STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Jan 30 2024

S.C. SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

BRIAN KENDRICK SPEARS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001070

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found counsel provided effective representation, where the trial court admitted as an excited utterance the testimony of Danyell Hammonds that a month before his death, Decedent declared Petitioner shot him in the Walmart parking lot, where counsel failed to present evidence from Officer Jackson that Hammonds told him another man (not Decedent) was the declarant, since the hearsay would not have qualified as an excited utterance absent counsel's deficient performance, and where Petitioner was prejudiced by the admission?

STATEMENT

On August 23, 2007, an Horry County Grand Jury indicted Brian "Bos" Spears, Petitioner, for murder and three counts of assault and battery with intent to kill (ABWIK). App. 973 – 980; App. 315, ll. 2-5. Petitioner was tried from May 10 – 13, 2010, before the Honorable Larry B. Hyman, Jr., and a jury. Petitioner was represented by Barbara Pratt. Donna Elder and Lawrence Filiberto prosecuted the case. App. 1.

At approximately 2:30 a.m. on May 27, 2007, Aaron Hammonds (Decedent) was shot and killed while walking down Ocean Boulevard during Memorial Day "bike week" in Myrtle Beach. Three bystanders were also hit by gunfire but they lived. App. 131, l. 4 – 134, l. 22; App. 143, l. 21 – 148, l. 16; App. 170, l. 22 – 171, l. 5; App. 189, l. 11 – 190, l. 6; App. 200, l. 5 – 207, l. 9; App. 351, l. 22 – 353, l. 3. The State alleged the shooting was gang-related payback for the killing of Eric Floyd several years earlier. Decedent was convicted of accessory after the fact to Floyd's murder, and he had recently been released from incarceration for that killing. The State alleged Decedent was a member of the "Bloods" gang and Appellant and Floyd were members of a rival "41 Curve" or "G.D. Folk Nation" gang (41 Curve). App. 274, l. 20 – 275, l. 23; App. 288, l. 23 – 291, l. 19; App. 360, ll. 8-20; App. 439, ll. 4-12.

Jeffrey "Bird" Bethea was a highly-ranked member of the 41 Curve gang. Bethea was with Eric Floyd when Floyd was shot and killed several years earlier, and Bethea "lost respect" in the gang because he let Floyd get killed. App. 274, l. 20 – 275, l. 23; App. 288, l. 23 – 292, l. 3. At trial, the parties disagreed who shot Decedent during bike week. The State alleged it was Petitioner or possibly Petitioner and Bethea, and the defense alleged it was only Bethea. App. 632, l. 16 – 636, l. 5; App. 558, ll. 19-22; App. 575, ll. 14-23. The day after the shooting Bethea was overheard at a cookout bragging that Decedent was "smoked sausage," i.e., that he had been killed. App. 331,

l. 1 – 332, l. 1. Notably, the two women who were with Decedent when he was killed, Brittney Maynor and Alexis Brown, testified that the shooter had long braided or dreadlocked hair. Critically, Bethea, not Petitioner, had long hair (dreadlocks). Petitioner had short hair. However, one of the women said the shooter had on a red shirt and the other woman said the shooter had on a red hat. Petitioner had on a red shirt and red and black hat. App. 203, l. 13 – 208, l. 14; App. 299, ll. 3-11; App. 324, ll. 16-20; App.. 325, l. 19 – 326, l. 6; App. 544, l. 4 – 550, l. 22.

Bethea and Petitioner were both charged with the murder and ABWIK counts. No forensic evidence connected Petitioner with the crime. App. 411, ll. 8-16. Petitioner denied shooting Decedent when he was interviewed by police officers. App. 414, ll. 7-9. The defense at trial was one of mere presence. App. 628, l. 23 – 629, l. 4. The State's star witness was Bethea, who agreed to cooperate with the prosecution and pleaded guilty to the reduced charge of voluntary manslaughter for a negotiated twenty-year sentence. Bethea had not yet been sentenced at the time of his testimony. App. 437, l. 10 – 438, l. 10; App. 465, ll. 13-24. Bethea claimed he was with Petitioner when they ran into members of the rival gang. According to Bethea, he and Petitioner decided they should "kill them before they kill one of us." Bethea claimed he and Petitioner went after the rival gang members, with Petitioner armed with gun and Bethea armed with a knife. Bethea claimed Petitioner pulled his gun and Bethea heard shots; everyone ran. App. 443, l. 1 – 452, l. 24; App. 448, ll. 5-9.

Other notable evidence at trial included the testimony of Petitioner's former cellmate, Timothy Smith, who claimed Petitioner told him he killed Decedent because Bethea would not do so. App. 501, l. 19 – 507, l. 6. The State also introduced rap lyrics written by Petitioner it argued were evidence of guilt. App. 406, l. 7 – 407, l. 16.

Finally, the State argued Petitioner had a motive because he had tried to kill Decedent a month before and failed. Danyell Hammonds (Hammonds), Decedent's sister, testified that Decedent came home bloody and "shocked" approximately a month before he was killed. Hammonds' testimony was proffered, and she stated Decedent came into the house bleeding from a grazed shoulder. Hammonds said Decedent stated he had been shot by "Bos" at the Walmart in Lumberton, North Carolina. App. 223, l. 6 – 225, l. 5; App. 228, l. 18 – 231, l. 3. Petitioner was never charged with or convicted of this offense. App. 264, ll. 7-13. Defense counsel cross-examined Hammonds during the proffer and asked her whether she remembered giving a statement to Officer Mark Jackson in which she stated that a man named Lemark Irons was the person who told her Decedent had been shot by "Bos." Hammonds said she did not remember. App. 235, ll. 5-25. The trial court found Hammonds' testimony was admissible, and it found, inter alia, Decedent's statement to Hammonds about the identity of the Walmart shooter met the excited utterance exception to the hearsay rule.[1] App. 265, l. 11 – 266, l. 11; App. 268, ll. 18-21; App. 269, ll. 13-14. The jury thus heard about the prior Walmart shooting allegation. App. 271, l. 7 – 273, l. 2.

Although the jury deliberated for eight hours, Petitioner was convicted as indicted. App. 658, ll. 23-25; App. 668, ll. 15 – 670, l. 3. He was sentenced to serve concurrent terms of imprisonment of thirty years for murder, and twenty years for each count of ABWIK. App. 680, ll. 11-17. On September 26, 2019, after his convictions were affirmed on direct appeal, Petitioner filed an application for post-conviction relief (PCR). App. 876 – 884. The State made its return

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1 The trial court also found the Walmart shooting incident was admissible under Rule 404(b), SCRE. The direct appeal of the case centered around the trial court's failure to perform an on-the-record balancing test regarding the Walmart incident pursuant to Rule 403, SCRE. *See* App. 716 – 725; App. 873 – 874.

and motion for a more definite statement on March 3, 2021. App. 885 – 899. On September 6, 2022, a hearing was held on the matter before the Honorable Kristi F. Curtis. Steven Fowler represented Petitioner. Chelsey Marto represented the State. App. 900.

At the PCR hearing, Petitioner testified that defense counsel should have called Officer Mark Jackson or used his investigative report to show that Danyell Hammonds originally stated it was Lemark Irons who declared Petitioner was the Walmart shooter. Had counsel done so, Lemark Irons' identification of Petitioner as the shooter would not have qualified as an excited utterance since Irons was not present during the shooting. (The prosecutor admitted Irons was not at the scene of the Walmart shooting.) App. 905, l. 6 – 909, l. 13; App. 257, l. 20 – 258, l. 1. Petitioner testified,

> **Mark Jackson, he could have impeached the testimony for the simple fact that in the investigative report . . . it is clearly stated in there that the Mark Irons [sic], the victim's friend told her about the prior bad act, but come time for trial all of a sudden it's transformed into the victim has directly – the deceased victim has directly told his sister about the prior bad act now.**
>
> . . .
>
> [I]t's basically hearsay because if Mark Irons is the one who is telling her that a prior bad act occurred where there was a lead shootout between me and the deceased victim, but now when it comes time for trial she's directly saying that her brother told her out of her mouth, that's not what she told Mark Jackson.
>
> . . .
>
> It was extremely prejudicial . . . propensity evidence because they're going to try to say it was a common scheme going on like it was a back and forth, but clearly that's not what's going on because **I was never charged with this crime** or anything or questioned . . . [but] the jury could have easily came to the conclusion that if he shot him this time then he had to be the guy who shot him this time.
>
> . . .
>
> All of a sudden it **transformed from blatant hearsay from the Mark Irons to, now he's coming in and he's bleeding so it's an excited utterance exception** to allow this in.

App. 905, l. 21 – 906, l. 2 (emphasis added); App. 906, ll. 9-14; App. 906, l7 – 907, l. 2 (emphasis added); App. 909, ll. 10-13 (emphasis added).

Trial counsel remembered that Hammonds testimony "was different from what she had said before." App. 945, ll. 8-12. However, counsel apparently forgot the procedural posture in which this issue arose—an in camera proffer as to the admissibility of this prior bad act evidence. Counsel testified Officer Jackson "probably would not have been particularly helpful to us. He might have said he didn't remember, he might have said, I guess if that's what the report said, but then it opens it up for the State to cross-examine, and they can have a field day, and that's why I usually, as a matter of strategy, don't call police." App. 940, ll. 8-13. Trial counsel mistakenly believed it would not have been "significant as to which person told [Hammonds]." App. 946, ll. 5-8. Counsel continued,

> I don't know that it would matter who told Danielle, although **I understand Brian's concern about the fact that if—that when the Court talked about it being an excited utterance it was whether or not the victim Aaron Hammond had said it to Danielle or not. But, you know, under Rule 613, when you're trying to put in extrinsic evidence to impeach somebody**, and they say, no, they don't recall, then I think there's some difficulty in putting up another witness to say, this is who you actually said . . .

App. 944, ll. 16-25. Regardless of Rule 613, counsel could have simply put up Officer Jackson during the in camera hearing on the admissibility of the hearsay/prior bad act evidence.

On June 20, 2023, the PCR court issued an order of dismissal. The court found counsel was not ineffective for failing to call Officer Jackson or use his report. "This Court finds that the officer's investigative report was likely not admissible, as any statements the witness she made to the officer would have been hearsay." App. 967. "Additionally, Counsel credibly testified that she did not think that this witness would be helpful. Instead, she testified that calling him would open the door to entry of further incriminatory evidence." App. 968. "This is a reasonable strategic

reason for not calling him to testify. Additionally, Applicant has failed to meet his burden of proof in establishing prejudice. *See Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (Mere speculation regarding the witness's testimony is insufficient to establish prejudice)." App. 968.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found counsel provided effective representation, where the trial court admitted as an excited utterance the testimony of Danyell Hammonds that a month before his death, Decedent declared Petitioner shot him in the Walmart parking lot, where counsel failed to present evidence from Officer Jackson that Hammonds told him another man (not Decedent) was the declarant, since the hearsay would not have qualified as an excited utterance absent counsel's deficient performance, and where Petitioner was prejudiced by the admission.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE. The hearsay rule is a "restriction on the proof of fact through extrajudicial statements." *Dutton v. Evans*, 400 U.S. 74, 88 (1970). "Hearsay testimony is inadmissible because the adverse party is denied the opportunity to cross-examine the declarant." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 150-51 (1985) (citations omitted).

However, exceptions exist—some statements are not excluded by the hearsay rule, regardless of the availability of the declarant. Pertinent here, an excited utterance is not excluded by the hearsay rule. Rule 803(2), SCRE. Rule 803(2), SCRE, provides that 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." "A 'declarant is a person who makes a statement." Rule 801(b), SCRE.

In this case, the trial court found testimony about the Walmart shooting was admissible under the excited utterance exception to the hearsay rule. That was because during the proffer,

Danyell Hammonds claimed the identity of the declarant who identified Petitioner as the shooter was Decedent, the person who was struck by a bullet. However, closer in time to the event, Hammonds had told Officer Jackson that Lemark Irons, not Decedent, was the declarant who identified Petitioner as the Walmart shooter. The State conceded at trial that Irons was not with Decedent when Decedent was shot at Walmart. Therefore, had the trial court heard evidence that Irons, not Decedent, was the declarant, it would not have found the testimony to qualify under the excited utterance exception. Instead, Hammonds' testimony about the Walmart shooting would have been excluded by the hearsay rule. Rule 802, SCRE.

As seen, defense counsel testified she did not call Officer Jackson or use his report since the State would be able to cross-examine him. This was not a valid, strategic decision. Apparently, counsel forgot the posture in which this issue arose—during an in camera proffer on admissibility. No damaging evidence could have been elicited since the jury was not present. Moreover, Officer Jackson had already appeared as a State's witness during a pretrial hearing—if there was damaging testimony the State wanted to elicit from him, it certainly could have called him in its case-in-chief and done so. *See Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("counsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial"); *Brown v. State*, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("although we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this 'strategy' cannot be construed as a valid one given the evident impropriety of the solicitor's remarks").

Similarly, because this was an in camera hearing on the admissibility of Hammonds' testimony about the Walmart shooting, this was not a Rule 613 problem. *See* Rule 613(b), SCRE: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the

witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement." "If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." Rule 613(b), SCRE. Counsel did not need to impeach Hammonds with Officer Jackson, she simply could have put him up as a witness at the in camera hearing, so the court could consider his testimony in determining whether to admit the evidence.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. As discussed above, counsel should have used testimony or evidence from Officer Jackson to show that Decedent was not the declarant of the statement that Petitioner was the person who shot at Decedent at Walmart. Rule 802, SCRE; Rule 803(2), SCRE.[2] Counsel's failure to do so was deficient performance. *Strickland v. Washington*, 466 U.S. at 687.

"To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C.

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[2] This testimony would not only have gone towards admissibility as a hearsay exception, it also would have gone to whether the State met its burden of proving a prior bad act not subject to conviction by clear and convincing evidence pursuant to Rule 404(b), SCRE. *See State v. Smith*, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989) (in a criminal case, evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction).

203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In determining whether an applicant has proven prejudice, the strength of the State's case is one significant factor to be considered, along with the specific impact of counsel's error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018).

This was not mere speculation. *See Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) ("applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice"). Trial counsel did not dispute that Officer Jackson's report stated Hammonds told him Irons was the declarant rather than Petitioner. Trial counsel simply believed which person was the declarant was not "significant," and as a general matter she did not call police officers as witnesses. Petitioner was prejudiced by the deficient performance. The jury struggled with this case, deliberating for eight hours and rehearing the testimony of several witnesses. The two women with Decedent when he was killed testified the shooter had long hair. Bethea had long hair, not Petitioner. The specific impact of counsel's error was to draw the jury's attention away from the issue of identity and instead focus it on inadmissible hearsay which went to propensity. *Smalls v. State*, 422 S.C. at 190, 810 S.E.2d at 844; *Strickland v. Washington*, 466 U.S. at 687.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests that a writ of certiorari be granted to allow full briefing on this issue.

Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of January, 2024.

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S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 30th day of January, 2024.