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May 02 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Lancaster County
The Honorable R. Knox McMahon, Trial Judge
The Honorable Paul M. Burch, Post-Conviction Relief Judge

Appellate Case No. 2019-001272

Devatee T. Clinton

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR REHEARING AND REHEARING EN BANC

On April 17, 2024, a three-judge panel of this Court reversed the post-conviction relief court's denial of relief to Petitioner Devatee T. Clinton. In reversing the post-conviction relief court, this Court found that trial counsel's performance was deficient because he failed to proffer the testimony of the responding officer and that this deficiency prejudiced Petitioner because the outcome of trial would likely have been different "if the excited utterances naming another person as the perpetrator had been admitted (or properly proffered)." State v. Clinton, Op. No. 2024-UP-129 (Ct. App. filed April 17, 2024). Because this panel's holding is in direct conflict with the opinion from another panel of this Court that heard and ruled on Petitioner's direct appeal[1],

[1] State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016).

Respondent respectfully petitions for rehearing and further petitions for rehearing en banc pursuant to Rules 219,[2] 221(a), and 240, SCACR.

During his direct appellate review, Petitioner argued that the trial court erred in excluding the hearsay statements of the victim's son, wherein the declarant stated a person other than Petitioner or his co-defendant had shot the victim, as the statements were admissible as excited utterances or as present sense impressions. In response, the State argued the issue was not preserved for appellate review as Petitioner failed to make an adequate proffer after receiving a favorable ruling on the State's motion *in limine*, citing State v. Trotter, 322 S.C. 537, 543, 473 S.E.2d 452, 455 (1996) ("Inasmuch as petitioner was granted the relief he sought, but failed to take advantage of it, there was actually no issue to be decided on appeal"), and State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (where defendant received the relief requested from the trial court, there is no issue for the appellate court to decide).

This Court agreed with the State, holding the issue was not properly preserved for appellate review, citing 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). Petitioner sought rehearing, arguing this Court misapplied the preservation standard and the record was sufficient to show what the content of the oldest child's statement would have been from the discussion in the State's motion *in limine*, citing Jamison v. Ford Motor Co. 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) ("[T]this rule regarding proffers has been

[2] Respondent acknowledges that "[a] hearing or rehearing *en banc* is not favored and ordinarily will not be ordered," but asserts that "consideration by the full court is necessary to secure or maintain uniformity of its decisions[.]" Rule 219(a), SCACR.

relaxed where the appellate court is able determine from the record what the testimony was intended to show and that prejudice clearly exists.'). This Court summarily denied Petitioner's petition for rehearing.

Petitioner then sought certiorari review from the South Carolina Supreme Court pursuant to Rule 242, SCACR, arguing that this Court had misapplied the preservation standard. The State maintained its position that the issue was not preserved for appellate review and further argued the trial court did not abuse its discretion in ruling Petitioner had failed to establish the foundation necessary to admit the hearsay statements, as no evidence was presented to support the position that the minor child witnessed the shooting. The Supreme Court denied the petition for writ of certiorari.

Thereafter, Petitioner sought post-conviction relief, arguing in part that trial counsel was deficient for failing to preserve for appellate review the issue of the exclusion of the hearsay statements from the minor child. At his evidentiary hearing, Petition testified on his behalf and presented testimony from trial counsel. Crucially though, Petitioner, who firmly had the burden of proof to establish his claims, failed to present any additional witnesses or otherwise offer evidence of any additional testimony in accordance with the South Carolina Rules of Evidence. Thus, Petitioner, while raising a claim that trial counsel was ineffective for failing to make a proffer at trial, failed to make the exact proffer he asserted trial counsel was constitutionally ineffective for failing to make.

At the hearing, trial counsel explained why he did not proffer testimony at trial, stating that he "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." (App. p. 1051, ll. 15-18). The post-conviction relief court

denied relief, finding Petitioner failed to meet his burden of establishing any constitutional deprivations entitling him to relief, including the claim currently before this Court.

Thereafter, Petitioner sought appellate review of the denial of his post-conviction relief action pursuant to Rule 243, SCACR, arguing the post-conviction relief court erred by failing to find trial counsel ineffective for failing to proffer Investigator Taylor's testimony because this Court held the issue was not preserved for direct appellate review.

Following briefing and oral argument, a three-judge panel of this Court reversed the post-conviction relief court, finding that Petitioner met his burden of establishing both that trial counsel was deficient and that this deficiency resulted in the requisite prejudice necessary for the grant of a new trial. Specifically, the panel of this Court found: (1) the trial court's ruling that the hearsay statements were admissible as excited utterances was proper; (2) the statements themselves inferred the declarant had witnessed the shooting; (3) the post-conviction relief court erred in finding trial counsel was not deficient as he failed to provide an objectively reasonable strategic reason for his failure to make a proffer; and (4) Petitioner suffered the necessary prejudice to warrant relief because the "State's case turned on witness credibility, and the State failed to produce strong evidence other than Blakeney's testimony. Thus, because there is a reasonable probability that the outcome of [Petitioner's] trial would have been different if the excited utterances naming another person as the perpetrator had been admitted (or properly proffered)."

Respectfully, this panel's ruling is incongruent with the ruling from the panel who determined Petitioner's direct appellate review based upon the same record as to the substantive issue before both panels. At the evidentiary hearing, Petitioner merely presented new testimony concerning trial counsel's strategy, which enabled this Court to conduct a meaningful review of the post-conviction relief court's finding concerning deficiency. Critically though, Petitioner

utterly failed to present any testimony or evidence whatsoever as to what helpful testimony Investigator Taylor would have provided had Trial Counsel made a proffer during his trial. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding an applicant could not establish prejudice based on a claim that counsel was ineffective for failing to present an alibi witness where applicant failed to "produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.'); see also Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (holding that pure conjecture as to what a witness's testimony would have been is not sufficient to show a reasonable probability the result at trial would have been different). Because Petitioner continued to fail to present this crucial evidence at the evidentiary hearing, it is axiomatic that the record before this Court on post-conviction relief review is the same as it was on direct appeal as to this issue. Despite this same record, this panel perplexingly speculated that the previously insufficient record was now sufficient enough to allow a determination on the admissibility of the minor child's out-of-court statements. Based on that determination, this panel rejected the post-conviction relief court's ruling and granted a new trial.

This Court's decision on Petitioner's direct appeal was sound, properly finding the issue unpreserved and refusing to analyze error and prejudice where the evidence and testimony presented at trial did not allow the Court to meaningfully do so. See Vause v. Mikell by Solomonic, 290 S.C. 65, 348 S.E.2d 187 (Ct. App. 1986) ("Even if a trial judge errs in excluding evidence, the case cannot be reversed on this basis unless the appellant shows prejudice."); see also Honea v. Prior, 295 S.C. 526, 534, 369 S.E.2d 846, 851 (Ct. App. 1988) ("Because Prior made no offer of proof, we do not know whether Burns' evaluation of Honea's psychiatric condition would have been favorable to Prior or not. Unless a party includes an offer of proof in the record, there is nothing for us to review.").

Now, based on the same evidence and testimony as was before this Court during Petitioner's direct appeal, this Court was surprisingly able to make definitive and conclusory findings that a proffer of Investigator Taylor's testimony would have resulted in the admission of the hearsay statements and exonerated Petitioner—despite not knowing what that testimony would have actually been because Petitioner (who holds the burden of proof) utterly failed to present such evidence to support his claim. A proffer could have resulted in favorable testimony—as this Court presumes—but it just as likely could have resulted in unfavorable testimony that would have been harmful to Petitioner's case. Indeed, it appears quite telling that Petitioner—aware the absence of a proffer was the basis of the denial of relief on his direct appeal—elected not to make the necessary proffer at the evidentiary hearing.

Without the benefit of a proffer, which Petitioner unquestionably had multiple opportunities to present, this Court cannot determine if Petitioner suffered prejudice, just as this Court determined in their previous opinion in Petitioner's case. State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016); Rental Unif. Serv. of Greenville, S.C., Inc. v. K & M Tool & Die, Inc., 292 S.C. 571, 357 S.E.2d 722 (Ct. App. 1987) ("K & M's failure to object at that time constitutes a waiver of its right to raise on appeal any question concerning the propriety and prejudicial effect of opposing counsel's argument.").

The three-judge panel of this Court that found the content of the declarant's hearsay statements and the declarant's presence in the home inferred personal knowledge of the identity of the shooter ignores the trial court's ruling that Petitioner would need to produce more to establish the foundation for admissibility. (App. p. 167, ll. 14-15) ("*Presence in the home doesn't mean observation of the fatal act*. That's all I am saying.") (emphasis added). Importantly, this precise issue was reviewed by this Court on direct appeal and found unpreserved; nevertheless, without

new facts, this Court has determined it is sufficiently inferable the declarant actually witnessed the shooting, such that the evidence was admissible. State v. Morales, 439 S.C. 600, 889 S.E.2d 551 (2023), citing Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) (The purpose of South Carolina's issue preservation rule is to give the trial court an opportunity to rule, thereby providing the reviewing court with the ability to provide "meaningful appellate review.")); State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986) (Where a trial judge excludes evidence, a proffer is necessary to demonstrate the admissibility of the excluded evidence and aid the reviewing court in determining error and prejudice to the aggrieved part.).

Further, the three-judge panel of this Court found there was a reasonable probability the outcome of Petitioner's trial would have been different had the hearsay statements been admitted, because the State failed to produce strong evidence other than the co-defendant's testimony. This ignores the other corroborating circumstantial evidence presented at trial implicating Petitioner in the robbery as the shooter.[3] Additionally, it ignores the fact that no credible evidence was

[3] Testimony of multiple witnesses establishing the relationship between the co-defendant and Petitioner, their statements of their intention to commit a robbery a day before the victim's death, and statements Petitioner made about having a gun in his possession he same day. (App. pp. 261–67; 271–79; 282–89; 291–94; 725–29). Testimony that two individuals borrowed a white ragtop Cadillac, circumstantial and direct witness testimony placing that Cadillac on the road leaving the trailer park where the victim lived in haste, and seeing the same Cadillac the next day at Piggly Wiggly. Additionally, investigators discovered molding from the Cadillac on the trailer park road. (App. pp. 242–52; 295–301; 380–401; 535–40; 546–47; 731–43). A jumpsuit discovered in the Cadillac that a witness identified Petitioner wearing the night of the murder along with testimony of Petitioner's response upon hearing about the murder of the victim, and DNA analysis of the jumpsuit which did not exclude his DNA or the DNA of the victim. (App. pp. 391–401; 534–40; 546–47; 597–615; 625–34). This evidence was presented in addition to Petitioner's co-defendant's statements implicating Petitioner and testimony that Petitioner made a statement he killed the victim. (App. pp. 739–75).

presented at Petitioner's trial of Rashad Johnson's, the subject of the declarant's hearsay statements, involvement. See, e.g., State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) ("[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; *evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible* … [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party") (emphasis added). Notably, trial counsel testified at the evidentiary hearing that law enforcement investigated Rashad Johnson prior to trial, and he had an alibi. (App. pp. 1050; 1064).

Lastly, the three-judge panel of this Court concluded the "trial court correctly determined AN's statement…met the admissibility requirements for an excited utterance exception to the hearsay rule." However, regarding the admissibility of the hearsay statements as excited utterances, the trial court merely stated, "*Depending on how it develops*, I think is admissible," and thus, made clear Petitioner would need to establish a foundation for admission. (App. pp. 177, l. 21; 177–179) (emphasis added). The trial court never made specific findings based on the testimony presented whether the hearsay statements constituted an excited utterance. Importantly, the evidence presented through Investigator Taylor established the declarant was being treated and entertained by EMS, his bloody clothes had been taken off him, and he did not appear upset. (App. pp. 500–502). On direct appeal, this Court refused to review this issue and determine whether or not the statements constituted an excited utterance based on the insufficiencies in the record.

Accordingly, for the foregoing reasons, Respondent respectfully urges this Court to reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new ruling comporting with its earlier decision as the record is insufficient for this Court to find Petitioner suffered prejudice from the exclusion of the minor child's hear statements. By doing so, this Court will maintain uniformity of its decisions and protect long-held legal principles that are integral in the effective application of the law. Furthermore, pursuant to Rule 219(b) of the South Carolina Appellate Court Rules, the State respectfully suggests this Court rehear the matter *en banc* in order to resolve the lack of uniformity that exists between its decision in Petitioner's direct appeal and post-conviction relief appeal. See Rule 219(a), SCACR (explaining "rehearing *en banc* is not favored and ordinarily will not be ordered *except* (1) when consideration by the full court *is necessary to secure or maintain uniformity of its decisions*, or (2) when the proceeding involves a question of exceptional importance") (emphasis added)).

|SIGNATURE PAGE FOLLOWS|

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PROOF OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of Respondent's **Petition for Rehearing and Rehearing En Banc** has been served upon Petitioner by electronically mailing a copy to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Jessica M. Saxon, Esq.
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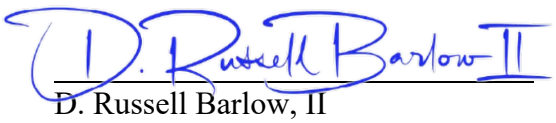
This 2nd day of May 2024.



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