RECEIVED
Jun 12 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2019-001272

DEVATEE T. CLINTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

D. RUSSELL BARLOW, II
S.C. Bar No. 105228

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOUTH CAROLINA CASES

FEDERAL CASES

STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issue Presented

Whether the PCR court erred by ruling defense counsel was not ineffective where counsel failed to proffer and argue that the identification statements of the victim's four-year-old son made shortly after the shooting that specifically named someone other than Petitioner as the murderer were admissible as "excited utterances" or "present sense impressions" since the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial?

Respondent's Counterstatement of Issue Presented

Whether the PCR court correctly found Trial Counsel was not constitutionally ineffective where Trial Counsel reasonably decided to move on from the line of questioning when prompted by the trial court, based on the trial court's demeanor in sustaining the State's objection; and Petitioner failed to show prejudice because, had the issue been preserved, the trial court's ruling would have been affirmed since nothing in the record shows the child made the statement under the excitement or stress of the event, and nothing in the record shows the child observed the event?

STATEMENT OF THE CASE

In March of 2012, the Lancaster County Grand Jury indicted Devatee T. Clinton (Petitioner), Al M. Green (Green), and Wayne Blakeney, Jr. (Blakeney) for the murder of Jenika Jones (Victim). (App. 1087-90). On March 10-14, 2014, Petitioner and Green proceeded to a joint jury trial before the Honorable R. Knox McMahon. (App. 1). Petitioner was represented by Assistant Public Defender William P. Frick (Trial Counsel), and Green was represented by Amy S. Raney, Esquire. Solicitor Douglas Barfield prosecuted the case. (App. 1-2). The jury convicted Petitioner and Green as indicted. Judge McMahon sentenced both Petitioner and Green to terms of life imprisonment without the possibility of parole. (App. 1011; 1091). Petitioner appealed.

Petitioner was represented on appeal by Chad Nicholas Johnston, Esquire, of Willoughby & Hoefer, PA, and Chief Appellate Defender Robert M. Dudek. Petitioner briefed the following to the Court of Appeals: The trial court erred in (1) failing to find statements were admissible pursuant to the excited utterance or present sense impression exceptions to the rule against hearsay; and (2) denying Petitioner's motion for a directed verdict. (App. 1093). After briefing and oral argument, the Court of appeals affirmed in State v. Clinton, Op. No. 2016-UP-206 (S.C. Ct. App. filed May 11, 2016). (App. 1092-93). The Remittitur was returned to the circuit court on August 23, 2017.

Petitioner timely commenced the underlying PCR action on February 6, 2018. (App. 1014). The State made its return on June 11, 2018. (App. 1021). Petitioner, through PCR counsel, amended his allegations on December 4, 2018. (App. 1040). An evidentiary hearing into the matter convened on January 23, 2019, before the Honorable Paul M. Burch. (App. 1014). Petitioner was present and represented by Donae A. Minor, Esquire. Assistant Attorney General Samuel L. Key represented the State. (App 1043). Petitioner testified on his own behalf, and Trial

Counsel also testified. Petitioner proceeded on the following allegations of ineffective assistance of counsel:

> 1. Failure to properly preserve the record for [Petitioner] 's appeal regarding the issue of excluding testimony of exculpatory statements made by the victim's oldest minor child;
> 2. Failure to present Hearsay Exception, Present Sense Impression, Rule 803(1), SCRE, as an argument in response to the State's objection to the admissibility of exculpatory statements made to officers and first responders by the victim's oldest minor child;
> 3. Failure to investigate Applicant's case;
>   a. Interviewing potential witnesses;
>   b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant;
>   c. Conducting an independent investigation of the crime scene; and
>   d. Investigating the alleged suspect named by the victim's oldest minor child to the police and first responders as the person who shot his mother as part of [Petitioner] 's defense.

(App. 1040-41). Judge Burch denied relief on July 19, 2020. (App. 1071). Petitioner appealed.

STATEMENT OF THE FACTS

In January 2012, Victim lived in a trailer park with her three minor children—ages four, two, and one. (App. 216; 218–19; 221–26; 264–65). Petitioner lived with his grandmother in the neighboring trailer. On January 19, 2012, law enforcement responded to a reported home invasion at Victim's trailer. They found Victim's body on the couch in a pool of blood with a single gunshot wound to the head. She was dead upon law enforcement's arrival. Her children were still in the house. Petitioner, Green, and Blakeney were ultimately arrested for murdering Victim.

Petitioner and Green were tried together from March 10–14, 2014, before Judge R. Knox McMahon and a jury. The State moved pretrial to bar Petitioner or Green from eliciting out-of-court statements by Victim's four-year-old son to the first responders. (App. 157–58). Trial Counsel argued that after law enforcement arrived and was "still trying to assess what occurred," Victim's four-year-old son "spontaneously stat[ed] to . . . Investigator Crump first and then to another officer and . . . maybe a third officer on the scene that 'Shi's daddy shot my momma.'" Later, the child stated, "Shortycake shot my momma." (App. 158–59).

To further clarify the issue, Trial Counsel explained Victim's son was nicknamed Duce, and his father was Antonio Lamont Truesdale. The nickname in Duce's declaration, "Shortycake," was not the nickname of either Petitioner or Green. Instead, it was the nickname of Rashad Johnson, who is the father of one of the Victim's children, "Shi." (App. 159–60). The State explained it verified Victim had a child nicknamed Shi; Rashad Johnson was Shi's father, and Rashad Johnson's nickname is "Shortycake." The State also acknowledged that Duce had made a statement to Investigator Crump. (App. 160–61).

Trial Counsel clarified his argument was the child's statement was admissible as an excited utterance under Rule 803(2), SCRE, to which the trial court stated, "I realize [under Rule] 803

[the] availability of a witness is immaterial, but you have to determine the competency of the individual that made the statement. In this regard, I'm dealing with a four-year-old." (App. 161). The State indicated that the child's competency was the basis for its objection. (App. 161–62).

Trial Counsel then argued Duce was four-years-old at the time of the murder, but almost immediately after the shooting, Duce:

> [Went] to the next door neighbor's house and ask[ed] for help. They called 911. The police respond within 15 minutes. Because it was cold, D[]uce and his siblings were put in an ambulance. [D[]uce] makes the comment Shi's daddy hurt my momma. Jamia's (phonetics) daddy hurt my momma. Jamia and Shi are the same person and 'daddy' they are referring to is Rashad Johnson. He makes this statement . . . to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [State's] witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous[ly] to Christy Rogers who is a CSI officer that responds there on the scene.

(App. 162–63). Thereafter, Trial Counsel presented three cases to the trial judge supporting his argument that the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of-court declarant, and he asked the trial judge to consider these cases before ruling on the issue. Specifically, Trial Counsel relied upon State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness); State v. Sims, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002); and In Interest of Smith, 277 S.C. 187, 284 S.E.2d 586 (1981) (three-year-old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to the hearsay rule in a case charging a juvenile defendant with criminal sexual conduct in the first degree). (App. 163).

The trial court noted factual distinctions between those three cases and the instant case and

clarified the issue with the statement was that Trial Counsel had not laid the foundation for that statement to come in. Specifically, the trial court stated that Trial Counsel needed to establish a "foundation of the personal knowledge of the hearsay declarant and then meet the three requirements within the rules." See Rule 602, SCRE. The trial court also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. . . . That goes back to the [R]ule 600 or something." (App. 163–67). The trial court further stated, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and . . . you all are welcome to do it in whatever manner you all so choose." (App. 168).

The following morning, the trial court re-stated Petitioner did not have to show Duce's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. (App. 178–79).

On cross-examination of Investigator Taylor, Trial Counsel established that Investigator Taylor saw the children at the crime scene on the night of the incident; all three children had blood on their clothing, and Investigator Taylor seized the children's bloody clothing. (App. 499–501). Trial Counsel then asked Taylor:

> Q Did you ever have any conversation with any of these children?
> A Yes.
> Q Which one?
> A Oldest child.
> Q Okay. Where did you have this conversation?
> A In the EMS truck.
> Q Do you recall about when you had this conversation? How long you [had] been on the scene?
> A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
> Q Do you recall the demeanor of this child?
> A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep

[their] mind[s] off maybe their thoughts or whatever.
Q Okay. Did you take a statement from any of these children?
A No, I did not take a statement.
Q Was anything told to you?

(App. 501–02). The State immediately objected based on Trial Counsel eliciting an out-of-court statement. Trial Counsel responded, "I didn't ask what." The trial court sustained the State's objection. (App. 502).

Investigator Taylor later testified he had been in the ambulance with the children "[p]robably about ten minutes." (App. 517–18). Investigator Taylor also opined that based on the blood on the children's clothing, it appeared the children would have been physically close to the victim, and he stated Duce was able to see the blood on his siblings' clothing while he was in the ambulance. However, Duce appeared to be "happy-go-lucky" during the time Investigator Taylor was with him. (App. 518–21).

STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694).

ARGUMENT

The PCR court correctly found Trial Counsel was not constitutionally ineffective where Trial Counsel reasonably decided to move on from the line of questioning when prompted by the trial court, based on the trial court's demeanor in sustaining the State's objection; and Petitioner failed to show prejudice because, had the issue been preserved, the trial court's ruling would have been affirmed since nothing in the record shows the child made the statement under the excitement or stress of the event, and nothing in the record shows the child observed the event.

Petitioner contends Trial Counsel was constitutionally ineffective for failing to proffer testimony he intended to elicit as an excited utterance or alternatively as a present sense impression, leaving the issue unpreserved for appellate review. Petitioner avers the PCR court erred in ruling that Trial Counsel's performance was not deficient as he employed a valid trial strategy, because the question was not whether Trial Counsel's strategy was valid but whether Trial Counsel's failure to preserve the record for review was an error. (BOP p. 11). Petitioner's assertion incorrectly frames the issue presented before the PCR Court.

Standard for Analyzing a Claim of Ineffective Assistance of Counsel

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties' mistake-free.'" (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the

right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

An applicant alleging ineffective assistance of counsel bears the burden of proving the allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. Strickland v. Washington, 466 U.S. 668 (1984). To obtain reversal of a conviction, the applicant must prove that (1) their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). Id. at 690–95; Butler, 286 S.C. at 442, 334 S.E.2d at 814. The defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. Strickland, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Id. at 700.

As to the first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Strickland, however, "does not guarantee perfect

representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[,] [as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

Here, the overarching question in Petitioner's PCR action was whether Trial Counsel was deficient for failing to proffer testimony and preserve for appeal the issue of Duce's statement of identification to first responders. The PCR Court correctly reviewed this issue by first assessing whether Trial Counsel's performance was deficient, judging whether or not Trial Counsel's decision was reasonable, and ultimately determining Trial Counsel's conduct was reasonable and

valid trial strategy. Thus, the PCR Court correctly framed and addressed Petitioner's allegations in his PCR action.

Application of Applicable Standard to Petitioner's Case

A. The PCR Court correctly ruled that Trial Counsel's performance was not deficient, and he employed a reasonable and valid trial strategy in moving on from a line of questioning when prompted by the trial court, based on the trial court's demeanor in sustaining the State's objection.

Respondent now turns to the first prong under Strickland—constitutional deficiency—and contends the PCR Court correctly ruled Trial Counsel's performance was not deficient.

Failure to preserve an issue for appellate review can be the basis of an ineffective assistance of counsel claim, however, leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. See Milledge v. State, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue; see also Id. at 380, 811 S.E.2d at 80 ("[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court's finding . . . . If so, an appellate court would necessarily have affirmed the trial court's [ruling] . . . ."). Strickland requires that trial counsel be given leeway to make reasonable strategic decisions, stating in part:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant…Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.

466 U.S. at 688-89; 691.

At the evidentiary hearing, Trial Counsel testified that he tried to get Duce's statement of identification in as an excited utterance. (App. 1050). Trial Counsel further testified that during

trial "it was quite apparent that [the trial court] was not going to let the statement in," as an excited utterance. (App. 1062). Trial Counsel felt that based on the trial court's ruling and demeanor, the only way he could get the statement in was through the child. However, Trial Counsel did not want to call the child because he "didn't want to put a five-year-old child on the stand when there [were] pictures of bloody footprints all over the scene." (App. 1063).

The record establishes that Trial Counsel argued before the trial court that Duce's statement of identification of "Shi's Daddy" and "Shortycake" as the one who shot the victim should be admitted as an excited utterance. (App. 158-159). The State objected, stating that even if the statement was admitted as an excited utterance, the defense will have to make a showing that the four-year-old declarant was a competent witness at the time. (App. 161-162). Trial Counsel relied on Ladner[1], Smith[2], and Sims[3] to support his motion. In response, the trial court stated:

> All right, if you would would please. Obviously I don't disagree approximate any of these propositions and that is why I was trying to relate it to the child sexual abuse situation. However, in this case Ladner, the hearsay of declarant was the victim. Was the victim. Duce is not the victim, number one. Number two, in both Sims and the other case cited herein, both of the minor children were found to be competent to testify. While on the witness stand they – for lack of a better way of expressing myself I would just eloquently say they clammed up. They wouldn't answer any more questions. Because they had been found competent – because they had been found competent, an officer who took the statement was then allowed to be recalled and testify to that… I'm trying to get to the foundation that the child observed the startling event. That is the first thing. You got to have personal knowledge, the declarant.

(App. 163-164). The trial court concluded that it would take testimony before ruling on the issue. (App. 165). The following day Trial Counsel elicited testimony on the matter, and after hearing

[1] *Supra* at 7.
[2] *Supra* at 7.
[3] *Supra* at 7.

this testimony, the trial court sustained the State's objection—effectively communicating to Trial Counsel that he had not laid the proper foundation for Duce's hearsay statements to be admitted. (App. 502).

Petitioner relies on Dove[4] and Stone[5] to support his contention that Trial Counsel's performance was deficient by signifying the similarities in the cases. However, Petitioner altogether dodges the stark differences that divorce Petitioner's facts from the facts of those cases. For instance, in Dove, the defendant was convicted of murdering his wife, and the Supreme Court determined that counsel was ineffective for failing to subpoena medical records that supported the defendant's theory that his wife had committed suicide. Dove, 337 S.C. 298, 302, 523 S.E.2d 459, 461. The Court reasoned that the medical records, "replete with evidence about the victim's past suicidal tendencies and depression," was crucial evidence that made the defendant's theory that his wife had committed suicide plausible. Id. at 303. Physical records prepared and kept by medical professionals detailing the victim's mental health are not in the same space, or even close, to an out-of-court oral statement made by a four-year-old.

In fact, in the Court's conclusion, they distinguished the facts in Dove from Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). In Stokes, the petitioner argued that her trial attorney was ineffective for failing to call witnesses whose testimony purportedly supported her theory the victim had committed suicide. The Court stated that the attorney in Stokes employed a "legitimate strategy" not to call witnesses he believed would not be credible, unlike in Dove, where the attorney took no action to retrieve documents stating irrefutable facts in support of the defendant's theory. Dove, 337 S.C. at 303-304.

[4] Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999).
[5] Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017).

Similarly, Petitioner relies on Stone, in which the Court determined counsel was ineffective for failing to object to portions of the testimony of law enforcement officers the State presented as victim impact evidence. Stone v. State, 419 S.C. 370, 798 S.E.2d 561 (2017). In Stone, counsel detailed, "[He] considered objecting…but Judge King was being very liberal in what he was allowing in from the standpoint of victim's testimony", and he "did not feel that the objection would be sustained." Stone, 419 S.C. at 382-83, 798 S.E.2d at 568. This is easily distinguishable from the present case, as counsel in Stone did not even attempt to object because of his perceptions of how the judge would rule, whereas Trial Counsel argued his motion before the judge, elicited testimony on the issue, the judge ruled and instructed Trial Counsel to move on.

Trial Counsel did not move on from questioning Investigator Taylor about Duce's statement casually, or with mere speculation as to why the trial judge sustained the State's objection concerning the trajectory of the questioning. Trial Counsel knew, based on previous discussions with the trial court, he would have to lay a foundation for Duce's statements to be admitted through the testimony of first responders. The trial court made it clear to Trial Counsel when it sustained the State's objection that Trial Counsel had failed to lay the foundation of Duce's personal knowledge, and so Trial Counsel made the reasonable decision to move on. Therefore, the PCR Court did not err in determining that Trial Counsel was not deficient when he reasonably decided to move on from the line of questioning concerning Duce's out-of-court statements.

B. Even if this Court determines the PCR Court erred in finding no deficiency, Petitioner failed to show prejudice, because had the issues been preserved, the trial court's ruling would have been affirmed.

As to the second prong in Strickland—prejudice—Respondent asserts Petitioner cannot show prejudice because the record does not establish Duce made the statement under the

excitement or stress of the event, and there is no evidence in the record that Duce observed the event.

"[T]he proper inquiry for determining prejudice…is whether there is evidence in the record to support the trial court's finding… If so, an appellate court would necessarily have affirmed the trial court's [ruling]…" Milledge, 422 S.C. 366, 380, 374 S.E.2d 769, 804. Hearsay is an out-of-court statement offered as a true statement. Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. However, an excited utterance is an exception to the general rule against hearsay. Rule 803(2), SCRE. An excited utterance is "[a] statement relating to a startling event . . . made while the declarant was under the stress of excitement caused by the event . . . ." Id. Whether the declarant of an excited utterance is available as a witness at trial is immaterial. Rule 803, SCRE.

For a statement to be an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). Additionally, "'[s]tatements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.'" State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (quoting 23 C.J.S. Crim.Law § 876 (1989)).

Here, if the issue had been preserved, the record shows the child did not make the statement under the excitement or stress of the event—Investigator Taylor's testimony was that the child was "happy-go-lucky" when speaking to EMS and law enforcement. Thus, despite Trial Counsel's best effort at laying a foundation, he was unable to establish that the child actually made the statement because of the event. See State v. Davis, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (reversing

the court of appeals for finding a statement was an excited utterance because "murder is certainly a startling event," and stating that relying on the fact there was a murder is inadequate to establish excited utterance). Because the only testimony in the record showed the child was not under the excitement or stress of the event when he made the statement, the trial court's ruling that the statement was inadmissible would have been upheld on appeal.

Furthermore, there was no evidence that the child actually witnessed the murder. The only person, other than potentially the perpetrators, who could have established that the child actually witnessed the murder was the child. As the trial court aptly stated, "Presence in the home doesn't mean observation of the fatal act." (App. 167). To succeed on appeal, Trial Counsel would have needed to call the child to testify, as the child is the only person who could attest to observing the event. At the evidentiary hearing, Trial Counsel testified that he would not proffer the child's testimony to lay the proper foundation because (1) the child was only five- or six-years-old at the time of trial; (2) the child was four-years-old when his mother was murdered; and (3) Trial Counsel was unsure how the child would testify.

Notably, Trial Counsel calling a witness to testify at trial that he does not know what the witness will testify to could be ineffective assistance of counsel. See Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding trial counsel was ineffective for calling a witness without first interviewing the witness to ascertain whether the witness would support the defendant's theory of the defense). Accordingly, Trial Counsel cannot be constitutionally ineffective for choosing not to call a witness he could have potentially been ineffective for calling.

Additionally, nothing else in the record establishes that the child actually observed the event. See Hill, 331 S.C. at 99, 501 S.E.2d at 125 (quoting 23 C.J.S. Crim.Law § 876 (1989)) ("'Statements which are not based on firsthand information, as where the declarant was not an

actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.'"). Because the evidence in the record showed only the child was somewhere inside the home, but nothing showed he observed the murder, the trial court did not err, and its decision would have been affirmed on appeal. Therefore, Petitioner failed to show prejudice because even if the issue were preserved for appellate review, the trial court's decision would have been affirmed. As such, the PCR court did not err, and the PCR court's ruling should be affirmed.

Finally, Petitioner has failed to establish deficiency and prejudice from Trial Counsel's alleged failure to preserve the issue of whether the child's statement was an excited utterance because, after a full PCR evidentiary hearing, there still has not been a proffer of the alleged statement. To show what Trial Counsel should have proffered, Petitioner needed to proffer Investigator Taylor or the child's testimony. There has been no foundation for the statement, even after the PCR hearing, as nothing in the record establishes that the child was excited or under the stress of the event when he made the statement, and nothing in the record shows the child actually observed who shot his mother. Petitioner failed to meet his burden of proof establishing deficiency or prejudice because he produced nothing more than Trial Counsel produced at trial. Therefore, the PCR court did not err, and the PCR court's order should be affirmed.

CONCLUSION

Based on the foregoing argument, Trial Counsel was not constitutionally ineffective. Trial Counsel articulated a reasonable strategy for his decision to move on from the line of questioning when prompted by the trial court because the testimony given by the person who heard the statement did not establish grounds for an excited utterance exception. Even if the issue had been preserved with a proffer, the trial court's decision would have been affirmed because nothing in

the record showed the child made the statement under the excitement or stress of the event, and nothing in the record showed the child observed the event. The PCR court, therefore, correctly found neither deficiency nor prejudice. Accordingly, this Court should affirm the PCR court's order.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM F. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

D. RUSSELL BARLOW, II
Assistant Attorney General
S.C. Bar No. 105228

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

June 12, 2023