

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

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

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APPEAL FROM JUDGMENT DATED DECEMBER 15, 2020  
IN DISTRICT COURT, GRAND FORKS COUNTY, STATE OF NORTH DAKOTA  
THE HONORABLE JOHN THELEN

**BRIEF OF APPELLEE – ORAL ARGUMENT REQUESTED**

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**STATEMENT OF ISSUES**

- I. Whether there was sufficient evidence to convict Demerais of Aggravated Assault.
- II. Whether trial counsel was ineffective.

## STATEMENT OF THE CASE

[¶1] Jacqueline Demerais (Demerais herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County in District Court No. 18-2020-CR-00507. On March 10, 2020, Demerais was charged with Aggravated Assault, a Class C Felony, Felonious Restraint, a Class C Felony, and Preventing Arrest, a Class C Felony, arising from an incident that occurred on March 9, 2020. Trial Tr., vol. I, p. 46. The Information in Count 1 alleged that Demerais willfully caused serious bodily injury to Jackie Marie Demery by strangling her causing injuries including, but not limited to, an impediment of blood and/or airflow to the brain or lungs. Trial Tr., vol. I, p. 47.

[¶2] The Information in Count II alleged that Demerais knowingly restrained Jackie Marie Demery from leaving her home under terrorizing circumstances or under circumstances exposing the victim to risk of serious bodily injury. Id. The Information in Count III alleged that Demerais, with intent to prevent a public servant from effecting an arrest of himself or another for a Class A, B, or C felony, created a substantial risk of bodily injury to the public servant or to anyone except himself, or employed means justifying or requiring substantial force to overcome resistance to effect such an arrest. Trial Tr., vol. I, p. 48. On October 20<sup>th</sup>, 2020, a jury trial on all counts began. Appellant's App. at Index #6. On October 21, 2020, Demerais was found guilty of Aggravated assault and acquitted on the other two counts. Id. at 5.

## STATEMENT OF FACTS

[¶3] On March 9, 2020, Jackie Demery was invited to Demerais's home to have drinks with her. Trial Tr., vol I, p. 56. While inside the home, Ms. Demery was attacked by Demerais who stabbed Ms. Demery with an unknown object, struck her in the face and subsequently strangled her. Id. Ms. Demery testified that on March 9<sup>th</sup>, 2020, she made arrangements to go to the home of Demerais where the two were planning to visit and because Ms. Demery had an upcoming job interview. Trial Tr., vol. I, p.62. Ms. Demery testified that Demerais began asking her for her EBT card and that is when the altercation began. Trial Tr., vol. I, p. 64. Ms. Demery testified that she agreed to let Demerais use her EBT card and that she was going to go with her, however, Demerais wanted to take the card herself. Trial Tr., vol. I, p. 65.

[¶4] Ms. Demery testified that Demerais struck her on her face and that she fell behind the couch and was stuck between the couch and the wall. Trial Tr., vol. I, p. 71. She further testified that this was when Demerais "put her boot right on my – right here (indicating), and then she gets down and she gets right on top of me, you know, like gets on top of me like a person gets on a person and starts choking me." Trial Tr., vol. I, p. 72. Ms. Demery thought she was going to die and lost consciousness while being strangled by Demerais. Trial Tr., vol. I, pp.72-73.

[¶5] Officer Brandan Steffan from the Grand Forks Police Department provided testimony as the initial responder on March 9, 2021. Trial Tr., vol I, p. 115. Officer Steffan testified that he first observed Ms. Demery standing outside with a male who she had borrowed his cell phone from. Trial Tr., vol I, p. 117. On first impression, Officer Steffan stated that Ms. Demery was very upset. Trial Tr. vol I, p. 118. He indicated she

was crying, he could see bleeding injuries on her back, neck and shoulders, and she was outside in the extreme cold wearing leggings and a three-quarter length t-shirt. Id. Exhibit 27 was admitted which included Ms. Demery's initial statements to Officer Steffan and paramedics. Again in this Exhibit 27, Ms. Demery provided a statement to Officer Steffan and paramedics reporting she was strangled and lost consciousness. Through his investigation, Officer Steffan took photographs of Ms. Demery and those were admitted as Exhibits 8 through 15. Trial Tr., vol I, pp. 123-126. Exhibit 14 showed the right side of Mr. Demery's throat that showed a couple little abrasions, bruising and dirt on her throat. Id. p. 125. Officer Steffan testified this was significant to him because Ms. Demery had reported to him that Demerais had stood on her neck with a boot. Id. pp. 125-126.

[¶6] The State's Exhibit 28 was admitted through Officer Steffan. Trial Tr., vol I, p. 129. In this Exhibit, the statement of Demerais can be found regarding the evening. In this statement, Demerais admitted to drinking with Ms. Demery, she talked about a boyfriend chasing Ms. Demery and that she was talking "mumbo jumbo." Exhibit 28. Demerais further reported that she had called law enforcement on Ms. Demery because she knew she had warrants. Id. This was later proven to be untrue after being confirmed by Officer Steffan. Trial Tr., vol I, p. 130.

[¶7] On the second day of trial, Dr. Benito Aubergine testified as the emergency room physician who attended to Ms. Demery following the aggravated assault. Dr. Aubergine testified that Ms. Demery reported she had lost consciousness during the incident. Trial Tr., vol II, p. 166. He further testified that "strangulation is the process of compression of the contents of the neck." Id. He said this compression could be all sort of



things and recalled that Ms. Demery had reported to him that Demerais had a boot to her neck. Id. Dr. Aubergine further explained the critical structures in your neck and that Ms. Demery suffered from a fractured thyroid cartilage, which could be an indication of strangulation or consistent with. Trial Tr., vol II, pp. 167-168. Dr. Aubergine also indicated that this injury is a “sign of a significant force” having been applied to cause the injury. Trial Tr., vol II, p. 164.

[¶8] Also on the second day of trial, Demerais testified. In her testimony, she painted a terrible picture of Ms. Demery. She testified that Ms. Demery was always coming over to ask her for money. Trial Tr., vol II, p. 221. According to Demerais, Ms. Demery had called her on March 9<sup>th</sup>, 2020 asking for twenty dollars because she had a job interview. Trial Tr., vol II, pp. 222-223. She testified that thereafter, Ms. Demery just showed up at her house with a bottle of vodka and a pack of cigarettes. Trial Tr., vol II, p. 224. Demerais testified she was not drinking on this day because she was observing lent and she maintained she told Ms. Demery so. Id. When questioned about her initial statement to law enforcement, which was admitted as Exhibit 28, Demerais admitted to what she initially told law enforcement on March 9<sup>th</sup>, 2020. Trial Tr., vol II, pp. 230-232.

### **REQUEST FOR ORAL ARGUMENT**

[¶9] Demerais has requested this Court schedule oral argument in this case pursuant to N.D.R.App.P. 28(h). Because the Appellant has requested oral argument, the State so requests to be present and argue on behalf of the Appellee.

## JURISDICTIONAL STATEMENT

[¶10] The district court had jurisdiction under N.D. Const. art. VI, § 8 and N.D.C.C. § 27-05-06. This appeal was timely under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, § 2 and N.D.C.C. § 29-28-06 which states:

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.

## LAW AND ARGUMENT

[¶11] In this appeal, Demerais argues (1) there was insufficient evidence to sustain the jury's finding of guilty to the charge of Aggravated Assault, and (2) that counsel for Demerais at trial were ineffective.

### **I. Sufficient evidence was presented in trial to sustain a guilty verdict.**

[¶12] 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 of North Dakota 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. To overturn a conviction, the defendant must show that the evidence, when viewed in a light most favorable to the verdict, permits no reasonable inference of guilt. State v. Fasching, 461 N.W.2d 102-03 (N.D.1990) (citing State v. Jacobson, 419 N.W.2d 899, 901 (N.D. 1988)).

#### **a. Sufficient evidence was presented at trial to support the jury's guilty verdict for aggravated assault.**

[¶13] Demerais argues that there was insufficient evidence to support the guilty verdict of the charge of Aggravated Assault in violation of N.D.C.C. §12.1-17-(1)(a). In arguing this, Demerais asserts that the testimony by the victim and the Defendant are too different to sustain a guilty verdict. In addition, Demerais argues that the victim provided inconsistent statements and therefore her testimony was not sufficient to obtain a guilty

verdict. In the present case, there is sufficient evidence to show that Demerais willfully caused serious bodily injury to Jackie Marie Demery by strangling her causing injuries including, but not limited to, an impediment of blood and/or airflow to the brain or lungs. Trial Tr., vol. I, p. 47. The trial record provides sufficient evidence to convict Demerais of aggravated assault.

[¶14] In considering the evidence for the guilty verdict, the jury had several things to consider. First, the jury had the testimony of Ms. Demery. Ms. Demery testified that Demerais struck her on her face and that she fell behind the couch and was stuck between the couch and the wall. Trial Tr., vol. I, p. 71. She further testified that this was when Demerais “put her boot right on my – right here (indicating), and then she gets down and she gets right on top of me, you know, like gets on top of me like a person gets on a person and starts choking me.” Trial Tr., vol. I, p. 72. Ms. Demery thought she was going to die and lost consciousness while being strangled by Demerais. Trial Tr., vol. I, pp.72-73.

[¶15] Further in corroboration to the testimony of Ms. Demery, there was the testimony of Officer Brandon Steffan to consider. On first impression, Officer Steffan indicated that when he came into contact with Ms. Demery, she was crying, he could see bleeding injuries on her back, neck and shoulders, and she was outside in the extreme cold wearing leggings and a three-quarter length t-shirt. Trial Tr. vol I, p. 118. Exhibit 27 was admitted which included Ms. Demery’s initial statements to Officer Steffan and paramedics. Again in this Exhibit 27, Ms. Demery provided a statement to Officer Steffan and paramedics reporting she was strangled and lost consciousness. Through his investigation, Officer Steffan took photographs of Ms. Demery and those were admitted

as Exhibits 8 through 15. Trial Tr., vol I, pp. 123-126. Exhibit 14 showed the right side of Mr. Demery's throat that showed a couple little abrasions, bruising and dirt on her throat. Id. p. 125. Officer Steffan testified this was significant to him because Ms. Demery had reported to him that Demerais had stood on her neck with a boot. Id. pp. 125-126.

[¶16] The jury also had the testimony of Dr. Aubergine to consider in corroboration with Ms. Demery's testimony and the other evidence presented. Dr. Aubergine testified that Ms. Demery reported she had lost consciousness during the incident. Trial Tr., vol II, p. 166. He further testified as to what strangulation was and he recalled that Ms. Demery had reported to him that Demerais had a boot to her neck. Id. Dr. Aubergine further explained the critical structures in your neck and that Ms. Demery suffered from a fractured thyroid cartilage, which could be an indication of strangulation or consistent with. Trial Tr., vol II, pp. 167-168. Dr. Aubergine also indicated that this injury is a "sign of a significant force" having been applied to cause the injury. Trial Tr., vol II, p. 164.

[¶17] The Century Code defines "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs." N.D.C.C. §12.1-01-04(27). Ms. Demery, in all her statements to officers and medical professionals, and in her testimony at trial indicated that she lost consciousness and was strangled by the Defendant. The jury had several consistent statements made by Ms. Demery to consider and inconsistent statements to consider of Demerais. It is clear by the verdict which the jury determined to be more credible.

[¶18] In considering the testimony of Ms. Demery, the testimony of Officer Brandan Steffan, the testimony of Dr. Aubregine, the photos and body camera exhibits, the jury found beyond a reasonable doubt that Demerais had committed the crime of aggravated assault. Based on the evidence presented at trial, a reasonable fact finder could have and did find evidence of guilt beyond a reasonable doubt and therefore, the evidence presented was sufficient to find Demerais guilty of aggravated assault.

**II. The record is insufficient to support a claim of ineffective assistance of counsel on direct appeal.**

[¶19] In order to successfully establish a claim of ineffective assistance of counsel a defendant must prove 1) counsel's representation fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by counsel's deficient performance. State v. Schweitzer, 2007 ND 122, ¶ 23, 735 N.W.2d 873, quoting Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602. A claim of ineffective assistance of counsel should not be raised on direct appeal. State v. Keener, 2008 ND 156, ¶ 13, 755 N.W.2d 462, quoting Schweitzer, 2007 ND 122, ¶ 25. This Court has further determined that ineffective assistance claims should normally be brought in post conviction proceedings "so the parties can fully develop a record . . . of counsel's performance and its impact on defendant's claim." Id. quoting State v. Bertram, 2006 ND 10, ¶ 39, 708 N.W.2d 913.

[¶20] "Unless the record affirmatively shows ineffectiveness of constitutional dimensions, the complaining party must show some evidence in the record to support the claim. Representations and assertions of appellate counsel are not enough to establish a claim of ineffective assistance." Schweitzer, 2007 ND 122, ¶ 25, 735 N.W.2d 873. In the present case, Demerais contends that trial counsel failed to make reasonable objections to

testimony from Dr. Aubergine. Appellant’s Brief, ¶ 20. It is true that the State asked Dr. Aubergine to refresh his recollection and thereafter he did have his report in front of him, however, he was not reading it at the request of the state. Trial Tr., vol II, p. 165. It was not until cross examination conducted by Mr. Brian Hardwick that Dr. Aubergine began reading the pages from the medical records at the request of defense counsel. Trial Tr., vol II, pp. 173-175. Defense counsel elicited the alleged hearsay by Dr. Aubergine, not the State.

[¶21] Appellant counsel is mistaken when they state that the doctors report was never offered into evidence. Appellant’s Brief, ¶ 21. In fact, Mr. Hardwick did move to admit the entire medical record after questioning Dr. Aubergine on the victim’s alcohol consumption. Trial Tr., vol II, p. 204 (lines 8-9). Judge Thelen denied admitting the entire medical report. *Id.* According to N.D.R.Ev. 803(5), the record may be read into evidence but may be received as an exhibit only if offered by an adverse party. This is a “may”, not a “shall”, so it was well within Judge Thelen’s purview to not admit the entire medical record of the victim which included sensitive medical records and more information than the scope of the charges.

[¶22] “Matters of trial tactics . . . are not to be second guessed on appeal.” Sayler v. State, 704 N.W.2d 559, 562, (2005 N.D. 166) quoting Mathre v. State, 2000 ND 201, ¶ 7, 619 N.W.2d 627. In looking at the determination of trial tactics, there is no record on appeal of why Mr. Hardwick or Ms. Nelson did what they did. There is no evidence to show that asking Dr. Aubergine to read directly from the medical records was or was not a trial tactic that was developed in the defense of Demerais. In addition to failing to object, there is no evidence to show that not asking for a lessor included offense in the

jury instructions was or was not a trial tactic that was developed in the defense of Demerais. This can also be explained as a trial tactic to take an all or nothing approach to trial. By not giving a jury a lesser included offense, the jury must either pick guilty or not guilty of the offense as charged. Appellate counsel is asserting representations that are not enough to establish a claim of ineffective assistance as decided in Schweitzer. In her appeal, Demerais maintains this was ineffective and prejudicial, but there is no record or evidence to consider in this appeal to make that determination. In order to begin to make the determination, there would need to be evidence of trial strategy and there is no evidence as such in this direct appeal.

[¶23] In State v. Schweitzer, following a conviction at a jury trial, the defendant, on direct appeal, alleged ineffective assistance of counsel for a variety of reasons including requesting continuances, failure to object to certain testimony, as well as many other trial related actions or inactions by counsel. 2007 ND 122 at ¶¶ 26-27. The North Dakota Supreme Court reiterated that direct appeal is not appropriate for a claim of ineffective assistance. Id. at ¶ 25. Furthermore, because the defendant's complaints could generally be explained as a matter of trial strategy and a record was not developed by the defendant otherwise, the defendant's direct appeal based on ineffective assistance of counsel was denied. Id.

[¶24] More recently, in State v. Atkins, following a plea of guilty, the defendant, on direct appeal, alleged ineffective assistance of counsel for multiple reasons. The North Dakota Supreme Court denied this appeal after being in agreement with the State in that "there was insufficient evidence on this direct appeal to determine whether Atkins received ineffective assistance of counsel." 2016 ND 13, ¶8, 873 N.W.2d 676. It was



determined that there was insufficient evidence on direct appeal to consider regarding the ineffectiveness and left the Court to “speculate about its prejudicial effect.” Id. In the present case, Demerais claims ineffective assistance of counsel, but like in Schweitzer and Atkins, this court has not been presented with sufficient evidence and is left to speculation.

**III. Demerais has failed to show that the assistance of trial counsel was plainly defective.**

[¶25] “When a claim for ineffective assistance of counsel is argued on direct appeal, we review the record to decide if the assistance of counsel was plainly defective.” State v. Yost, 914 N.W.2d 508, 519 (N.D. 2018)(citing State v. Bertram, 2006 ND 10, ¶ 39, 708 N.W.2d 913). “Representations and assertions of appellate counsel are not enough to establish a claim of ineffective assistance. To successfully claim ineffective assistance of counsel, a defendant must establish counsel’s representation fell below an objective standard of reasonableness and the defendant was prejudiced by counsel’s deficient performant.” Id.

[¶26] The second prong under Strickland is that there “must be a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.” Strickland v. Washington, 466 U.S. 668 at 694. “[A] defendant must demonstrate both deficient representation by counsel *and* prejudice caused by the deficient representation.” Woelhoff v. State, 487 N.W.2d 16, 17 (N.D. 1992). Here, this court must determine if the assistance of counsel was plainly defective. Just as the defendant in Schweitzer and the defendant in Atkins could not develop a trial record that established that counsel was plainly defective, the defendant in this case

cannot and has not established that counsel was ineffective. Direct appeal is an inappropriate venue for claims of ineffective assistance and as such, the defendant's appeal on this issue must be denied.

## CONCLUSION

[¶27] The district court properly concluded that the evidence against Demerais was more than sufficient to sustain the jury's guilty verdict. As to the second issue on appeal, the Defendant has failed to establish that trial counsel was plainly defective and there is no evidence in the record to the contrary to consider. Therefore, the State of North Dakota respectfully requests that this Court **AFFIRM** the District Court's criminal judgment in this case.

Dated this 1<sup>st</sup> day of July, 2021.

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

---

<b>Jacqueline Carol Demerais,</b>	)	
	)	
<b>Plaintiff and Appellant,</b>	)	<b>Supreme Court No. 20210012</b>
	)	
<b>vs.</b>	)	
	)	
<b>State of North Dakota,</b>	)	<b>Grand Forks County District Court</b>
	)	<b>Case No. 18-2020-CR-00507</b>
<b>Defendant and Appellee.</b>	)	

---

**CERTIFICATE OF COMPLIANCE**

SA#154581

[¶1] The State of North Dakota, by and through Assistant State's Attorney Rachel R. Egstad hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 19 number of pages.

Dated this 1st day of July, 2021.

*/s/ Rachel R. Egstad*

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State of North Dakota,

Plaintiff,

v

Jacqueline Carol Demerais,

Defendant.

**DECLARATION OF SERVICE BY  
ELECTRONIC FILING**

Court No. 18-2020-CR-00507

SA#154581

STATE OF NORTH DAKOTA )  
  ) SS  
COUNTY OF GRAND FORKS)

The undersigned, being of legal age, declares under penalty of perjury under the law of North Dakota, that the foregoing is true and correct, that on the 1<sup>st</sup> day of July, 2021, she served true copies of the following documents:

**Brief of Appellee  
Certificate of Compliance**

electronically through the Court Electronic Filing System to:

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At the office of the Grand Forks County States Attorney's Office.

Signed on the 1<sup>st</sup> day of July, 2021, at Grand Forks, North Dakota, United States.

*Jennifer Seidel*

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