ORIGINAL

20060243

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,
Appellee

- vs.-

Jodi Rae Schweitzer,
Appellant

Supreme Court No. 20060243

BRIEF FOR 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
Case No. 05-K-4231

ATTORNEY:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATIES

STATEMENT OF THE ISSUES

I. Did Schweitzer receive Ineffective Assistance of Counsel.

II. Did the Trial Court Err in Finding Hearsay Testimony to be an "Excited Utterance."

III. Does Insufficient Evidence Exist to Sustain Schweitzer's Conviction.

STATEMENT OF CASE

On December 12, 2006, Jodie Rae Schweitzer (herinafter "Schweitzer") was charged with assaulting Laurie Stamness (hereinafter "Stamness") in Grand Forks County District Court. (A-3). The charge, which was originally a Class A Misdemeanor, was later amended to Aggravated Assault, a Class C Felony. (A-4).

On January 4, 2006, Mr. Alan Sorenson of the Bulie Law Firm was appointed to represent Mr. Schweitzer. (A-5). On March 7, 2006, Mr. Schweitzer appeared with Mr. Sorenson before the trial court for a bail review. Mr. Sorenson indicated that he had "workload issues" and that he was "not prepared to address Mr. Schweitzer's position in any detail. (Bail Trans., pg. 4, ll. 10-22). Mr. Sorenson complained that he did not have Westlaw access through the Indigent Defense System to do research. (Bail Trans., pg. 3, ll. 7-14). Mr. Sorenson complained about a contractual conflict with the Commission on Indigent Defense. (Bail Trans., pg. 3, ll. 15-25, pg. 4, ll.1-7). The trial court also noted receiving a letter from Schweitzer complaining about Mr. Sorenson being inattentive on consulting with him. (Bail Trans., pg. 5, ll. 7-14). After that exchange, the rest of the hearing involved Schweitzer primarily

trying to argue for his own bond reduction with only limited assistance from his attorney. (Bail Trans., e.g., pg. 6-15).

On May 4, 2006, Mr. Schweitzer and his attorney again appeared before the trial court on a Motion for Continuance filed by Schweitzer's attorney. At the hearing, Mr. Sorenson did not have his file on Mr. Schweitzer's case with him. (Motion Trans., pg. 7, ll. 6-7). The trial court noted receiving numerous requests by Mr. Schweitzer seeking a new attorney, which the trial court denied. (Motion Trans., pg 12, ll. 11-25; pg. 13, ll. 1-23). After noting that he wanted to "wrap up" the hearing to pick up his children at school, Mr. Sorenson noted that he had been "overworked" and admitted to trying to "dump some of these cases", (Motion Trans., pg. 13, ll. 24-25; pg. 14, ll. 1-11). The hearing then turned to address Mr. Sorenson's Motion for Continuance. (Motion Trans., pg. 13, ll. 3-11). At which point, Mr. Sorenson did not even recall filing a previous Motion for Continuance on the case. (Motion Trans., pg. 15, ll. 3-18). While the trial court granted the continuance, the Court noted a desire to resolve the case for the sake of both the State and Mr. Schweitzer's. (Motion Trans., pg. 15, ll. 19-25; pg. 22, ll. 8-16).

A jury trial was finally commenced on Mr. Schweitzer's case on August 22, 2006. The State informed the trial court it intended to call Officer Jennifer Lammers, Nancy Johnson, Dr. Troy Peterson, Dawn Standing Chief, and Laurie Stamness. (Trial Trans., pg 8, ll. 18-23). Mr. Sorenson indicated he was not going to be calling Mr. Schweitzer and would only be recalling Laurie Stamness. (Trial Trans., pg 9., ll. 10-15).

After the State's opening statement, Mr. Sorenson elected to defer making an opening statement until the start of the defense's case in chief. (Trial Trans., pg. 30, ll. 23-25; pg. 31, ll. 1-3). Laurie Stamness, the alleged victim and girlfriend of Mr. Schweitzer, testified first. (Trial Trans., pg 32, ll. 1-24). Ms. Stamness testified that Jodi Schweitzer, Dawn Standing Chief, Dennis Hanson, and her were drinking at Ms. Standing Chief's apartment on the evening of December 10, 2005. (Trial Trans., pg. 33, ll. 2-21). Stamness indicated sporadic arguments between the four of them began taking place throughout the night. (Trial Trans., pg. 33, ll. 22-25; pg. 34, ll. 1-6). Stamness stated that she was leaving the residence when someone she could not identify assaulted her by striking her in the face. (Trial Trans., pg. 34, ll. 7-15). Stamness stated she walked home and was taken to the emergency room the next day by her sister, Nancy Johnson. (Trial Trans., pg. 34, ll. 16-25, pg. 35, ll. 1-11). Stamness was later diagnosed with a broken jaw. (Trial Trans., pg. 37, ll. 6-12). Stamness admitted that she initially informed officers that Jodie Schweitzer assaulted her. (Trial Trans., pg. 36, ll. 13-15). Under cross-examination, Stamness further admitted that, out of anger, she had fabricated the initial story which involved Schweitzer assaulting her by kicking her twice in the face with steel-toed boots. (Trial Trans. pg. 41, ll. 19-25; pg. 42, ll. 1-4).

Nancy K. Johnson, Stamness's sister, testified next that she learned about the assault one and a half to two hours after it occurred. (Trial Trans., pg. 48, ll. 13-15). Ms. Johnson stated she learned it from her nephew, Stamness's son, who she described was extremely upset. (Trial Trans., pg. 47, ll. 23-25; pg. 48,

ll. 1-19). The State then asked Ms. Johnson to tell what Stamness's son had told her. (Trial Trans., pg. 48, ll, 23-25). Defendant objected on the basis that the testimony was hearsay. (Trial Trans., pg. 48, ll. 25; pg. 49, ll. 1). The trial court overruled the objection and found it qualified as an "excited utterance." (Trial Trans., pg. 49, ll. 2-4). Mrs. Johnson then testified that Stamness's son told her that, referring to Mr. Schweitzer, "the bastard broke her nose". (Trial Trans., pg. 49, ll. 5-9). Later, Mrs. Johnson also testified that Stamness told her in person that Schweitzer had assaulted her. (Trial Trans., pg. 50, ll. 4-7).

Jennifer Lammers, an 18-year veteran Grand Forks Police Officer, testified next. (Trial Trans., pg. 54). Officer Lammers testified that from her experience it was "very common" for victims of domestic violence to recant or change their story. (Trial Trans., pg. 54, ll. 23-25; pg. 55, ll. 1). Mr. Sorenson did not object to this testimony on behalf of the Defendant. (Trial Trans., pg. 55). Officer Lammers, further testified that Stamness told her the day of the assault that Schweitzer had grabbed her outside the residence and started hitting her. (Trial Trans., pg. 55, ll. 19-25; pg. 56, ll. 1-9). Lammers continued that Stamness said that Schweitzer was kicking her in the face with his steel toed boots while she laid on the ground. (Trial Trans., pg. 56, ll. 7-9). Mr. Sorenson did not object to the testimony on behalf of the Defendant. (Trial Trans., pg. 68).

Dawn Standing Chief testified next. (Trial Trans., pg. 68). She testified that she heard the commotion, but didn't see who assaulted Laurie Stamness. (Trial Trans., pg. 70, ll. 19-23). Upon the conclusion of her testimony, Mr.

Sorenson moved for a Judgment of Acquittal based upon the State presenting insufficient evidence. (Trial Trans., pg. 78, ll. 7-9). The Court informed Mr. Sorenson that his motion was untimely since the State had not yet rested. (Trial Trans., pg. 78, ll. 7-13).

Dr. Troy Peterson, Stamness's oral maxillofacial surgeon, next testified for the State. (Trial Trans., pg. 79). Over the objection of the defense, Dr. Peterson was allowed to testify that Stamness told him that her boyfriend had assaulted her. (Trial Trans., pg. 80, ll. 17-25; pg. 81, ll. 1-5).

Upon conclusion of Dr. Peterson's testimony, the State rested. (Trial Trans., pg. 96, ll. 18-22). Mr. Sorenson then indicated that the defense did not intend to call any witnesses and rested. (Trial Trans., pg. 97, ll. 12-14). The trial court then addressed the issue of the defense's opening statement, which Mr. Sorenson had reserved earlier. (Trial Trans., pg. 97; ll. 2-11). The trial court noted that it "may not exactly fit in because there's not additional evidence to present." (Trial Trans., pg. 97; ll. 8-10). Mr. Sorenson agreed and indicated he didn't see any point in doing an opening statement at that point. (Trial Trans., pg. 97, ll. 12-14).

On Mr. Schweitzer's behalf, Mr. Sorenson then moved for a Judgment at acquittal. (Trial Trans., pg. 98, ll. 18-21). The Court denied the motion finding sufficient evidence to submit the case to the jury. (Trial Trans., pg. 99, ll. 7-13).

After closing argument and jury instructions were completed, the case was submitted to the jury, who found Jodie Schweitzer guilty of Aggravated Assault.

(Trial Trans., pg. 118, ll. 19-24). Neither side requested to poll the jury after the verdict was read. (Trial Trans., pg. 119, ll. 3-9).

On September 27, 2006, Jodie Schweitzer was sentenced to five years with the Department of Corrections with three years suspended during which time he would be on supervised probation. (A-6 to A-7). Mr. Schweitzer received credit for 285 days already served. (Id.) Schweitzer now appeals the Criminal Judgment entered by the Grand Forks County District Court to this Court. (A-8).

ARGUMENT AND LAW

A. Schweitzer received Ineffective Assistance of Counsel

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to effective assistance of counsel, made applicable to the States by the Fourteenth Amendment and Article I §12 of the N.D. Constitution. Sambursky v. State, 2006 N.D. 223, ¶13, 723 N.W.2d 524; Garcia v. State, 2004 N.D. 81, ¶5, 678 N.W. 2d 568.

"To establish ineffective assistance of counsel, a party must prove (1) it's counsel's performance was deficient such that it fell below an objective standard of reasonableness; and, (2) counsel's deficient performance prejudiced the defendant." State v. Klein, 2006 N.D. 37, ¶2, 711 N.W.2d 606 (citing Klose v. State, 2005 N.D. 192, ¶9, 705 N.W. 2d 809). "This Court prefers in an effective assistance at counsel claim he made in an application for post-conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying counsel's conduct." Id. (citing State v. Causer, 2004 N.D. 75, ¶19, 678 N.W. 2d 552).

"Nevertheless, this Court will, on direct appeal, examine the entire record to determine if assistance of counsel was plainly defective." Id. "Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of constitutional dimensions or the defendant points to some evidence in the record to support the claim." Id. Schweitzer maintains that a mere perusal through the record shows plainly defective representation.

In the case before the Court, the record before the Court paints a picture of an attorney overwhelmed and, at times, appearing almost clueless of certain basic rules of procedure. During some of the pretrial proceedings, Mr. Schweitzer's attorney's statements plainly demonstrated errors so blatant and obviously prejudicial, the ultimate result of Mr. Schweitzer's case would likely have been far different had he had effective representation. See Wright v. State, 2005 N.D. 217, ¶10, 707 N.W. 2d 242 (discussing the second prong of the Strickland v. Washington test).

For instance, Mr. Sorenson complained of "workload" issues, and wanting to dump Schweitzer's case. (Bail Trans., pg. 4, ll. 10-22; Motion Trans., pg. 13, ll. 24-25; pg. 14, ll. 1-11). He admitted to not being prepared on one occasion and did not even have the file on another. (Bail Trans., pg. 4, ll. 10-22; Motion Trans., pg. 7, ll. 6-7). Mr. Sorenson did not even recall filing a previous Motion for Continuance. (Motion Trans., pg. 15, ll. 3-18). Mr. Sorenson's inadequate preparation quite clearly contributed to the delays in Mr. Schweitzer's case. These delays resulted in a lengthy pretrial incarceration, which even caused the trial court to become concerned. (Motion Trans., pg. 15, ll. 19-25; pg. 22, ll. 8-16).

At trial, the inadequacies of Schweitzer's counsel became even more apparent. After the State's opening statement, Mr. Sorenson reserved making an opening statement until the start of the defense's case. (Trial Trans., pg.36, ll. 23-25; pg. 31, ll. 1-2). However, when it came time for the defense to present evidence, Mr. Sorenson rested without calling any witnesses. (Trial

Trans., pg. 97, 11, 2-14). Since the evidentiary stage of the trial was concluded, the trial court correctly noted that the opening statement which the defense reserved did not seem to "fit." (Id.) Hence, Mr. Sorenson then elected not to make one on behalf of Mr. Schweitzer. (Id.)

As one treatise suggested, the opening statement is "perhaps the most important phase of the trial because the jury's impression regarding the innocence or guilt of the accused is often formed at this time." Cipes, Bernstein & Hall, Criminal Defense Techniques, §1A.08. As a result of this importance, the defenses' reserving an opening statement until after the State has rested is a strategy that is cautioned against "because it leaves the prosecutor's opening statement in mind without a rebuttal." Id. In addition, without a defense opening statement, the jury will not have the defense theory to consider while it hears the government's case. Id.

In this case, defense counsel's decision to reserve the opening statement was completely inappropriate and demonstrative of ineffective counsel. As noted previously, the strategy of reserving the opening statement itself is questionable, but there appeared to be absolutely no strategic logic in reserving the defense's opening statement in Schweitzer's case. Prior to the start of trial, Mr. Sorenson knew he only had one witness who he intended to recall to the stand. (Trial Trans., pg.9, ll. 7-15). Schweitzer submits that any reasonable competent counsel would know that, under these circumstances at the start of trial, it would be entirely possible the defense may end up not calling any witnesses. A fact which would mandate that the defense must make an

opening statement at the start of the trial. The loss of opening statement not only resulted in one less opportunity for Schweitzer to present his theory to the jury, but also left the State's opening unrebutted until closing arguments.

Mr. Sorenson also failed to object to questions and responses made during the State's case. Sorenson failed to object to Officer Lammar's offering opinion testimony that it was "very common" for victims of domestic violence to recant or change their story. (Trial Trans., pg. 54, ll. 23-25; pg. 55, ll.1). Mr. Sorenson did not object to the hearsay testimony offered by Officer Lammars on what Stamness told her the day of the assault. (Trial Trans., pg. 55, ll. 21-25; pg. 56, ll. 1-9).

Schweitzer's counsel also demonstrated deficient performance in failing to know basic procedure, such as when to make a motion for a directed verdict of acquittal. (Trial Trans., pg. 78, ll. 7-14). Likewise, Schweitzer's counsel's failure to poll the jury after the verdict was read was a further demonstration of deficient performance. (Trial Trans., pg. 119, ll. 3-9). As a result of this failure, there is no way of knowing for certain that the jury's verdict was indeed unanimous.

Taken together, Schweitzer's counsel's performance prior to and during trial was wholly deficient and below the objective standard of reasonableness. This deficient performance clearly prejudiced Mr. Schweitzer. His attorney's unpreparedness and inabilities prior to trial led to a lengthy pretrial incarceration. At trial, Schweitzer did not receive an opening statement

because of his attorney. Schweitzer's counsel failed to object properly, poll the jury, and even made an untimely motion for a directed verdict.

Based upon the foregoing, Schweitzer urges the Court to find that he received ineffective assistance of counsel and remand this case for a new trial.

B. The Trial Court erred in finding Hearsay Testimony to be an "Excited Utterance."

Over Schweitzer's hearsay objections, the trial court allowed Nancy K. Johnson to testify that Stamness's son told her that the "bastard broke her nose." (Trial Trans., pg. 48, ll. 23-25; pg. 49, ll. 1-9). The trial court ruled that Johnson's statement constituted an excited utterance, which, under Rule 803(2) N.D.R.Evid., is not excluded by the hearsay rule. (Trial Tran., pg. 49, ll. 2-4).

As an exception to the hearsay exception, excited utterances are firmly rooted in the law. State v. Whalen, 520 N.W.2d 830, 831 (N.D. 1994). A conscious recognition has existed since the 1700's for the excited utterance exception, often under the term "res gestae", which applies to exclamations by persons present at affrays or other excited occasions. Id. (citing John Henry Wigmore, Evidence §1746 (Chadboarn rev. (1976)). "The assumption underlying this exception is that a person under the sway of the excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication and that, consequently, any utterance will be spontaneous and trustworthy." Id. at 831-32 (quoting 4 Weinstein & Berger, Weinstein's Evidence, ¶803(2)[01], pg. 803-101 (1994)).

As a result, the proponent of the evidence must demonstrate two things: 1.) a startling event or condition; and 2.) the statement as the product of the declarant's stress and excitement resulting from the startling event or condition. Whalen, at 832. Under this test, the excited utterance exception is only available when the declarant has firsthand knowledge of the subject matter of the statement. Bemis v. Edwards, 45 F.3d 1369, 1373 (9th Cir. 1995). As demonstrated by the Bemis Court, repetition of the statement of someone who had seen the event is not sufficient to establish personal knowledge. Id. at 1373-74.

In this case, there is no dispute that Stamness's son, who stated the hearsay evidence to Nancy Johnson, did not see the assault on his mother. None of the witnesses placed him at the time and place of the assault. Stamness's son only called and made the statement after approximately an hour and a half to two hours after the assault. (Trial Trans., pg. 49, ll. 13-15).

Schweitzer maintains that Stamness's son's statement made through Nancy Johnson's testimony wholly fails to meet the "personal knowledge" of the event. Schweitzer contends the statement does not have the trustworthiness of the nature of someone who actually witnessed the event would have.

Based upon the foregoing, and the dramatic impact that the statement would have on a reasonable jury, Schweitzer urges that the Court find that the statement constitutes hearsay and remand to the Grand Forks District Court with instructions to order a new trial.

C. Insufficient Evidence Exists to Sustain Schweitzer's Conviction.

When reviewing challenges to the sufficiency of the evidence, this Court views the evidence most favorable to the verdict as well as all reasonable inferences from such evidence. State v. Wilson, 2004 N.D. 51, ¶6, 676 N.W.2d 98 (citing State v. Knowels, 2003 N.D. 180, ¶6, 671 N.W.2d 816). The defendant must show that, even viewed in the light most favorable to the verdict, the evidence reveals no reasonable inference of guilt. Id. (quoting State v. Strutz, 2000 N.D. 22, ¶7, 606 N.W. 2d 886). This Court will not weigh conflicting evidence or judge the credibility of witness. Id. (citing State v. Johnson, 425 N.W.2d 903, 906 (N.D. 1988)). Rather, the Court reviews the record to determine if there is competent evidence allowing the jury to draw a reasonable inference proving guilt. Wilson, 2004 N.D. 51, ¶6. Only after determining that no rational fact-finder could have found the defendant guilty will this Court reverse a conviction. Id. (citing State v. Burke, 2000 N.D. 25, ¶12, 606 N.W.2d 108).

In this case, Stamness testified that she did not know who assaulted her. (Trial Trans., pg. 34, ll. 7-15). Stamness also admitted that the initial report that Schweitzer assaulted her to Officer Lammers was fabricated and made out of anger with Schweitzer. (Trial Trans., pg. 41, ll. 19-25; pg. 42, ll. 1-4). The only other testimony that Schweitzer committed the crime came from testimony from witnesses who were told the false account of the attack provided by Ms. Stamness.

Furthermore, Schweitzer maintains that even much of the testimony provided by those witnesses was inadmissible hearsay. For instance, Nancy Johnson testified that Stamness identified to her that Schweitzer was her attacker. (Trial Trans., pg. 50, ll. 4-7). Likewise, Officer Lammers testified, in detail, about the account of the assault that Stamness initially provided to her. (Trial Trans., pg. 55, ll. 19-25; pg. 56, ll. 1-9).

This Court considered a similar situation in State v. Norman, 507 N.W.2d 522 (1993). In Norman, the defendant attempted to elicit testimony about statements made by police officer to his mother and sister. Id. at 526. The police officer in question had earlier testified at the trial, but was never questioned about the statements. Id. This Court upheld the trial court's decision to exclude the testimony and found the testimony to be a "classic case of hearsay." Id.

In this case, Stamness was never questioned by the State about the statement made to Nancy Johnson. (Trial Trans., pg. 32-37 ll. 44-46). Likewise, Stamness' testimony on direct examination, about the statement provided to Officer Lammers was limited to the fact that she identified her attacker as Schweitzer. (Trial Trans., pg. 36, ll. 2-17). Schweitzer maintains that, like Norman, this is a "classic case of hearsay."

Based upon the fact that the evidence that Schweitzer committed the crime evolves from a recanted statement and that the vast majority of the other testimony detailing the assault is inadmissible hearsay, Appellant Jodi

Schweitzer urges the Court to find that insufficient evidence exists and reverse his conviction.

Conclusion

Based upon the facts and law provided on Issues I and II, the Criminal Judgment entered by the Grand Forks County District Court should in all things be REVERSED and the case remanded for a new trial.

Based upon the facts and law provided on Issue III, the Criminal Judgment entered by the Grand Forks County District Court should in all things be REVERSED and a Judgment of Dismissal entered in the case.

Dated this 29th day of December, 2006

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