STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Feb 08 2023
SC Court of Appeals

Appeal from Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

DEVATEE TYMAR CLINTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001272

BRIEF OF PETITIONER

JESSICA M. SAXON
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Federal Cases

Other Jurisdictions

Other Authorities

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" where the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial?

STATEMENT OF THE CASE

During its June 2012 term, the Lancaster County grand jury indicted Petitioner for one count of murder. App. 1089. An amended indictment to correct a misspelling of Petitioner's name was obtained during the March 2014 term of the Lancaster grand jury. App. 1087. Petitioner and his co-defendant, Al Martinez Green,[1] proceeded to trial on March 10-14, 2014, before the Honorable R. Knox McMahon and a jury. App. 1. The State was represented by Douglas Barfield. Petitioner was represented by William Frick. App. 1. Petitioner was found guilty as charged and sentenced to life in prison without the possibility of parole. App. 989, ll. 5-7; App. 1011, ll. 15-18; App. 1091.

Petitioner appealed his conviction and sentence. Following oral argument, this Court affirmed Petitioner's conviction in an unpublished opinion. State v. Clinton, 2016-UP-206 (S.C. Ct.App. May 11, 2016); App. 1092-1094. This Court denied rehearing. The South Carolina Supreme Court subsequently denied certiorari on August 4, 2017. App. 1021-1022.

Petitioner filed an application for post-conviction relief on February 6, 2018. App. 1014-1020. The State filed a return dated June 11, 2018. App. 1021-1039. PCR Counsel Donae Minor filed an amended PCR application dated December 4, 2018, raising three grounds for relief. An evidentiary hearing was convened on January 23, 2019, before the Honorable Paul M. Burch. The State was represented by Samuel Key. App. 1043.

An order of dismissal was filed on July 26, 2019. App. 1071-1086. Petitioner filed a timely notice of appeal from the order dismissing his PCR application. A petition for writ of certiorari was filed on March 4, 2020. The State filed a return to the petition for writ of certiorari

---

[1] Al Martinez Green was represented at trial by Amy S. Raney. App. 2.

on August 10, 2020. The Supreme Court transferred the case to this Court on August 25, 2020. By order dated January 9, 2023, this Court granted certiorari. This brief of petitioner follows.

STANDARD OF REVIEW

The standard of review in PCR cases depends on the specific issue raised on appeal. Smalls v. State, 422 S.C. 174, 180-181, 810 S.E.2d 836, 839–40 (2018). The reviewing court must defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Id. (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, the appellate court reviews questions of law de novo, with no deference to the PCR court. Id.

ARGUMENT

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" where the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial.

Relevant Facts

During the evening hours of January 19, 2012, Jenika Jones was killed by a single gunshot wound to the head. App. 217, ll. 3-11; App. 364, ll. 21-22. At the time of the shooting, Jones was in her mobile home located in a trailer park off Highway 200 near Great Falls, South Carolina. App. 194, ll. 14-16. Unfortunately, Jones' three minor children were also in the home when she was shot. App. 158, ll. 1-2. The oldest child, a four-year-old boy known by the nickname "Duce," went next door crying and upset to get help from the neighbors who promptly called 911. App. 162, ll. 13-17; App. 166, ll. 18-23.

Deputies with the Lancaster County Sherriff's office were dispatched at 10:09 P.M. and arrived on the scene within minutes of receiving the call. App. 217, ll. 3-11. Officers entered the mobile home to "clear the residence." Upon entering the residence, the officers observed Jones laying on the couch and her two youngest children in the living room area next to her. The children were secured, and officers confirmed that Jones was deceased. App. 221-222.

Multiple officers and crime scene investigators with the Lancaster County Sherriff's Office processed the scene. Despite the close proximity of the trailers to one another, officers were unable to find any neighbors who heard gun shots or saw anyone entering or leaving the

victim's home. App. 230-233; App. 922, ll. 1-8. Evidence was collected, DNA swabs were taken from various locations in the mobile home, photographs were taken of the scene, and various surfaces were dusted for fingerprints. App. 464-472.

The children were initially secured by first responders in an ambulance at the scene. All three children had blood on their clothing. App. 500, ll. 3-9. While in the ambulance, the eldest child, Duce, spontaneously stated "Shi's[2] daddy shot my momma." His statement then changed to "Shortycake shot my momma." App. 158, l.15-App. 160, l. 25. He repeated this spontaneous statement to various officers and emergency medical workers on the scene. The investigation revealed that "Shi" was Duce's younger half-brother. Shi's father was Rashad Johnson, whose street name was "Shortycake." App. 158-168. Despite these statements by Duce, the investigation focused on Petitioner, Al Martinez Green, and Wayne Blakeney – all three were ultimately charged with the murder of Jones.

Prior to the start of the trial, Solicitor Barfield objected to the defense attempting to bring in Duce's spontaneous statements under a hearsay exception. App. 158, ll. 1-13. Counsel Frick noted that while the State had initiated the motion, it was a defense motion in *limine* to determine the admissibility of the statements made by Duce to law enforcement and EMS personnel regarding the identity of the shooter. App. 162, l. 11-App. 163, l. 16. Counsel Frick argued that the statements made by Duce should be admissible under Rule 803(2), SCRE, as excited utterances. App. 161. The State argued that, even if a hearsay exception applied, the defense had to show the minor child was competent at the time of the statements. App. 161-162. The trial court ruled that, based on the current case law, the competency of a minor child did not have to be established for a hearsay exception to apply. The trial court further stated that the

---

2 Duce also stated "Jamia's daddy hurt my momma." Shi and Jamia are the same person, Duce's younger half-brother. App. 162, ll. 19-23.

admissibility of the statement would depend upon how the testimony developed. Mainly, the court was concerned with whether defense counsel would be able to lay the proper foundation for a hearsay exception. App. 177-179.

At trial, the State put forth the theory that Jones died during an attempted robbery organized by Petitioner. The key evidence relied upon by the State was the testimony of co-defendant Blakeney. Blakeney had provided inconsistent statements to the police during the investigation of the case. Blakeney originally told police that there were two other people in the car with him the night of the incident and then changed it to three other people. He said that Petitioner was driving the car and then later admitted he was the driver. Additionally, he changed the caliber of the gun from a nine-millimeter to a .380. App. 759-761; 770-771. He stated that Petitioner asked him to hold onto a gun for him and that he had buried that gun in the woods. He later admitted that he had sold that gun to a relative and never buried it. App. 775, ll. 15-19.

At trial, Blakeney directly implicated Petitioner, Green, a third individual named Delrico McDow, and himself in the murder of Jones.[3] Blakeney's trial testimony also contained details and statements not mentioned in his prior statements to police. App. 1057, ll. 11-15. To rebut the State's theory and highlight the inconsistent, biased testimony of Blakeney, Counsel Frick

---

[3] Blakeney was originally charged with murder. The State asserted that, outside of consenting to a PR bond, no deal or consideration had been given to Blakeney for his testimony. After the trial of Petitioner and Green, Blakeney's murder charge was reduced to accessory after the fact. He was sentenced under the Youthful Offender Act to a term of imprisonment not to exceed six years, suspended upon time served and eighteen months' probation. See, https://publicindex.sccourts.org/Lancaster/PublicIndex/ (search case number 2014GS2900566); See also Wise v. Wise. 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984) (stating a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records).

sought to elicit the statements made by Duce through crime scene Investigator Ken Taylor. During the cross-examination of Investigator Taylor, the following exchange occurred:

> Mr. Frick: Did you ever have any conversation with any of these children?
>
> Investigator Taylor: Yes.
>
> Mr. Frick: Which one?
>
> Investigator Taylor: Oldest child.
>
> Mr. Frick: Okay. Where di you have this conversation"
>
> Investigator Taylor: In the EMS truck.
>
> Mr. Frick: Do you recall about when you had this conversation? How long you have been on the scene?
>
> Investigator Taylor: I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.
>
> Mr. Frick: Do you recall the demeanor of this child?
>
> Investigator Taylor: 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 there mind off maybe their thoughts or whatever.
>
> Mr. Frick: Okay. Did you take a statement from any of these children?
>
> Investigator Taylor: No, I did not take a statement.
> Mr. Frick: Was anything told to you?
>
> Solicitor Barfield: Objection.
>
> Mr. Frick: I didn't ask what.
>
> The Court: I will sustain the objection. You may ask your next question.

App. 501, l. 25-App. 502, l. 24.

Counsel Frick did not return to that line of questioning, and at no other point during the trial did Counsel Frick move to proffer any testimony regarding the statements Duce made identifying Rashad Johnson as the person who killed Jones. Defense Counsel Raney also

inquired about the general demeanor of the children on the night in question. Regarding Duce, Investigator Taylor changed his description of the child's demeanor stating, "the older boy, again, he was somewhat being entertained by the EMS workers so he seemed kind of happy go lucky, if you will." App. 518, ll. 7-9.

After a three-and-a-half day trial, the jury found both Petitioner and Green guilty as charged. App. 988-989. Petitioner appealed his conviction and sentence, arguing that the trial court erred in excluding Duce's statements to first responders that implicated someone other than Petitioner in the charged crime. Following oral argument, this Court affirmed Petitioner's conviction finding that the issue of the admission of the excited utterance or present sense impression statements had not been preserved for appellate review. State v. Clinton, 2016-UP-206 (S.C. Ct.App. May 11, 2016); App. 1092-1094.

Petitioner filed an application for post-conviction relief on February 6, 2018. App. 1014-1020. The State filed a return dated June 11, 2018. App. 1021-1039. PCR Counsel Donae Minor filed an amended PCR application dated December 4, 2018, raising three grounds for relief. All three grounds in the amended application centered on Counsel Frick's failure to have Duce's hearsay statements admitted or the exclusion of the statements preserved for review. App. 1040-1042. An evidentiary hearing was convened on January 23, 2019, before the Honorable Paul M. Burch. App. 1043.

During the PCR hearing, Counsel Frick testified that he had been practicing law for about thirteen years at the time of Petitioner's trial and had handled numerous murder cases as both a prosecutor and defense attorney. App. 1047-1048. Frick testified that the strategy at trial was to get Duce's spontaneous statements to various first responders admitted through a hearsay exception. Counsel Frick thought that the excited utterance exception applied to the facts of

Petitioner's case. App. 1050, ll. 20-25. Counsel Frick conceded that it was also possible that the present sense impression exception would have applied but that he did not raise that as a ground for admitting Duce's statements. Id.

Counsel Frick testified that he disagreed with the ruling from the Court of Appeals and thought that he had preserved the record for appeal. Frick argued it was the State's motion in *limine* to exclude the statements made by Duce, not his, and he did not know how he was supposed to protect an objection that he did not make. When asked why he did not respond or offer argument to the State's objection of his questioning of Taylor, he replied that "[t]he Judge shut that down. I did not think it would be fruitful to argue anymore at that point. The Judge had clearly decided he wasn't going to let it in at that point." Counsel Frick said that, although he could not remember which witness it was, he and Counsel Raney had tried to get Duce's statements in again but "the Judge shut it down again." App. 1051, l. 10-App. 1052, l. 3. Counsel Frick admitted that he did not proffer any testimony or attempt to argue for the admission of the statements by Duce after the State objected during Taylor's testimony. He conceded that the Court of Appeals ruled that he had in fact failed to preserve the issue for appellate review. App. 1051-1055.

In the order denying Petitioner's PCR application, the PCR court found that Counsel Frick was not ineffective for failing to preserve the issue regarding the exclusion of Duce's statements for appellate review because he had employed a valid trial strategy in attempting to have the statements of Duce admitted at trial through a hearsay exception. The PCR court found that Counsel Frick's justification for failing to proffer the child's testimony was reasonable because the trial court instructed him to move on from the issue. App. 1079. The PCR court wrote that "[w]hile trial counsel arguably needed to proffer the child's testimony to preserve the

issue for appellate review, the Court will not second-guess trial counsel's decision to move on with his questioning." App. 1080. The PCR court also found that Counsel Frick was not ineffective for failing to argue that the present sense impression hearsay exception applied to Duce's statements because he had articulated a reasonable strategy regarding the admissibility of the statements as excited utterances. App. 1081

Discussion

Deficient Performance

In dismissing Petitioner's PCR application, the PCR court relied on the "valid trial strategy" reasoning expressed in Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). The reliance on Whitehead was misplaced. The question before the PCR court was not whether the strategy employed by counsel to admit the statements was valid, but whether counsel's failure to preserve the record for appellate review when the trial judge excluded the admissible statements was error. Regardless of the strategy employed to admit the statements, Counsel Frick was deficient in failing to preserve the issue for appellate review.

The failure to make a proffer of excluded evidence will preclude review on appeal. State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d 23, 29 (Ct.App.2006) (holding a proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been). Where no proffer of excluded testimony is made, the court is unable to determine whether the appellant was prejudiced by the trial court's refusal to admit the testimony into evidence. TNS Mills, Inc. v. S.C. Dep't. of Revenue, 331 S.C. 611, 628, 503 S.E.2d 471, 480 (1998).

Accordingly, it is well settled that failure to preserve an issue for appellate review can be the basis of a claim of ineffective assistance of counsel. See Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel can be found deficient for failing to object, failing to place an argument on the record, failing to obtain a final ruling, or failing to proffer testimony. See Thompson v. State, 423 S.C 235, 814 S.E.2d 487 (2018); Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). In the present action, Counsel Frick failed to obtain a final ruling on a motion in *limine* that involved a critical, exculpatory, piece of evidence. Counsel Frick also failed to proffer the excluded testimony which wholly precluded this Court from reviewing the matter on appeal. Counsel Frick had a duty, as the party seeking to admit the evidence, to proffer the testimony that was excluded in order to preserve the matter for appellate review. The failure to preserve the issue for appellate review constituted deficient performance.

In Dove v. State, 337 S.C. 298, 523 S.E.2d 459 (1999), our Supreme Court found trial counsel ineffective for failing to subpoena medical records of the victim and introduce them at trial. Dove was accused of murdering his wife and asserted that she had committed suicide. The medical records at issue confirmed that Dove's wife suffered from depression and suicidal ideations. Dove at 303, 523 S.E.2d at 461. This Court held that trial counsel was deficient because the medical records were "replete with evidence" about the victim's past suicidal tendencies and depression which was evidence that "would have been crucial in trying to prove the victim committed suicide." Id.

Here, as in Dove, there was evidence that would have been crucial in proving that Petitioner did not commit the murder of Jones and that evidence was never entered into the record. The failure to enter the exculpatory evidence into the record is even more egregious in

Petitioner's case because unlike counsel for Dove who did not know of the existence of the medical records, Counsel Frick was aware the statements made by Duce. However, even knowing about the highly exculpatory statements, Counsel Frick still failed to have them admitted into evidence, failed to argue that they should have been admitted into evidence under multiple hearsay exceptions, and failed to proffer the testimony to preserve the issue for appellate review.

The PCR court excused Counsel Frick's performance by ruling that he employed a valid trial strategy in attempting to have Duce's statements admitted through a hearsay exception. Notably, the PCR court admitted that Counsel Frick should have proffered the testimony at issue, but then inexplicably reached the conclusion that the failure to proffer the testimony was not deficient performance. Even if Counsel Frick's strategy to admit the statements of Duce through a first responder was valid, there is nothing in the record that supports the holding of the PCR court that the failure to proffer the testimony was not deficient performance. The failure to proffer the testimony and failure to preserve the record for appeal was not valid strategy, particularly considering that trial counsel thought he had properly persevered the record.

Our Supreme Court has held that trial counsel's decision to employ a certain strategy must be sound. A strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound. Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017). In Stone, counsel was found deficient for not objecting to various portions of victim impact testimony during the penalty phase of a capital trial. During the PCR hearing, counsel for Stone stated he did not object because the trial judge was being very liberal in what he was allowing in as victim impact testimony, that based on what the judge had let in from one witness he felt the judge would let in the testimony of a different witness, and that he did not want to be

perceived by the jury as jumping up and down objecting to everything as if he was trying to hide something. Id. The Court found that counsel should have objected to the portions of testimony as to which he felt he had a reasonably persuasive argument for exclusion and that the fact that the trial court had wide discretion in what was admitted did not justify the decision not to object. Id. at 386, 798 S.E.2d at 570. The Court noted that counsel's testimony indicated he chose not to object despite the strength of his arguments for exclusion and stated, "that counsel's belief that the trial court would overrule his objection does not justify the decision not to make it." Id. at 386-387, S.E.2d at 570. In finding that counsel was deficient, the Court held that "[t]rial counsel failed to articulate any valid strategic reason for not objecting to important victim impact testimony the trial court had the discretion to exclude. Therefore, the decision not to object does not meet an objective standard of reasonableness, and Stone has satisfied the first prong of Strickland." Id. at 387, S.E.2d at 570.

The present case closely mirrors the facts of Stone regarding the deficient performance of defense counsel. Counsel Frick had a strong argument for admission of the spontaneous statements of Duce. However, when he attempted to question one of the numerous first responders that Duce had made his consistent spontaneous statements to, the State objected, and the trial court sustained the objection. Instead of proffering the testimony of Taylor, the other first responders, or Duce, Counsel Frick moved on from the line of questioning. In justification of his performance, Frick testified that he did not pursue the matter further because "[t]he judge shut that down." He stated that he did not "think it would be fruitful to argue anymore" and the judge had "clearly decided he wasn't going to let it in at that point." App. 1051, ll. 14-18. These "justifications" are similar to the ones provided in Stone, *supra*, which our Supreme Court held were not sound strategic reasons for failing to preserve a matter for review. Counsel Frick did

not fail to preserve the matter for review because he thought it was not a strong argument, but because he did not want to challenge the discretion of the judge.

Tellingly, Counsel Frick maintained multiple times that despite the ruling of the Court of Appeals he had properly preserved the record for appellate review. The continued denial of his deficient performance indicated that Counsel Frick was unaware of the numerous cases holding that, to preserve excluded evidence for appellate review, the proponent of the evidence must proffer the testimony and obtain a final ruling on the matter. See State v. Atieh, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) (holding a ruling in *limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review); State v. Simmons, 360 S.C. 33, 45-46, 599 S.E.2d 448, 454 (2004) (finding an issue unpreserved where the State objected to a witness's testimony, the objection was sustained, and the defendant failed to raise his argument regarding the trial court's exclusion of the testimony or proffer what that witness's testimony would have been had the witness been allowed to continue testifying).

In the present case, the failure of Counsel Frick to proffer the excluded testimony and to preserve the issue for appellate review cannot be deemed reasonable under prevailing professional norms. A threshold for evaluating the reasonableness of counsel's conduct is whether counsel performed the function of making the adversarial testing process work in a particular case. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). The adversarial process broke down in Petitioner's case due to counsel's errors. Counsel Frick failed to challenge the trial court's exercise of discretion in excluding the evidence by moving on from the line of questioning. As our Supreme Court wrote in Stone, *supra*, "the debate that precedes the exercise of that discretion [in the admission or exclusion of evidence] is part of the

adversarial process Ard and Strickland require trial counsel to test." Stone at 386, 798 S.E.2d at 570. Further, by not proffering the testimony, Petitioner was denied the opportunity to have this Court review the trial court's exclusion of this key piece of exculpatory evidence. Counsel Frick was deficient in failing to proffer the testimony regarding Duce's spontaneous statements identifying someone other than Petitioner as the person who killed Jones and preserve the issue for appellate review.

Prejudice

Petitioner's defense at trial was that he was actually innocent. There was no forensic evidence that linked Petitioner to the scene of the murder and no motive for Petitioner to kill Jones. The State's entire cased hinged on the testimony of Petitioner's co-defendant Blakeney. Blakeney's testimony was extremely biased as he stood to gain, and did in fact receive, a great benefit in return for testifying against Petitioner. Additionally, Blakeney had given previously inconsistent statements to law enforcement that further weakened his credibility. Based on the total lack of evidence against Petitioner, it was imperative that the exculpatory statements made by Duce be introduced into evidence at trial.

Duce's statements identified Rashad Johnson, "Shortycake," as the individual that shot his mother. Importantly, the State conceded during the pre-trial motion that Duce did in fact make the statements identifying Johnson as the shooter to both EMS and law enforcement shortly after the murder had occurred. App. 158-161. A fair reading of the record shows that the statements fell into a hearsay exception as either excited utterances or present sense impressions.

Under Rule 803(2), SCRE, an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Three elements must be met 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. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010).

"In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." State v. Sims, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002). "Additionally, such a determination is left to the sound discretion of the trial court." Id. at 21, 558 S.E.2d at 521. "The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor." Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Id. (quoting Sims, 348 S.C. at 22, 558 S.E.2d at 521). "The excited utterance exception is based on the rationale that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) (quoting State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)). The burden of establishing facts that would qualify a statement as an excited utterance is upon the proponent of the evidence. State v. Davis, 371 S.C. 170, 178-79, 638 S.E.2d 57, 62 (2006).

In State v. Sims, *supra*, police were called to the scene when the victim's five-year-old son was found upset and crying outside of his mother's apartment. When police arrived on scene, they discovered the victim in a pool of blood on her bed which a knife protruding from one of her various stab wounds. Id. at 18, 558 S.E.2d at 520. The son, in response to questioning from an officer, indicated that Sims was the individual who was in the apartment with him and his mother on the night she was attacked. At trial, the State called the child, who

was then six years old, to testify about the attack on his mother. During his testimony the child stopped responding to questions and was excused from the stand. Id. at 19, 558 S.E.2d at 520. The State then recalled to the stand the officer who questioned the son to testify to his statement identifying Sims as the perpetrator of his mother's attack. Defense counsel objected to the officer's testimony on hearsay grounds and was overruled. The trial court allowed the testimony reasoning that while the statement was hearsay, given the situation under which the son made the statement, it was admissible. The court pointed to the fact the son made the statement after he discovered his mother, and "in the throws [sic] of the police being there." The court further elaborated that "given the ... traumatic circumstances under which this statement was made, and the age of the child, and particularly with his moral accountability ... I think that gives credibility to what he said that would outweigh any objection as to hearsay." Id. at 20, 558 S.E.2d at 520.

On appeal Sims challenged the propriety of admitting the hearsay statement of the son through the testifying officer. Our Supreme Court found that the statement clearly met the first element of an excited utterance because it related to the startling event of the son seeing his mother after she was attacked and possibly while she was being attacked. The Court further reasoned that if the son was under the stress of the excitement, then that stress was caused by the startling event of seeing his mother being attacked and not being able to wake her. The main question was whether the son was "under the stress of excitement." Id. at 21, 558 S.E.2d at 521. In answering that question the Court considered numerous factors including the passage of time between the son's statement and the attack, the son's demeanor, the son's age, and the severity of the event.

The possible time that could have passed between the attack and the son's statement to the officer was approximately twelve hours. In finding that the son was still under the stress of

the excitement, the Court wrote "a five-year-old child possibly saw his mother being attacked and, at the very least, was left alone with his severely injured mother whom he could not wake, until he made his way outside to be found by a neighbor. Under these circumstances, we find the stress of excitement from those events lasts a longer period of time than would be likely to occur if the son had been an adult. See, e.g., State v. Cude, 784 P.2d 1197, 1200 (Utah 1989) (excitement generally lasts longer in children and fabrication is less likely)." Id. 21–22, 558 S.E.2d at 521.

Regarding the child's demeanor, the child was upset and crying when the neighbor initially found him. When questioned by the officer, he was withdrawn and automatic. The Court held that, while the son was not crying or acting "excited" in the sense of being animated when he made the statement, his demeanor could be characteristic of someone who was under the "stress of excitement." Id. at 22-23, 558 S.E.2d at 521-522. In support of this, the Court cited to numerous cases where a subdued or quiet child had been found to be under the "stress of excitement." See, e.g., Dezarn v. State, 832 P.2d 589, 591 (Alaska Ct.App.1992) (statement to mother by two-year-old child, who had been unusually quiet, concerning sexual abuse by defendant was excited utterance; extreme emotion can still a person's speech as well as evoke it); State v. Kay, 129 Idaho 507, 927 P.2d 897, 907 (Ct.App.1996) (four-year-old child, who had dried tear tracks on face and was unusually subdued and quiet, was found to be under stress of abduction and molestation when making statements to mother and officer); People v. Nevitt, 135 Ill.2d 423, 142 Ill.Dec. 854, 553 N.E.2d 368, 376 (1990) (statement to mother by three-year-old child, who was uncharacteristically silent and withdrawn, concerning sexual abuse by defendant was excited utterance); State v. Hobby, 9 Neb.App. 89, 607 N.W.2d 869, 876 (Ct.App.2000) (victim, who was upset, nervous, withdrawn, and uncomfortable, was speaking under stress of

nervous excitement and shock produced by assault perpetrated by defendant); State v. Kaytso, 684 P.2d 63, 64 (Utah 1984) (child who gives statement under stress of nervous excitement need not be hysterical as long as still under emotional influence of the event); Braxton v. Commonwealth, 26 Va.App. 176, 493 S.E.2d 688, 692 (Ct.App.1997) (statement by three-year-old child approximately one hour after discovered with mother's body was admissible as excited utterance; although record did not establish how much time had passed following mother's death, child remained visibly distressed, i.e., was quiet and dazed, through time of statement).

Like the child in Sims, Duce was under the stress of the excitement caused by his mother's shooting when he made the various, spontaneous statements to law enforcement and EMS personnel. While Taylor testified that Duce "seemed kind of happy go lucky," he initially described the child as "not too upset to a great extent" and admitted that EMS workers were actively trying to entertain Duce. That EMS workers were able to momentarily distract Duce does not negate the stress of the excitement considering that the record shows that all three children were in the trailer at the time of the murder, that Duce immediately went to the neighbor's house upset and crying to tell them what had happened, that Duce and the other children had their mother's blood on their clothing, and that Duce had repeatedly identified "Shi's daddy" as the shooter to multiple first responders without being prompted shortly after the murder was committed. Even without a proffer of the evidence to preserve the error, the record indicates that Duce's statements were excited utterances.

Additionally, the statements could have been entered under the present sense impression exception to hearsay. A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Rule 803(1), SCRE. The State's timeline presented at trial supports

that Duce made the statements about the attack on his mother immediately after it occurred. It is undisputed that Duce was in the home when Jones was shot. His immediate statements to first responders were that "Shi's daddy" or "Shortycake" shot his mother. The police investigating the case confirmed that "Shi's daddy" was Rashad Johnson who was also known as "Shortycake." Importantly, Johnson was someone Duce was familiar with – Johnson was the father of Duce's younger half-brother, Shi. Based on the record, it can be reasonably concluded that Duce perceived the shooting of his mother, recognized the shooter, and identified that person to first responders once they were on the scene giving them his present sense impression of what had just occurred.

Our Supreme Court held in Dove, *supra*, that the defendant was prejudiced because "he was unable to present relevant and important evidence supporting his assertion that his wife committed suicide" to the jury. Dove at 303, 523 S.E.2d at 461. Here, as in Dove the jury never had a chance to consider crucial, relevant, and exculpatory evidence that supported Petitioner's assertion of actual innocence. Petitioner could have used Duce's statements to cast doubt on the highly biased and inconsistent testimony of Blakeney. The State's case was almost entirely circumstantial and without the testimony of Blakeney there was nothing connecting Petitioner to the murder. The fact that the jury never had the opportunity to consider the statements of Duce that directly inculpated another person in the murder of his mother undermines the confidence in the outcome of Petitioner's trial.

If the jury had heard the spontaneous statements of Duce made to various first responders, it can be reasonably deduced that the outcome of Petitioner's trial would have been different. Additionally, had Counsel Frick successfully preserved the record for appellate review, it is highly probable that the appellate court would have ruled the exclusion of the

evidence was improper and reversed Petitioner's conviction. By failing to proffer the testimony and protect the record for full appellate review, the confidence in the outcome of Petitioner's trial has been severely undermined. Petitioner was undoubtedly prejudiced because he was unable to present relevant and exculpatory evidence to the jury that supported his assertion of innocence and was further prejudiced when this Court was precluded from reviewing the exclusion of that evidence because the issue was preserved.

A criminal defendant is entitled to effective assistance of counsel under the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984). When a defendant challenges a conviction on the ground that counsel was ineffective, the question becomes, "'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466 U.S. at 686; see Ard v Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Pursuant to Strickland v. Washington, an applicant must show that counsel's performance was deficient and that counsel's "deficient performance prejudiced the defendant to the extent that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688).

In the present case, Petitioner has shown both deficient performance and prejudice. Counsel Frick's failure to preserve the record for appellate review cannot be justified as a valid trial strategy. The failure to proffer the testimony and obtain a final ruling on the admission or exclusion of the exculpatory hearsay statements was in no way reasonable under prevailing professional norms. The statements made by Duce were critical to Petitioner's defense and should have been admitted as either excited utterances or present sense impressions for the jury to consider. When that did not

occur, it was incumbent upon Counsel Frick to ensure a higher court could review the decision of the trial court. Failure to preserve the record on this issue was ineffective assistance of counsel.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully request that this Court vacate his conviction and sentence and remand his case to the Court of General Sessions of Lancaster County for a new trial.

Jessica M. Saxon
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 8th day of February, 2023.