

NO. A-22-865

IN THE
NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

ANGELINA M. CLARK,

Appellant.

APPEAL FROM THE DISTRICT COURT

OF LANCASTER COUNTY, NEBRASKA

Honorable Darla Ideus, District Court Judge

BRIEF OF APPELLANT

Respectfully submitted:

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DECISION OF LOWER COURT

Angelina Clark (“Clark”) appeals to this Court from a conviction in the District Court of Lancaster County for Terrorist Threats, a class 3A felony, pursuant to Nebraska Revised Statute §28-311.01; and for Third-Degree Sexual Assault, a class 1 misdemeanor, pursuant to Nebraska Revised Statute §28-320(1)(A)(3). (T114). The Clark was sentenced to one year of incarceration on Count I, and six months of incarceration on Count II, with the sentences to be served consecutively. (T121). The Clark was also sentenced to nine months post-release supervision on Count I. (T121).

STATEMENT OF THE BASIS OF JURISDICTION

On December 31st, 2020, an Information was filed that charged Clark with violating two counts, Terroristic Threats, a class 3A felony, which carries a possible penalty of up to three years in prison, post-release supervision up to eighteen months and up to a \$10,000 fine; and third-degree sexual assault, a class I misdemeanor, which carries a possible penalty of up to one year in prison. (T40).

On October 11th, 2022, a two-day jury trial was held in Lancaster County District Court. On October 12th, 2022, Clark was found guilty of Terroristic Threats and Third-Degree Seal Assault. (T114). On November 15th, 2022, Clark was sentenced to one year of incarceration on Count I, and six months of incarceration on Count II, with the sentences to be served consecutively. (T121). Clark was also sentenced to nine months post-release supervision on Count I. (T121).

On November 21st, 2022, Clark timely filed her Notice of Appeal. (T133). This Court has exclusive jurisdiction to hear this appeal pursuant to Neb. Rev. Stat. § 25-1912 (Reissue 2007).

STATEMENT OF THE CASE

1. Nature of the case.

This is a direct appeal by Clark following the Lancaster County District Court’s Sentencing Order. On December 31st, 2020, a two count Information was filed against Clark in Lancaster County District Court. (T40).

On October 11th, 2022, a two-day jury trial was held. On October 12th, 2022, the jury found Clark guilty of Terroristic Threats and Third-Degree Sexual Assault. (T114).

On November 15th, 2022, Clark was sentenced to one year in custody on Count I, and six months in custody on Count II, with the sentences to be served consecutively. (T121). Clark was also sentenced to nine months post-release supervision on Count I. (T121).

2. Issues tried in the court below.

The jury was left to determine whether Clark was guilty of Terroristic Threats and Third-Degree Sexual Assault.

The Lancaster County District Court was left to determine the imposition of a fair and just sentence.

3. How the issues were decided and what judgment was entered by the trial court.

The jury found Clark guilty of Terroristic Threats and Third-Degree Sexual Assault. (T114).

The Lancaster County District Court sentenced Clark to one year in custody on Count I, and six months in custody on Count II, with the sentences to be served consecutively. (T121). Clark was also sentenced to nine months post-release supervision on Count I. (T121).

4. Scope of review for the Court of Appeals.

The scope of review in a criminal appeal is limited to the errors assigned and discussed in Appellant’s brief and the appellate court’s right to note plain error appearing on the record. See *State v. Paul*, 256 Neb. 669, 677 (1999).

“In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Garcia*, 302 Neb. 406, 419 (2019).

A claim of “ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court’s decision. The court reviews factual findings for clear error.” *State v. Vanderpool*, 286 Neb. 111, 115 (2013).

“Whether a claim of ineffective assistance of trial counsel can be determined on direct appeal presents a question of law, which turns upon the sufficiency of the record to address the claim without an evidentiary hearing or whether the claim rests solely on the interpretation of a statute or constitutional requirement. We determine as a matter of law whether the record conclusively shows that (1) a defense counsel’s performance was deficient or (2) a defendant was or was not

prejudiced by a defense counsel's alleged deficient performance." *State v. Hood*, 301 Neb. 207, 212 (Neb. 2018).

ASSIGNMENTS OF ERROR

- I. Clark was denied her constitutional right to a fair trial and an impartial jury guaranteed by the Sixth and Fourteenth Amendments when Clark did not receive a jury of her peers because the jury was all-male.
- II. There was insufficient evidence submitted to support a jury verdict that Clark violated Nebraska revised statute § 28-311.01, terroristic threats, because a rational trier of fact could not find all elements of the offense charged beyond a reasonable doubt.
- III. Clark received ineffective assistance of counsel when Trial Counsel failed to object based on hearsay when Shauna Parker testified to statements made by Anthony Lawson.
- IV. Clark received ineffective assistance of counsel when Trial Counsel failed to object to the all-male jury.
- V. Clark received ineffective assistance of Counsel when Trial Counsel failed to file a Motion in Limine to keep out any statements regarding the purchase of drugs.

PROPOSITIONS OF LAW

1. "The Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment. Our inquiry is whether the presence of a fair cross section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975).
2. "[T]he Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the 'core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender]." *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).
3. "[I]n holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit

- juries actually chosen must mirror the community and reflect the various distinctive groups in the.” *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).
4. “In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Garcia*, 302 Neb. 406, 419 (2019).
 5. “[W]hether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.” *State v. Mendez-Osorio*, 297 Neb. 520, 528 (2017).
 6. “When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.” *State v. Saltzman*, 235 Neb. 964, 968 (Neb. 1990).
 7. A claim of “ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.” *State v. Vanderpool*, 286 Neb. 111, 115 (2013).
 8. “[A]n appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel’s alleged deficient performance.” *State v. Mrza*, 302 Neb. 931, 936-37 (2019).
 9. “When a defendant’s trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel’s ineffective performance which is known to the defendant or is

apparent from the record. Otherwise, the issue will be procedurally barred.” *State v. Sherrod*, 27 Neb. App. 435, 445 (Neb. App. 2019).

10. “The decision whether or not to object has long been held to be part of trial strategy. When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics.” *State v. Huston*, 285 Neb. 11, 28 (2013).

STATEMENT OF FACTS

On January 14th, 2020, Officers responded to a report of a fight between two females at a Kwik Stop gas station in Lincoln, Nebraska. (318:17-21). Upon arrival, Officers contacted one female at the Kwik Stop, and another female that was walking away from the Kwik Stop with blood on her shirt.

Officers interviewed Shauna Parker and her son, Anthony Lawson. Officers learned that Angelina Clark had arrived at Ms. Parker’s residence early in the morning on January 14th, 2020. (198:16-19). Ms. Parker reported that Clark had been drinking, and she had asked Clark to leave her home. (200:13-14; 202:4-5). Ms. Parker reports that Clark was not very agreeable to leaving the residence, so Anthony Lawson, Ms. Parker’s son, assisted in getting Clark out of the residence. (204:3-205:4). There is some discrepancy in the testimony about whether Mr. Lawson offered to go or if his mother asked him to go along. Regardless, the testimony is consistent that Mr. Lawson went into the vehicle with Ms. Parker and Clark to help get Clark home. Ultimately, Clark never makes it home, and the three of them end up at a Kwik Stop.

At some point, Mr. Lawson told Ms. Parker that Clark has touched him, and that he feels uncomfortable. (207: 20-21). Later, Mr. Lawson further explains that Clark touched his penis. (215:10-12). So, Ms. Parker decides to pull over at the Kwik Stop and make Clark get out of the truck. However, Clark refuses to get out. (214:21-25). A fight occurs between Clark and Ms. Parker. There is a video of the fight, which was admitted into evidence at trial. (223:25-225:8). Clark is injured by Ms. Parker during the incident at Kwik Stop, but there are competing reasons as to how Clark sustained the injury on her head. Clark ultimately finds a box cutter in Ms. Parker’s glove compartment, and she uses that to get out of the vehicle and away by allegedly threatening Ms. Parker. (217:23-218:23). Law enforcement is eventually called, and when they arrive Clark is walking away from the gas station. (358:20-359:2). Law enforcement took statements from Ms. Parker and Mr. Lawson and ultimately charged Clark with terroristic threats and third-degree

sexual assault. Clark was taken to the hospital for medical treatment for the wound she sustained while Clark and Ms. Parker were fighting. (361:9-22).

Prior to Trial, Trial Counsel did file a Motion to Suppress. At the hearing on the Motion, the State conceded that Clark's statements were inadmissible, so a contested evidentiary hearing was not held. (18:2-17).

Ultimately, the jury found Clark guilty of both terroristic threats and third-degree sexual assault.

SUMMARY OF ARGUMENT

Clark asserts that there was insufficient evidence to convict her of Terroristic Threats and Third-Degree Sexual Assault. There was not enough evidence submitted for a rational trier of fact to find Clark guilty because there was no evidence submitted of Clark's intent. However, even if the Court believes there was sufficient evidence, Clark's conviction should be reversed and her case remanded for a new trial due to the many other errors. Clark did not receive a fair trial with an impartial jury when she had a jury made up of all men. The lack of females on Clark's jury violated her Sixth and Fourteenth Amendment Rights. Additionally, Clark received ineffective assistance of counsel when hearsay was allowed into the trial without objection. Additionally, evidence of drugs should have been kept out of the trial through a Motion in Limine.

ARGUMENT

I. CLARK WAS DENIED HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND AN IMPARTIAL JURY GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS WHEN CLARK DID NOT RECEIVE A JURY OF HER PEERS BECAUSE THE JURY WAS ALL MALE.

After the names of the jurors were identified, it was immediately apparent that the jury pool looked quite different than it normally did. The District Court Judge even noted that, "I just realized we have all men. I don't think I have ever had that before." (174:20-175:1). Even Counsel for Clark and the State had difficulty remembering that only men were on the jury. Both attorneys continued to address the jury as "Ladies and Gentlemen." (187:16-18; 188:14-18). It appears that this issue is a novel issue for Nebraska, and Counsel did not locate a case directly on point in Nebraska. However, the issue has been addressed in other jurisdictions that do provide some guidance.

In *Taylor v. Louisiana*, the United States Supreme Court examined the constitutionality of a rule that required women to file a written declaration of her desire to be on a jury. 419 U.S. 522 (1975). The central issue was whether that rule was constitutional. The State Supreme Court of Louisiana rejected the constitutional challenge to that rule, and the Defendant appealed. The result of this rule was that Taylor, a male, received an all-male jury for his trial. In fact, in Taylor's case, there was not even a female on the venire from which the jury was drawn. Taylor asserted that the all-male jury deprived him of "a right to a fair trial by jury of a representative segment of the community." 419 U.S. at 524.

The Supreme Court in *Taylor* explained that, "The Sixth Amendment's provision for jury trial is made binding on the States by virtue of the Fourteenth Amendment. Our inquiry is whether the presence of a fair cross section of the community on venires, panels, of lists from which petit juries are drawn is essential to the fulfillment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions." 419 U.S. at 526.

The Court went on to explain that, "(o)ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government,' and repeated the Court's understanding that the jury 'be a body truly representative of the community' . . . and not the organ of any special group or class." *Id.* at 527. The Supreme Court ultimately held that, "women cannot be systematically excluded from jury panels from which petit juries are drawn." *Id.* at 533.

Although Ms. Clark did not receive an all-male jury due to a rule that excluded one gender, the result was the same – a single gender jury. The concerns brought up in *Taylor* are present here for Clark. According to the United States census report from July 2022, 49.6% of the population in Lancaster County, Nebraska, is female, but yet Clark's jury was 100% male. Clark understands that perhaps this could have occurred from no purposeful gender exclusion by one side, but however it occurred, it still denied Clark the right to a jury of her peers, made up of a representative body of the community. That denied right should result in the reversal of her conviction. Clark understands that women were included in the full venire list called to serve, but ultimately none were left on the jury resulting in a jury that was not representative of Clark's community. The record is unclear as to whether females were purposefully removed from the jury, and the Equal Protection Clause would prohibit such discrimination in the jury selection. "[T]he Equal Protection Clause prohibits discrimination in jury

selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the ‘core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender].” *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

The Supreme Court did explain in *Taylor* that, “in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition.” 419 U.S. at 538.

The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.

Taylor v. Louisiana, 419 U.S. at 531-532. Clark is unclear the actual number of jurors initially called for jury duty. Clark is also unaware how many of those jurors were female. So, Clark lacks enough information to ascertain whether this is the result of an initial jury pool that failed to accurately represent the community. Despite this information, Clark asserts that lack of any females

within the final jurors chosen for trial is enough evidence to support an assertion that something did not happen as it should have during jury selection – whether the calling of a disproportionate jury pool or discrimination in jury selection. “The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge.” 419 U.S. at 530. Clark was not afforded this safeguard.

As noted previously, Clark understands that the Supreme Court also held in *Taylor* that, “Defendants are not entitled to a jury of any particular composition.” 419 U.S. at 538. Clark understands this and agrees that rules on the composition of juries as far as the number of females, the number of males, and so on could severely hinder the judicial process due to the difficulty in adhering to such rules every single jury trial. However, in this instance, the complete lack of a gender group sending Clark’s jury composition back to a time when it was not even contemplated that women be allowed on a jury denied Clark her right to a fair trial and impartial jury trial as guaranteed by the Sixth and Fourteenth Amendments. Therefore, Clark’s conviction should be reversed.

II. THERE WAS INSUFFICIENT EVIDENCE SUBMITTED TO SUPPORT A JURY VERDICT THAT CLARK VIOLATED NEBRASKA REVISED STATUTE § 28-311.01, TERRORISTIC THREATS, BECAUSE A RATIONAL TRIER OF FACT COULD NOT FIND ALL ELEMENTS OF THE OFFENSE CHARGED BEYOND A REASONABLE DOUBT.

Clark asserts that insufficient evidence was submitted to support a jury verdict that Clark is guilty of terroristic threats, pursuant to Nebraska Revised Statute § 28-311.01. “When reviewing a criminal conviction for sufficiency of evidence to sustain a conviction, the relevant question for the appellate court is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Thompson*, 278 Neb. 320, 331 (2009). The Nebraska Supreme Court went on to explain that, “whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.” *State v. Mendez-Osorio*, 297 Neb. 520, 528 (2017).

Nebraska Revised Statute § 28-311.01 states that, “A person commits terroristic threats if he or she threatens to commit any crime of violence: (a) With the intent to terrorize another; or (c) In reckless disregard of the risk of causing such terror.” As Trial Counsel noted in closing arguments, “The threat alone isn’t enough. The government also has to prove that there’s intent.” (434:15-17). The Nebraska Supreme Court has held that, “the intent to terrorize another is an intent to produce intense fear or anxiety in another. . . .It does not require that the recipient of the threat be actually terrorized, and it does not require an intent to execute the threats made.” *State v. Smith*, 267 Neb. 917 (2004). The focal point is whether the person making the threat did intend for the recipient to be scared.

There is no direct evidence that points to Clark’s intent to actually terrorize Ms. Parker. So, the fact finder is left to examine the circumstances surrounding the statement. “When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.” *State v. Saltzman*, 235 Neb. 964, 968 (Neb. 1990).

Testimony was presented that Clark was heavily intoxicated when the incident occurred. Officer Anna Strien, who was one of the responding officers, testified that Clark was heavily intoxicated. (374:15-20). Ms. Park testified that Clark was drunk and could be seen stumbling around. (245:16-246:1). Anthony Lawson also confirmed that Clark was drunk. (307:16-308:7). The Nebraska Supreme Court has stated that, “Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged.” *Saltzman*, 235 Neb. at 969.

Clark asserts that there was a lack of any evidence submitted to the show Clark intended to terrorize Ms. Parker, and even if the Court feels sufficient evidence was submitted of her intent, it was negated by Clark’s intoxication level.

III. CLARK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO OBJECT BASED ON HEARSAY WHEN SHAUNA PARKER TESTIFIED TO STATEMENTS MADE BY ANTHONY LAWSON.

Clark asserts that Trial Counsel was ineffective for failing to object to hearsay statements by Shauna Parker regarding what Anthony Lawson had told

her. “When a defendant’s trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel’s ineffective performance which is known to the defendant or is apparent from the record. Otherwise, the issue will be procedurally barred.” *State v. Sherrod*, 27 Neb. App. 435, 445 (Neb. App. 2019). Appellate Counsel is different than Trial Counsel, and this is the first opportunity that Clark has to raise any possible ineffective assistance of counsel claims.

A claim of “ineffective assistance presents a mixed question of law and fact. Determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law that an appellate court reviews independently of the lower court's decision. The court reviews factual findings for clear error.” *State v. Vanderpool*, 286 Neb. 111, 115 (2013).

To prevail pursuant to a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test created under *Strickland v. Washington*. 466 U.S. 668 (1984). “The defendant must show that counsel's performance was deficient, and that this deficient performance actually prejudiced his or her defense.” *Vanderpool*, 286 Neb. at 116. To satisfy the first part, Clark must show that Trial Counsel’s performance was less than that of a lawyer with ordinary training and skill.

When a defendant’s trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel’s ineffective performance which is known to the defendant or is apparent from the record, otherwise, the issue will be procedurally barred in a subsequent postconviction proceeding. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.

State v. Mrza, 302 Neb. 931, 937 (2019).

Further, when examining claims of ineffective of counsel, “an appellate court decides only whether the undisputed facts contained within the record are sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel’s alleged deficient performance.” *State v. Mrza*, 302 Neb. at 936-37.

When a claim of ineffective assistance of counsel is raised on direct appeal in order for the Appellate Court to review the claim, it must allege “deficient performance with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to recognize whether the claim was brought before the appellate court.” *State v. Garcia*, 302 Neb. 406, 434 (Neb. 2019). Whether the issue can be decided on direct appeal is determined by the record and if it is adequate to review the question presented. If the Court concludes that there is insufficient evidence in the record to decide this claim, then Clark is noting the issue on appeal and preserving it for later possible post-conviction relief.

Clark is aware that, “the decision whether or not to object has long been held to be part of trial strategy. When reviewing claims of alleged ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics.” *State v. Huston*, 285 Neb. 11, 28 (2013). “There is a strong presumption that counsel acted reasonably, and an appellate court will not second-guess reasonable strategic decisions.” *Sherrod*, 27 Neb. App. at 446. So, a question is whether the failure to object was a part of Trial Counsel’s strategy.

Hearsay is an out of court statement that is made by a declarant and offered at trial or a hearing to prove the truth of the matter asserted. Neb. Rev. Stat. § 27-801 (Reissue 2016). Hearsay is generally not admissible in trial unless there is a recognized exception to the hearsay rule that is applicable to the situation. Neb. Rev. Stat. § 27-802 through 804 (Reissue 2016).

Clark asserts that Trial Counsel was ineffective when Counsel failed to object to hearsay statements made by Shauna Parker. Ms. Parker testified to out-of-court statements Anthony Lawson made on seven different occasions. (206:17-25; 207:1-3; 207:21-22; 211:19-21; 212:4-6; 215:10-13; and 227:15-16). Each statement revolves around the conversation Ms. Parker had with Mr. Lawson regarding Clark allegedly touching Mr. Lawson on his penis. Clark understands that Mr. Lawson did testify after Ms. Parker, and he described what happened, but it was prejudicial to allow Ms. Parker to discuss it, as well. It allowed the jury to hear statements about Clark touching Mr. Lawson with each witness. Ms. Parker noting what Mr. Lawson allegedly said to her. Mr. Larson testifying as to what Clark allegedly did to him in the truck. The officers testifying to what Clark was charged with – third degree sexual assault. The jurors were not able to draw their own conclusion about what had occurred and whether Mr. Lawson was being

truthful because they were repeatedly told the information, which would cause them to believe it must be true. Had the jury only heard the information from Mr. Lawson, then they would have been left to Judge the veracity of his statements and the allegation through his testimony alone.

The testimony that was received was highly prejudicial to Clark and whether the issue can be decided on direct appeal is determined by the record and if it is adequate to review the question presented. If the Court concludes that there is insufficient evidence in the record to decide this claim, then Clark is noting the issue on appeal and preserving it for later possible post-conviction relief.

IV. CLARK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE ALL-MALE JURY.

When trial counsel failed to object to the final jury that was selected, then trial counsel waived any objection Clark had to the jury.

As Clark noted in the previous section, to prevail pursuant to a claim of ineffective assistance of counsel, the defendant must satisfy the two-part test created under *Strickland v. Washington*. 466 U.S. 668 (1984). “The defendant must show that counsel's performance was deficient, and that this deficient performance actually prejudiced his or her defense.” *Vanderpool*, 286 Neb. at 116. To satisfy the first part, Clark must show that Trial Counsel’s performance was less than that of a lawyer with ordinary training and skill. A lawyer with ordinary training and skill would have objected to the all-male jury and to the peremptory challenges made to at least preserve the issue for appellate purposes. For the reasons stated in the first assignment of error, it was prejudicial for Clark to receive an all-jury.

V. CLARK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO FILE A MOTION IN LIMINE TO KEEP OUT ANY STATEMENTS REGARDING CLARK’S ALLEGED REQUEST FOR DRUGS.

Clark’s case did not involve drugs. There were no charges regarding controlled substances. There was no evidence presented that drugs were found at the gas station or inside Ms. Parker’s vehicle or on her person, nor was their evidence that controlled substances were found at Ms. Parker’s home. There was no evidence presented that Clark was under the influence of a controlled substance. The only evidence presented to the Court was that Clark was intoxicated from drinking an excess amount of alcohol, not from the use of

controlled substances. There was no reason that the mention of drugs was necessary for the trial. Drugs are by nature considered bad things and associated with criminals. So, any mention of Clark attempting to purchase drugs could only be seen as prejudicial.

Ms. Parker testified that while Clark was at her apartment, using a coded phrase, Clark asked if Ms. Parker had any drugs. (200:13-201:17; 251:10-252:10). Ms. Parker says she responded that she did not, and then nothing further came of that conversation. The mention of this conversation has absolutely no probative value to the charge of terroristic threats or third-degree sexual assault. None of this evidence was necessary for the State to prove their case. It did nothing more than to prejudice the jury against Clark due to mentioning drugs. Therefore, Trial Counsel was ineffective for not even attempting to keep out all evidence and statements regarding drugs.

The Supreme Court of Nebraska has previously found that the mere mention of drugs without some connection to the drugs can be prejudicial. In *State v. Masters*, the defendant was charged and convicted of possession of marijuana. 216 Neb. 304, 307 (Neb. 1984). Masters was the driver in a vehicle owned by someone else. The marijuana found in the vehicle was located in a bag between the legs of the front seat passenger. During the trial, the arresting officer testified that Masters had a connection with drugs, and Masters objected. That objection was sustained, but the jury was never told to disregard the testimony. On appeal, the Supreme Court was left to decide whether that statement by the arresting officer about a connection with drugs was prejudicial. “A more substantial question then presents itself. Was the testimony that Masters ‘had some type of connection with drugs’ so prejudicial that its mere recitation in court requires reversal of Masters' conviction? We are of the opinion, in this factual context, that it was.” *Masters*, 216 Neb. at 307. The Court went on to explain that the statement, “‘connection with drugs’ in this circumstance may have been the crucial factor in the jury's decision to believe the trooper's assertion and not the appellant's disclaimer. Obviously, where it cannot be said that absent the improper evidence the appellant might not have been convicted, the error is not harmless.” 216 Neb. at 309.

Clark asserts that all statements regarding drugs in her trial are also prejudicial, and they should not have been admitted in the trial. Clark received ineffective assistance of counsel when those statements were allowed in and especially when they were allowed in without any objection by Trial Counsel.

There is not a scenario where letting this information into evidence would be part of a defense strategy.

CONCLUSION

For the foregoing reasons, Angelina Clark respectfully requests that the Court reverse her conviction and remand her case for a new trial due to the errors noted – the all-male jury, the insufficient evidence to support a verdict of guilty, and the claims of ineffective assistance of counsel.

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NO. A-22-865

IN THE
NEBRASKA COURT OF APPEALS

STATE OF NEBRASKA,

Appellee,

v.

ANGELINA M. CLARK,

Appellant.

Certificate of Compliance

1. Appellant's Brief in this matter is 18 pages in length and contains 6,216 words, excluding the Certificate of Compliance, which complies with the page and word limit option found at Neb. Ct. R. § 2-103(C)(3)(a).

2. Appellant's Brief in this matter was prepared using MS Office, with a 12-pt, proportionally-spaced Times New Roman font face, in compliance with Neb. Ct. R. § 2-103(C)(4).

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Certificate of Service

I hereby certify that on Monday, April 24, 2023 I provided a true and correct copy of this *Brief of Appellant Clark* to the following:

State of Nebraska represented by Michael Thomas Hilgers (24483) service method: Electronic Service to **katie.beiermann@nebraska.gov**

Signature: /s/ Candice Wooster (25318)