IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

ANITA JANE SMITHEY,

Appellant,

v. Case No. 5D19-880

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed December 31, 2020

3.850 Appeal from the Circuit Court for Seminole County, Melanie Chase, Judge.

Michael Ufferman, of Michael Ufferman Law Firm, P.A., Tallahassee, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

COHEN, J.

Anita Smithey was convicted of second-degree murder in the shooting death of Robert Cline, her estranged husband. On direct appeal, her conviction was affirmed per curiam. Smithey v. State, 206 So. 3d 717 (Fla. 5th DCA 2016). Subsequently, Smithey moved for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, alleging ineffective assistance of counsel. After an evidentiary hearing, the trial court denied the motion. This appeal followed.

The evidence at trial indicated that Smithey and Cline had been married for three years but had separated and were living apart. Despite the separation, they would still see each other and engage in sexual relations. Their lovemaking incorporated role playing, including rape, as well as consensual vaginal and anal intercourse.

Smithey provided differing stories to law enforcement on the night of the shooting. However, a consistent theme was that Smithey had refused Cline's request to come over to her house on the evening of the shooting. Nonetheless, Cline drove to her house and in some manner gained entry into the residence, although law enforcement found no signs of forced entry. Despite Cline's unwanted presence, the two drank together and eventually proceeded to the bedroom, where they engaged in consensual sex. Afterwards, Smithey showered and upon returning to the bedroom, found that Cline wanted to continue having sex. Smithey did not. Cline forced himself on her, sexually assaulting her by both vaginal intercourse and digital anal penetration. Smithey further alleged that Cline stabbed her with a knife and beat her during the sexual assault. Smithey's defense was that she shot Cline in self-defense in an effort to stop the assault.[1]

Following the shooting of Cline, Smithey called 911. After explaining to first responders that she had been physically and sexually assaulted by her estranged husband, Smithey was transported to the hospital for treatment and a sexual assault examination. She was treated for bruising and superficial wounds to her torso, which appeared to have been inflicted with a sharp instrument. Following the examination, Smithey was taken to the Oviedo Police Department where she was interviewed.

[1] Some of the inconsistencies with Smithey's stories were related to where she stored the firearm, how she obtained it during the events, and when she actually pulled it out to shoot Cline.

Eventually, Smithey informed the investigator that she no longer wished to make any statements; however, the detective improperly continued the interrogation.

During the continued interrogation, Smithey admitted that after having shot Cline, she self-inflicted the wounds to her torso in fear that no one would believe that she had acted in self-defense. Because Smithey had invoked her right to remain silent, that admission was suppressed by the trial court. However, the trial court ruled that the statements were voluntary and thus potentially admissible for impeachment. The trial court also suppressed a significant portion of the evidence that was recovered at the scene, including a knife and the murder weapon, as a result of an invalid search warrant.[2]

At Smithey's trial,[3] her counsel presented the testimony of Dr. William Anderson, who opined that, based upon the nature and location of the wounds to Smithey's torso, the wounds were not self-inflicted and were consistent with a sexual assault. Such testimony directly contradicted that of the State's medical examiner. The State argued that Dr. Anderson's testimony opened the door to the admission of Smithey's acknowledgment that her torso wounds were self-inflicted. The trial court rejected the State's position.

Trial counsel then introduced a recording of Smithey's 911 call, wherein she informed the operator that Cline had stabbed her in her torso and that she shot him in self-defense. Immediately following the publication of the 911 call, the State once again moved to admit Smithey's previously suppressed admission that she had self-inflicted the

[2] Smithey acknowledged that the knife had, on prior occasions, been used as a part of the couple's role playing.

[3] Judge Kenneth Lester presided over the trial.

wounds to her torso. The State argued that the defense opened the door for it to utilize those statements to impeach Smithey's representation in the 911 call that Cline had stabbed her. The trial court agreed, and during its rebuttal case, the State was allowed to present the following previously suppressed portion of the interview:

> LAW ENFORCEMENT: We're doing, we're doing good. Where did you find the knife at? Did you pick it up off the bed, did you pick it up off the floor?
>
> SMITHEY: Yeah, I picked it, I picked it up where it was laying.
>
> LAW ENFORCEMENT: Where was it laying?
>
> SMITHEY: I don't, I don't remember where it was laying. I just know that I freaked out and I, and I picked it up and I stabbed —
>
> LAW ENFORCEMENT: And you stabbed—
>
> SMITHEY: —myself.
>
> LAW ENFORCEMENT: —yourself. Okay.
>
> . . . .
>
> LAW ENFORCEMENT: You run around to him, you're thinking, shit, the guy is about to die, I don't know what to do, and you stab yourself and you drop the knife right there and then that's, that's when you call 911 and run all the over place. Is that pretty much a fair assessment of what happened?
>
> SMITHEY: Yeah, except I'm not, I think – no, that's true. Yeah, that's true. That must be true.

That admission became a central theme of the State's case and was highlighted in its closing argument.

Following affirmance of her conviction and sentence, Smithey filed her rule 3.850 motion, which alleged that her trial counsel, Rick Jancha and Ryan Belanger, rendered ineffective assistance when they opened the door to the admission of her previously

suppressed statements that she had self-inflicted her wounds. Unfortunately, Jancha, who was lead counsel, was not available to appear as a witness at the evidentiary hearing on Smithey's motion. Jancha was able to provide an affidavit which, by agreement, was admitted for purposes of that hearing. In the affidavit, Jancha advised he did not believe introducing the 911 call would open the door to the admission of the suppressed statements, and that, while helpful, the 911 call was not essential to the defense's case.

Belanger, who was co-counsel, testified at the evidentiary hearing. He explained that after the suppression of Smithey's statements, the defense's strategy was to ensure that those statements, specifically the admission that the wounds to her torso were self-inflicted, did not come into evidence. Belanger testified that neither he nor Jancha believed that introducing the 911 call would open the door to the admission of the suppressed statements. Belanger explained that, had they anticipated that possibility, they "absolutely [would] not" have introduced the 911 call. Belanger acknowledged he had forgotten that Smithey told the 911 operator she had been stabbed by Cline.

To prevail on a claim of ineffective assistance of counsel, Smithey must demonstrate that her counsel's performance was deficient and that she was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984). In its order denying Smithey's rule 3.850 motion, the trial court concluded that counsel's decision to introduce the 911 call was "a reasonable strategic decision." We do not find the evidence supportive of that conclusion.

First, the record is undisputed that counsel was unaware that, during the 911 call, Smithey had accused Cline of stabbing her. The only evidence presented on the issue was from Belanger's testimony, who said:

> I do recall there being some issue of that [Smithey's assertion that Cline had stabbed her] being relatively quiet on the 911 call, and obviously that was the most damaging thing that got played. So there may have been times that I listened to it before that *I didn't recall her saying that, that's correct*.

(Emphasis added). While that statement does not, in and of itself, establish that Jancha was unaware of Smithey's statement on the 911 call, Belanger confirmed that neither he nor Jancha discussed the possibility of it opening the door to the suppressed statements.[4] The effort by the dissent to minimize Belanger's testimony, implying at some earlier time he might (or might not) have been aware of Smithey's admission, is unavailing. The issue is whether counsel were aware of the admission at the time the decision was made to introduce the 911 call, and the only evidence presented at the postconviction evidentiary hearing was that they were not. Nor did Belanger remember the process by which the defense decided to ultimately present the call. If either counsel was aware of Smithey's statements on the 911 call, some analysis, or, at a minimum, discussion, should have occurred regarding the potential risk of it opening the door to the suppressed statements.

Additionally, Jancha's affidavit and Belanger's testimony made clear that not only was the decision not strategic, it was in complete opposition to their actual strategy—that having successfully excluded extremely prejudicial admissions, it was critical to not undo that effort and allow those statements into evidence. Under those circumstances, counsel's decision to admit the 911 call can hardly be deemed reasonable and strategic. See Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000) ("[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered

[4] Jancha's affidavit did not address his recollection of the 911 call.

and rejected and counsel's decision was reasonable under the norms of professional conduct." (emphasis added) (citations omitted)).

Contrary to the dissenting opinion, the suggestion that the presentation of the 911 call arguably would not have opened the door to the admission of the suppressed statements is unpersuasive. "[T]he concept of 'opening the door' allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted . . . [and] is based on considerations of fairness and the truth-seeking function of a trial." Melendez v. State, 135 So. 3d 456, 459 (Fla. 5th DCA 2014) (citing Lawrence v. State, 846 So. 2d 440, 452 (Fla. 2003)). That concept applies when the admitted evidence would create an incomplete or misleading impression without the otherwise inadmissible evidence. Lawrence, 846 So. 2d at 452.

To those ends, courts have permitted the introduction of highly prejudicial evidence that, absent a misleading representation, would not have been admissible. For example, the supreme court upheld the admission of a defendant's prior arrest for carrying a concealed weapon because he claimed that he was ignorant about guns during his direct testimony. Calloway v. State, 210 So. 3d 1160, 1186 (Fla. 2017). Likewise, in Walsh v. State, 596 So. 2d 756, 757 (Fla. 4th DCA 1992), the court upheld the introduction of a confession made by a codefendant when the defendant elicited only the favorable portions thereof, despite the codefendant not testifying at trial. Such evidence raises Sixth Amendment concerns and is less credible than ordinary hearsay because of the strong motivation to implicate someone else, see Pacheco v. State, 698 So. 2d 593, 595 (Fla. 2d DCA 1997), yet the Fourth District found that the full confession was proper to qualify the testimony that was elicited. Walsh, 596 So. 2d at 757.

In the 911 call, Smithey claimed that Cline had assaulted her with a knife during the course of a sexual assault and that she shot him in self-defense. Once admitted, the State was entitled to offer Smithey's previously suppressed statement as impeachment evidence, in which she acknowledged that she, rather than Cline, inflicted her wounds in fear that she would not otherwise have been believed.[5]

On direct appeal, Smithey's appellate counsel did not challenge that ruling. We respectfully disagree with the dissent that the failure to argue error on direct appeal is irrelevant. Smithey was represented on appeal by an experienced lawyer who is board certified by The Florida Bar in criminal appellate law. Despite that the admission of the 911 call and resultant introduction of the previously suppressed statements was a critical turning point in the case, appellate counsel determined that he could not make a good faith argument that the trial court erred in the admission of the previously suppressed statements. While the dissent goes to great lengths to suggest that there was a colorable argument that admission of the 911 call would not necessarily open the door to the previously suppressed evidence, such an argument, as recognized by counsel on direct appeal was, and is, unavailing. In fact, rather than challenge the trial court's evidentiary ruling, Smithey's appellate counsel raised a claim of ineffective assistance based on the

[5] The assertion that the admission of the 911 call was necessary for the jury to hear Smithey's hysterical tone is untrue. Smithey's next-door neighbor and a law enforcement officer who responded to the scene both testified that she was hysterical after the shooting.

introduction of the 911 call, an issue generally heard postconviction. See Barnes v. State, 218 So. 3d 500, 505–06 (Fla. 5th DCA 2017).[6]

Notably, the dissent does not suggest that the trial court erred in admitting the previously suppressed admission.[7] Instead, the dissent merely posits that there was a colorable argument against its admission, and thus, the decision to play the 911 call could be deemed strategic and not ineffective. However, that argument is belied by Belanger's testimony that the defense strategy was to avoid the introduction of the previously suppressed statements. This would seem self-evident; to do otherwise would defeat the defense's successful effort to suppress the portion of Smithey's statement to the police in which she acknowledged self-inflicting her stab wounds.

Assuming, arguendo, that Jancha was aware of Smithey's statement during the 911 call that Cline had stabbed her with a knife, at the very least, an effort should have been made to obtain a ruling as to whether the admission of the 911 call would open the door to the presentation of the suppressed statements before going down that ill-advised path. The defense had utilized that procedure with other evidence during the course of the trial.

Accordingly, we find that counsel rendered deficient representation when they opened the door to the admission of Smithey's suppressed statements that she had self-inflicted the wounds to her torso.

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[6] While the dissent speculates that the heightened standard of review might have been a factor in the decision not to raise this issue, that is refuted by the effort to raise ineffective assistance of counsel on direct appeal, an even more difficult proposition.

[7] To do so would be to suggest that Smithey's counsel on direct appeal was ineffective in having failed to brief and argue that issue.

We now turn to whether Smithey demonstrated prejudice under Strickland. To prove prejudice, Smithey must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. We find that Smithey has done so.

There can be no doubt that, as aptly expressed by Belanger, the admission of Smithey's statement that her wounds were self-inflicted was "devastating" to her case. The admission completely contradicted the testimony of Dr. Anderson, who was Smithey's sole expert, and thereby undermined the credibility of counsel. If Smithey's counsel had planned to admit the 911 call, presenting the testimony of Dr. Anderson would have been ill-advised at best. The result was Dr. Anderson's testimony that Smithey's wounds were not self-inflicted being directly refuted by admissions from Smithey that she had, in fact, as the state's medical expert had opined, self-inflicted her wounds.

The presentation of Smithey's admission eviscerated her self-defense claim. Smithey presented evidence that Cline had a history of domestic violence. While there was conflicting testimony regarding the alleged sexual assault, the rape examination nurse, who was called by the State, explained that Smithey's injuries to her groin area were consistent with sexual assault. Dr. Anderson provided similar testimony.[8] There were no witnesses to the crime, other than Smithey, and she did not testify, although she provided inconsistent statements to law enforcement and her story did not completely align with the physical evidence. Ultimately, the jury was left to determine what

[8] Both acknowledged that the injuries were also consistent with consensual sex.

transitioned consensual sex into a crime scene, and the suppressed statements turned that determination in favor of the State.

The critical nature of Smithey's admission to having self-inflicted her wounds is illustrated by the State's closing argument. The State ended its argument explaining why this was not a case of self-defense: "[Smithey] was not justified and she knew it. And that's exactly why she cut herself, she inflicted those injuries to herself, and that's exactly why, we submit to you, that we've proven our case to you beyond a reasonable doubt . . . . " Accordingly, we find that there is a reasonable probability that, but for counsel's errors, the result of Smithey's trial would have been different.

The dissent is correct that Jancha's representation was, in many respects, competent; however, Jancha ultimately pursued a path which effectively sealed his client's fate. We do not utilize a scale which weighs those actions done well versus those actions which fall below the standard of effective assistance of counsel. Doing so obfuscates the central issue, which is whether counsel rendered ineffective assistance by introducing the 911 call that opened the door to the jury hearing Smithey's admission to having self-inflicted her wounds. Jancha might have done a good job in securing an expert who contradicted the medical examiner's testimony that Smithey's wounds were self-inflicted. However, his subsequent actions bolstered the State's expert while eviscerating the credibility of his own expert.

This is clearly a case in which counsel's representation fell so far below the constitutional guarantee to effective assistance that Smithey is entitled to a new trial, despite the error being isolated. That was acknowledged by Belanger, who testified that the primary defense strategy was to avoid the introduction of the suppressed statements

and that the introduction of the 911 call was “devastating”; and by the assistant state attorney, who ended her closing argument with that evidence. Thus, in conclusion, we find that the trial court erred in denying Smithey’s motion for postconviction relief and therefore, we reverse for a new trial.

REVERSED AND REMANDED.

MARQUES, L., Associate Judge, concurs.
TRAVER, J., dissents, with opinion.

Traver, J., dissenting.

This is not a typical ineffective assistance case. The majority reverses and remands for a new trial based on a single strategic decision during four years of sterling representation. The trial court recognized the strategic nature of counsel's decision and overall excellent representation. The postconviction court found that a colorable legal argument supported counsel's strategic decision, even though the argument proved unsuccessful. Smithey fails to challenge this finding and thus fails to discharge her appellate burden. Regardless, counsel's representation markedly exceeds constitutionally adequate representation. Accordingly, I respectfully dissent.

1. Counsel consistently provided skilled, diligent, and zealous representation.

The majority accurately observes that counsel filed two successful pretrial motions to suppress, which precluded the State from introducing the alleged murder weapon, the knife, and Smithey's admission of self-harm. During the pretrial stage counsel also: (1) obtained Smithey's release on bond in a high-profile murder case, (2) filed and argued a Stand Your Ground motion to dismiss featuring fourteen defense witnesses, (3) requested an emergency writ of prohibition with this Court when the trial court denied the motion to dismiss, (4) successfully suppressed Smithey's statements to a Child Protection Investigator, (5) propounded a *Daubert* challenge to an emergency medical technician's opinion testimony that Cline's body was cool to the touch, and (6) filed written responses to nine State motions in limine, obtaining on five motions either relief or a deferral to ruling until trial.

During the two-week trial, counsel effectively cross-examined each key State witness. Among other crucial points, counsel elicited testimony that Smithey suffered a previous episode of domestic violence at Cline's hands, which advanced Smithey's theory that she shot Cline in self-defense. Counsel then propounded a thorough case in chief, calling six witnesses. Most notably, counsel presented Dr. William Anderson as an expert witness. Dr. Anderson rebutted the independent medical examiner's testimony that cuts to Smithey's face, neck, and stomach were all self-inflicted and that the injuries to her genitals were consistent with consensual sex.[9]

Smithey received skilled, diligent, and zealous representation. In fact, she lodges no complaint about the quality of counsel's pretrial preparation or the soundness of counsel's trial strategies. Smithey instead premises her postconviction motion on a single evidentiary decision: the introduction of her 911 call.

2. Counsel's introduction of the 911 call was a strategic decision.

To succeed on her claim of ineffective assistance, Smithey must overcome a presumption that counsel's decision to introduce the 911 call "might be considered sound trial strategy." *Patrick v. State*, 302 So. 3d 734, 741 (Fla. 2020) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). The postconviction court, in a well-reasoned and detailed order, determined that counsel advanced a reasonable and strategic explanation for introducing the 911 call. This is a factual finding to which we must defer because it is supported by competent, substantial evidence. *See id.* at 742. But the majority discounts

[9] Trial counsel retained another expert, who contended that law enforcement had created an environment conducive to a false confession and had not followed proper police procedures. The trial court granted the State's motion in limine to exclude this testimony.

the postconviction court's factual finding, as well as the trial court's corresponding observation when ruling on the evidentiary issue:

> We've had four years on this case, we've had countless matters redacted. If there was something -- it's purely strategy is what it is. It's purely strategy. And each of you have your own strategy and you're entitled to it. Very experienced, excellent attorneys. Been a delight to have a trial with you, I might say. But, nonetheless, it's strategy and here we are.

Ample evidence supports the postconviction court's finding that introducing the 911 call was a reasonable and strategic decision. Lead counsel viewed the 911 call as "helpful," and second chair counsel explained that they wanted the jury to hear Smithey's hysterical tone. As the postconviction court determined, the 911 call served "several purposes." First, the call rebutted an emergency medical technician's testimony about Smithey's "crocodile tears" and feigned emotional state, which the State highlighted during its opening statement. Second, the call's timing and content rebutted the State's argument that Smithey delayed calling the authorities while she reflected on ways to explain Cline's murder as self-defense. Third, the call allowed the jury to hear Smithey's emotional voice in the moments after the shooting. Although the majority is correct that two other witnesses testified to Smithey's genuine hysteria, the emergency medical technician's statements were probative and problematic. The jury's ability to hear Smithey's voice firsthand resolved the conflicting testimony.

Smithey had no other way to explain her emotional state in the moments after the shooting because she could not take the witness stand.[10] As the postconviction court

[10] With Smithey's consent, postconviction counsel abandoned her ineffective assistance claim based on trial counsel's failure to call her as a witness after the trial court ruled that the 911 call opened the door to impeachment.

observed, the State would have introduced evidence that Smithey stood to receive about $750,000 in life insurance proceeds if the jury found her not guilty. In denying her Stand Your Ground motion, the trial court discounted Smithey's credibility, outlining ten material flaws. While Smithey's prosecutors were skilled and prepared, and did not need the assistance, the trial court essentially outlined a powerful cross examination.

Finally, I respectfully disagree with the majority's central premise that the "undisputed" record shows counsel did not know the 911 call included Smithey's statement, "he stabbed me." Second chair counsel testified that he listened to the 911 call "many times" and that the portion where Smithey said Cline stabbed her was "relatively quiet." He acknowledged that there may have been "times I listened to it before that I didn't recall her saying that . . . ." This testimony does not, in my opinion, establish that second chair counsel did not know the call's contents when it was played at trial**,** rather than some other time.

But regardless, lead counsel made the strategic decision to play the call, not second chair counsel. And Smithey points to no evidence showing that lead counsel did not know about the call's contents. During the evidentiary hearing, Smithey elected to proceed solely on lead counsel's sparse affidavit, which does not discuss this issue. This Court should decline to reweigh the evidence, particularly based on speculative inference and equivocal testimony. *See Patrick*, 302 So. 3d at 743.

3. Counsel's introduction of the 911 call was neither unreasonable nor, as an isolated decision, sufficiently egregious.

To prove counsel's deficient performance, Smithey must prove that "counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment." *Id.* at 741. "[T]here is no expectation that competent counsel will be

a flawless strategist or tactician . . . .” *Harrington v. Richter*, 562 U.S. 86, 110 (2011). Thus, while the right to effective assistance of counsel may “be violated by even an isolated error of counsel,” that error must be “sufficiently egregious and prejudicial.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (citing *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984)).

a. Counsel raised a colorable legal argument.

Smithey claims that counsel introduced the 911 call—and opened the door to significant impeachment—based on a misunderstanding of the law. “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.” *Hinton v. Alabama*, 571 U.S. 263, 274 (2014); *accord Amaro v. State*, 272 So. 3d 853, 856 (Fla. 5th DCA 2019). But while “[i]gnorance of well-defined legal principles is nearly inexcusable . . . . ‘an attorney is not liable for an error of judgment on an unsettled proposition of law . . . .’” *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) (quoting 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 17.1 (4th ed.1996)); *accord* Wayne R. La Fave et al., 3 *Criminal Procedure* § 11.10(c) (4th ed. 2019) (“The cases have insisted, however, that counsel’s error constitute a misreading of well established, clear legal standards.”).

In its thorough order, the postconviction court found that counsel “cited several supporting cases” during trial and concluded that counsel advanced “a colorable argument against the statement’s admission, even though it was ultimately unsuccessful.” The postconviction court’s findings are presumed correct, and Smithey neglects to challenge—or even acknowledge—those findings on appeal. She identifies no well-

defined legal principle or case law that defense counsel overlooked or misunderstood. Section 90.806(1), Florida Statutes (2019), provides that a "hearsay statement" can open the door to impeachment, but nowhere in her briefs does Smithey discuss what constitutes a "hearsay statement" under section 90.806, nor does she evaluate whether the 911 call qualifies as a hearsay statement. She also cites no record evidence pertaining to counsel's actual knowledge or research on this issue.

Smithey's failure to discharge her appellate burden should, by itself, resolve this appeal. *See Union Planters Bank v. Guardianship of Heft*, 866 So. 2d 1246, 1246 (Fla. 5th DCA 2004). Instead, the majority infers a lack of merit because Smithey declined to challenge the trial court's section 90.806(1) ruling on direct appeal. But appellate counsel's decision to omit an issue on direct appeal is not evidence that trial counsel lacked a good-faith or colorable legal argument. Counsel on direct appeal might strategically decline to raise a "colorable" issue to avoid diluting stronger issues. *See Fotopoulos v. State*, 838 So. 2d 1122, 1135 (Fla. 2002) ("For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim . . . would disserve the very goal of vigorous and effective advocacy. . . ." (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983))). Appellate counsel is especially likely to omit an issue when, as here, the issue is evidentiary and reviewed under the highly deferential abuse-of-discretion standard. *See Fitzpatrick v. State*, 900 So. 2d 495, 514–15 (Fla. 2005) (reviewing for abuse of discretion a trial court's admission of impeachment evidence under section 90.806(1)); *Gudmestad v. State*, 209 So. 3d 602, 605 (Fla. 2d DCA 2016) (same); *see also Clark v. State*, 95 So. 3d 986, 987 (Fla. 2d DCA 2012) ("[The abuse-of-discretion] standard rarely results in relief because it requires

affirmance of the trial court order unless no reasonable judge could have reached the decision challenged on appeal.").

Finally, even if Smithey challenged on appeal the postconviction court's finding that counsel's argument was "colorable"—which she has not—the postconviction court's finding is correct. Lead counsel raised two distinct bases on which the trial court could have ruled the 911 call was not hearsay. And if counsel elicits no "hearsay statement," section 90.806(1) does not open the door to impeachment. *See Gudmestad*, 209 So. 3d at 605.

First, counsel argued that the 911 call was not hearsay because it showed Smithey's "state of mind." Under Florida law, a statement offered to show state of mind can either: (1) qualify as not hearsay, or (2) fall within an exception to the hearsay rule. When offered to show the state of mind of the listener, the statement is not hearsay because it is not offered for its truth. *See* Charles W. Ehrhardt, 1 *Florida Evidence* § 801.6 (2020 ed.). But when offered to show the state of mind of the declarant, the statement typically falls within the "state of mind" hearsay exception.[11] *See* § 90.803(3)(a), Fla. Stat. (listing as a hearsay exception "[a] statement of the declarant's then-existing state of mind, emotion, or physical sensation, including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health").

[11] Lead counsel first argued that the 911 call fell within the "excited utterance" hearsay exception. *See* § 90.803(2), Fla. Stat. (listing as a hearsay exception "[a] statement or excited utterance relating to a startling event or condition"). Perhaps Smithey could have argued that counsel's shifting explanations showed a lack of research or preparation, but she raised this argument neither on appeal nor in the postconviction court.

Because counsel introduced the 911 call to show Smithey's—the declarant's—state of mind, the statement should fall within the hearsay exception. And that means the statement constitutes a door-opening "hearsay statement" under section 90.806(1). *See Fitzpatrick*, 900 So. 2d at 515 (holding that a statement admissible as an excited utterance opened the door to impeachment under section 90.806(1)); *see also Jackson v. Household Fin. Corp. III*, 298 So. 3d 531, 535 (Fla. 2020) (explaining that the hearsay exceptions "constitute categories of admissible hearsay").

But some Florida courts do not consistently apply the distinction between a statement offered to show the state of mind of the declarant (hearsay exception) and a statement offered to show the state of mind of the listener (not hearsay). For example, in *Everett v. State*, the Fourth District held that a statement offered to show the declarant's state of mind was not hearsay because it was not offered for its truth. 801 So. 2d 189, 191–92 (Fla. 4th DCA 2001). The *Everett* court relied on a First District case, which reached the same conclusion on similar facts. *See Fields v. State*, 608 So. 2d 899, 903 (Fla. 1st DCA 1992). Florida law thus supports counsel's argument that the 911 call is not hearsay because it showed Smithey's state of mind.

Second, counsel argued that the 911 call was not hearsay because it was offered not for its truth but to prove Smithey's hysteria through the sound of her voice and her manner of speaking. In advancing this argument, counsel relied on a First District decision that reversed a trial court's exclusion of a defendant's self-serving interview. *See Barber v. State*, 576 So. 2d 825, 830–31 (Fla. 1st DCA 1991). Barber argued his statements were not hearsay because they were offered not for their truth, but to show he was intoxicated—specifically, to show the sound of his voice and his manner of speaking. *See*

id. The First District recognized that "[w]hen a defendant seeks to introduce his own prior self-serving statement for the truth of the matter stated, it is hearsay and not admissible." *Id*. at 830 (citing multiple authorities). But the statement is admissible if it is "offered for a purpose other than proving truth of its contents" and the purpose is a "material issue in the case." *Id*. at 830 (first citing Charles W. Ehrhardt, *Florida Evidence,* § 801.2 (2d ed. 1984); and then citing *State v. Baird,* 572 So. 2d 904, 907 (Fla. 1990)).

In *Barber*, "[t]he probative value of the tape did not lie in the words stated, but in the way they were stated." *Id.* at 831. The *Barber* court emphasized that the defendant's manner of speaking was "made a material issue" by the State. *Id.* Lead counsel echoed this argument, contending Smithey's tone was at issue because an emergency medical technician testified that Smithey was crying "crocodile tears" and faking her medical condition.

While ultimately unsuccessful, counsel raised viable arguments that the 911 call did not open the door under section 90.806(1). Yet Smithey fails to show—on the available record—counsel's "[i]gnorance of well-defined legal principles," *Smith*, 170 F.3d at 1054, or counsel's "fundamental misunderstanding" of the law. *Lamb v. State*, 124 So. 3d 953, 957 (Fla. 2d DCA 2013). Smithey thus establishes no unreasonable performance.

b. <u>On the unique facts of this case, counsel's overall representation precludes a finding of deficient performance.</u>

If a claim rests on an isolated error, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington*, 562 U.S. at 111. As a result, "[i]t will generally be appropriate for a reviewing court to assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that a counsel rendered

reasonable professional assistance." *Kimmelman v. Morrison*, 477 U.S. 365, 386 (1986) (quoting *Strickland*, 466 U.S. at 690) (noting, in a case involving a single error, that two lower courts' failure "to examine counsel's overall performance was inadvisable"). "Although it is possible for commission of a single error to amount to ineffective assistance, this circumstance 'is clearly the exception and not the rule.'" *Gordon v. United States*, 518 F.3d 1291, 1297–98 (11th Cir. 2008) (quoting *Chatom v. White*, 858 F.2d 1479, 1485 (11th Cir. 1988)).

Here, not only did counsel provide active and capable advocacy throughout the four-year litigation, counsel adroitly handled the unexpected adverse section 90.806(1) ruling. Counsel requested and obtained a limiting jury instruction. Counsel also ensured redaction of the incriminating statements to reflect not only law enforcement's coercive techniques but Smithey's repeated assertions that she had not stabbed herself and Smithey's confusion when detectives continued to press the issue. As a result, while the jury heard the excerpts highlighted by the majority, they also heard Smithey deny, essentially in the same breath, that she stabbed herself.

Perhaps most effectively, counsel argued at length during closing that Smithey's incriminating statements were not credible because law enforcement "browbeat" a traumatized and medically fragile sexual assault and domestic violence victim. Counsel repeatedly leveraged Smithey's inconsistent statements as a call for the jury to "stop this train wreck" (the State's bullying of Smithey) and find reasonable doubt. In short, counsel artfully exploited the unexpected ruling.

"*Strickland*'s first prong sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017); *accord Patrick,* 302 So. 3d at 741 ("The defendant's task in proving deficiency is difficult

by design."). I respectfully disagree with the majority's conclusion that counsel acted unreasonably by introducing the 911 call, and I agree with the postconviction court that counsel advanced a colorable argument. In any case, the vast record shows that if counsel's strategic decision was unsound, this error was isolated and not egregious, especially when viewed in context. Stated differently, some errors are so serious that nothing else matters. This is not one of those cases.

By delivering continually "active and capable advocacy," *Harrington*, 562 U.S. at 111, counsel fulfilled their Sixth Amendment duty "to make the adversarial testing process work." *Patrick,* 302 So. 3d at 741 (quoting *Strickland*, 466 U.S. at 690). For these reasons, and based on the unique facts of this case, I respectfully dissent.