ORIGINAL (e-filed)

20060243

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	Supreme Court No. 20060243
Appellee.	)	District Court No. 18-05-K-04231
	)	
-vs.-	)	
	)	
Jodi Rae Schweitzer,	)	
	)	
Appellant	)	

ON APPEAL FROM A CRIMINAL JUDGMENT
DISTRICT COURT FOR GRAND FORKS COUNTY,
NORTHEAST CENTRAL JUDICIAL DISTRICT
HONORABLE JOEL D. MEDD, JUDGE OF DISTRICT COURT, PRESIDING

BRIEF OF APPELLEE

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STATEMENT OF THE CASE

[¶ 1] Jodi Rae Schweitzer (Schweitzer herein), appeals from a judgment of criminal conviction in District Court of Grand Forks County. Schweitzer was found guilty of aggravated assault on August 22, 2006. (Trial Trans., pg. 118, ll. 6-24). On September 27, 2006, Schweitzer was sentenced to five years with the North Dakota Department of Corrections with three years suspended. (A-6 to A-7). In his appeal, Schweitzer asks that the decision of the lower court be reversed or dismissed based on claims of Ineffective Assistance of Counsel, error in admitting hearsay evidence under the excited utterance exception and insufficient evidence to support the conviction.

STATEMENT OF THE FACTS

[¶ 2] On December 10, 2005 Laurie Stamness was assaulted by Jodi Rae Schweitzer. Ms. Stamness suffered a broken jaw, a dislocated jaw, a broken nose, and a laceration under her lip. (A-4). The injuries resulted from being punched and/or kicked by Schweitzer. (A-4). Prior to the assault Ms. Stamness and Schweitzer had been arguing along with consuming alcohol. (Trial Trans., pg. 33, ll. 20-21; pg. 34, ll. 3-6; pg. 69, ll. 15-25; pg. 70, ll. 1-16). The other person present at the time of the assault, Dawn Standing Chief, denied causing the injuries to Ms. Stamness. (Trial Trans., pg. 70, ll 24-25).

[¶ 3] Following the assault, Ms. Stamness went to her home and sought treatment for her injuries the following morning. (Trial Trans., pg. 35, ll. 6-9.) While being treated at the hospital Ms. Stamness gave a statement to the police at which time she said that Schweitzer had been the one who assaulted her. (Trial Trans., pg. 36, ll. 13-15). The doctor who treated Ms. Stamness referred her to a specialist, Dr. Peterson, whom she saw a couple of days later. (Trial Trans., pg. 36, ll. 18-25). After examining Ms. Stamness Dr. Peterson concluded that she did have fractures to her jaw and nose. (Trial Trans., pg. 81, ll. 11-21). At the time of the examination, Ms. Stamness told Dr. Peterson that her injuries were the result of being assaulted by Schweitzer. (Trial Trans., pg. 81, ll. 1-5).

[¶ 4] On August 22, 2006, a jury found Jodi Rae Schweitzer guilty of aggravated assault. (Trial Trans., pg. 118, ll. 19-24).

ARGUMENT AND LAW

I. SCHWEITZER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

[¶ 5] Generally, a claim of ineffective assistance of counsel should be brought in a post-conviction relief proceeding, rather than on direct appeal. State v. Bell, 2002 ND 130, ¶ 29, 649 N.W.2d 243. However, when it is argued on direct appeal, the court will review the record to decide if the assistance of counsel was plainly defective. Id. "Unless the record affirmatively shows ineffectiveness of constitutional dimensions, the Defendant must provide the Court with some evidence in the record to support the claim. Some form of proof is required, and the representations and assertions of new counsel are not enough." State v. Causer, 2004 ND 75, ¶ 19, 678 N.W.2d 552

[¶ 6] The Court must apply the test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This test has two components. First, the Defendant must show that counsel's performance was deficient. Id. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. Second, the Defendant must show that the deficient performance prejudiced the defense. Id. This requires a showing that the Defendant establish that "but for" counsel's unprofessional errors, the result of the proceedings would have been different. Causer at ¶ 19. And the Defendant must point out with specificity how and where trial counsel was incompetent and the probable different result. State v. DeCouteau, 1998 ND 199, ¶ 6, 586 N.W.2d 156. In proving that counsel's performance was deficient, the Defendant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. State v.

Norman, 507 N.W.2d 522, 525 (N.D. 1993). The Court will not second guess defense strategy through hindsight. State v.Lefthand, 523 N.W.2d 63, 69 (N.D. 1994).

[¶ 7] In the case at hand, Schweitzer argues that his attorney failed to provide effective assistance of counsel beginning with the pretrial hearings. Schweitzer points to work load issues raised by his attorney and states that his attorney in fact wanted to get rid of Schweitzer's case. In fact, the record indicates that Schweitzer's attorney was in fact feeling overwhelmed, but at no time did he tell the court that he wanted to dump Schweitzer's case as indicated by Schweitzer. (Bail trans., pg. 4, ll. 10-22; Motion Trans., pg. 13, ll. 24-25; pg. 14, ll. 1-11.) On careful review, Schweitzer was the one who asked that the attorney client relationship be severed and his attorney simply cited being overwhelmed with cases and wished to dispose of some of them, not indicating that Schweitzer's case was one of those he wished to get rid of. Id.

[¶ 8] Schweitzer also cites that his attorney was unprepared which led to delays in Schweitzer's continued incarceration prior to trial. Schweitzer asked for and received several bond review hearings and was in fact able to bond out on one occasion. (Bond Review Trans., pg. 4-6). However, Schweitzer was arrested while out on bond which resulted in his bond being revoked. (Bond Review Trans., pg. 6, ll. 7-13). Schweitzer's continued incarceration was not the result of ineffective assistance of counsel, but rather, it was Schweitzer's own actions that caused him to be detained until the time of his trial. Additionally, the continuances that were granted resulted from calendar conflicts, among other issues, and Schweitzer does not present how these delays prejudiced the outcome of his trial. Schweitzer simply argues that the delays resulted in his lengthy incarceration. which as stated above was actually the result of Schweitzer's own actions and not those

of his attorney.

[¶ 9] Next, Schweitzer cites actions and decisions made by his attorney at trial as being further evidence of his attorney's ineffectiveness. Attorneys are given the power to make decisions from a strategical perspective. In State v. Strutz, 2000 ND 22. 606 N.W.2d 886 the Court addressed the issue of strategy versus ineffective assistance. State v. Hayek, 2004 ND 211, ¶ 6, 689 N.W.2d 422 (citing Strutz). As cited by Hayek, the court found in Strutz that:

> "we are not able to discern whether trial counsel's decision to elicit testimony from Strutz about his prior conviction was truly ineffective assistance or a legitimate trial strategy....Strutz cannot establish that his trial counsel's conduct fell below an objective standard of reasonableness or that it is reasonably probable the result his trial would have been different but for his counsel's alleged errors."

Id. The same may be said in this case. Schweitzer points out that his attorney did not give an opening statement and did not call witnesses on his behalf. However, one can only predict what an attorney is thinking when he makes decisions during a trial. Despite the importance of an opening statement, as argued by Schweitzer, whether to give an opening statement or not is a decision to be made by the attorney, it is not ineffective assistance, but rather a strategy that an attorney may use.

[¶ 10] Next, Schweitzer argues that his attorney did not object to some of the testimony during trial. In Stutz the court found that a failure to object to witness testimony is not evidence of ineffective assistance of counsel. Id. If Schweitzer's attorney had not objected at all during trial there may be a more credible argument, but a review of the transcript shows that he did in fact object to testimony throughout

[¶ 11] Finally. Schweitzer argues that his attorney's failure to poll the jury was another example of ineffective assistance. Once again, this is a decision that is left up to

the attorney and is not required at every trial. The jury is instructed on what is required of them to reach a guilty verdict and, even without a poll, one must believe that the jury did indeed reach a unanimous decision as they were directed to do by the Court. Schweitzer fails to point out how a failure to poll the jury could have been prejudicial to his case or how this could have changed the outcome, other than to verbally hear the decision made by each and every juror.

[¶ 12] "The defendant must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance, and the courts must consciously attempt to limit the distorting effect of hindsight." Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524. In this case, Schweitzer raises concerns arising from alleged ineffective assistance, however, these concerns do not rise to the level necessary to overcome the standards set forth in both this Court and in the Supreme Court of the United States. Attorneys are given the power to make strategical decisions and none of the decisions made by Schweitzer's attorney at trial were blatant errors, but rather discretional decisions that were made.

[¶ 13] Schweitzer maintains that his counsel's lack of preparation and attention to his case resulted in a lengthy pretrial incarceration. While the time spent incarcerated prior to trial was significant, the reason Schweitzer had to remain incarcerated was due to his own actions, not those of his attorney. Although Schweitzer's attorney raised concerns of being overwhelmed and at times may have appeared to be inadequately prepared for pretrial hearings, he did not attempt to remove himself from Schweitzer's case and in fact went to trial prepared to vigorously cross exam witnesses and advocate for his client using whatever strategy he deemed appropriate. While Schweitzer has

indicated alleged deficits of his counsel, he has failed to indicate how the result would have been different had his attorney made different decisions, thus he did not receive ineffective assistance of counsel, but rather representation by an attorney who, although overwhelmed at times, came to the trial, actively participated and did his job by advocating for his client and using his discretion where he deemed appropriate.

II. THE DISTRICT COURT DID NOT ERR IN FINDING HEARSAY EVIDENCE TO BE AN "EXCITED UTTERANCE."

[¶ 14] Under Rule 803(2), N.D.R.Ev. an excited utterance is an exception to the general hearsay rule. During the trial, Schweitzer's attorney objected to the testimony provided by Nancy K. Johnson that Stamness's son told her the "bastard broke her nose." (Trial Trans.. pg. 48. ll 23-25; pg. 49, ll. 1-9). The trial court determined that the testimony did in fact meet the requirements of the excited utterance exception and allowed the testimony. (Trial Trans., pg. 49, ll. 2-4).

[¶ 15] Rule 803(2) allows the exception when "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and the testimony is able to be solicited "even though the declarant is available as a witness." In order for the excited utterance to apply the proponent must "demonstrate (1) a startling event or condition and (2) the statement as the product of the declarant's stress or excitement resulting from the startling event or condition." State v. Whalen, 520 N.W.2d 830, 832 (citing Staiger v. Gaarder, 258 N.W.2d 641, 647 (N.D. 1977)).

[¶ 16] When Stamness's son made the phone call to Nancy Johnson, he was in an excited state after seeing his mother come home bleeding. (Trial Trans.. pg. 48, ll. 10-22). Although Stamness's son did not witness the assault he was witness to the startling

event of his mother coming home injured and was so upset that he called his aunt to tell her what was happening. (Id.) One can only imagine how traumatic it would be to have your mother walk through the door bleeding. Stamness's son called his aunt and reported to her that his mother had been assaulted by Schweitzer and this call was made during the time that Stamness's son was experiencing the stress of finding his mother to be injured and bleeding.

[¶ 17] The trial court correctly ruled that this statement fit squarely inside the parameters of the excited utterance exception as a startling event had occurred and the declarant was experiencing stress and excitement as a result of this. The statement was made shortly after Stamness returned home where her son was present and he had to experience the frightful sight of his injured mother and as a result he phoned his aunt to relay what had happened. "The trial court's evidentiary ruling will be reversed only if it abused its discretion." Whalen at 831. In this case, the testimony of Nancy Johnson meets the requirements of the excited utterance exception and the trial court did not err in its ruling to allow the testimony to be heard at trial.

III. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT THE JURY'S GUILTY VERDICT ON THE CHARGE OF AGGRAVATED ASSAULT.

[¶ 18] In reviewing the sufficiency of the evidence to convict, the Supreme Court of North Dakota looks only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a

conviction. State v. Kunkel, 548 N.W.2d 773 (N.D. 1996). A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Id. Furthermore, the Court does not weigh conflicting evidence, nor does it judge the credibility of the witnesses. Id. at 774.

[¶ 19] In the case at hand. a jury properly found the Defendant (Schweitzer) guilty of aggravated assault because sufficient evidence was presented to warrant such a conclusion. Mr. Schweitzer argues that the victim, Stamness, testified that she did not know who had assaulted her, however Ms. Stamness also testified that she and Schweitzer were in a dating relationship at the time of the incident and at the time of trial. (Trial Trans., pg. 32, ll. 20-24). Ms. Stamness also indicated that she was reluctant to testify against Schweitzer and was concerned about what was going to happen to him. (Trial Trans., pg. 32, ll 18-19, 25; pg. 33, ll. 1). Ms. Stamness did admit that she and Schweitzer had been arguing prior to the assault and that in her statement to police she had indicated to the officer that it was Schweitzer who had assaulted her. (Trial. Trans., pg. 34, ll. 3-6; pg. 36, ll. 13-15).

[¶ 20] The state presented four additional witnesses, each of whom testified that Ms. Stamness indicated to them that Schweitzer had been the one who assaulted her, including one report that was given to the doctor two days after the incident occurred. (Trial Trans., pg. 80, ll. 7-18; pg. 81, ll. 1-5). The reports, having been made at different times following the incident, would reasonably lead to a conclusion that Schweitzer was in fact the person who had assaulted Ms. Stamness and that in fact Ms. Stamness recanted

her earlier statements as a result of their continued relationship and not due to the fact that she was truly unaware of who had assaulted her.

[¶ 21] Finally, Schweitzer argues that the testimony of the other witnesses constitutes inadmissible hearsay, however this is an unjustified argument to make at this time. As stated earlier, the testimony of Nancy Johnson was admissible under the hearsay exception of excited utterance. Additionally, the testimony of Officer Lammers was not objected to during the trial, thus the issue cannot be raised on appeal. The Court has "held that the failure to object at trial operates as a waiver of any claimed error." Hayek at ¶ 10 (citing State v. Anderson, 2003 ND 30, ¶ 7, 657 N.W.2d 245). The hearsay issues are moot and were raised only in passing in Schweitzer's brief and, therefore, the issue of whether or not the testimony of the other witnesses was or was not admissible hearsay should not be considered by the Court. The Court "will only decide issues that have been thoroughly briefed and argued." Ernst v. State, 2004 ND 152, ¶ 16, 683 N.W.2d. 891, 897. (citing State v. Backlund, 2003 ND 184, ¶ 38, 672 N.W.2d 431.)

[¶ 22] The jury is in a position to listen to all of the testimony and to decide the credibility of each witness as the trial progresses. The jury in this case listened to the testimony presented by each side and weighed the evidence, reaching a decision beyond a reasonable doubt that Schweitzer did in fact commit the crime of aggravated assault. After viewing the evidence in the light most favorable to the State, sufficient evidence was presented to justify a conviction.

CONCLUSION

[¶ 23] Based upon the facts and law provided, the Criminal Judgment entered by the Grand Forks County District Court should be upheld and the request for a new trial should be denied.

Dated this 31st day of January, 2007

/s/ Jodi A. Bass
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