree murder was a killing without premeditation which was "immediately dangerous to others and evincing of a depraved mind." N.D.C.C. § 12-27-11 (repealed 1973); *A Hornbook to the North Dakota Criminal Code*, 50 N.D. L. Rev. 639, 697–89 (1974). When the Legislative Assembly revised the criminal code and created Title 12.1, N.D.C.C., in 1973, it abolished the gradation of murder by degree, opting instead to create "only two offenses – murder and manslaughter." *Minutes of Interim Comm. on Judiciary "B"*,

50 (May 11–12, 1972). In consolidating the two degrees of murder into one offense under N.D.C.C. § 12.1-16-01, the Legislative Assembly plainly intended intentional murder and extreme indifference murder to constitute the same offense.

[¶ 37] This intent was shared by the drafters of the proposed Federal Criminal Code. The North Dakota Legislative Assembly used the proposed Federal Criminal Code as a basis for its work in enacting Title 12.1 in 1973. *State v. Bourbeau*, 250 N.W.2d 259, 264 (N.D. 1977). The statutory language recommended in the Final Report of the National Commission on Reform of Federal Criminal Laws is "substantially the same as [North Dakota's] current murder statute." *State v. Borner*, 2013 ND 141, ¶ 51, 836 N.W.2d 383 (Sandstrom, J., dissenting). The drafters of the proposed Federal Code abolished the distinction between first and second degree murder, in part, because they recognized that "[s]ome impulsive killings are more heinous than some premeditated killings." National Commission on Reform of Federal Criminal Laws, II Working Papers 824 (1970); *Hornbook*, 50 N.D. L. Rev. 639, 688 (1974). Section 12.1, N.D.C.C., reflects this policy decision and classifies intentional and extreme indifference murder under one flexible offense. *Minutes of Interim Comm. on Judiciary "B"*, 50 (May 11–12, 1972).

[¶ 38] Section 12.1-16-01, N.D.C.C., is the product of federal and state deliberation. Lawmakers consciously chose to abandon a rigid hierarchy of homicide to create a single, flexible murder offense. This single offense encompasses both intentional killings and killings under circumstances manifesting extreme indifference to the value of human life.

[¶ 39] Because murder is one offense, the instruction accurately informed the jury of the law. The district court did not commit obvious error in giving the instruction.

III. Counts 1 and 3 charge separate offenses which do not violate constitutional protections against double jeopardy.

[¶ 40] Kollie argues his convictions on both Count 1: murder and Count 2: aggravated assault violate the double jeopardy clauses of the state and federal constitutions. At. Br. at ¶ 25. He argues Counts 1 and 3 punish the same conduct.

[¶ 41] The Third Amended Information charges:

> Count 1: **MURDER** in violation of Section 12.1-16-01(1), 12.1-16-01(1)(a), 12.1-16-01(b), 12.1-32-01(1) (CST # C99152), N.D.C.C. in that on or about June 04, 2021: The defendant intentionally or knowingly caused the death of another human being or willfully caused the death of another human being under circumstances manifesting extreme indifference to the value of human life to-wit: that on or about the above-stated date, the defendant, **ARTHUR PRINCE KOLLIE,** intentionally or knowingly caused the death of Jane Doe or willfully caused the death of Jane Doe under circumstances manifesting extreme indifference to the value of human life.
>
> . . .
>
> Count 3: **AGGRAVATED ASSAULT** in violation of Section 12.1-17-02(1)(b), 12.1-32-02.1, 12.1-32-01(4) (CST # C00239), N.D.C.C., in that on or about June 04, 2021: The defendant knowingly caused bodily injury or substantial bodily injury to another human being with a dangerous weapon, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury to-wit: that on or about the above-stated date, the defendant, **ARTHUR PRINCE KOLLIE,** knowingly caused bodily injury or substantial bodily injury to another human being, Jane Doe, with a dangerous weapon, namely, a knife, the possession of which under the circumstances indicates an intent or readiness to inflict serious bodily injury.

(R180).

[¶ 42] In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180 (1932), the United States Supreme Court created the "same elements" to determine whether each offense contains an element not contained in the other. If each offense does not contain a separate element, they are the same offense and double jeopardy bars additional punishment and successive prosecution. *State v. Bertram*, 2006 ND 10, ¶ 14, 708 N.W.2d 913 (internal citations omitted).

[¶ 43] Here, Kollie was charged with two separate offenses. The murder charge required proof that Kollie intentionally or knowingly caused Jane Doe's death or that he willfully caused her death under circumstances manifesting an extreme indifference to the value of human life. The aggravated assault charge required proof that Kollie knowingly caused serious bodily injury to Jane Doe with a dangerous weapon, the possession of which under the circumstances, indicated an intent or readiness to inflict serious bodily injury. The required result of the Kollie's act for murder is death of another and the result of Kollie's act for aggravated assault is serious bodily injury.

[¶ 44] Not only is the element of the result different, but here different conduct supported each charge. Dr. Koponen testified Jane Doe died of strangulation by Kollie. Sept. 13, 2022 Tr. 81:9–15. He also testified that the many stab wounds complicated the strangulation. Sept. 13, 2022 Tr. 81:9–15. The death in Count 1 was caused by strangulation, whereas the serious bodily injury in Count 3 was caused by stabbing with a knife. While both happened during the same course of conduct,

each was a separate and distinct charge which did not violate the double jeopardy clauses of the state or federal constitutions.

IV. **The district court did not abuse its discretion in admitting a video of Jane Doe alive.**

[¶ 45] Kollie argues the district court erred in admitting a video of Jane Doe while she was alive. At. Br. at ¶ 29. He argues the video was improper because its risk of unfair prejudice outweighed its probative value.

[¶ 46] During direct examination of Jane Doe's father, the State offered Exhibit 84, which is a short TikTok video of Jane Doe when she was alive. Sept. 13, 2022 Tr. 100:22–23. Kollie objected, citing N.D.R.Ev. 401 and 403. Sept. 13, 2022 Tr. 100:24–101:4. The State explained the jury had only seen Jane Doe depicted alive in grainy security camera video of the parking lot during the assault and Exhibit 84 would help humanize her. Sept. 13, 2022 Tr. 101:7–15.

[¶ 47] In ruling on Kollie's objection to Exhibit 84, the district court stated:

> THE COURT: Okay. I guess in due of Marsy's Law and so forth, I will overrule the objection on this, and those will be received.

Sept. 13, 2022 Tr. 101:24–102:1.

[¶ 48] Article I, § 25(1)(a), N.D. Const., states crime victims shall have "[t]he right to be treated with fairness and respect for the victim's dignity." As the rest of the evidence introduced at trial showed Jane Doe only as a grainy silhouette or deceased, admission of Exhibit 84 which depicted Jane Doe alive, was proper to respect her dignity under N.D. Const. art. I, § 25(1)(a).

[¶ 49] All relevant evidence is generally admissible, but relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Thomas*, 2022 ND 126, ¶ 14, 975 N.W.2d 562 (citing N.D.R.Ev. 403). When determining whether to exclude evidence under Rule 403, a trial court should "give the evidence its maximum probative force and its minimum prejudicial value." *Id.* (internal quotation omitted).

[¶ 50] Rule 403, N.D.R.Ev., applies to unfairly prejudicial evidence, not simply evidence that is prejudicial. *Thomas*, 2022 ND 126, at ¶ 14. In light of the strong evidence that Kollie brutally attacked Jane Doe and then attempted to hide evidence of his crime, it is unlikely that a brief, seconds-long video clip depicting her alive tipped the scale for the jury. To be clear, the State does not argue a district court must always admit living-victim evidence when offered. Rather, in this case where substantial evidence of Kollie's guilt had already been established, the district court did not abuse its discretion.

[¶ 51] Kollie also argues Exhibit 84 was received in violation of N.D.R.Ev. 801. At. Br. at ¶ 28. This argument was not raised below, and the Court should not consider it for the first time on appeal.

CONCLUSION

[¶ 52] For the foregoing reasons, the State respectfully requests this Court **AFFIRM** the criminal judgment.

ORAL ARGUMENT STATEMENT

[¶ 53] The State requests oral argument to respond to points raised by the Appellant and answer any questions the Court may have.

Respectfully submitted this 24th day of March 2023.

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CERTIFICATE OF COMPLAINCE

[¶ 1] Pursuant to N.D.R.App.P. 32(d), the principal brief complies with the page limitation and consists of 22 pages.

Respectfully submitted this 24th day of March 2023.

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CERTIFICATE OF SERVICE

[¶ 1] A true and correct copy of the foregoing document was e-served on July 6, 2022, to: Kiara Kraus-Parr at service@krausparrlaw.com

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