

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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S.C. SUPREME COURT

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Certiorari to Lancaster County  
Paul M. Burch, PCR Judge

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Appellate Case No. 2019-001272

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DEVATEE T. CLINTON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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The PCR court correctly found Counsel was not constitutionally ineffective where Counsel reasonably decided to move on from the line of questioning when prompted by the trial court, based on the trial court’s demeanor in sustaining the State’s objection; and Petitioner failed to show prejudice because, had the issue been preserved, the trial court’s ruling would have been affirmed because nothing in the record shows the child made the statement under the excitement or stress of the event, and nothing in the record shows the child observed the event..... 8

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**PETITIONER’S STATEMENT OF ISSUE PRESENTED**

Whether the PCR court erred by ruling defense counsel was not ineffective where counsel failed to proffer and argue that the identification statements of the victim’s four-year-old son made shortly after the shooting that specifically named someone other than Petitioner as the murderer were admissible as “excited utterances” or “present sense impressions” since the Court of Appeals found the error excluding these statements unpreserved because counsel failed to proffer this testimony at trial?

**RESPONDENT’S COUNTER-STATEMENT OF ISSUE PRESENTED**

Whether the PCR court correctly found Counsel was not constitutionally ineffective where Counsel reasonably decided to move on from the line of questioning when prompted by the trial court, based on the trial court’s demeanor in sustaining the State’s objection; and Petitioner failed to show prejudice because, had the issue been preserved, the trial court’s ruling would have been affirmed because nothing in the record shows the child made the statement under the excitement or stress of the event, and nothing in the record shows the child observed the event?

## STATEMENT OF THE CASE

Petitioner Devatee Clinton, Al Green, and Wayne Blakely, Jr., were indicted for the murder of Janika Jones in March 2012. App. 1087-90. Petitioner and Green received a joint jury trial on March 10–14, 2014, before Judge R. Knox McMahon and a jury. App. 1. Petitioner was represented by Assistant Public Defender William P. Frick (Counsel), and Green was represented by Amy S. Raney, Esquire. Solicitor Douglas Barfield prosecuted the case. App. 1-2. The jury convicted Petitioner and Green as indicted. Judge McMahon sentenced both Petitioner and Green to terms of life imprisonment without the possibility of parole. App. 1011; 1091. Petitioner appealed.

Petitioner was represented on appeal by Chad Nicholas Johnston, of Willoughby & Hoefler, PA, and Chief Appellate Defender Robert M. Dudek. Petitioner briefed the following to the Court of Appeals: The trial court erred in (1) failing to find statements were admissible pursuant to the excited utterance or present sense impression exceptions to the rule against hearsay; and (2) denying Petitioner's motion for a directed verdict. App. 1093. After briefing and oral argument, the Court of appeals affirmed in *State v. Clinton*, Op. No. 2016-UP-206 (S.C. Ct. App. filed May 11, 2016). App. 1092-93. The case was remitted back to the circuit court on August 23, 2017.

Petitioner timely commenced the underlying PCR action on February 6, 2018. App. 1014. The State made its return on June 11, 2018. App. 1021. Petitioner, through PCR counsel amended his allegations on December 4, 2018. App. 1040. An evidentiary hearing into the matter convened January 23, 2019, before Judge Paul M. Burch. App. 1014. Petitioner was present and represented by Donae A. Minor, Esquire. Assistant Attorney General Samuel L. Key represented the State.

App 1043. Petitioner testified on his own behalf, and Counsel also testified. Petitioner proceeded on the following allegations of ineffective assistance of counsel:

1. Failure to properly preserve the record for [Petitioner]’s appeal regarding the issue of excluding testimony of exculpatory statements made by the victim’s oldest minor child;
2. Failure to present Hearsay Exception, Present Sense Impression, Rule 803(1), SCRE, as an argument in response to the State’s objection to the admissibility of exculpatory statements made to officers and first responders by the victim’s oldest minor child;
3. Failure to investigate Applicant’s case;
  - a. Interviewing potential witnesses;
  - b. Evaluating the veracity and authenticity of DNA evidence and other evidence sought against Applicant;
  - c. Conducting an independent investigation of the crime scene; and
  - d. Investigating the alleged suspect named by the victim’s oldest minor child to the police and first responders as the person who shot his mother as part of [Petitioner]’s defense.

App. 1040-41. Judge Burch denied relief on July 19, 2020. App. 1071. Petitioner appealed.

### **STATEMENT OF THE FACTS**

In January 2012, Jenika Jones lived in a trailer park with her three minor children—ages four, two, and one. App. 216; 218–19; 221–26; 264–65. Petitioner lived with his grandmother in the neighboring trailer. On January 19, 2012, law enforcement responded to a reported home invasion at Jones’s trailer. They found Jones’s body on the couch in a pool of blood with a single gunshot wound to the head. She was dead upon law enforcement’s arrival. Her children were still in the house. Petitioner, Al Green, and Devante Blakeney were ultimately arrested for murdering Jones.

Petitioner and Green were tried together from March 10–14, 2014, before Judge R. Knox McMahan and a jury. The State moved pretrial to bar Petitioner or Green from eliciting out-of-court statements by Jones’s four-year-old son to the first responders. App. 157–58. Counsel argued that after law enforcement arrived and was “still trying to assess what occurred,” Jones’s four-year-old son “spontaneously stat[ed] to . . . Investigator Crump first and then to another

officer and . . . maybe a third officer on the scene that ‘Shi’s daddy shot my momma.’” Later, the child stated, “Shortycake shot my momma.” App. 158–59.

To further clarify the issue, Counsel explained Jones’s son was nicknamed Deuce, and his father was Antonio Lamont Truesdale. The nickname in Deuce’s declaration, “Shortycake,” was not the nickname of either Petitioner or Green. Rather, it was the nickname of a Rashad Johnson, who is the father of another of Jones’s children, “Shi.” App. 159–60. The State explained it verified Jones had a child nicknamed Shi; Rashad Johnson was Shi’s father; and Rashad Johnson’s nickname is “Shortycake.” The State also acknowledged Deuce had made a statement to Crump. App. 160–61.

Counsel clarified his argument was the child’s statement was admissible as an excited utterance under Rule 803(2), SCRE, to which the trial court stated, “I realize [under Rule] 803 [the] availability of a witness is immaterial but you have to determine the competency of the individual that made the statement. In this regard I’m dealing with a four-year old.” App. 161. The State indicated the child’s competency was the basis for its objection. App. 161–62.

Counsel then argued Deuce was four-years old at the time of the murder, but almost immediately after the shooting, Deuce:

[Went] to the next door neighbor’s house and ask[ed] for help. They called 911. The police respond within 15 minutes. Because it was cold, Deuce and his siblings were put in an ambulance. [Deuce] makes the comment Shi’s daddy hurt my momma. Jamia’s (phonetics) daddy hurt my momma. Jamia and Shi are the same person and ‘daddy’ they are referring to is Rashad Johnson. He makes this statement . . . to Investigator Crump. He makes it in the ambulance in front of some of first responders who are on the [State’s] witness list, and Mr. Plyler and Mr. Hope and then he says it spontaneous[ly] to Christy Rogers who is a CSI officer that responds there on the scene.

App. 162–63. Thereafter, Counsel presented three cases to the trial judge supporting his argument

the admissibility of this declaration under Rule 803(2) did not depend upon the competency of the out-of-court declarant, and he asked the trial judge to consider these cases before ruling on the issue. Specifically, Counsel relied upon *State v. Ladner*, 373 S.C. 103, 644 S.E.2d 684 (2007) (the incompetency of a declarant at the time of trial does not preclude the admission of that declarant's excited utterance through a different, competent witness); *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002); and *In Interest of Smith*, 277 S.C. 187, 284 S.E.2d 586 (1981) (three year old victim's statements describing defendant's actions to mother immediately after the incident, while she was still crying and showing signs of pain, were admissible under *res gestae* exception to hearsay rule in case charging juvenile defendant with criminal sexual conduct in the first degree). App. 163.

The trial court noted factual distinctions between those three cases and the instant case, and clarified the issue with the statement was the foundation, stating Counsel needed to establish a "foundation of the personal knowledge of the hearsay declarant and then meet the three requirements within the rules." *See* Rule 602, SCRE. The trial court also observed that "[p]resence in the home doesn't mean observation of the fatal act. That's all I am saying. . . . That goes back to the [R]ule 600 or something." App. 163–67. The trial court further stated, "I am not saying it is or isn't admissible. I am saying a foundation has got to be laid for its admissibility and . . . you all are welcome to do it in whatever manner you all so choose." App. 168.

The following morning, the trial court re-stated Petitioner did not have to show Deuce's competency "for purposes of asking those questions, but they do have to lay the foundation under the excited utterance." The child's competency or incompetency, however, could be presented to the jury. App. 178–79.

On cross-examination of Investigator Taylor, Counsel established Taylor saw the children

at the crime scene on the night of the incident; all three children had blood on their clothing; and Taylor seized the children's bloody clothing. App. 499–501. Counsel then asked Taylor:

Q Did you ever have any conversation with any of these children?

A Yes.

Q Which one?

A Oldest child.

Q Okay. Where did you have this conversation?

A In the EMS truck.

Q Do you recall about when you had this conversation? How long you [had] been on the scene?

A I had probably been there about maybe 20 minutes, 30 minutes. So it was probably shortly before midnight, maybe.

Q Do you recall the demeanor of this child?

A He seemed -- he didn't really seem too upset to a great extent. Kind of being entertained by EMS folks. They were trying to keep him and his sister and I guess the younger brother occupied to keep [their] mind[s] off maybe their thoughts or whatever.

Q Okay. Did you take a statement from any of these children?

A No, I did not take a statement.

Q Was anything told to you?

App. 501–02. The State immediately objected based on trial eliciting an out-of-court statement. Counsel responded, “I didn't ask what.” The trial court sustained the State's objection. App. 502.

Taylor later testified he had been in the ambulance with the children “[p]robably about ten minutes.” App. 517–18. Taylor also opined based upon the blood on the children's clothing, it appeared the children would have been physically close to the victim, and he stated Deuce was able to see the blood on his siblings' clothing while he was in the ambulance. However, Deuce appeared to be “happy-go-lucky” during the time Taylor was with him. App. 518–21.

## STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

## ARGUMENT

The PCR court correctly found Counsel was not constitutionally ineffective where Counsel reasonably decided to move on from the line of questioning when prompted by the trial court, based on the trial court’s demeanor in sustaining the State’s objection; and Petitioner failed to show prejudice because, had the issue been preserved, the trial court’s ruling would have been affirmed because nothing in the record shows the child made the statement under the excitement or stress of the event, and nothing in the record shows the child observed the event.

Petitioner argues Counsel was constitutionally ineffective for failing to proffer the testimony he intended to elicit as an excited utterance, leaving the issue unpreserved for appellate review. Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 (“[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court’s finding . . . . If so, an appellate court would necessarily have affirmed the trial court’s [ruling] . . . .”). Counsel articulated a reasonable trial strategy for eliciting the statement as an excited utterance and attempted to employ that strategy through cross-examination of Investigator Taylor; however, as noted above, Taylor testified the child seemed “happy go lucky” when the child made the statement, not under the stress or excitement of the event. The State objected to Counsel asking Taylor if “anyone had told him anything,” and the trial court instructed Counsel to move on from that line of questioning. Counsel followed the trial court’s instruction because he felt, in the midst of trial, the only way he could get the child’s statement into evidence was through the child himself. Counsel reasonably chose not to call the child as a witness because the child was only six-years-old at the time of trial, four-years-old when he made the statement, and Counsel did not know how the child would testify. Finally, Petitioner failed to show prejudice because, even if the issue was preserved, the trial court’s ruling would have been upheld because nothing in the

record showed the child made the statement while still excited or stressed by the event; and nothing in the record showed the child actually observed the event. Therefore, the PCR court did not err in finding Counsel was not constitutionally ineffective. Certiorari should be denied.

*Strickland v. Washington*, requires that trial counsel must be given leeway to make reasonable strategic decisions. 466 U.S. 668 (1984). “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland* at 688–89. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” *Id.* at 691. Therefore, “[j]udicial scrutiny of counsel’s performance must be highly deferential.” *Id.* at 689. *Strickland* therefore established the rule that in proving a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* Further, “Courts must be wary of second-guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Counsel testified at the PCR hearing he tried to get Deuce’s statement in as an excited utterance. App. 1050. Counsel testified that during trial, “it was quite apparent that [the trial court] was not going to let the statement in,” as an excited utterance. App. 1062. Counsel felt, based on the trial court’s rulings and demeanor, the only way he could get the statement in was through the child. However, Counsel did not want to call the child because he “didn’t want to put a five-year-old child on the stand when there [were] pictures of bloody footprints all over that scene.” App.

1063. Counsel agreed with Petitioner he did not proffer any further testimony as to what Taylor would have testified to. App. 1053.

Here, even though Counsel asked the requisite questions to lay a foundation for an excited utterance exception, Taylor testified the child was calmly sitting in the back of the ambulance and described his demeanor as “happy go lucky,” when the child made the statement to EMS and law enforcement. Taylor’s testimony did not support Counsel’s position that the statement was admissible as an excited utterance. *See State v. Davis*, 371 S.C. 170, 180, 638 S.E.2d 57, 62 (2006) (“[N]o evidence was elicited by the [proponent] that [the declarant] was still under the stress or excitement of [the victim’s] shooting. Therefore, the [proponent] did not meet its burden of establishing a foundation for the excited utterance.”). Based on the trial court’s ruling and demeanor in making the ruling, Counsel decided to move on from the line of questioning. App. 1062–63. Petitioner argues Counsel was deficient for moving on when instructed by the trial court because he did not preserve the argument for appeal. Counsel moved on because he felt he reasonably preserved the issue for appeal. App. 1054. While Counsel arguably should have proffered Taylor’s testimony, Counsel decided not to because he did not think it was in Petitioner’s best interest to go against the trial court’s instruction to move on from the line of questioning. App. 1062; 1067.

Even if Counsel had proffered Taylor’s testimony to preserve the issue, Petitioner failed to show prejudice because the trial court’s decision to exclude the statement would have been upheld on appeal.

Hearsay is an out of court statement offered as a true statement. Rule 801(c), SCRE. Hearsay is generally inadmissible. Rule 802, SCRE. However, an excited utterance is an exception to the general rule against hearsay. Rule 803(2), SCRE. An excited utterance is “[a] statement

relating to a startling event . . . made while the declarant was under the stress of excitement caused by the event . . . .” *Id.* Whether the declarant of an excited utterance is available as a witness at trial is immaterial. Rule 803, SCRE.

For a statement to be 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. Washington*, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). Additionally, “[s]tatements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.” *State v. Hill*, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998) (quoting 23 C.J.S. *Crim.Law* § 876 (1989)).

Here, had the issue been preserved, the only evidence in the record showed the child did not make the statement under the excitement or stress of the event—Taylor’s statement the child was “happy-go-lucky” when speaking to EMS and law enforcement. Thus, despite Counsel’s best effort at laying a foundation, he was unable to establish the child actually made the statement because of the event. *See State v. Davis*, 371 S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (reversing the court of appeals for finding a statement was an excited utterance because “murder is certainly a startling event,” and stating that relying on the fact there was a murder is inadequate to establish excited utterance). Because the only testimony in the record showed the child was not under the excitement or stress of the event when he made the statement, the trial court’s ruling the statement was inadmissible would have been upheld on appeal.

Further, there was no evidence the child actually witnessed the murder. The only person, other than potentially the perpetrators, who could have established the child actually witnessed the

murder was the child. As the trial court aptly stated, “Presence in the home doesn’t mean observation of the fatal act.” App. 167. To succeed on appeal, Counsel would have needed to call the child to testify, as the child is the only person who could attest to observing the event. Counsel stated he would not proffer the child’s testimony to lay the proper foundation because: (1) the child was only five- or six-years old at the time of trial; (2) the child was four-yearsold when his mother was murdered; and (3) Counsel was unsure how the child would testify. Counsel would have been ineffective for calling a witness at trial when he did not know how that witness would testify. *See Ingle v. State*, 348 S.C. 467, 560 S.E.2d 401 (2002) (finding trial counsel was ineffective for calling a witness without first interviewing the witness to ascertain whether the witness would support the defendant’s theory of the defense). Counsel cannot be ineffective for choosing not to call a witness he would have potentially been ineffective for calling. Additionally, nothing else in the record establishes the child actually observed the event. *See Hill*, 331 S.C. at 99, 501 S.E.2d at 125 (quoting 23 C.J.S. *Crim.Law* § 876 (1989)) (“Statements which are not based on firsthand information, as where the declarant was not an actual witness to the event, are not admissible under the excited utterance or spontaneous declaration exception to the hearsay rule.”). Because the evidence in the record showed only the child was somewhere inside the home, but nothing showed he observed the murder, the trial court did not err, and its decision would have been affirmed on appeal. Therefore, Petitioner failed to show prejudice because even if the issue was preserved for appellate review, the trial court’s decision would have been affirmed. As such, the PCR court did not err and certiorari should be denied.

Finally, Petitioner failed to establish deficiency or prejudice from Counsel’s alleged failure to preserve the issue whether the child’s statement was an excited utterance because, after a full PCR evidentiary hearing, there still has not been a proffer of the alleged statement. To show what

Counsel should have proffered, Petitioner needed to proffer Taylor or the child's testimony. There has been no foundation for the statement, even after the PCR hearing, as nothing in the record establishes that the child was excited or under the stress of the event when he made the statement, and nothing in the record shows the child actually observed who shot his mother. Petitioner failed to meet his burden of proof establishing deficiency or prejudice because he produced nothing more what Counsel produced at trial. Therefore, the PCR court did not err and certiorari should be denied.

### **CONCLUSION**

Based on the foregoing argument, Counsel was not constitutionally ineffective. Counsel articulated a reasonable strategy for his decision to move on from the line of questioning when prompted by the trial court because the testimony given by the person who heard the statement did not establish grounds for an excited utterance exception. Even if the issue been preserved with a proffer, the trial court's decision would have been affirmed because nothing in the record showed the child made the statement under the excitement or stress of the event, and nothing in the record showed the child observed the event. The PCR court therefore correctly found neither deficiency nor prejudice. Accordingly, this Court should deny certiorari.

Respectfully submitted,

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