THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2022-001717

The State, ... Respondent,

v.

Charles Jason Carmichael, ... Appellant.

PETITION FOR REHEARING

On January 29, 2025, this Court issued an unpublished opinion in which it affirmed Appellant Charles Jason Carmichael's two convictions for murder, and possession of a weapon during the commission of a violent crime. *State v. Charles Jason Carmichael*, Op. No. 2025-UP-032 (S.C. Ct. App. filed January 29, 2025). Pursuant to 221(a) of the South Carolina Appellate Court Rules, Appellant respectfully petitions for rehearing of this matter in light of the facts and law overlooked and/or misapprehended by this Court in rendering its opinion.

Argument

I. The Court overlooked or misapprehended the law on the standard for permitting a witness to testify outside the presence of a defendant.

In affirming the trial court's decision to allow the Child to testify outside of the presence of the Appellant, this Court misapprehends the purpose and standards necessary to accurate evaluate the need for alternative methods of testimony. In this case, the trial court did not interview the Child or directly speak with the Child to assess whether he was capable of testifying in the

presence of the Appellant. The factual circumstances of this case indicate that an interview of the Child was a necessary function of the assessment the trial court was engaging in, and one it should have performed.

Although S.C. Code Ann. § 16-3-1550(E) does not describe how courts should consider the need for alternative methods when vulnerable individuals are involved, in *State v. Murrell*, the Supreme Court established the circumstances under which, and the procedures by which, a child witness may testify outside the presence of the defendant in a criminal trial:

> First, the trial judge must make a case-specific determination of the need for videotaped testimony. In making this determination, the trial court should consider the testimony of an expert witness, parents or other relatives, other concerned and relevant parties, and the child. Second, the court should place the child in as close to a courtroom setting as possible. Third, the defendant should be able to see and hear the child, should have counsel present both in the courtroom and with him, and communication should be available between counsel and appellant.

Id. 302 S.C. at 80–81, 393 S.E.2d at 921.

The trial court must also find that the child witness would be traumatized "not by the courtroom generally, but by the presence of the defendant." S*tate v. Bray*, 342 S.C. 23, 30, 535 S.E.2d 636, 640 (2000) (quoting *Maryland v. Craig*, 497 U.S. 836, 856–7 (1990)). "Denial of face-to-face confrontation is not needed to further state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma." *Id.*

This Court correctly notes that our Supreme Court has declined to impose categorical prerequisites to a trial court's consideration of alternative procedures. And even though it has not mandated a method, the Supreme Court has encouraged trial courts to personally interview the child during its determination. *See Murrell*, 302 S.C. at 82, 393 S.E.2d at 922, n.2 ("In the future, however, we suggest that the trial judge personally interview the child in addition to receiving

expert testimony."); *Bray*, 342 S.C. at 31, 535 S.E.2d at 641 (reiterating that "the better practice in this cases, when possible, is for the trial judge to personally interview the child witness. . . .").

It appears that trial courts often interview the child during its necessity finding as a standard best practice. *See, e.g., State v. Lewis*, 324 S.C. 539, 549, 478 S.E.2d 861, 866 (Ct. App. 1996) (citing *Starnes v. State*, 307 S.C. 247, 414 S.E.2d 582 (1991) (treating psychiatrist's testimony and child's testimony sufficient); *State v. Lopez*, 306 S.C. 362, 412 S.E.2d 390 (1991) (sufficient evidence where the trial court considered a letter from a psychologist, solicitor testified about another psychologist's opinion, and court personally interviewed children); *State v. West*, 313 S.C. 426, 438 S.E.2d 256 (Ct. App. 1993) (sufficient evidence to order alternative procedure where trial court relied on treating psychologist's testimony and personally interviewed child)). In affirming the trial court's failure to do so here, this Court overlooked elements of this case which distinguish it from those traditionally invoking the need for alternative procedures which demonstrates that an adequate showing of necessity was not made.

In the overwhelming majority of cases invoking use alternative procedures, the child witness is also a victim. Historically alternative procedures, including the enactment of South Carolina's statute, developed out of the strong public policy interest in protecting child sex abuse victims from the trauma of testifying before their abusers. *See e.g.*, *Murrell*, 302 S.C. at 81-82 393 S.E.2d at 922. While use of these procedures is not limited to circumstances where the child is also a victim, the relationship between the child and the underlying crime is a significant consideration for the court to accurately assess the showing of necessity.

The trial court's decision to allow the Child to testify outside of Appellant's presence rested on unsupported factual conclusions, and the ruling of this Court to affirm warrants rehearing. The Child was not a victim of the crime in this case. He did not directly witness the shooting taking

place, nor did he observe the perpetrator after the shooting. This Court held that the trial court was not required to interview the Child, in part, because the testimony from the Child's counselor Hannah Hucks, and his grandmother, Rachel Alston, sufficiently established his fear. This finding is inconsistent with the record and contrary to the standards established by precedent.

Testimony from third parties concerning a child's fear of testifying in the presence of a defendant does not meet the showing of necessity when it is merely generalized or non-affirmative. *See e.g.*, *State v. Bray*, 342 S.C. at 31, 535 S.E.2d at 640; *State v. Lewis*, 324 S.C. at 548, 478 S.E.2d at 865. At the pre-trial hearing, Hucks testified that she thought there was a possibility the Child could experience a setback in managing his post-traumatic stress symptoms if he had to testify in the presence of the Appellant. (R. p. 15: 1-17.) She testified that when she talked with the Child about the possibility of testifying in court, the Child told her he was extremely nervous. (R. p. 17: 10-12.) When asked how likely it was that the Child would be unable to communicate in a courtroom setting or whether doing so would be detrimental to him, Hucks testified that she could not speak to the likelihood of either outcome. (R. p. 18: 1-7.) When asked whether the Child would be able to communicate the events even if in the presence of the Appellant, Hucks testified that she could not say for certain. (R. p. 19: 6-11.) Huck's further testified:

> Q. So you can't say either way whether or not he could or could not communicate what happened in front of his uncle?
>
> A. I think that there is a possibility that he would experience post-traumatic stress symptoms, but I can't say for certain because no one can say 100 percent. But it is -- based on my clinical knowledge, it is more likely that he would have trouble than not.
>
> Q. Well, trouble or would it be inability to?
>
> A. I can't say for certain whether he would be completely unable.

(R. p. 19:12-22.)

Hucks's testimony does not specifically or persuasively establish that the Child had a more than *de minimis* fear of testifying in Appellant's presence. At no point in her testimony did Hucks clarify or distinguish whether her opinion was that the Child would be unable to testify in a courtroom setting generally, or whether her concerns specifically related to the Child testifying in Appellant's presence. Hucks additionally made no declaration that the Child would be traumatized by being in Appellant's presence. Instead, when she was asked whether the Child would have trouble or would be completely unable to communicate in front of the Appellant, Hucks testified she "could not say for certain whether he would be completely unable" to testify, suggesting that although the Child may be nervous or have trouble, he was not so afraid as to shut down and be unable to speak.

The Child's grandmother Rachel Alston testified that she did not think the Child would be able to articulate his testimony in front of the Appellant because the Child had told her he was scared of Appellant and never wanted to see him again. (R. pp. 21: 19-25, 22: 1-5.) But when asked specifically what may happen if the Child had to testify in the Appellant's presence, Alton stated "[h]e may stutter a little bit and it may just make him nervous where he can't give the answer that he normally would have given." (R. p. 23: 6-11.) The testimony presented by Alston and Hucks was insufficient to establish the specific and convincing significant harm that the Child would suffer if he was required to testify in Appellant's presence. *See e.g.*, *State v. Carter*, 433 S.C. 352, 355-56, 857 S.E.2d 910, 911-12 (Ct. App. 2021) (Victim's counselor testified that if victim were forced to testify before the defendant "she would freeze up and not be able to be open and upfront with what she needed to say." Victim's mother testified she believed victim would "shut down," and when interviewed by the court, Victim claimed she would "freeze up and have a meltdown" if she testified in front of the defendant.)

Because this case does not involve a circumstance where the child was directly harmed by the defendant at issue, the risk of harm and potential trauma to the Child is reduced, and therefore the burden of proving necessity for alternative procedures is heightened. In light of the above factual deficiencies, the trial court's failure to personally interview the Child and ensure there was an adequate basis for use of the alternative procedure was an abuse of discretion. Because the decision to allow the Child to testify outside of Appellant's presence was a violation of his right to confrontation, rehearing and/or the issuance of a new opinion holding Appellant is entitled to a new trial is warranted.

II. The Court misapprehends the excited utterance exception as it relates to the Child's hearsay statement.

In affirming the trial court's hearsay rulings, this Court overlooked South Carolina case law which requires witnesses to have firsthand knowledge and observe the events they intend to testify about. In doing so, the Court erroneously held that Child's statements were admissible as an excited utterance under the Rule 803(2) exception to hearsay despite the record demonstrating that the Child lacked sufficient firsthand knowledge. Specifically, the Court found that the Child's statement "Uncle Jason shot my mommy" was admissible as an excited utterance despite the fact that "he was hiding in the backseat of the truck and did not ***actually see*** the shooting." Op. No. 52025-UP-032 at 3. (emphasis added). The Court concluded that even though the Child did not actually observing the shooting, he was "still physically present during the shooting" and therefore his statement was "based on his firsthand knowledge of the shooting." *Id.* This is inconsistent with South Carolina case law and the theories underlying our rules of evidence.

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" and may be

admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. For a statement to qualify as 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. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002). This Court relies on the Child's presence in the car as the basis for his firsthand knowledge of who the shooter was. This is erroneous. The mere act of being physically present at the scene of an event does not necessarily establish that the witness had sufficient personal knowledge of the event required for testimony under the South Carolina Rules of Evidence. "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." Rule 602, SCRE.

South Carolina courts have consistently required evidence of a witness's personal knowledge, such as proof they actually observed or saw the event occur, for the statement to be admissible as an exception to the hearsay rules. In *State v. Hill*, the Supreme Court clarified that "statements which are not based on firsthand information, such as where the declarant was not an ***actual witness*** to the event, are not admissible under the excited utterance exception to the hearsay rule." 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (emphasis added).[1] Observation is a standard requirement to establish firsthand knowledge. *See id.* at 100, 501 S.E.2d at 125 (stating a declarant

[1] Citing 23 C.J.S. Crim. Law § 876 (1989)); *People v. Fields*, 71 Ill.App.3d 888, 28 Ill.Dec. 202, 390 N.E.2d 369 (1979) (if nature of event or circumstances indicate bystander did not observe the act, declaration should be excluded); *State v. Kent*, 157 Mich.App. 780, 404 N.W.2d 668 (1987) (declarant must have had opportunity to personally observe the matter of which he speaks); *Commonwealth v. Stetler*, 494 Pa. 551, 431 A.2d 992 (1981) (declarant must have perceived the happening); *Underwood v. State*, 604 S.W.2d 875 (Tenn.Crim.App. 1979) (excited utterance of bystanders admissible when declarant observed the act and the declaration arose from personal observation); *Crawford v. Charleston–Isle of Palms Traction Co.*, 126 S.C. 447, 120 S.E. 381 (1923) (under res gestae exception, declarant must have had opportunity to personally observe the matter of which he speaks)).

"must have had an opportunity to ***personally observe the matter and must have perceived the event***, and if the circumstances indicate the bystander did not observe the act, the declaration should be excluded."); *State v. Davis*, 371 S.C. 170, 180, 638 S.E.2d 57, 63 (2006) (holding that "[b]ecause there is no evidence Hill ***actually saw*** Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule."); *State v. LaCoste*, 347 S.C. 153, 161, 533 S.E.2d 464, 468 (2001) (reiterating the standard that "the excited utterance exception is limited to firsthand information, such as the statements of an ***actual witness to an event***."); *State v. Sanders*, No. 2018-000911, 2022 WL 2720574, at *6 (S.C. Ct. App. July 13, 2022) (witness's text message was not admissible under the excited utterance exception because it did not indicate he witnessed a startling event or condition when he sent the text message) (emphasis added).

Requiring proof of the declarant's perception has also been upheld across other jurisdictions and in our legal treatises. Observation is mandated by the requirement that the declarant's excitement be "caused" by the event or condition. Weinstein's Evidence Manual § 16.03[3] (2024) ("Despite the difference in wording, the requirement of perception is identical in Rules 803(1) and (2).") When there is no evidence of personal observation of the startling event, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as evidence of the declarant's opportunity to observe. *See Miller v. Keating*, 754 F.2d 507, 511 (3rd Cir. 1985). *See also McLaughlin v. Vinzant*, 522 F.2d 448 (1st Cir. 1975) (to be admissible, the declarant of an excited utterance must personally observe the startling event); *State v. Bass*, 198 Ariz. 571, 12 P.3d 796 (2000) (where sole evidence of declarant's personal perception is declaration itself, courts are reluctant to allow excited utterance to stand alone as evidence of declarant's opportunity to observe); *Cluster v. Cole*, 21 Md.App. 242, 319 A.2d 320 (Ct.Spec.App. 1974) (hearsay declaration by unidentified witness to accident ruled inadmissible where nothing

in statement or circumstances under which it was given would make it so inherently trustworthy as to dispense with oath and right to cross-examination).

When direct personal observation of an event does not occur, our courts have only allowed a declarant's statements to be admitted when it is supported by substantial circumstantial evidence demonstrating firsthand knowledge. In *State v. Sledge*, this Court acknowledged that the law "clearly provides that in situations in which the declarant does not have firsthand knowledge because he did not witness an event, statements made by the declarant concerning the event are not admissible under the excited utterance exception to the rule against hearsay." 428 S.C. 40, 54, 832 S.E.2d 633, 641 (Ct. App. 2019). In *Sledge*, even though the child witness did not visually observe his father shooting his mother the Court found the child's statement and perception that his father was the shooter was supported by substantial circumstantial evidence to make it an excited utterance. *Id.* This evidence included the fact that the child had witnessed the argument and physical altercation between his parents prior to the shooting, continued to hear the altercation leading up to the shooting, observed his mother's body after the shooting and the fact that his father had left the house, and the child's knowledge that no other visitors or individuals were in the home that day. *Id.*

This Court applied similar considerations in a recent PCR case involving the trial level admissibility of a child witness's statement identifying the perpetrator of his mother's homicide. *Clinton v. State*, No. 2019-001272, 2024 WL 1655725 (S.C. Ct. App. Apr. 17, 2024). Like *Sledge*, in *Clinton* the child witness made several statements identifying who the shooter was. This Court held that substantial circumstantial evidence in the case suggested the child had witnessed the intruder shoot his mother. *Id.* at *4. It was this substantial circumstantial evidence, in addition to the child's identification of the shooter, that rendered it sufficient to infer that the child observed

the shooter and therefore the child's statement was based on firsthand information and qualified as an excited utterance. *Id.*

In the present case, the Court overlooked the above precedent and factual record when it held the Child's statement was based on sufficient firsthand knowledge. The declarant of an excited utterance must personally observe the startling event for the statement to be admitted. During trial, the Child's testimony reveals the only reason he believed the shooter was his "Uncle Jason" is because he claims he heard his mother say "Jason, where is my baby's daddy?" before she was shot. (R. p. 88: 5-19.) The Child testified he was in the backseat of the truck hiding at this time and did not see or observe the vehicle that pulled up next to their truck. (R. p. 87: 19-25.) His testimony confirmed that he did not see anything beside the truck, or any other vehicles next to the truck at that time. (R. p. 89: 15-20.) Critically, the Child testified that he did not see anyone either approaching his mother's truck or observe anyone get near the truck while he was hiding in the backseat. (R. p. 89: 21-23.)

The Child did not see, hear, or otherwise witness the shooter in any way. No evidence in the record supports the conclusion that Child had firsthand knowledge of who the shooter was. Being physically present for the shooting, without any further observation, would only allow the Child to testify that a shooting had occurred because that is the only thing he actually observed. The trial court erred in admitting the Child's statement that Appellant shot his mother. The Child admitted he did not witness the event or perceive the shooter, and the record is devoid of any evidence otherwise establishing that he had firsthand knowledge of the shooters identity. Moreover, this case lacks any substantial circumstantial evidence like that present in *Sledge* and *Clinton* to validate the Child's perception. The one and only tether giving rise to the Child's belief is his mother's statement to an unknown, unobserved individual.

In misapplying the law, this Court erroneously affirmed the trial court's hearsay ruling resulting in an expansion of the excited utterance exception to permit a declarant to identify the perpetrator of a crime without the declarant having actually witnessed the crime or observed the perpetrator at all. Because the Child did not actually observe the event or shooting his statement was inadmissible hearsay. At trial the State compounded this prejudicial error by repeatedly introduced the Child's hearsay statement claiming that "Uncle Jason" shot his mother through at least three different witnesses. This Court misapplied the law when it affirmed the trial court's admission of testimony from witnesses who repeated the Child's hearsay statement, and rehearing is warranted on this basis.

III. The Court erroneously concluded that Haigler's statement was admissible as an excited utterance.

As discussed above, none of the hearsay exceptions apply under the facts of this case and the trial court should have excluded the testimony at issue. The failure to do so prejudiced Appellant and necessitates a new trial. This Court concluded that the Child's repetition of Haigler's statement "Jason, where is my baby's daddy?" was admissible as hearsay within hearsay because Haigler's statement was admissible as an excited utterance. The Court's emphasis on the elements of an excited utterance and the startling event occurring ignores the fact that the State failed to set a proper foundation for admission of Haigler's testimony to establish that it was an excited utterance.

"Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Rule 805, SCRE. "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). While the events surrounding Rufus Carmichael's disappearance would certainly

lead Haigler to experience intense emotions, at trial the State failed to show the nature of her reaction in making the statement the Child heard was such that it generated the spontaneity that gives an excited utterance its inherent reliability. *See e.g.*, *State v. Ladner*, 373 S.C. 103, 119, 644 S.E.2d 684, 692 (2007). Additionally, the State did not show that Haigler was still under the required stress of excitement when she actually made her statement. *See Davis*, 371 S.C. at 180, 638 S.E.2d at 62 (finding the State elicited no evidence the declarant "was still under the stress or excitement of [the victim's] shooting," and "[t]herefore, the State did not meet its burden of establishing a foundation for the excited utterance").

The timeline of events as established in the trial indicates that Rufus disappeared from the home shortly after 4:00 a.m. At approximately 4:25 a.m. Haigler called her sister Tiara to tell her about what had occurred and describing Rufus's disappearance. Tiara testified that Haigler sounded frantic and very worried over the phone. (R. p. 323.) Tiara testified that before hanging up Haigler told Tiara she was going to Appellant's house to see if Rufus went there or to see if Appellant knew where Rufus was. (R. p. 103: 11-15.)[2] Tiara did not provide any other testimony to establish Haigler's emotional state or stress at that time. When Haigler went to look for Rufus, she brought her son with her. The Child testified that Haigler woke him up that morning to go look for his father and described that Haigler was "going real fast" and telling him to hurry up. (R. p. 85: 7-22.) He testified that she appeared worried and said they were going to drive to find his father. The Child testimony establishes that Haigler drove and stopped at a several different houses before finally stopping at the final location where she was eventually shot. (R. p. 87: 5-16.) The

[2] Tiara thereafter testified that when she got off the phone with Haigler, Haigler stated she would call her back because Haigler was already pulling up to Appellant's house. (R. p. 104: 1-6.)

Child testified that Haigler pulled up front of trees and looked around before rolling down her window before he heard her say "Jason, where is my baby's daddy?" (R. pp. 87: 19-25, 88: 5-19.)

Surveillance video introduced at trial showed Haigler's truck arriving at the final location where she was shot around 4:45 a.m. This was approximately twenty minutes after Haigler first called Tiara and forty-five minutes after Rufus initially disappeared. The State elicited no evidence that Haigler was still under the stress or excitement of Rufus's disappearance at the time the Child heard her statement. Therefore, the State did not meet its burden of establishing a foundation for the excited utterance. In the forty-five minutes following Rufus's disappearance, Haigler had gotten her son dressed and ready, into the car, and was calm enough to drive and make stops at multiple houses looking for Rufus. The Child, who was with Haigler during this period, provided no testimony which indicated Haigler was under the continued stress of the event. He testified that Haigler rolled down the window and said the statement. There was no evidence presented that Haigler was emotional, or upset, or angry when speaking, just simply that she said it.

The record does not support the admission of Haigler's statement as an excited utterance, and the trial court did not act within its discretion when it allowed the Child to testify to Haigler's statement. As Haigler's statement does not qualify as an excited utterance, it similarly could not be admitted as hearsay within hearsay. *See State v. Prather*, 429 S.C. 583, 610, 840 S.E.2d 551, 565 (2020) (finding hearsay within hearsay where the victim's statement to one person was hearsay and that person's statement to law enforcement was hearsay; then concluding "such may be admitted if each part of the combined statements satisfies an exception to the hearsay rule"). Therefore, not only was Haigler's statement hearsay, but the Child's own statement identifying the shooter and repeating Haigler's statement was additionally hearsay, rendering each introduction at trial impermissible hearsay within hearsay. This Court overlooked the State's failure to establish

the required foundation and basis to admit the hearsay statements. The cumulative effect of these errors, each sufficient to warrant a new trial on its own, and the manner which the State capitalized on them, requires a new trial.

Conclusion

For the foregoing reasons, Appellant respectfully requests the Court grant rehearing and/or issue a new opinion holding Appellant is entitled to a new trial.

Respectfully submitted,

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This 13th day of February 2025.