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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

DEVATEE TYMAR CLINTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001272

Appeal from Lancaster County

Honorable Paul M. Burch, Circuit Court Judge

Opinion No. 2024-UP-129

RETURN TO PETITION FOR REHEARING

In a unanimous, well-reasoned, unpublished opinion a three-judge panel of this Court reversed the PCR court's denial of Petitioner's PCR application and remanded Petitioner's case to the circuit court for a new trial. Clinton v. State, Op. No. 2024-UP-129 (Ct. App. filed April 17, 2024). Based on the proper standard of review for the question presented during this stage of the appeal process, this Court determined that Petitioner had shown both deficient performance and prejudice, requiring the grant of a new trial. On May 2, 2024, the State filed a petition for rehearing and suggestion for rehearing *en banc* on the basis that the unpublished opinion from

this panel was in conflict with the unpublished opinion[1] from the panel that heard Petitioner's direct appeal. The State asserted that "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." State's Pet. 5. As explained below, this argument is without merit as it misapprehended the substantive issue before the Court at this stage in the proceedings. Respectfully, this Court should deny the petition for rehearing and suggestion for rehearing *en banc*.

In requesting rehearing, the State failed to recognize that this Court was deciding different substantive issues at each stage of Petitioner's appellate process. The question presented in the direct appeal and the question presented in the PCR appeal undeniably revolved around the same evidentiary issue – the admission of Duce's hearsay statements. However, the matters were not and cannot be viewed through the same lens as one dealt with trial court error, and one dealt with trial counsel error.

On direct appeal the issue before this Court was whether the **trial court** erred in excluding Duce's hearsay statements. The standard of review at that stage of Petitioner's appeal was whether the trial court abused its discretion in excluding the evidence. The admission or exclusion of evidence is subject to an abuse of discretion standard of review. State v. Rosenbaum, 438 S.C. 91, 101–02, 882 S.E.2d 180, 185 (Ct. App. 2022) *citing* State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion ...."). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. *citing* State v. Pittman, 373 S.C. 527,

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

570, 647 S.E.2d 144, 166–67 (2007). In the unpublished string-cite opinion affirming Petitioner's conviction this Court was unable to address the merits of the exclusion of Duce's statements because this Court found the issue unpreserved. Based on the case law cited by this Court in that opinion it can be concluded that the issue was unpreserved because Counsel Frick had 1) only raised the issue *in limine*,[2] 2) failed to raise any arguments regarding the trial courts exclusion of the testimony after the State's objection was sustained,[3] 3) failed to proffer the testimony of the officer,[4] and 4) failed to get a final ruling on the matter that would be sufficient for appellate review.[5] The decision by this Court during Petitioner's direct appeal did not hinge solely on the failure to proffer the testimony but on numerous preservation errors.

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2 State v. Clinton, Op. No. 2016-UP-206 (Ct. App. filed May 11, 2016) *citing* State v. Stokes, 339 S.C. 154, 163, 528 S.E.2d 430, 434 (Ct.App.2000) (holding an issue regarding exclusion of evidence was unpreserved, stating "the record reflects that this issue was only raised and ruled on *in limine*. Stokes never raised the issue again at any time during the trial. Merely raising an argument *in limine* does not preserve the issue for appellate review").

3 Id. *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).

4 Id.

5 Id. *citing* State v. Atieh, 397 S.C. 641, 646, 725, S.E.2d 730, 733 (Ct. App. 2012) ("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. Hicks, 330 S.C. 207, 216, 499 S.E.2d 209, 214 (1998) (holding matters not raised to or ruled upon by the trial court are not preserved for appellate review); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct.App.2004) ("There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed.2002))).

Further, this Court made no rulings on the admissibly of the statements or the sufficiency of the record regarding the content of the statements in the opinion from Petitioner's direct appeal. The unpublished opinion made no factual findings and did not address the merits of the issue. Curiously, the State now appears to infer that this Court ruled on direct appeal that Duce's statements were inadmissible. Such an inference goes far beyond the holding of this Court on direct appeal. The only holding from this Court on the issue of Duce's statements in Petitioner's direct appeal was that the matter was not properly preserved for appellate review. Incidentally, the holding from Petitioner's direct appeal established the deficiency prong for Petitioner's PCR appeal. The unpublished direct appeal opinion is not in conflict with the unpublished opinion from Petitioner's PCR appeal but is in harmony as both opinions found the evidentiary issue of the admission of Duce's hearsay statements unpreserved.

The issue before this Court on appeal from the denial of PCR was whether **trial counsel** provided constitutionally effective assistance when he failed to preserve the issue of the admission of Duce's statements for direct appellate review. On review of denial from PCR this Court defers to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Questions of law are reviewed de novo, with no deference to trial courts. Id. at 180-81, 810 S.E.2d at 839. Pursuant to Strickland v. Washington, , 466 U.S. 668 (1984), 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 determining deficiency this Court found, as it did on direct appeal, that the issue of the exclusion of Duce's hearsay statements was not properly preserved for appellate review. Notably, this Court did not determine that Duce's statements were *per se* admissible. It was however, able to reflect on the record before it and consider the totality of the circumstances to determine that the statements did qualify as excited utterances because 1) the statements were made in relation to the startling event of Duce seeing his mother laying in a pool of blood and his younger siblings standing by her saturated in blood and 2) the statements were made within hours of his mother's death so he was still under the stress of the event. See State v. Sims, 348 S.C. 16, 20, 558 S.E.2d 518, 521 (2002) ("In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances."). These facts were firmly established by the record. App. 460, ll. 12-23; App. 500, ll. 21-App. 501, l. 24.

The State also contends that this Court's determination that Duce had the requisite personal knowledge was improper because there is no evidence that Duce saw his mother being shot. However, the rule requiring personal knowledge does not require evidence of visual observance of an act. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge **may, but need not, consist of the witness' own testimony**." Rule 602, SCRE (emphasis added). Knowledge is gained through all senses, not just sight. During the *in limine* hearing both parties agreed that Duce identified a specific person who was familiar to him as the person who hurt his mother and identified the method by which his mother was hurt, shooting. The record contains substantial circumstantial evidence that supports this Court's finding that Duce perceived the shooting of his mother by a known person whether by sight or sound or some combination thereof, and thus had the requisite personal knowledge.

The State has argued that this Court lacked the ability to determine prejudice from this record because there has never been a proffer of the officer's testimony. The record affirmatively established what Duce told the various officers and first responders. The victim, Jones, was in her mobile home with her children at the time of the shooting. App. 217, ll. 3-11; App. 364, ll. 21-22; App. 194, ll. 14-16; App. 158, ll. 1-2. Duce went to the neighbor's house with his mother's blood on his body crying and upset to get help. App. 162, ll. 13-17; App. 166, ll. 18-23; App. 500, ll. 3-9. 911 was called and first responders were on the scene within minutes. App. 217, ll. 3-11. Duce repeated to numerous first responders that "Shi's daddy" or "Shortycake" or "Jamia's daddy" shot his mother. Shi and Jamia are the same person, Duce's younger half-brother. Shi's father is Rashad Johnson, whose nickname is "Shortycake." App. 158, l.15-App. 160, l. 25; App. 162, ll. 19-23; App. 158-168. All of these facts were established during the *in limine* hearing and have never been contested by the State. It is disingenuous to argue that the record does not contain sufficient facts for a determination of prejudice at the PCR stage. There is no speculation as to what the testimony would have been because the State confirmed that the statements were made and acknowledge the circumstances surrounding their making during the *in limine* hearing. The proffer of the officer, while necessary to preserve the matter for direct appellate review, was not necessary in determining prejudice as Duce's statements and the circumstances around the making of the statements are clear from the record.

Additionally, prejudice can be established because there was not overwhelming evidence of guilt in this case. "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) *citing* Strickland, 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important

factual findings in a particular case). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Id. *citing* Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."); *see also* Strickland 466 U.S. at 696 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

As this Court properly determined the State's case relied on the credibility of the witnesses. There was no forensic evidence linking Petitioner to the crime. Importantly, the only person directly tying Petitioner to the shooting of the victim was his co-defendant Blakeney. Not only was the testimony of Blakeney highly inconsistent throughout the investigation and trial but Blakeney received a great benefit for his testimony. At the time of trial Blakeney was charged with murder and claimed that he had not been promised any help on his pending charge for his testimony. However, Blakeney testified that he was enrolled in college and did not plan on spending the next thirty years incarcerated. App.757, l. 16-App. 758, l. 2. Blakeney ultimately pled guilty to accessory after the fact to murder under the Youthful Offender Act for a term of imprisonment not to exceed six years, suspended upon time served and eighteen months' probation.[6] Without the highly biased, inconsistent testimony of Blakeney, the State would not have been able to prosecute Petitioner.

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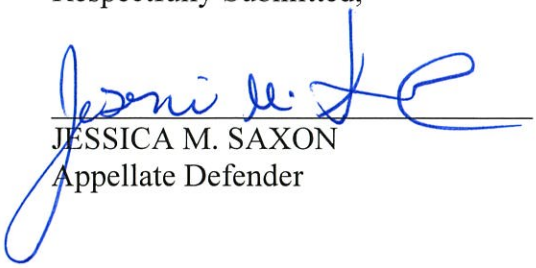
6 See, https://publicindex.sccourts.org/Lancaster/PublicIndex/ (search case number 2014GS2900566); See also Wise v. Wise. 394 S.C. 591, 601, 716 S.E.2d. 117, 122 (Ct. App. 2011) (noting an appellate court can take judicial notice of a fact that was not before the lower court if the fact is indisputable); 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).

Finally, a rehearing, particularly *en banc,* is unnecessary in this matter. "[R]ehearing 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." Rule 219, SCACR. The State has alleged that rehearing or rehearing *en banc* is necessary to maintain uniformity of its decisions. However, this Court's unpublished opinions in both the direct appeal and PCR appeal of Petitioner's case are in harmony. Further, this Court's opinion from the denial of PCR conforms with decades of precedent in this State finding that failure to preserve an issue for review is deficient performance and prejudice occurs when the jury is denied the opportunity to consider valid, exculpatory evidence. Further, as this Court is well aware, pursuant to Rule 268(d)(2), SCACR, an unpublished opinion has no precedential value and cannot be relied upon except in proceedings in which the opinion is directly involved. Therefore, the reach of the opinions discussed *supra* is limited only to Petitioner and his criminal charges. While the question answered by this Court in overturning the denial of Petitioner's PCR application is of exceptional importance to him, it is not so exceptionally important as to require rehearing or rehearing *en banc.*

The undersigned respectfully requests that this Court deny the state's petition for rehearing.

Respectfully Submitted,



JESSICA M. SAXON
Appellate Defender

This 16th day of May, 2024.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Talida Balaj, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); on and Devatee T. Clinton, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC, 29512, this 16th day of May, 2023.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR PETITIONER