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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

Edgar W. Dickson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Unpublished Opinion No. 2014-UP-234 (S.C. Ct. App. filed June 18, 2014)

THE STATE, RESPONDENT,

vs.

JULIAN C. YOUNG, PETITIONER.

Appellate Case No. 2014-002054

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Did the trial court err, and thereby violate the Petitioner's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot where the statements at issue were testimonial in nature and where, even if not testimonial, they did not qualify under Rule 803(2), SCRE, as excited utterances which would be admissible as an exception to Rule 802, SCRE; the hearsay rule?

RESPONDENT'S COUNTER STATEMENT OF QUESTION PRESENTED

Whether certiorari is appropriate where the appellate court properly applied the law in affirming the trial court's admission of hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot.

RESPONDENT'S STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Petitioner, Julian C. Young, in February 2012 for murder. (R. pp. 413–14). On August 14, 2012, Petitioner's case was called to trial before the Honorable Edgar W. Dickson. (R. p. 1). Petitioner was represented by Virgin Johnson and Corey L. Williams during the three-day trial. (R. pp. 1–2). Assistant Solicitors Donald Sorenson and Harrison Bell represented the State. (R. p. 1). On August 16, 2012, the jury returned a verdict of guilty. (R. p. 405, lines 5–12). Judge Dickson sentenced Petitioner to a term of thirty-five years of incarceration. (R. p. 406, lines 17–25). Petitioner appealed.

On December 17, 2013, appellate counsel filed a Final Brief of Appellant, addressing the following issue:

> Did the trial court err, and thereby violate the Appellant's right to confront his accusers, by admitting into evidence hearsay testimony concerning statements made by the victim-deceased to a law enforcement officer after he was shot?

(FBOA, p. 4).

The State filed its final brief in response on December 23, 2013.

The South Carolina Court of Appeals heard argument on the issue on June 4, 2014. On June 18, 2014, the Court of Appeals issued an unpublished opinion affirming the ruling and conviction. (App. pp. 1–3). Petitioner filed a petition for rehearing on July 2, 2014. (App. pp. 3–6). The Court of Appeals denied the petition on August 25, 2014. (App. p. 9).

On September 24, 2014, petitioner filed a Petition for Writ of Certiorari in this Court raising the following issue:

> Did the trial court err, and thereby violate the Petitioner's right to confront his accusers, by admitting into evidence hearsay testimony concerning

statements made by the victim-deceased to a law enforcement officer after he was shot where the statements at issue were testimonial in nature and where, even if not testimonial, they did not qualify under Rule 803(2), SCRE, as excited utterances which would be admissible as an exception to Rule 802, SCRE; the hearsay rule?

(Cert. Petition p. 2).

This return follows.

RESPONDENT'S STATEMENT OF FACTS

A Conversation with Victim

Around 11:14 p.m. on the night of April 15, 2011, Kendra Williams, a sergeant with the South Carolina State University (SC State) Police Department, was dispatched to a building on Russell Street, which held offices for SC State. (R. p. 51, line 3–p. 52, line 25). When Williams arrived on the scene at 11:20 p.m., she observed that a green car had struck the front of the Russell Street building. (R. p. 52, line 6–53, line 22). Williams observed "a lot of car pieces and a lot of bricks everywhere. . . ." (R. p. 53, lines 19–20). There were a number of public safety officers already at the scene when Williams arrived. (R. p. 53, lines 13–21). An ambulance was also there. (R. p. 54, line 22–p. 55, line 2).

Williams found the former occupant of the wrecked vehicle, a man named Jonathan Bailey (Victim), in the ambulance when she arrived. (R. p. 56, lines 11–22). Williams got in the back of the ambulance with Victim and observed that he had a gunshot wound to the right chest area and another wound to the left chest area.[1] (R. p. 57, lines 3–13). Williams observed that Victim "was frantic, he was scared, terribly scared." (R. p. 57, lines 14–17). Victim was rolling back and forth on a stretcher and complaining of the pain he was in. (R. p. 57, lines 14–21). According to Williams, he kept saying, "'get me to the hospital, I'm going to die.'" (R. p. 58, lines 3–4).

Williams asked Victim his name and if he was a student at SC State, but Victim would not answer her. (R. p. 57, line 22–p. 58, line 2). Victim gave few audible responses. (R. p. 62, lines 22–23). But Williams testified that she

[1] Dr. Kelly Rose, the forensic pathologist who performed Victim's autopsy, testified that Victim had an open gunshot wound to his stomach and an exit wound coming out of his left side. (R. p. 234, line 1–p. 236, line 20).

> asked him if he was Queen's Village, he said he—well, he shook his head, yes. I asked him if he had been robbed, he shook his head, yes. I asked him if, how many, and he stuck his hand up and showed me four fingers. I asked him if he saw the weapon, he shook his head, yes. I asked him if it was a revolver, he shook his head, yes. When I asked him if he saw the color of the weapon, he just shook his head, no. He just kept saying he was in pain, get me to the hospital. It wasn't real easy to get anything out of him.

(R. p. 58, lines 6–14). The ambulance ultimately took Victim to the helipad at The Regional Medical Center of Orangeburg, and then he was transported to another hospital. (R. p. 58, lines 19–25). Victim died later that night from his injuries. (R. p. 59, lines 1–3).

After getting information from Victim, Williams contacted her supervisors, and then a number of officers from the SC State Police Department responded to Russell Street and also to Queen's Village. (R. p. 60, line 13–p. 61, line 14). The officers secured both locations and began looking for evidence. (R. p. 61, lines 1–14).

Investigation

When Dustin Johnson, an officer with the SC State Police Department responded to Queen's Village the night of April 15, 2011, the crime scene had already been secured. (R. p. 68, line 1–p. 69, line 16). Johnson began to process the crime scene. (R. p. 69, lines 17–24). Johnson found and collected the following pieces of evidence from the crime scene at Queen's Village: two bags of a green leafy substance that appeared to be marijuana and a fifty dollar bill. (R. p. 69, line 24–p. 70, line 8; R. p. 72, line 10–p. 73, line 5). Johnson also photographed an area that had—what he perceived to be—fresh, tire skid marks. (R. p. 70, lines 8–12; R. p. 73, lines 5–12). Johnson did not find any bullets or shell casings in the area. (R. p. 76, lines 14–17).

Johnson then went to process the second crime scene, a short distance away on Russell Street. (R. p. 76, line 23–p. 77, line 14). While observing the wrecked car at the crime scene, Johnson noticed a marking on the arm rest of the driver side door that appeared to be blood spatter, so he began looking for a bullet projectile. (R. p. 78, line 2–p. 79, line 24). He found the bullet projectile about eighteen inches from the side of the car, right under the driver side door. (R. p. 79, line 25–p. 80, line 11). In the passenger side of the car, Johnson found another fifty dollar bill, along with five twenty dollar bills and another bag of a green leafy substance that appeared to be marijuana. (R. p. 83, line 8–p. 84, line 20). Johnson then secured the vehicle with evidence tape and had it towed to a secure location. (R. p. 84, line 21–p. 85, line 7).

Once police learned that Victim had died from his injuries, the South Carolina Law Enforcement Division (SLED) was called in to take over the case. (R. p. 304, line 1–p. 305, line 14). SLED Agent Richard Johnson came to Orangeburg on April 16, 2011 to begin his investigation. (R. p. 305, lines 14–24). Investigators lifted two latent prints from the outside of the passenger door of Victim's vehicle, one from the top of the window and one from the door, near the key entry. (R. p. 261, line 22–p. 265, line 9). The latent print from the window was identified as belonging to Ray Alston. (R. p. 284, line 13–p. 286, line 8; R. p. 294, lines 15–19). The other print could not be identified at first, but eventually it was identified as belonging to Petitioner.[2] (R. p. 286, line 9–p. 292, line 11).

As part of SLED's investigation, Agent Johnson obtained Victim's phone records. (R. p. 307, lines 8–17). From those records, Agent Johnson identified Ricky Gipson as

[2] The bills collected from the crime scenes were also examined for latent prints, but none of the latent prints on the bills were of sufficient value to compare. (R. p. 292, line 12–p. 294, line 5).

someone who had been in "constant contact" with Victim before his death and who had sent two text messages to Victim shortly after the 911 call regarding Victim's accident was made. (R. p. 307, lines 17–25). Agent Johnson contacted Gipson and took his statement about what happened the night of April 15th. (R. p. 309, lines 3–8). Agent Johnson showed Gipson Alston's photograph, and Gipson identified Alston as someone who was present the night Victim was shot. (R. p. 309, lines 9–17).

Thereafter, Alston was arrested for murder, and Alston identified the other individuals who were present the night Victim was shot. (R. p. 309, line 18–p. 310, line 22). Alston identified Petitioner, who goes by the nickname Gouda, as one of the individuals present the night Victim was killed. (R. p. 310, lines 8–24).

Night of April 15, 2011

At trial Alston testified that, on the night of April 15, 2011, he was hanging out with Petitioner and others at a friend's house. (R. p. 167, line 8–p. 171, line 4). Alston decided he wanted to get some marijuana. (R. p. 171, lines 3–10). Alston asked Petitioner about arranging for him to buy marijuana, and Petitioner made some phone calls and set something up. (R. p. 171, line 11–p. 172, line 3). Then, Alston, Petitioner, Hilliard Pinckney, and Maurice Thompson drove to the SC State campus in silver Buick. (R. p. 168, lines 9–13; R. p. 173, lines 1–20). Thompson drove, and Pinckney sat in the passenger seat. (R. p. 173, line 21–p. 174, line 4). Alston and Petitioner sat in the back seat. (R. p. 174, lines 5–24).

On the SC State campus, the group picked up Gipson, who had been contacted by Petitioner earlier in the day about purchasing marijuana. (R. p. 99, line 16–p. 104, line 4). Because Gipson did not have as much marijuana as Alston wanted to buy, Gipson arranged for Victim to sell to Alston. (R. p. 100, line 16–p. 101, line 20). In the car

Gipson sat between Alston and Petitioner, but Petitioner was the only one there who knew Gipson. (R. p. 103, line 18–p. 105, line 16; R. p. 174, line 25–176, line 3).

Gipson testified that he had arranged to meet with Victim at the marriage housing area. (R. p. 103, line 18–p. 104, line 4). The group arrived before Victim, so they reversed and parked in a parking space and waited for Victim to arrive. (R. p. 107, lines 8–21; R. p. 176, lines 4–24). When Victim arrived, he pulled into a parking spot such that his passenger side was closest to the passenger side of the Buick. (R. p. 107, line 21–p. 108, line 11; R. p. 176, line 25–p. 177, line 21). Gipson, Alston, and Petitioner went to Victim's car, and Gipson got in the passenger seat to facilitate the transaction. (R. p. 109, lines 1–13). Alston and Petitioner were not happy with the quality of the marijuana, and they began complaining to Victim. (R. p. 109, line 8–p. 110, line 18; R. p. 178, line 13–p. 179, line 7). Gipson then got out of the car and turned his attention to another car in the parking lot. (R. p. 110, line 19–p. 111, line 12). When Gipson turned back around, he saw Petitioner and Victim "tussling in the car. . . ." (R. p. 111, lines 12–14). Gipson observed that Petitioner was leaning in the car, but Gipson could not tell what Petitioner and Victim were fighting over. (R. p. 112, lines 10–24). Gipson never saw anyone with a gun. (R. p. 112, line 25–p. 113, line 2). Gipson noticed that Victim's car was in reverse and the passenger door was open. (R. p. 111, lines 14–16). Gipson also observed that Alston was standing away from the car. (R. p. 113, lines 11–19). Gipson testified that he heard Victim's tires make a noise, then he heard a pop, and he ran away. (R. p. 111, lines 16–21). Gipson looked back at the scene and saw that Victim's car had left the parking spot. (R. p. 111, lines 21–25). Gipson kept running. (R. p. 111, line 25).

Alston also testified that Petitioner was leaning in Victim's car when he "heard a pow go off." (R. p. 179, line 19–p. 181, line 11). Alston thought the "pow" was a gun

shot. (R. p. 181, lines 12–14). Petitioner then got back in the Buick. (R. p. 180, lines 2–3). Alston asked Petitioner "if he was alright, and then [Alston] asked if he shot the guy, but [Petitioner] never answered. . . ." (R. p. 180, lines 3–6; R. p. 183, lines 1–7).

ARGUMENT

The Court of Appeals did not err in affirming the trial judge's admission of hearsay testimony concerning excited utterances made by Victim to law enforcement after Victim was shot. Victim's statement to law enforcement was non-testimonial, and, as such, admission of the statement did not violate Petitioner's rights under the Confrontation Clause. Additionally, the statement was properly admitted under a hearsay exception.

Court of Appeals Opinion

The Court of Appeals found, by *per curiam*, unpublished opinion, that the trial judge did not err in admitting the hearsay testimony. (App. pp. 1–2). In affirming the trial court, the Court of Appeals referenced a United States Supreme Court case, *Michigan v. Bryant*, 131 S. Ct. 1143, 1166 (2011) (holding a gunshot victim's statement to police was non-testimonial and did not violate the Confrontation Clause when the police's "primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements"). The court also summarily referenced four cases from this Court that dealt with excited utterances.

Considerations Governing Review

A writ of certiorari is not a matter of right but of judicial discretion. Rule 242(b), SCACR. The following, while not binding, weigh in favor of granting the writ:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. None of the above are true for this case, and, as such, the writ of certiorari should not be granted.

Relevant Facts

Before trial began, defense counsel moved to have Williams's testimony concerning her conversation with Victim excluded. (R. p. 3, line 24–p. 7, line 16). Defense counsel argued before the trial court (1) that the testimony would violate Petitioner's rights under the Confrontation Clause, (2) that the testimony was inadmissible hearsay and was not admissible under the excited utterance exception, and (3) that the testimony was inadmissible hearsay and was not admissible under the dying declaration exception. (R. p. 3, line 24–p. 7, line 16). Defense counsel also submitted a brief to the court providing case law in support of their arguments and additionally asserting that Williams's testimony was inherently prejudicial. (R. pp. 407–12).

In response, the State argued that the evidence was not testimonial because it "wasn't information that was given in . . . anticipation of litigation." (R. p. 9, lines 12–17). As to whether the testimony was admissible under a hearsay exception, the State asserted that it would be up to the court to decide whether Victim's statement to Williams was an excited utterance or a dying declaration. (R. p. 9, line 17–p. 10, line 2).

The trial court then heard Williams's testimony *in camera*. (R. p. 13, line 1–p. 23, line 9). On direct examination Williams testified that she spoke with Victim in the back of an ambulance. (R. p. 15, lines 1–8). Williams observed that Victim had a gunshot wound to his right chest area and another wound on his left side. (R. p. 15, lines 8–11). Williams described Victim's demeanor as "frantic[. H]e was rolling back and

forth[;] he was scared[;] he kept saying, [']get me to the hospital, I'm going to die.['] He was, he was scared. . . . He appeared to be in a lot of pain." (R. p. 15, lines 14–19). Williams then described her conversation with Victim:

> I asked [Victim] if he had been robbed, and he shook his head, yes. I asked him if he had been in the parking lot of Queen's Village, and he shook his head, yes. And I asked him if he saw who robbed him, and he shook his head, yes. I asked him how many? And he stuck his hand up and had four fingers up. I said, four? He shook his head, yes. I asked him if, you know, if he saw the weapon. He shook his head. . . .
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> . . . .
>
> . . . I asked him if the weapon was silver or black. At that time he was, kept shaking his head, no. And there were some other questions that I asked him, but he did tell me that he lived in Queen's Village. He did tell me that he saw the person who shot him. He told me there was four of them, but most of it was just him shaking his head. He, if he took any kind of effort to speak he would just shake his head and kept saying he's in pain, he couldn't talk he was having a hard time talking, real frantic, still saying, you know, get me to the hospital, I'm going to die.

(R. p. 16, lines 2–21).

When asked on cross-examination how long after the incident occurred did Williams get to the scene, she responded that she would have to look at the time. (R. p. 22, lines 10–12). Williams also testified that when she initially spoke with Victim, he would not tell her his name. (R. p. 22, line 24–p. 23, line 4).

Following Williams's *in camera* testimony, defense counsel argued that Victim's statement was not an excited utterance because Williams was asking Victim questions—he was not just blurting the information out. (R. p. 23, line 21–p. 24, line 7). Additionally, defense counsel argued that there was nothing about Victim's situation that was startling. (R. p. 24, lines 1–7). Defense counsel then argued that Victim's statement was not a dying declaration because Williams did not put in her statement, which she gave to SLED the day after she spoke with Victim, that Victim told her that he thought he

was dying. (R. p. 24, lines 7–14). Defense counsel also argued that the statement was more prejudicial that probative and that it should have been excluded under S.C. R. Evid. 403. (R. p. 24, line 14–p. 25, line 8).

The State then argued that, looking at the totality of the circumstances, Victim's statement was non-testimonial. (R. p. 25, line 12–p. 26, line 1). The State further argued that Victim's statement was admissible as either a dying declaration or an excited utterance. (R. p. 25, lines 1–15). As to the issue of prejudice, the State pointed out that Victim did not even identify Petitioner by name in his statement—he merely confirmed that he had been robbed by four people. (R. p. 25, lines 16–22).

Defense counsel replied that it was prejudicial because one of those four men was the defendant. (R. p. 27, lines 12–16). Defense counsel then went into more depth with his arguments concerning whether Victim's statement was either a dying declaration or an excited utterance. (R. p. 27, line 16–p. 30, line 1).

Judge Dickson found the testimony to be admissible, specifying that "because he is in the ambulance after he had just been shot and robbed, he's still under a stressful event at that point." (R. p. 30, lines 2–4). Upon prompting by the State, Judge Dickson clarified his ruling, stating

> I'm going to let it in, I say it will be non-testimonial and let it in. It's just part of his excited utterance at the time, whether or not—you know, the purpose of letting an excited utterance in is that he doesn't have time for any kind of reflective though. And so, right now, this is a gentleman that's just been robbed and shot, he's in an ambulance, and I don't think based on the testimony I heard that he had time to have much reflection about what was going on so he could make up a story.

(R. p. 30, line 13–p. 31, line 3).

In the Court of Appeals, Petitioner argued that Petitioner's statement was testimonial because "[h]e made those statements under circumstances where an objective

witness would reasonably believe that the statement would be available for later use at trial." (FBOA p. 11). Petitioner additionally asserted that the statement did not qualify as an excited utterance because Victim's failure to provide his name to police was evidence of reflective thought. (FBOA p. 11–12). However, the Court of Appeals affirmed the trial court, citing United States Supreme Court precedent on the Confrontation Clause and opinions from this Court on the admission of evidence under the excited utterance exception.

Discussion

Confrontation Clause

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court has held that this provision bars "admission of testimonial statements of a witness who did not appear at trial unless he was available to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). According to the Supreme Court

> when a court must determine whether the Confrontation Clause bars the admission of a statement at trial, it should determine the "primary purpose of the interrogation" by objectively evaluating the statements and actions of the parties to the encounter, in light of the circumstances in which the interrogation occurs. The existence of an emergency or the parties' perception that an emergency is ongoing is among the most important circumstances that courts must take into account in determining whether an interrogation is testimonial because statements made to assist police in addressing an ongoing emergency presumably lack the testimonial purpose that would subject them to the requirement of confrontation.

Michigan v. Bryant, __ U.S. __, 131 S.Ct. 1143, 1162 (2011).

"A violation of the Confrontation Clause is not *per se* reversible but is subject to a

harmless error analysis." *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012) (citing *Delaware v. Van Arsdall*, 475 U.S. 813, 822 (2006)).

> "Whether such an error is harmless in a particular case depends upon a host of factors . . . . The factors include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case."

Id. (quoting *Van Arsdall*, 475 U.S. at 684).

Respondent submits that Victim's statement to Williams was non-testimonial, and, thus, admission of that statement did not violate Petitioner's constitutional rights. Petitioner, on the other hand, argues that Victim "made those statements under circumstances where an objective witness would reasonably believe that the statement would be available for later use at a trial." (Cert. Petition p. 12). Respondent disagrees.

The facts under which Victim made his statement are substantially similar to those in the case the Court of Appeals referenced in its opinion, the case of *Michigan v. Bryant*, __ U.S. __, 131 S. Ct. 1143 (2011), in which the United States Supreme Court found that a gunshot victim's statement to police was non-testimonial. In *Bryant*, the Supreme Court described the circumstances surrounding the victim's statement as "a nondomestic dispute, involving a victim found in a public location, suffering from a fatal gunshot wound, and a perpetrator whose location was unknown at the time the police located the victim." 131 S. Ct. at 1156. That description is on all fours with the circumstances in which Victim spoke to Officer Williams in this case.[3]

[3] There are a few slight differences between the facts in *Bryant* and those in the instant case. For example, in *Bryant*, police spoke to the victim before emergency medical services had arrived. 131 S. Ct. at 1150. Also, in *Bryant*, the victim identified the person who had shot him when he spoke to the police, but he did not indicate the cause of the

In deciding whether the primary purpose of the victim's statement was to enable police assistance to meet an ongoing emergency, the Court in *Bryant* "first examine[d] the circumstances in which the interrogation occurred." *Id.* at 1163. As part of the analysis, the Court noted that when the police questioned the victim, they did not know, and the victim did not tell them, if the threat was limited to the victim. *Id.* at 1163–64. The Court also explained that because the *Bryant* case involved a gun, "[t]he physical separation that was sufficient to end the emergency in [a domestic violence case where fists were the weapon] was not necessarily sufficient to end the threat in this case." *Id.* at 1164. Also, the Court considered that the police in *Bryant* did not know the location of the shooter when they questioned the victim. *Id.* The Court then looked at the statement by the victim and the questions by the police. *Id.* at 1165. As to the victim, "[h]is answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive. He was obviously in considerable pain and had difficulty breathing and talking." *Id.* (internal citations omitted). On the other hand, "[t]he questions [the police] asked—what had happened, who had shot him, and where the shooting had occurred, were the exact type of questions necessary to allow the police to assess the situation, the threat to their own safety, and the possible danger to the potential victim." *Id.* at 1166 (internal quotations and citations omitted). Finally, the Court considered the informality of the situation, which in the *Bryant* case was "fluid and somewhat confused." *Id.* The Court found that "[t]he informality suggest[ed] that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted [the victim] to or focused him on the possible future prosecutorial use of his statements."

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shooting. *Id.* at 1150, 1163–64.

Id. Based on its assessment of the facts in *Bryant*, the Court ultimately concluded that the victim's statement was not testimonial and that admission of the statement did not violate the Confrontation Clause. *Id.* at 1167.

The circumstances analyzed by the Supreme Court in *Bryant* are substantially similar to the circumstances surrounding Victim's statement to Williams, and, like the Court in *Bryant*, the Court of Appeals apparently found that Victim's statement was non-testimonial and, thus, admission of the statement did not violate Petitioner's rights under the Confrontation Clause. Like in *Bryant*, when Williams spoke to Victim, she did not know if the threat was limited to him. Also like in *Bryant*, this case involved a shooter, whose whereabouts were unknown at the time Williams spoke with Victim. When Williams questioned Victim, she sought to find out where Victim had been at the time of the shooting, what had instigated the shooting, how many people had been involved in the shooting, and if Victim knew any details about the gun that had been used. All of these questions indicate that Williams's primary purpose in speaking with Victim was to address the ongoing emergency—namely, the situation of having an unknown shooter on the SC State campus. Like the victim in *Bryant*, here, Victim was clearly in considerable pain. While Petitioner makes much of the fact that Victim would not tell Williams his name, the record reflects that Victim mostly responded to Williams's inquiries by nodding his head, which is not surprising considering Victim was suffering from a gunshot wound to his abdomen. In Williams's own words, "if [Victim] took any kind of effort to speak he would just shake his head and kept saying he's in pain, he couldn't talk he was having a hard time talking, real frantic, still saying, you know, get me to the hospital, I'm going to die." (R. p. 16, lines 17–21). Finally, the informality of the conversation between Williams and Victim did not put Victim on notice that his

statement would be for future prosecutorial use. For the same reasons that the Court in *Bryant* found the victim's statement to be non-testimonial, Respondent submits that Victim's statement in the instant case, too, was non-testimonial.[4] The Court of Appeals apparently agreed, as it cited *Bryant* in its opinion affirming Petitioner's conviction.

Excited Utterance

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. In general, hearsay is not admissible for purposes of trial; however, there are a number of exceptions. *See* Rule 802, SCRE. For example, S.C. R. Evid. 803(2) provides that "[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" is not excluded. That exception is known as the excited utterance exception. *See* Rule 803(2), SCRE.

This Court has recognized that

[t]hree elements must be met in order for a statement to be an excited

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[4] Additionally, even if this Court found that Victim's statement was testimonial, the admission of the statement through Williams's testimony at trial was harmless error. Foremost, Victim did not even identify Petitioner as the shooter when he communicated with Williams. Victim merely confirmed that the shooting happened in Queen's Village, that he had been robbed, that there had been four people, and that he had seen the gun. Petitioner argues that Victim's statement was particularly prejudicial because "[a]bsent these statements, there was no other evidence that the victim in this case was robbed prior to his shooting. . . . If anything, the testimony of all the states [sic] other witnesses left as a mystery what happened in the moments preceding the victim's shooting." (Cert. Petition p. 12). Respondent disagrees. Though the eyewitnesses to the shooting could not see exactly what happened in Victim's car that night, they observed Petitioner leaning in Victim's vehicle and tussling with Victim, and they observed Victim trying to reverse while Petitioner was still in the car immediately before they heard a gunshot. Additionally, investigators found money and bags of marijuana in the passenger side of Victim's car and on the ground at the location of the shooting. Respondent submits that the combination of this circumstantial evidence suggests that Petitioner attempted to rob Victim. Finally, the State's case was strong even without Victim's statement.

> 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. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008) (citing *State v. Ladner*, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007)). "The rationale underlying the excited utterance exception is that 'the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication.'" *Id.* (quoting *State v. Davis*, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006)). In determining whether a statement is admissible under the excited utterance exception, a court must consider the totality of the circumstances. *Id.*

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494–95 (2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" *Id.* at 349, 737 S.E.2d at 495 (quoting *Douglas*, 369 S.C. at 429–30, 632 S.E.2d at 848)).

Victim's statement was properly admitted under the excited utterance exception to the general hearsay rule. In this case the trial court considered "the totality of the circumstances" and decided to admit Victim's statement to Williams under the excited utterance exception. (R. p. 28, lines 4–24). The Court of Appeals affirmed the trial court's admission of the statements as excited utterances, citing the South Carolina Supreme Court case noting this Court has "generally allowed as excited utterances

statements made by the victim to the police immediately following a physical attack." (App. p. 2 (citing *State v. Burdette*, 335 S.C. 34, 43, 515 S.E.2d 525, 530 (1999))). Though in this case Williams was unsure of how long after the shooting occurred she spoke to Victim, he was in the ambulance and still at the scene when she questioned him. Such proximity is sufficient considering the circumstances of this case.[5] *See State v. Blackburn*, 271 S.C. 324, 327, 247 S.E.2d 334, 336–37 (1978) (concluding that a statement given while declarant was "still under the stress and pain of the assault" would be admissible under the excited utterance exception though the statement was given in excess of one hour after the incident).

Petitioner argues that the statement evidenced reflective thought because Victim would not tell Williams his name, and, thus, the statement was not an excited utterance. However, the trial court rejected that argument, stating

> this is a gentleman that's just been robbed and shot, he's in an ambulance, and I don't think based on the testimony I heard that he had time to have much reflection about what was going on so he could make up a story. . . . He was just answering questions that were posed to him by a police officer trying to get to the bottom of the situation.

(R. p. 30, line 23–p. 31, line 3). Indeed, Victim's refusal to give his name could be a result of the considerable pain that he was feeling, as opposed to an indication that he was

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[5] Respondent submits that this case is distinguishable from *State v. Washington*, 379 S.C. 120, 665 S.E.2d 602 (2008), a case where the Supreme Court excluded a statement made in response to a police interrogation. In the *Washington* case, the victim's girlfriend gave a statement "in a formal interview with law enforcement at police headquarters almost ninety minutes after the events." *Id.* at 124, 665 S.E.2d at 604. The girlfriend's statement "consisted of a written narrative of the incident, which [the girlfriend] wrote, and three pages of questions and answers, which the Officer transcribed." *Id.* at 123, 665 S.E.2d at 603. The circumstances under which Victim gave his statement to Williams in this case are vastly different from those of *Washington*. As previously discussed, the exchange was informal and was limited to the information that Williams needed to address the ongoing emergency. Thus, the trial court properly admitted Victim's statement.

trying to hide his identity. As previously discussed, Williams testified that any time Victim attempted to speak, he would start shaking his head and complaining of his pain. Consequently, during Williams's conversation with Victim, he gave "[v]ery, very few" audible responses—again, not surprising considering he was suffering from a gunshot wound to his abdomen. (R. p. 62, lines 22–23). Respondent submits that the continuing stress of the attack makes Victim's statement to Williams inherently reliable. *See State v. McHoney*, 344 S.C. 85, 95, 544 S.E.2d 30, 34–35 (2001) (finding victim's statement to a nurse while she was still under the continuing stress of being stabbed seven times in the abdomen and having her throat cut was inherently reliable because there was no time for the victim to reflect on the event).

Respondent would note that this Court has previously found statements made in response to questions to be admissible under the excited utterance exception. For example, in *State v. McHoney*, the Court found the statement of a victim, whose throat had been slit, to be admissible under the excited utterance exception. 344 S.C. at 94–95, 544 S.E.2d at 34–35. In *McHoney* the victim was unable to speak, but she nodded in response to questions asked by a nurse—questions including if victim knew her attacker, if victim's family knew her attacker, if victim's attacker lived in her neighborhood, and if victim's boyfriend was the attacker. *Id.* at 89–90, 544 S.E.2d at 32. In another case, this Court found that a trial court did not err in admitting a son's statement concerning who murdered his mother under the excited utterance exception. *State v. Sims*, 348 S.C. 16, 20–23, 558 S.E.2d 518, 520–22 (2002). The Court specifically noted in that case, "[a]lthough the son's statement was in response to a question, under the circumstances presented, we find this fact does not prevent his answer from being an excited utterance." *Id.* at 23 n. 1, 558 S.E.2d at 522 n.1.

Having found that Victim's statement was both non-testimonial and an excited utterance,[6] the trial judge properly admitted Williams's testimony concerning that statement. Petitioner's argument the Court of Appeals erred in affirming the ruling must be rejected.

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[6] The trial court did not admit Victim's statement as a dying declaration; however, Respondent submits that the statement would also be admissible under that exception to the hearsay rule.

> A statement made under the belief of impending death is not excluded by the hearsay rule if the declarant is unavailable as a witness in a prosecution for homicide, the statement is made by a declarant while believing the declarant's death is imminent, and the statement concerned the causes or circumstances of what the declarant believed to be impending death.

State v. McHoney, 344 S.C. 85, 92, 544 S.E.2d 30, 33 (2001). Because Victim's statement meets all of the above criteria, in addition to being admissible as an excited utterance, it is admissible as a dying declaration.

The trial court neither accepted nor rejected the State's argument that Victim's statement should be admitted as a dying declaration. The court expressed that it had

> questions about whether or not it's a dying declaration, the statement about needing to get to the hospital, I'm going to die, it's not in the statement. So, I do have an issue about whether or not it's a dying declaration, but I'm not going to decide that on that issue. I'm deciding it on whether or not it's excited utterance based on the totality of the circumstances.

(R. p. 27, line 25–p. 28, line 6). It appears that because Williams did not include in her statement to SLED that Victim had said he was going to die, the trial court declined to make a ruling as to whether Victim's statement was a dying declaration. Respondent notes that Williams testified *in camera* and before the jury that when she spoke to him, Victim said, "I'm going to die[,]" (R. p. 16, lines 20–21; R. p. 58, line 4). The trial court never made a finding that Williams's testimony was either credible or not credible. As such, Respondent submits this argument as an additional sustaining ground.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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October 23, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions

Edgar W. Dickson, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Unpublished Opinion No. 2014-UP-234 (S.C. Ct. App. filed June 18, 2014)

THE STATE, RESPONDENT,

vs.

JULIAN C. YOUNG, PETITIONER.

Appellate Case No. 2012-213006

PROOF OF SERVICE

I, Kaycie S. Timmons, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling
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This 23rd day of October, 2014.

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