

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

State of North Dakota,)	
)	
Plaintiff and Appellee,)	
)	Supreme Court No. 20210012
vs.)	Case No. 18-2020-CR-00507
)	
)	ORAL ARGUMENT
Jacqueline Demerais,)	REQUESTED
)	
Defendant and Appellant.)	

ON APPEAL FROM A CRIMINAL JUDGMENT ENTERED DECEMBER 15,
2020, AFTER MS. DEMERAIS WAS FOUND GUILTY BY A JURY OF HER
PEERS OF AGGRAVATED ASSAULT
FROM THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JOHN A. THELEN, PRESIDING.

**BRIEF OF APPELLANT
JACQUELINE CAROL DEMERAIS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ¶ 1

STATEMENT OF THE ISSUES..... ¶ 2

STATEMENT OF THE CASE..... ¶ 3

STATEMENT OF THE FACTS ¶ 4

REQUEST FOR ORAL ARGUMENT..... ¶ 9

STANDARD OF REVIEW ¶ 10

LAW AND ARGUMENT..... ¶ 12

I. The evidence was insufficient to sustain the jury’s finding of guilt to the charge of aggravated assault. ¶ 12

II. Counsel for Ms. Demerais at trial in the District Court were ineffective...... ¶ 19

a. Counsel failed to make proper objections at trial...... ¶ 19

b. Counsel failed to request a lesser included charge for the jury to consider ¶ 22

CONCLUSION ¶ 24

[¶ 1] **TABLE OF AUTHORITIES**

CASES:

UNITED STATES SUPREME COURT:

Strickland v. Washington, 466 U.S. 668 (1984) ¶ 19

NORTH DAKOTA SUPREME COURT:

City of Fargo v. Nikle, 2019 ND 79, ¶ 6, 934 N.W.2d 388 ¶ 22

Coppage v. State, 2014 ND 42, ¶ 17, 843 N.W.2d 291 ¶ 19

Ernst v. State, 2004 ND 152, ¶ 9, 683 N.W.2d 891 ¶ 19

Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687 N.W.2d 454 ¶ 19

State v. Blunt, 2010 ND 144, ¶ 12, 785 N.W.2d 909 ¶ 12

State v. Carlson, 1997 ND 7, ¶ 34, 559 N.W.2d 802 ¶ 22

State v. Cody, 2017 ND 147, ¶ 5, 896 N.W.2d 647 ¶ 11

State v. Eggleston, 2020 ND 68, 940 N.W.2d 645 ¶¶ 10, 13

State v. Friesz, 2017 ND 177, ¶34, 898 N.W.2d 688 ¶ 12

State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816 ¶ 10

State v. McAllister, 2020 ND 48, ¶ 21, 939 N.W.2d 502 ¶ 22

State v. Polk, 2020 ND 248, ¶ 6, 950 N.W.2d 764 ¶¶ 10, 16

State v. Romero, 2013 ND 77, ¶ 24, 830 N.W.2d 592 ¶ 12

State v. Truelove, 2017 ND 283, ¶7, 904 N.W.2d 342 ¶ 13

State v. Weidrich, 460 N.W.2d 680 (N.D. 1990) ¶ 22

OTHER:

North Dakota Rules of Appellate Procedure

N.D.R.App.P. 28(h) ¶ 9

North Dakota Rules of Criminal Procedure

N.D.R.Crim.P. 29(a) ¶¶ 10, 12

North Dakota Rules of Evidence

N.D.R.Ev. 803(5) ¶ 21

[¶ 2] STATEMENT OF THE ISSUES

- I. The evidence was insufficient to sustain the jury’s finding of guilty to the charge of Aggravated Assault.**
- II. Counsel for Mr. Demerais at trial in the District Court were ineffective.**

STATEMENT OF THE CASE

[¶ 3] Jacqueline Carol Demerais (“Ms. Demerais”) appeals from a criminal judgment entered after she was found guilty of aggravated assault following a jury verdict in the District Court of Grand Forks County. On March 9, 2020, Ms. Demerais was arrested and charged with aggravated assault, felonious restraint, and preventing arrest. (Appellant’s App. at p. 9). A jury ultimately acquitted Ms. Demerais of felonious restraint and preventing arrest. The jury did, however, find her guilty of aggravated assault. (Appellant’s App. at p. 14). She was sentenced on December 14, 2020 and a criminal judgment was entered on December 15, 2020. (Appellant’s App. at 15-18.) On January 15, 2021, Ms. Demerais filed her notice of appeal. (Appellant’s App. at 19-20.)

STATEMENT OF THE FACTS

[¶ 4] On March 9, 2020, Officer Steffan, with the Grand Forks Police Department, responded to a call from an individual who claimed that she had been assaulted. Tr. Vol. I. at 117-118. Officer Steffan testified that he found a female and a male when he arrived at the scene. Id. Officer Steffan determined that the first female to be the alleged victim, Jackie Demery, and the male was a neighbor of the Ms. Demerais, who let Ms. Demery use his cell phone to call the police. Id. Officer Steffan testified that Ms. Demery told him that her cousin, Ms. Demerais, assaulted her that evening and then claimed that she left the residence and called the police. Id. Officer Steffan never formally interviewed the male on

scene. Id. Officer Steffan stayed with Ms. Demery and the paramedics while Officer Bullinger and Officer Nichols made contact with Ms. Demerais.

[¶ 5] While Officer Steffan was speaking with Ms. Demery, Officers Bullinger and Nichols made contact with Ms. Demerais. Tr. Vol. I. at 87. While talking with Ms. Demery, Officer Steffan heard noises from Ms. Demerais' residence. Tr. Vol. I. at 127. Officer Steffan jogged down to the location and saw Officer Bullinger and Officer Nichols restraining Ms. Demerais in the entryway of her home. Id. The officers ultimately placed Ms. Demerais under arrest for aggravated assault, felonious restraint, and preventing arrest.

[¶ 6] There are many conflicting testimonies throughout this case. Throughout Ms. Demery's testimony at trial, she claims that Ms. Demerais assaulted her multiple times while she was at her house and held her there against her will. Tr. Vol. I. at 66-74. Ms. Demery testified that she received money from a friend and had bought a bottle of liquor over and was drinking all night. Ms. Demery testified that the argument started over an EBT card and liquor being drank. Tr. Vol. I. at 64-65. Ms. Demery testified that Ms. Demerais eventually became so angry that she began assaulting her throughout the house and then at the end of the physical altercation, stood in front of her front door and would not let Ms. Demery leave until she promised not to call the cops. Tr. Vol. I. at 74. Ms. Demery then testified that she was walking away from the house, found a neighbor outside in the cold, and used his cell phone to call the police. Id.

[¶ 7] However, Ms. Demerais has a much different story. Ms. Demerais testified that her cousin, Ms. Demery, would often come over and ask for money. Tr. Vol. II. at 221. Ms. Demerais testified that Ms. Demery would ask her to go buy her items at the store because she was banned from shopping there due to previous thefts that she committed. Id.

Ms. Demerais testified that on the night of March 9, 2020, Ms. Demery called her while she was walking her dog and asked her to give her twenty dollars. Tr. Vol. II. at 223. Ms. Demerais testified that she gave Ms. Demery the twenty dollars to help with feminine care products. Id. However, Ms. Demerais testified that after Ms. Demery received the twenty dollars from her, she returned to her house shortly after with a bottle of liquor and a pack of cigarettes. Id. Ms. Demerais testified that she refused to drink with Ms. Demery. Tr. Vol. II. at 225. Ms. Demerais testified that Ms. Demery left her home around 9:30 P.M, Ms. Demery did not have any injuries, and no altercation had occurred. Tr. Vol. II. at 226-227. Two hours later, officers arrived at her home. Once they arrived, Ms. Demerais thought the officers were there because her dog was barking. Tr. Vol. II. at 227. Ms. Demerais had no idea that they were arresting her for allegations of assault and other various crimes. Id.

[¶ 8] Ms. Demerais was subsequently charged with Aggravated Assault, Felonious Restraint, and Preventing Arrest. A jury found her not guilty of Felonious Restraint and Preventing Arrest but did find her guilty of Aggravated Assault.

REQUEST FOR ORAL ARGUMENT

[¶ 9] Ms. Demerais requests the Court schedule oral argument in this case under N.D.R.App.P. 28(h). This matter involves the insufficient evidence provided at trial to uphold a guilty verdict. Additionally, this case presents an issue of ineffective representation by defense counsel at the time of trial. Oral arguments would be helpful for this Court's review.

STANDARD OF REVIEW

[¶ 10] “In reviewing the sufficiency of the evidence to convict, we look 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. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816. A district court abuses its discretion in denying a motion under Rule 29 if the evidence is insufficient to sustain a conviction. State v. Polk, 2020 ND 248, ¶ 6, 950 N.W.2d 764 (quoting State v. Eggleston, 2020 ND 68, ¶ 7, 940 N.W.2d 645). The defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict. Id.

[¶ 11] To establish an ineffective assistance of counsel claim, the defendant must show the representation fell below an objective standard of reasonableness and there is a reasonable probability, but for counsel’s unprofessional errors, the result of the proceeding would have been different. State v. Cody, 2017 ND 147, ¶ 5, 896 N.W.2d 647 (internal citations omitted). “[W]e examine the entire record when an ineffective assistance of counsel claim is raised on direct appeal. A conviction will not be reversed unless the record reveals the assistance of counsel was plainly defective and requires such reversal.” Id.

LAW AND ARGUMENT

I. The evidence was insufficient to sustain the jury’s finding of guilty to the charge of Aggravated Assault.

[¶ 12] “Under N.D.R.Crim.P. 29(a), the district court is authorized, upon the defendant’s motion, to ‘enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.’” State v. Blunt, 2010 ND 144, ¶12, 785 N.W.2d 909 (quoting N.D.R.Crim.P. 29(a)). “To grant a motion for judgment of acquittal under N.D.R.Crim.P. 29, “a trial court must find the evidence is insufficient to sustain a conviction of the offenses charged.” (quoting State v. Romero, 2013 ND 77, ¶ 24, 830

N.W.2d 592). “When the verdict is attacked and the evidence is legally sufficient to sustain the verdict, we will not disturb the verdict and judgment even though the trial included conflicting evidence and testimony.” State v. Friesz, 2017 ND 177, ¶ 34, 898 N.W.2d 688.

[¶ 13] “In reviewing challenges to the sufficiency of the evidence on appeal, the defendant bears the burden of showing the evidence reveals no reasonable inference of guilt when viewed in the light most favorable to the verdict.” State v. Eggleston, 2020 ND 68, ¶ 7, 940 N.W.2d 645 (quoting State v. Truelove, 2017 ND 283, ¶ 7, 904 N.W.2d 342). In determining whether a defendant has met his burden, on a challenge to the sufficiency of the evidence, the Supreme Court views the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the verdict to decide whether a reasonable fact finder could have found the defendant guilty beyond a reasonable doubt. Eggleston, 2020 ND 68 at ¶ 9.

[¶ 14] In this case there is a drastic lack of evidence to support the aggravated assault conviction against Ms. Demerais. The conflicting, uncorroborated testimony produced at trial insufficient to sustain a finding of guilt beyond a reasonable doubt. Here, Ms. Demerais testified that she was never in any altercation with Ms. Demery, whatsoever. In fact, Ms. Demerais testified that Ms. Demery left her house by 9:30 P.M. on the evening of the incident. There is no dispute Ms. Demery was injured at some point that night, however a significant dispute remains as to whether the injuries were caused by Ms. Demerais. It is simply impossible that those injuries were given to her by Ms. Demerais given the timeline. The police responded nearly two hours after Ms. Demery left Ms. Demerais’ home. Ms. Demerais had no knowledge of where Ms. Demery went after she left her home. Once the police arrived on the scene, they talked with Ms. Demery and then

went to arrest Ms. Demerais based off the lone, uncorroborated statement. Once they arrived at Ms. Demerais' home, she was talking with them about her dog and had no idea that they were there to arrest her due to an alleged assault. Ms. Demerais was caught off guard by this as she was unaware an assault had occurred. Ms. Demery's testimony revealed several inconsistencies which can't reasonably be used to uphold a finding of guilt.

[¶ 15] The evidence reveals no reasonable inference of guilt even when viewed in light most favorable to the verdict. Ms. Demery's testimony was inconsistent, at best. First, she revealed the two went downstairs after an argument. Tr. Vol. I. at p. 66. Next, she alleged Ms. Demerais grabbed a tool and started "stabbing her in the back, in the back of my neck." Id. Next, she claims she went back downstairs, that Ms. Demerais followed, pushed her down, and put her boot on her chest. Id. at p. 71-72. Ms. Demery next claimed that Ms. Demerais leaned down and began choking her with her hands. Id. at p. 72. However, the story she told police on-scene is significantly different than the testimony provided at trial.

[¶ 16] While being interviewed, Ms. Demery told officers that Ms. Demery put her boots on her neck and strangled her with her boots. See Exhibit 27. Although a victim's non-corroborated testimony can be sufficient to sustain a conviction (see State v. Polk, 2020 ND 248, ¶ 8, 950 N.W.2d 764), the contradicting testimony raises serious concerns regarding a guilty verdict in this case. Ms. Demery's account of the alleged assault changed from on-scene to the testimony she gave at trial.

[¶ 17] The state alleges that Ms. Demery lost consciousness due to Ms. Demerais assaulting her. The doctor testified that there is no way to determine whether she lost

consciousness. Tr. Vol II. At p. 176. Ms. Demery testified that she drank a large amount of alcohol that night. Other than her own biased testimony, there was never any evidence presented which supported the theory that Ms. Demery suffered from unconsciousness or impediment of air flow or blood flow to the brain or lungs due to Ms. Demerais.

[¶ 18] Thus, even when this evidence is viewed in light most favorable to the verdict, a reasonable fact finder could not find that the defendant was guilty of aggravated assault beyond a reasonable doubt because there was no definitive evidence presented by the prosecution or collected by the police throughout their investigation.

II. Counsel for Ms. Demerais at trial in the District Court were ineffective.

a) Counsel failed to make proper objections at trial.

[¶ 19] In accordance with the two-pronged test established in Strickland v. Washington, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel bears the heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. The Defendant must first overcome the "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance, and courts must consciously attempt to limit the distorting effect of hindsight. Coppage v. State, 2014 ND 42, ¶ 17, 843 N.W.2d 291 (citing Heckelsmiller v. State, 2004 ND 191, ¶ 3, 687 N.W.2d 454; Ernst v. State, 2004 ND 152, ¶ 9, 683 N.W.2d 891.)

[¶ 20] Here, counsel did not make reasonable objections to the testimony from the doctor who treated Ms. Demery. Dr. Aubergine was the doctor who treated Ms. Demery for her injuries the night of the incident. He was subpoenaed by the state to testify. The state gave Dr. Aubergine his medical records to "refresh his recollection". Tr. Vol. II at

165 (line 15-16). The Judge asked if there was any objection from the defense, but they said no. Id. at line 17-18. Dr. Aubergine held on to his report for his entire testimony with no objections from the defense. Defense counsel confirmed that Dr. Aubergine had his report in front of him while testifying and allowed him to read from his report regarding whether Ms. Demery was significantly injured. Tr. Vol. II at 171 (lines 9-22). Again, Dr. Aubergine was allowed to read directly from his report and described head injuries that he found present. Tr. Vol. II at 177 (lines 2-4). Dr. Aubergine read verbatim, directly from his report about the clinical impressions he took in his notes. Tr. Vol. II at 181 (lines 10-25). Dr. Aubergine continued to testify directly from his report. Tr. Vol. II at 182 (lines 1-5). Dr. Aubergine testified to what the radiologist found when Ms. Demery came into the hospital that evening. Tr. Vol. II at 183 (lines 5-15). Dr. Aubergine testified as to what he thinks the radiologist was trying to say in his own report. Tr. Vol. II at 184 (lines 9-20). Finally, Dr. Aubergine read directly from his report regarding the discharge of Ms. Demery. Tr. Vol. II at 190 (lines 7-19).

[¶ 21] Here, the doctors report was never offered into evidence. If admitted, a record may be read into evidence but may be received as an exhibit only if offered by an adverse party. N.D.R.Ev. 803(5). Since Dr. Aubergine was subpoenaed by the state, it was the responsibility of the defense to object to this hearsay. It was improper for the judge to allow Dr. Aubergine to read from the report and testify on behalf of other doctors' numerous times throughout the trial. Additionally, this failure by defense counsel fell below an objective standard of reasonableness and the defendant was prejudiced by this act.

b) Counsel failed to request a lesser included charge for the jury to consider.

[¶ 22] This Court views the evidence in the light most favorable to the defendant when determining whether there was sufficient evidence to support an instruction. City of Fargo v. Nikle, 2019 ND 79, ¶ 6, 934 N.W.2d 388. This Court applies an elements-of-the-offense analysis for a lesser included offense. State v. McAllister, 2020 ND 48, ¶ 21, 939 N.W.2d 502. For an offense to be a lesser included offense, it must be impossible to commit the greater offense without committing the lesser offense. Id. For a lesser-included-offense instruction, there must be evidence on which a jury could rationally find beyond a reasonable doubt that the defendant is not guilty of the greater offense and to find beyond a reasonable doubt that the defendant is guilty of the lesser. State v. Carlson, 1997 ND 7, ¶ 34, 559 N.W.2d 802. Either the prosecution or the defense may request a lesser-included-offense instruction, or the court may on its own give such an instruction. McAllister, 2020 ND 48 at ¶ 21, (citing State v. Weidrich, 460 N.W.2d 680 (N.D. 1990)).

[¶ 23] Here, the defense counsel should have included a lesser offense of Simple Assault given the vast inconsistencies in the evidence. An objectively reasonable attorney should have realized the state did not have sufficient evidence to prove the elevated charge of Aggravated Assault. The attorney would have known about this insufficient evidence through the discovery process. Therefore, this would satisfy the two-pronged test because defense counsel's representation fell below an objective standard of reasonableness and the defendant was directly prejudiced by counsel's deficient performance.

CONCLUSION

[¶ 24] The District Court's abused its discretion in denying Ms. Demerais' Motion for a Judgment of Acquittal. Additionally, counsel that represented Ms. Demerais at trial in District Court were ineffective due to their failure to make objectively reasonable

objections on multiple occasions throughout the trial and their failure to request a lesser-included charge be sent to the jury for consideration. Therefore, Ms. Demerais respectfully requests this Court reverse the judgment of conviction and remand the case for entry of dismissal with prejudice.

Dated this 2nd day of June, 2021.

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Jacqueline Demerais,)	
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Defendant and Appellant.)	

CERTIFICATE OF COMPLIANCE

[¶ 1] The undersigned, as the author of the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 14 pages.

[¶ 2] This Brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 word processing software in Times New Roman 12-point font.

Dates this 2nd day of June, 2021.

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Defendant and Appellant.)	

[¶ 1] I hereby certify that on June 2, 2021, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPELLANT’S APPENDIX** were filed electronically with the Clerk of Supreme Court through E-Filing Portal and served on Rachel Rae Egstad at sasupportstaff@gfcounty.org.

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