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2019 UT 48

IN THE

SUPREME COURT OF THE STATE OF UTAH

TROVON DONTA ROSS,
Appellant,

v.

STATE OF UTAH,
Appellee.

No. 20180187
Filed August 15, 2019

On Direct Appeal

Second District, Farmington
The Honorable Judge David M. Connors
No. 080700641

Attorneys:

Troy L. Booher, Dick J. Baldwin, Salt Lake City, for appellant

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JUSTICE PEARCE authored the opinion of the Court in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE, JUSTICE HIMONAS, and JUSTICE PETERSEN joined.

JUSTICE PEARCE, opinion of the Court:

INTRODUCTION

¶1 A jury convicted Trovon Donta Ross of aggravated murder and attempted aggravated murder. After a direct appeal, in which his appellate counsel successfully argued for the merger of the murder and attempted murder convictions, Ross filed a pro se petition seeking relief under the Post-Conviction Remedies Act (PCRA). In the petition, he argued that his trial counsel and his appellate counsel were both constitutionally deficient. Ross appealed the district court's grant of summary judgment. We held that

disputed issues of material fact should have precluded summary judgment on Ross's claim that his appellate counsel was ineffective. We reversed summary judgment and remanded for an evidentiary hearing.

¶2 At that hearing, the district court allowed the parties to introduce extensive evidence about Ross's trial and appeal in order to evaluate whether either of his attorneys offered ineffective assistance. Ross's trial counsel testified about his reasoning at the time of trial regarding why he did not raise an extreme emotional distress defense. And the hearing examined appellate counsel's process and her thinking about the claims she would raise on appeal—including why she did not argue that trial counsel's failure to seek an extreme emotional distress instruction was ineffective assistance of counsel. The district court also permitted the State to introduce evidence about testimony and documents it was prepared to introduce had Ross's trial counsel successfully argued that the jury should be instructed on extreme emotional distress.

¶3 The district court ultimately concluded that appellate counsel's performance was deficient because she had failed to investigate certain arguments while preparing the appeal. But the district court decided that the deficient performance had not prejudiced Ross because his trial counsel had not rendered ineffective assistance. To reach these conclusions, the court relied, in part, on the evidence that the State argued it would have presented at trial had Ross's counsel requested the extreme emotional distress instruction.

¶4 Ross appeals the post-conviction district court's conclusion that appellate counsel's performance did not prejudice him. And he argues that the district court erred when it considered the State's newly proffered evidence. Ross further asserts that we must also restrain ourselves from considering this evidence as we review whether appellate counsel's performance prejudiced Ross.

¶5 We conclude that we may consider the evidence entered into the record during the district court proceeding. To ensure that Ross received the counsel the Sixth Amendment guarantees him, *Strickland v. Washington*, 466 U.S. 668 (1984), we must determine whether Ross received ineffective assistance and, if so, whether that deficient performance affected the outcome of the proceeding. We see no compelling reason to turn our collective back on evidence properly in the record that will assist us in making that determination. And the district court did not err by reaching that same conclusion. Because the State's evidence reveals that there was no reasonable probability of a different outcome had Ross's counsel

acted as Ross now wishes he had, we conclude that Ross was not prejudiced by his appellate counsel's failure to investigate the alleged ineffective assistance of his trial counsel. We affirm.

BACKGROUND

The Murder

¶6 Trovon Donta Ross dated Annie Christensen.

¶7 After her relationship with Ross ended, Christensen met James Thomas May, III. After a few months, they began a committed and exclusive relationship. Soon, Christensen and May regularly spent several nights together each week.

¶8 Early one morning, May and Christensen heard a knock on the door of Christensen's home. Christensen answered the door. Ross stood outside. May rose from bed, wearing pajama pants and no shirt, and joined Christensen in the hallway as Ross approached them.

¶9 Ross said to May, "So you're [May], huh?" Ross then turned to Christensen and demanded that she "[t]ell him the last time we had sex." Ross then demanded that Christensen answer other questions. When Christensen refused to comply, Ross pulled out a gun and again demanded answers.

¶10 May testified at trial that "[t]he mood changed a little bit where . . . at first . . . he was asking questions, and then once he pulled out the gun, the situation become a lot more intense." Christensen pleaded with Ross to leave. Ross then told May, "I can't let her hurt you like she hurt me."

¶11 With the gun aimed at Christensen, Ross grabbed her and pushed her back into the bedroom. In the bedroom, Ross shot Christensen three times: first in the back of her head and then in her neck and abdomen. The shots killed Christensen.

¶12 As this was happening, May went to the garage and attempted to start his car. As he did, he heard the three shots. May looked up to see Ross standing in the garage's doorway. May exited the car and began to run down the street. Ross fired his weapon at May—hitting him in the arm and chest. May kept running.

¶13 A neighbor heard the gunshots and saw Ross jump into a van. The neighbor called the police as Ross sped off. Police chased Ross with sirens blaring.

¶14 While Ross drove, he called Christensen's father and told him, "I just shot and killed your daughter . . . and I'm on my way to your home to finish the job." Ross also left a voice message for his

boss and again confessed that he had killed Christensen. Ross also threw a gun out his car's window as he drove.

¶15 The car chase led to a neighborhood cul-de-sac where Ross abandoned his car and attempted to flee on foot. Ross eventually stopped and was arrested.

¶16 Meanwhile, police officers contacted May, who directed them to Christensen's house. The officers found Christensen's body face down underneath a blanket in the bedroom.

The Trial

¶17 The State charged Ross with aggravated murder, attempted aggravated murder, and failure to respond to an officer's signal to stop. The State based the aggravated murder charges on the theory that Ross killed Christensen and attempted to kill May as part of one criminal episode. *See* UTAH CODE § 76-5-202. The State sought the death penalty.

¶18 Ross did not testify at trial. The district court confirmed that Ross had discussed whether to testify with his trial counsel. Ross affirmed that he did not wish to testify during the guilt phase of the trial.

¶19 Ross's trial counsel made no opening statement, did not present any witnesses, and only cross-examined five of the prosecution's nineteen witnesses. At the close of evidence, Ross's trial counsel moved to dismiss the aggravated murder charge. Ross's trial counsel argued that the killing of Christensen and the attempted killing of May were "separate criminal episodes" and were "not the type of facts that are covered by [the statutory language of] scheme, course of conduct, a criminal episode." The court denied the motion.

¶20 In his closing argument, Ross's trial counsel acknowledged that "I don't believe there is much doubt, in view of the evidence, that Trovon Ross killed Ms. Christensen, and that he attempted to kill Mr. May." Trial counsel focused the rest of his argument on asserting that the homicide and attempted homicide were not committed during or incident to "one act, one scheme, one course of conduct, or one criminal episode in which the homicide was committed." He argued, "There was two acts here, and there was no evidence of any scheme." In his closing, he asked the jury to "return a verdict of murder and attempted murder, and to return a not guilty verdict of aggravated murder."

¶21 After the jury retired to deliberate, Ross's trial counsel asked to make a record of the trial strategy that he elected and why he had chosen that route. In an in-chambers discussion, Ross's trial

counsel explained that Ross had decided to not accept a plea deal offered prior to trial that would have required the State to recommend a sentence of life without parole. Trial counsel explained that Ross did not want to accept the deal because at that time, he "desired the death penalty." Ross's trial counsel explained that he had advised Ross that "it was to his benefit to have a trial because . . . that would keep his options open."

¶22 Trial counsel continued, "Ross was in agreement with that strategy. I think we followed through with [it]. There was no manslaughter defense raised based on any extreme emotional disturbance because of . . . evidentiary problems as are known to Mr. Ross and myself." Ross's trial counsel explained, "[T]hat's the reason I've done what I've done. I think Mr. Ross—he and I have talked about this a lot, on numerous occasions, and I think he agrees with that strategy. So I'd like to put that on the record." The court then confirmed with Ross that this was in fact the strategy that he had agreed upon with his trial counsel. It was.

¶23 The jury returned a guilty verdict on each charge. Ross subsequently agreed to waive his right to a jury for the sentencing phase in exchange for the State's recommendation of life in prison without parole. The court imposed that sentence and Ross avoided the potential death sentence.

The Direct Appeal (*Ross I*)

¶24 Ross appealed and was represented by a different attorney. His appellate counsel argued that his aggravated murder and attempted aggravated murder convictions should merge. In *State v. Ross*, we agreed and ordered that the two convictions merge. 2007 UT 89, ¶¶ 66–67, 174 P.3d 628 (*Ross I*).[1]

The Post-Conviction Petition and Appeal (*Ross II*)

¶25 In a pro se PCRA petition, Ross argued that both his trial counsel and his appellate counsel had been ineffective. *Ross v. State*, 2012 UT 93, ¶ 11, 293 P.3d 345 (*Ross II*). Ross argued that his trial

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[1] Ross's appellate counsel raised three additional claims: that the aggravator under Utah Code section 76-5-202(1)(b) is unconstitutionally vague, that prosecutorial misconduct required a new trial, and that the use of an anonymous jury—meaning a jury that court and counsel referred to by number instead of name—implied Ross was dangerous and denied him a fair trial. We did not agree. *Ross I*, 2007 UT 89, ¶ 59.

counsel was ineffective for failing to raise the extreme emotional distress defense. He also argued that his appellate counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim on direct appeal based on trial counsel's failure to raise the defense. Ross sought an evidentiary hearing to examine evidence and witnesses in support of his claims. *Id.* ¶ 11.

¶26 In his petition, Ross described that he and Christensen were both dating other individuals while continuing to see each other.[2] Ross recounted that he believed that he and Christensen were reconciling. He asserted that he knew Christensen was dating May but that Christensen had told him that the relationship was "going nowhere." Ross also alleged that two nights before the murder, he and Christensen spent the night together, engaging in sexual relations and talking.

¶27 Ross claims that on the morning of the murder he became concerned when he missed a call from Christensen and she did not return his call. He alleges that he went to Christensen's home to see what had happened and that he did not go intending to kill Christensen or anyone else. Ross describes that he "became concerned that his reconciliation efforts with [Christensen] meant little to her—or it meant she was in trouble with someone and needed help." Ross contends that his trial and appellate counsel were deficient for failing to ask for an extreme emotional defense instruction, and failing to raise trial counsel's omission, respectively.

¶28 The State moved for summary judgment on Ross's two claims of ineffective assistance of counsel. The State argued that Ross's claim of ineffectiveness against trial counsel was procedurally barred because he could have brought it on direct appeal. The State maintained that Ross's claim that appellate counsel was ineffective was not obvious from the record and would not have likely resulted in reversal on appeal.

¶29 In particular, the State asserted that "[t]he record conclusively foreclose[s] [Ross's] claim" that his appellate counsel was ineffective because of the in-chambers discussion after the

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[2] The post-conviction court determined that Ross's first petition did not provide a sufficient factual basis to support his claims. Ross filed a memorandum supporting his petition which the court treated as an amendment to his first petition. In the interest of brevity, we do not distinguish between the claims and facts that Ross asserted in his initial petition and in his amended petition.

closing arguments. Because Ross's trial counsel stated that there were "evidentiary problems" with the extreme emotional distress defense and Ross confirmed that he agreed with the strategic decision to not raise the defense, the State contended that the record reveals that trial counsel acted reasonably in not raising the defense—and therefore appellate counsel could not have been ineffective in failing to raise it.

¶30 Ross opposed the motion. Ross argued that he "was never informed he could claim this defense" by trial counsel and that appellate counsel should have investigated the issue on her own to see if "any . . . mistakes were made," especially as he had told her through letters that the reason why he went to Christensen's home was to check on her.

¶31 The post-conviction court granted the State's motion for summary judgment. And the court ruled that appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness because "the trial record conclusively demonstrates that the petitioner's trial counsel's decision not to raise the 'extreme emotional distress' affirmative defense was not only strategic, but was specifically agreed to by the petitioner"—referencing the in-chambers conference. Reasoning that the claim of ineffective assistance of trial counsel "would not have been obvious from the trial record at the petitioner's direct appeal" and that Ross had not set forth facts that the claim would have resulted in reversal on appeal if raised, the post-conviction court ruled that Ross failed to meet his burden of establishing an ineffective assistance of appellate counsel claim. Thus, the district court concluded that Ross's claim that his trial counsel was ineffective was procedurally barred because Ross could have raised this issue on direct appeal and the failure to raise the claim was not due to ineffective assistance of appellate counsel. *See* UTAH CODE § 78B-9-106(1)(c), (3)(a) ("A person is not eligible for relief under this chapter upon any ground that . . . could have been but was not raised at trial or on appeal. . . . Notwithstanding . . . a person may be eligible for relief on a basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground was due to ineffective assistance of counsel . . . .").

¶32 Ross appealed. On appeal, Ross argued that genuine issues of material fact existed as to whether his trial counsel was ineffective for failing to investigate and present the extreme emotional distress defense, whether it was an unreasonable trial strategy to omit the

defense, and whether Ross knowingly agreed to forego the defense.[3] In addition, Ross contended that genuine issues of material fact existed as to whether his appellate counsel rendered ineffective assistance by failing to investigate the adequacy of trial counsel's performance. Because of the genuine issues of material fact, Ross sought a remand to the post-conviction court for a hearing.

¶33 In *Ross II*, we concluded that disputed issues of material fact should have precluded summary judgment on Ross's claim that his appellate counsel was ineffective. 2012 UT 93, ¶ 43. We examined the merits of the ineffective assistance of trial counsel claim to address the ineffectiveness of appellate counsel claim. *Id.* ¶ 26. We noted that "[w]hen claiming extreme emotional distress, a defendant must present only a minimum threshold of evidence to establish the affirmative defense." *Id.* ¶ 29. And we reasoned that the "trial record suggests that the [extreme emotional distress] defense likely would have been available to Mr. Ross" because the trial record showed that Ross and Christensen had a romantic relationship and that Ross "became upset after arriving at Ms. Christensen's home and finding that she had spent the night with Mr. May." *Id.* ¶¶ 32–33.

¶34 In addition, we reasoned that the evidence that had been adduced at trial "may have been sufficient to satisfy the 'relatively low' burden necessary to establish the affirmative defense." *Id.* ¶ 33. We specifically focused on the evidence before the jury that Ross repeatedly asked Christensen to tell May about Christensen's sexual relationship with Ross, as well as the evidence that Ross told May "I can't let her hurt you like she hurt me." *Id.* And we noted that it did not appear that the extreme emotional distress defense would have conflicted with any of trial counsel's tactics. *Id.* ¶ 31.

¶35 We disagreed with the post-conviction court that the in-chambers conference following the trial foreclosed Ross's argument. *Id.* ¶¶ 35–42.

> The remarks made by trial counsel during the in-chambers conference are confusing and could call into question whether counsel had a strategy in declining to raise the extreme emotional distress defense, what the

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[3] Ross asserted that appellate counsel should have either raised the issue of trial counsel's ineffectiveness or requested a "Utah Rule of Appellate Procedure Rule 23B evidentiary hearing to establish whether there had been ineffective assistance on the part of trial counsel for his failure to raise the affirmative defense."

> strategy might have been, whether Mr. Ross was in agreement with counsel's decision, and whether counsel's decision was reasonable.

Id. ¶ 36. We were particularly troubled by evidence that suggested that Ross's trial counsel may have misunderstood the governing law, in part because he referred to it as "extreme emotional disturbance" and because he asserted that "[t]here was no *manslaughter* defense." *Id.* ¶¶ 36–42. And this caused us to question whether counsel had properly explained the extreme emotional distress defense to Ross. *Id.* ¶ 42.

¶36 We observed that the "trial record indicates that a defense based on extreme emotional distress may have been the most obvious and reasonable strategy to prevent Mr. Ross from being convicted for aggravated murder and attempted aggravated murder." *Id.* ¶ 46. We concluded that "the record is unclear regarding whether there was a legitimate reason to forego the defense." *Id.* ¶ 48. And "the record is unclear regarding whether counsel elected not to raise the defense because he believed that foregoing the defense would be advantageous to Mr. Ross in some way." *Id.* Accordingly, we could not "conclude that the record could have conveyed anything 'conclusive' to appellate counsel about trial counsel's strategy." *Id.* ¶ 49.

¶37 We identified several "red flags in the trial record that should have sparked some investigation by appellate counsel." *Id.* ¶ 51. "[A]ppellate counsel may have been ineffective for either failing to investigate them, or, after investigating, failing to bring a claim of ineffective assistance of trial counsel." *Id.* "[I]t is precisely this confusion—on the disputed, genuine issues of whether an investigation occurred and on what it might have uncovered—that require[d] [this court to] remand on the appellate counsel claim." *Id.* ¶¶ 51, 62.

¶38 Because we could not reach his claims regarding the ineffectiveness of his trial counsel without deciding that his appellate counsel was ineffective, we did not reach those claims. *Id.* ¶ 52. We instructed that if, on remand, the district court decided that appellate counsel was ineffective, then the court should consider whether trial counsel was ineffective as well. *Id.* ¶ 53. We anticipated that in that event, an additional evidentiary hearing would be necessary. *Id.*

Post-Conviction Hearing and Order
on Appellate Ineffectiveness

Testimony from Trial and Appellate Counsel

¶39 Ross's trial counsel and his appellate counsel testified extensively on the first day of the evidentiary hearing.

¶40 Ross's appellate counsel recognized gaps in her investigation. She acknowledged that she did not investigate the in-chambers discussion Ross's trial counsel had with the judge where he made a record of his trial strategy. She testified that she had not asked trial counsel what the strategy was that he referenced in that discussion, did not investigate why trial counsel erroneously referred to the defense as extreme emotional disturbance, did not investigate what the "evidentiary problems" were that he referred to, and did not verify that Ross understood what trial counsel referred to during the colloquy. Appellate counsel did not recall discussing with trial counsel his reasons for omitting the defense. And appellate counsel did not investigate whether trial counsel fully explained the defense of extreme emotional distress to Ross.

¶41 Ross's appellate counsel explained that she did not investigate or raise an ineffectiveness claim—or move for a rule 23B hearing—because she "believe[d] that under *Strickland* deficient performance and duty to investigate by a trial lawyer is largely determined by what the client tells the lawyer." She continued, "My understanding was that [Ross] told [trial counsel] that he didn't do it and I didn't think I needed to go beyond that . . . ."

¶42 Appellate counsel acknowledged that "a large part" of her decision not to raise the claim was based on her reasoning that trial counsel reasonably limited his investigation of the extreme emotional distress defense argument because Ross would not admit guilt. Additionally, appellate counsel identified that Ross's "inconsistent statements" in his letters to her were part of the reason that she did not investigate the potential claim.

¶43 During his testimony, Ross's trial counsel recognized that extreme emotional distress was an "obvious" defense for Ross but explained that he believed he was precluded from pursuing it because Ross instructed him not to present it. Ross's trial counsel testified that he shared with appellate counsel that the

> reason [the defense] didn't run an emotional distress defense was because Mr. Ross insisted throughout my representation of him . . . up until the time we entered the penalty phase of this trial, . . . that he did not kill Ms. Christensen and he also instructed me that I was

> not to argue anything where the argument would say that he had in fact killed her.

Trial counsel also testified that Ross specifically instructed him not to pursue the extreme emotional distress defense. Trial counsel "told [appellate counsel] that basically that precluded me from running what was probably the most obvious of defenses that you would see in a case like this."

¶44 Ross's trial counsel explained that he believed that in order to effectively establish the extreme emotional distress defense, Ross would need to admit guilt. He opined that Ross would also need to admit guilt to an expert who could then testify on his behalf. Counsel testified that he explained this to Ross.

¶45 Trial counsel also testified about his concern with raising the extreme emotional distress defense without Ross's testimony:

> The risk is [the jury is] going to, you know, think you're just trying to sort of pull the wool over their eyes, and that Mr. Ross didn't testify, and they don't believe that he did it in the extreme emotional disturbance. And then, you got to deal with them at the penalty phase when you come back and ask them to save his life when you really sort of run—in my opinion—a bogus defense, bogus on the facts. You know, that's why the death penalty cases are different because you know, you don't really worry about what the judge is going to do at the penalty phase. You're worried about that jury.

Counsel asserted that the reason that he conceded Ross's guilt in closing argument was so he "c[ould] argue what the evidence showed with an idea of keeping some cred[i]bility with that jury when I had to . . . try to argue that they should not give him the death penalty."

¶46 Ross's trial counsel explained that he requested an in-chambers meeting to make a "record so it was clear . . . that there was a reason why I didn't put on an obvious defense." Trial counsel testified that the "evidentiary problems" with presenting the defense that he referred to in the colloquy consisted of Ross's refusal to admit guilt and Ross's insistence that he not present the defense. He also explained that he misidentified the defense as "extreme emotional disturbance" and referred to manslaughter only out of habit, but that he accurately understood the defense and explained it accurately to Ross.

¶47 Ross's trial counsel appeared to recognize that if Ross had raised the defense, the State could have introduced additional evidence that would have been harmful to Ross. And trial counsel was aware of Ross's "long history of violence" with Christensen and his "history of violence with other women."

The State's Additional Evidence

¶48 During the evidentiary hearing, the State took the opportunity to insert additional evidence into the record. The prosecutor testified that the State anticipated that Ross might raise a defense of extreme emotional distress. The prosecutor explained that the State was prepared to demonstrate that, regardless of any evidentiary support for Ross's subjective experience of extreme emotional distress, "a reasonable person would not have reacted th[e] way [he did], but Mr. Ross did because of his background, what he had done, what he had shown in the past."[4] The State intended to put on evidence that "this is who he is. This is Mr. Ross. This is how he reacts. This is his violent nature."

¶49 The State was ready to introduce testimony from Christensen's sister, Christensen's father, and May—all of whom would have testified about Ross's abuse of Christiansen. One or more of them would have testified that Ross had become "very controlling" of Christensen and that she was "terrified" of Ross. Ross would "slap her," "push her," and "tell her . . . what she could and couldn't do." Christensen had attempted to end the relationship and even moved to a different home and changed her phone number to escape Ross.

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[4] The prosecutor's articulation of the extreme emotional distress standard in the evidentiary hearing is not entirely accurate. At the time of Ross's trial, the Utah Code provided that "[i]t is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another . . . under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." UTAH CODE § 76-5-202(3)(a)(i) (2003). And we have interpreted the statute as requiring two findings: "(1) subjectively, the defendant committed the killing while under the influence of extreme emotional distress, and (2) objectively, a reasonable person would have experienced an extreme emotional reaction and loss of self-control under the circumstances." *Ross II*, 2012 UT 93, ¶ 28. *See infra* ¶¶ 97–100.

¶50 Christensen's sister observed that during and after her relationship with Ross, Christensen had "hand marks on her throat," "bruises on her body," and at one point "had a black eye."

¶51 Ross asked Christensen's father to "stay out of the relationship." Ross told him "that [Christensen] was his bitch now and that he could do what he wanted, when he wanted."

¶52 And Christensen's fear of Ross infected her relationship with May. When May first asked Christensen out on a date, she refused because of her "crazy ex-boyfriend," Ross. They eventually began a committed and exclusive dating relationship. Christensen expressed fear for May's safety and urged him to have a plan in the event something happened to either of them.

¶53 After Christensen ended the relationship, Ross continued to contact her. On one occasion, Ross arrived at Christensen's apartment, looking for her. Christensen's sister (Sister) was there alone. Sister made sure the door was locked and hid in a closet. Ross reached through an unlocked window and opened the door through the window. Ross found Sister in the closet and asked her where Christensen was. When she refused to tell Ross, he "shook her and told her that she'd better be afraid of him. He told her this is serious. Motherfuckers, you're going to die tonight." Ross called Sister's attention to the gun he carried. Ross then took Sister in a car, but she eventually escaped. Christensen asked Sister to not press charges for kidnapping out of fear that Ross would hurt someone in their family if she did.

¶54 The State possessed a police report from this incident. The report demonstrated that Ross was aware of Christensen's relationship with May and illustrated that "Ross had a very violent reaction to what was going on with respect to [Christensen] and other people." The report "showed that Mr. Ross was aware of Mr. May considerably, time-wise, before the actual homicide occurred. He knew that Mr. May had a relationship with Ms. Christensen and that he was upset because of that relationship." The police report "would have shown a history of anger and violence toward anybody who might have been a suitor of [Christensen] and the fact that he would have definitely reacted in that way regard[less] of the circumstances or situation. He was—he had a violent temper type situation when it came to [Christensen]."

¶55 The State was prepared to present the phone records between Ross and Christensen to show that Ross initiated all of the calls on the morning of the murder. And the State was ready to call a

witness who would testify about Ross's relationships with other women and his concern that Christensen would find out about them.

¶56 The prosecutor explained that they did not introduce this evidence in the guilt phase of the trial because the State focused on the evidence that satisfied the aggravated murder statute.[5] The State elected to reserve this additional evidence for the penalty phase. In other words, this is the evidence the State thought would convince the jury that Ross should die for his crimes.

¶57 Finally, May testified at the hearing on remand. He reiterated what had occurred on the morning Ross killed Christensen. At the hearing, he provided additional detail that he had not mentioned at trial. For example, May stated that when Ross arrived, he had a "look in his eyes" such that he looked like a "killer." Ross had a "blank expression," an expression of "ill intent." The only other time that May had seen such an impression was in combat zones while serving in the military. May explained that the situation became more intense when Ross pulled out a gun and started "badgering" Christensen with questions, but that Ross appeared to remain in control of himself throughout the encounter.

District Court Findings of Fact and Conclusions of Law

¶58 The district court concluded that "[d]espite the 'heavy measure of deference to counsel's judgments,' the Court finds that . . . appellate [counsel's] representation of Petitioner was constitutionally deficient." The court reasoned that "there were a number of 'red flags' apparent from the trial record that should have triggered an investigation." This included evidence that Ross was angry about Christensen's relationship with May, Ross's statement that he would not let Christensen hurt May like she had hurt Ross, trial counsel's misstatement of the defense in the in-chambers colloquy, and trial counsel's failure to present any other defense coupled with the fact that the defense would have been consistent with trial counsel's admission in closing argument that Ross committed the crimes charged. In addition, the court pointed to information that appellate counsel learned during the pendency of the appeal—information in trial counsel's files and letters sent from Ross—which the court concluded triggered a duty to investigate further.

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[5] The prosecutor acknowledged some uncertainty about the admissibility of some of this evidence.

¶59 The district court called attention to appellate counsel's testimony which revealed that she "came to the conclusion that Petitioner could not prevail on an [extreme emotional distress] defense without conducting any investigation." The court reasoned that the "evidence reveals that [appellate counsel] should have sought a Rule 23B remand . . . to have a hearing as to whether [trial counsel] rendered ineffective assistance . . . in failing to raise [the] defense or at least inquired with [trial counsel] and Petitioner regarding the circumstances about the failure to raise the . . . defense."[6] Accordingly, the court concluded that appellate counsel's representation was constitutionally deficient.

¶60 But the district court also concluded that Ross failed to demonstrate that "he probably would have prevailed on appeal" had appellate counsel raised the claim. To address prejudice, the district court considered whether trial counsel's representation was ineffective. And the district court concluded that trial counsel was not ineffective because he had "valid, strategic reasons for not raising the [extreme emotional distress] defense"—"unrebutted testimony [which] demonstrate[d] that [Ross] refused to admit that

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[6] The district court's conclusion that counsel should have asked for a rule 23B hearing "as to whether" trial counsel was ineffective suggests that Ross's appellate counsel could have used a rule 23B motion to conduct her investigation. This misapprehends the rule. Rule 23B of the Utah Rules of Appellate Procedure has a narrow and specific purpose—to permit a party to address record deficiencies that exist as a result of ineffective assistance of counsel. *State v. Griffin*, 2015 UT 18, ¶ 17 & n.13, 441 P.3d. 1166.

Rule 23B permits "[a] party to an appeal in a criminal case [to] move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court's determination of a claim of ineffective assistance of counsel." UTAH R. APP. P. 23B(a). A rule 23B motion is "available only upon a nonspeculative allegation of facts" and the trial court in a rule 23B remand hearing is confined to those claims of ineffectiveness identified in the motion or ordered by the reviewing court. *Id.* 23B(a), (b), (c), (e). The purpose of a rule 23B remand is not to permit a "fishing expedition," and it cannot take the place of counsel's investigation. *State v. Hopkins*, 1999 UT 98, ¶ 13 n.1, 989 P.2d 1065 (citation omitted) (internal quotation marks omitted). Therefore, the district court misspoke to the extent that it suggested that appellate counsel could have used a rule 23B remand to investigate the case.

he committed the offenses and that [Ross] instructed him not to present any defense inconsistent with [his] claim." In addition, trial counsel believed that presenting the extreme emotional distress defense without Ross's testimony would undermine Ross's credibility to the jury, which could jeopardize Ross's life at the penalty phase of the trial. Despite the district court's concerns about trial counsel's understanding of the defense, the court concluded that trial counsel's "strategy was to save [Ross's] life, a strategy that ultimately proved successful."

¶61 The district court further concluded that regardless of whether trial counsel's performance was deficient, counsel's omission of the defense did not prejudice Ross. The district court concluded that Ross "would likely have been granted a jury instruction on" extreme emotional distress if it had been sought, but that the State was prepared to present evidence which would have disproved it beyond a reasonable doubt. The district court concluded that Ross had not demonstrated that he would have prevailed in his affirmative defense had the State presented the additional evidence. Rather, the court concluded that "had this evidence been presented, the [c]ourt finds the jury would have been even more likely to find him guilty of aggravated murder."

¶62 Finally, the district court concluded that because Ross's appellate counsel was not ineffective, his claim that his trial counsel was ineffective was procedurally barred. *See* UTAH CODE § 78B-9-106(1)(c), (3).

¶63 Ross then filed a post-hearing motion in which he argued that once the district court determined that appellate counsel's performance was deficient, the court should have then relied exclusively on the record as it existed at the time of trial to determine whether the deficiency prejudiced Ross. In addition, Ross argued that he was entitled to a second evidentiary hearing to address trial counsel's ineffective representation in which Ross would have testified "that the extreme emotional distress defense was never explained to him, and he did not instruct his counsel not to present the defense." Neither argument persuaded the district court.

ISSUES AND STANDARDS OF REVIEW

¶64 Ross appeals the district court's conclusion that appellate counsel's omission of the ineffective assistance of counsel claim caused him no prejudice. And Ross contends that the district court erred by considering evidence that was outside of the record created

at trial.[7] Ross asserts that the issue before this court is whether, "on direct appeal, [we] would have held that there is a reasonable likelihood that the jury, properly instructed, would have found in favor" of Ross—and that to answer this question, we must ignore the evidence presented at the evidentiary hearing below which was not a part of the trial record. Ross seeks a new trial.

¶65 When we are presented with a claim of ineffective assistance of counsel, we "review a lower court's purely factual findings for clear error, but [we] review the application of the law to

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[7] The State asserts that we should not reach these issues and that we should instead disavow *Ross II*. The State argues that, on summary judgment, Ross failed to satisfy his burden to advance sufficient affirmative evidence that would rebut the presumption that appellate counsel acted reasonably. And that by reversing the grant of the State's motion for summary judgment, *Ross II* inappropriately bailed Ross out.

When a party "had the opportunity to fully litigate the issues raised in the summary judgment motions," we will not review the denial of the motion. *Wayment v. Howard*, 2006 UT 56, ¶ 19, 144 P.3d 1147. Such is the case here. In the evidentiary hearing below, the State presented evidence and litigated the questions of the ineffectiveness of trial and appellate counsel. *Ross II* is therefore beyond direct review in this appeal. And the State has not engaged with the standard we have set for a party seeking to shoulder the burden of convincing us to overturn our precedent. *See Eldridge v. Johndrow*, 2015 UT 21, ¶ 22, 345 P.3d 553.

While we will not break from those standards here, we will clarify *Ross II*. The State claims that *Ross II* could be read to suggest that a defendant need not put forward evidence sufficient to create a genuine issue on whether the defendant can overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). To be clear, to prevail on summary judgment, a defendant must point to sufficient evidence to create a genuine issue of material fact that counsel's performance fell outside that range. In other words, a defendant must show that he can "produce evidence which would reasonably sustain a judgment in his favor." *Archuleta v. Galetka*, 2011 UT 73, ¶ 43, 267 P.3d 232 (citation omitted) (internal quotation marks omitted). That necessarily includes evidence that creates a genuine issue of material fact on whether the defendant can overcome the presumption of reasonableness that attaches to her counsel's strategic choices.

the facts for correctness." *Menzies v. State*, 2014 UT 40, ¶ 29, 344 P.3d 581 (alteration in original) (citation omitted) (internal quotation marks omitted).

ANALYSIS

I. The District Court Properly Considered Evidence Outside of the Record on Direct Appeal

¶66 Ross contends that the district court erred by considering the evidence presented at the evidentiary hearing because, he argues, this evidence was not relevant to the issue of whether he suffered prejudice as a result of appellate counsel's ineffectiveness as it was not in the record on direct appeal.

¶67 After we reversed the grant of summary judgment in *Ross II*, the district court held an evidentiary hearing. At that hearing, the State presented evidence that it anticipated a potential extreme emotional distress defense and was prepared to rebut it if Ross had asked for an extreme emotional distress jury instruction. The State was prepared to forward evidence that Ross had a long history of abusing and threatening Christensen. And it intended to use this evidence to dispute the argument that Ross only killed Christensen because he was under extreme emotional distress. In addition, the State was prepared to call witnesses who would testify about Ross's relationships with other women and that he was worried Christensen would learn of these relationships.

¶68 The State was also ready to demonstrate that Ross had been aware of Christensen's relationship with May for months prior to the murder. The State would point to this evidence to dispute the contention that it was objectively reasonable for Ross to have been upset and surprised to find Christensen with May. Finally, the State anticipated developing May's testimony to provide evidence that Ross was not experiencing extreme emotional distress when he murdered Christensen.

¶69 The district court concluded that appellate counsel was deficient because she "should have sought a rule 23B remand . . . to have a hearing as to whether [trial counsel] rendered ineffective assistance . . . in failing to raise an [extreme emotional distress] defense or at least inquired with [trial counsel] and [Ross] regarding the circumstances about the failure to raise the . . . defense." The district court then concluded that Ross had failed to "prove that he probably would have prevailed on appeal"—and therefore, Ross suffered no prejudice from appellate counsel's deficiency.

¶70 To reach this conclusion, the district court evaluated, based on the evidence at the hearing, whether Ross's trial counsel was

ineffective. The court concluded that Ross's trial counsel had "valid, strategic reasons for not raising the [extreme emotional distress] defense" and that in any case, Ross was not prejudiced by the omission of the defense. Therefore, because Ross's trial counsel was not ineffective, the district court concluded that Ross was not prejudiced by his appellate counsel's deficient performance.

¶71 Ross asserts that the district court erred by considering the State's evidence to evaluate prejudice and that we also cannot consider this evidence because it was not in the record on direct appeal. He argues that we must place ourselves in the position we were in when we heard *Ross I* and limit ourselves to what was before this court at that time. The State's additional evidence was not added into the record on direct appeal through a rule 23B motion and hearing.[8] Therefore, because it was not in the record before this court in *Ross I*, Ross argues we also cannot consider it.

¶72 *Strickland v. Washington* gives meaning to the Sixth Amendment's guarantee of assistance of counsel in criminal prosecutions. 466 U.S. 668, 686 (1984). *Strickland* provides us with two inquiries to assess a claim of ineffective assistance of counsel: objective deficiency of counsel and prejudice to the defendant.[9] *Id.* at 687. *Strickland* instructs that

> the ultimate focus of [the] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular

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[8] Although not necessary to our disposition of this case, the arguments the parties raise have caused us to reflect on whether the State could have availed itself of a rule 23B remand to augment the record with its additional evidence. Ross argues that the State could not. He acknowledges that the rule appears to contemplate that any "party" can bring the motion. But he contends that other language in the rule requiring that the movant forward an affidavit showing "the claimed deficient performance" and "claimed prejudice" clarify that only a defendant may avail herself of rule 23B.

The parties have not briefed the issue, so we will not opine on the question. But we flag any potential ambiguity for the Supreme Court Committee on the Rules of Appellate Procedure to consider.

[9] If Ross "makes an insufficient showing on one" prong, his claim fails and we need not review the other. *Strickland*, 466 U.S. at 697.

> proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id. at 696. Therefore, as we assess whether it was appropriate for the district court to consider the extra-record evidence, we do so remembering that the ultimate aim of our inquiry is the fundamental fairness of Ross's proceeding.

¶73 Ross asserts that the "relevant 'proceeding' is the proceeding before this court in 2007." "Thus," he argues, "the question is whether [the Utah Supreme Court] would have reversed had appellate counsel raised trial counsel's failure to request an instruction on extreme emotional distress based upon the evidence in the trial record." Ross asserts that the State's rebuttal evidence would not have been before this court in *Ross I* on direct appeal. According to Ross, the State's evidence would only have been in the record if Ross's appellate counsel had sought a rule 23B remand hearing.[10] Ross argues that the district court erred in considering this evidence to determine whether Ross "probably would have prevailed" in that appeal because the additional evidence would not have been before this court when we decided *Ross I.*

¶74 We take Ross's point that because he has not challenged appellate counsel's failure to move under rule 23B, we assume that the *Ross I* court would not have had the benefit of the State's evidence; that is, had Ross challenged his appellate counsel's decision not to seek a rule 23B remand, the hypothetical world we would imagine would have necessarily included the evidence that would have been injected into the record on remand. And Ross forwards a plausible, and quite clever, argument that he has positioned this case such that this court can be asked to forget that it

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[10] While Ross asserts that the State introduced the evidence to show what appellate counsel would have found in a rule 23B hearing, the State represented that it introduced this evidence for a different reason. The State explained that "[t]he question we're trying to answer here is we're essentially reconstructing a hypothetical [extreme emotional distress] defense to see whether—had that been run, there was a reasonable likelihood of a more favorable result at trial." The district court admitted the evidence on this basis. Still, for the sake of argument, we engage with Ross's framing.

knows what it knows about what would have happened at trial had Ross's counsel requested the extreme emotional distress instruction.

¶75 Although Ross is right about what would have been in front of us in *Ross I*, he provides little support for the conclusion that other information properly in the record is out of bounds. We see nothing in *Strickland*, or any other precedent, that requires us to ignore evidence that is properly in the record when we evaluate whether appellate counsel's failure to challenge trial counsel's failure to raise extreme emotional distress prejudiced Ross's trial.

¶76 *Strickland* and the cases that follow it illustrate that to evaluate prejudice, we assess counterfactuals scenarios—that is, what would have happened but for the ineffective assistance—and that we may do so with the evidence available to us, even when not part of the original record. As the State points out, "[T]he United States Supreme Court requires reviewing courts [evaluating prejudice] to consider not just what did happen at trial, but also what would have happened, including evidence that would have come in but didn't as a result [of] counsel's decisions."

¶77 *Strickland* itself illustrates the appropriateness of considering such evidence. *Strickland* addressed claims that counsel was ineffective for, among other things, failing to request a presentence investigation and present certain evidence at a sentencing hearing. 466 U.S. at 675–77. The Court reasoned that "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 699–700. "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence"—testimony from individuals that knew the respondent, expert testimony that respondent acted under stress, and a rap sheet—"would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Id.* at 700. The Court noted that the admission of this evidence "might even have been harmful to [the respondent's] case" as his rap sheet and psychological reports would have undone other aspects of his defense. *Id.* After evaluating the potential impact of this unintroduced evidence, the Court concluded that counsel was not deficient and that respondent was not prejudiced as a result.

¶78 *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam), also supports our conclusion that it is appropriate to consider the impact the State's rebuttal evidence would have had if it had been presented at Ross's original trial. In *Sears*, the Supreme Court ruled that a state supreme court failed to properly apply the prejudice prong of the

Strickland inquiry when the state court "determined it could not speculate as to what the effect of additional evidence would have been"—evidence which was not introduced into the proceeding in question. *Id.* at 946.

¶79 After a jury convicted Sears of armed robbery and kidnapping with a bodily injury, his trial counsel presented evidence at sentencing about Sears's childhood. *Id.* at 947. Specifically, counsel introduced evidence to portray Sears's "childhood as stable, loving, and essentially without incident." *Id.* Counsel's mitigation theory—apparently calculated to emphasize the "adverse impact of Sears' execution on his family and loved ones"—"backfired." *Id.* The prosecutor took advantage of the mitigation theory and argued to the jury that they should impose the death penalty because "[w]e don't have a deprived child from an inner city; . . . we have a person, privileged in every way, who has rejected every opportunity that was afforded to him." *Id.* at 947–48 (first alteration in original) (citation omitted). The jury sentenced Sears to death. *Id.* at 947–48 & n.2.

¶80 A post-conviction evidentiary hearing later revealed mitigation evidence that Sears's trial counsel had not known or presented to the jury. *Id.* at 948–51. The mitigation evidence powerfully revealed that Sears was "far from 'privileged in every way'": his parents had a physically abusive relationship, he was sexually abused by a cousin, he was verbally abused by his father, his older brother—a drug dealer—introduced him to crime, and, most of all, Sears had "substantial deficits in mental cognition and reasoning." *Id.* at 948–50. Sears's impairments were so severe that he performed at the first and lowest percentile on certain standardized tests that assess frontal lobe functioning. *Id.* at 950.

¶81 In the face of evidence that Sears's trial counsel knew "*none* of this evidence," and conducted only a "cursory" investigation into mitigation evidence, the post-conviction court concluded that counsel was constitutionally deficient. *Id.* at 951–52. The Supreme Court noted that this conclusion was "unsurprising[]." *Id.* at 951. But the Court characterized the post-conviction court's application of the *Strickland* prejudice standard as "surprising" and erroneous. *Id.* at 952–53.

¶82 The state post-conviction court had reasoned that "it is impossible to know what effect [a different mitigation theory] would have had on [the jury]," and "[b]ecause counsel put forth a reasonable theory with supporting evidence . . . [Sears] . . . failed to meet his burden of proving that there is a reasonable likelihood that the outcome at trial would have been different if a different

mitigation theory had been advanced." *Id.* at 952 (cleaned up). In essence, the state post-conviction court concluded its hands were tied because trial counsel had presented *some* mitigation evidence.

¶83 The Supreme Court admonished the state court's failure to properly apply the prejudice inquiry. *Id.* at 954–55. The Court explained, "We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955. "To the contrary," the Court continued, "we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below." *Id.*

¶84 "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." *Id.* at 955–56 (alterations in original) (citation omitted). "That same standard applies—and will necessarily require a court to 'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Id.* at 956. Therefore, the Court concluded:

> A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' "significant" mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation.

Id. at 956.

¶85 Accordingly, under the *Strickland* inquiry we must take into account the effect of evidence which was not introduced in the proceeding below. In other words, "[i]n evaluating [prejudice], it is necessary to consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam).

¶86 Evaluating the effect of evidence not before the decision maker in the original proceeding may require courts to imagine and assess the fairness of a proceeding radically different from the one that actually occurred. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (reasoning that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime

charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial"). And we have considered the potential effect of previously unadmitted evidence before. *See State v. McNeil*, 2016 UT 3, ¶¶ 32–34, 37, 43, 365 P.3d 699 (rejecting the argument that "appellate courts may never speculate about how the trial would have been different had the error not occurred"). Even though we are in the situation of evaluating the ineffectiveness of appellate counsel for failing to raise the ineffectiveness of trial counsel, these principles apply with equal force.

¶87 Not so, says Ross. And he attempts to distinguish each of the cases cited or discussed above. He characterizes them as addressing claims about "trial counsel's failure to introduce additional evidence, a claim that requires the introduction of evidence outside the record in the criminal case," which to him justified the Court's consideration of extra-record evidence. (Citing *Strickland*, 466 U.S. 688; *Sears*, 561 U.S. 945; *Wong*, 558 U.S. 15; *Hill*, 474 U.S. 52; *McNeil*, 2016 UT 3.) "In other words," Ross asserts, these "cases presented issues that would require a rule 23B remand in Utah, so they only confirm Mr. Ross's position here."

¶88 Even if we were to accept Ross's characterization of the cases, we are not bound to the conclusion he reaches. Ross is right to assert that a rule 23B remand is a mechanism that we have implemented to allow supplementation of a record to permit us to better assess ineffective assistance of counsel. But Ross is wrong to assume that rule 23B is the only mechanism by which this could occur. The information came into the record through an evidentiary hearing designed to augment the record. It is before us, and we see nothing in *Strickland* nor its progeny that would require us to ignore what we now know about what would have likely happened at trial had Ross's trial counsel raised an extreme emotional distress defense.

¶89 Ross levels two additional criticisms at our consideration of this evidence. First, he believes that if we consider the State's evidence, we are inappropriately judging prejudice based on what would occur in a new trial, not based on what occurred in the original trial. In support of this argument, Ross cites to *Nelson v. Hall*, 573 S.E.2d 42 (Ga. 2002), to argue that we must confine our review to the evidence on direct appeal because the "inquiry does not focus on the projected result on remand or retrial, but [on] whether there is a reasonable probability that the result of the appeal would have been different." (Citing *id.* at 43–44.)

¶90 *Nelson* holds that the prejudice prong of the ineffective assistance of counsel inquiry requires that a court consider whether the outcome at the original proceeding in question—not a new proceeding on remand or new trial—would have been different but for the counsel's ineffectiveness. *Id.* at 43. And that is precisely the exercise we are engaged in. Nothing in *Nelson* mandates that we use only the record on direct appeal to assess the impact of counsel's deficient performance. We look back to what would have happened at Ross's original trial, but we do it with the benefit of what we know thanks to the evidentiary hearing.[11]

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[11] Ross also assumes that the district court would have rebuffed the State's attempt to re-open the evidence. He asserts that because "Ross did not call any witnesses in his criminal trial, . . . the State would not have had an opportunity to put on rebuttal evidence, including the evidence it presented at the post-conviction evidentiary hearing."

We are not as certain as Ross. Utah Rule of Criminal Procedure 17(g) provides that after the parties have rested, they "may offer only rebutting evidence unless the court, for good cause, otherwise permits." UTAH R. CRIM. P. 17(g)(5) (2003). A district court's decision of whether to reopen a case is committed to "the sound discretion of the court." *Lewis v. Porter*, 556 P.2d 496, 497 (Utah 1976). "A court should consider a motion to reopen to take additional testimony in light of all the circumstances and grant or deny it in the interest of fairness and substantial justice." *Id.* "The word 'discretion' itself imports that the action should be taken with reason and in good conscience, and with an understanding of and consideration for the rights of the parties, for the purpose of serving the always desired objective of doing justice between them." *Davis v. Riley*, 437 P.2d 453, 455 (Utah 1968).

This places us in the position of predicting what a district court would have done with a discretionary ruling in the counter-factual world *Strickland* requires us to inhabit. We consider it much more likely that in a capital case where neither party introduced evidence focused on the extreme emotional distress defense, the district court would have permitted the State to re-open the case to introduce the additional evidence had Ross's counsel asked for an extreme emotional distress instruction after the close of evidence.

"A criminal trial is not a 'game' . . . ." *Morris v. Slappy*, 461 U.S. 1, 15 (1983). "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399

(continued . . .)

¶91 Second, Ross argues that we must assess prejudice by looking at what would have happened on appeal in *Ross I*. In his view, in *Ross I*, we would not have had access to the State's additional evidence. And because of that, we would have been unable to entertain a counter-factual scenario in which we considered the impact of that additional evidence. Therefore, Ross believes we would have ordered a new trial because we would have concluded that there was a reasonable likelihood of a different outcome if the jury had been properly instructed.

¶92 If we were to accept this reasoning, we would improperly and artificially compartmentalize the inquiry *Strickland* requires us to undertake. As explained above, *Strickland* is the United States Supreme Court's effort to breathe life into the Sixth Amendment's guarantee of counsel in a criminal prosecution. And *Strickland* is designed to help ensure that a defendant receives the fair trial she is constitutionally guaranteed.

¶93 *Strickland* instructs that the "ultimate focus of [the] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. The defendant's burden is to show prejudice—"that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In this context, a "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This necessarily requires us to ask whether appellate counsel's failure to properly investigate trial counsel's decision to not seek an extreme emotional distress instruction undermines our confidence in the outcome of Ross's proceeding—not just whether he could have received a new trial had his appellate counsel played her cards differently.

U.S. 78, 82 (1970) (citing William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. Q. 279, 292 (1963)). Rather, the adversarial system "is designed to enhance the search for truth in the criminal trial." *Id.* In this instance, and on these facts, we think the more likely outcome would have been a district court amenable to permitting the State to introduce evidence to counter a belated request for an extreme emotional distress instruction.

II. The District Court Properly Concluded That Ross Did Not Suffer Prejudice

¶94 Ross contends that the district court erred by concluding that he was not prejudiced by appellate counsel's failure to raise the ineffectiveness of trial counsel on direct appeal.[12] And, as we have explained, this requires Ross to demonstrate that the district court erred by concluding that he had failed to demonstrate that "he probably would have prevailed on appeal" had appellate counsel raised the claim. He has not carried this burden.

¶95 The district court correctly recognized that the question of whether appellate counsel's performance prejudiced Ross is intertwined with whether trial counsel's representation was ineffective. The district court concluded that Ross was not prejudiced by his appellate counsel's failure to investigate because trial counsel had not rendered ineffective performance. The district court recognized that trial counsel had "valid, strategic reasons for not raising the [extreme emotional distress] defense"—"unrebutted testimony [which] demonstrate[d] that [Ross] refused to admit that he committed the offenses and that [Ross] instructed him not to present any defense inconsistent with [his] claim." In addition, trial counsel believed that presenting that defense without Ross's testimony would undermine Ross's credibility to the jury, which could jeopardize Ross's life at the penalty phase of the trial. Despite the district court's concerns about trial counsel's understanding of the extreme emotional distress defense, the court concluded that trial counsel's "strategy was to save [Ross's] life, a strategy that ultimately proved successful."

¶96 Ross's argument that he was prejudiced by his counsel's deficiency rests upon his assertion that "there is a reasonable likelihood that the jury would have found that Mr. Ross was under extreme emotional distress when he committed the crime," if only an extreme emotional distress instruction was before the jury. He asserts that the "State's evidence satisfied the minimum threshold that entitled [him] to the instruction," and "to succeed, only one juror had to find that the State failed to prove beyond a reasonable doubt that [he] was not under extreme emotional distress."

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[12] Because we conclude that Ross was not prejudiced by his trial counsel's failure to raise the defense of extreme emotional distress, we do not address the issue of whether his trial counsel's performance was deficient. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984). We take no position on the district court's conclusion.

¶97 In this context, evaluating prejudice requires us to consider whether there was a reasonable probability that at least one juror would have concluded that Ross acted under extreme emotional distress.[13] At the time of Ross's trial, the Utah Code provided that "[i]t is an affirmative defense to a charge of aggravated murder or attempted aggravated murder that the defendant caused the death of another or attempted to cause the death of another . . . under the influence of extreme emotional distress for which there is a reasonable explanation or excuse." UTAH CODE § 76-5-202(3)(a)(i) (2003); *see also Ross II*, 2012 UT 93, ¶ 27.[14] This affirmative defense reduced a charge of aggravated murder to murder and a charge of attempted aggravated murder to attempted murder. UTAH CODE § 76-5-202(3)(d).

¶98 We have concluded that the factfinder must make two findings for the defense of extreme emotional distress to attach. *Ross II*, 2012 UT 93, ¶ 28; *see also* UTAH CODE § 76-5-203(4)(a)(i). "[T]he fact finder must determine whether (1) subjectively, the defendant committed the killing while under the influence of extreme emotional distress, and (2) objectively, a reasonable person would

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[13] After some evidence had been produced in support of the defense, and the district court granted the jury instruction, the burden shifted to the prosecution to disprove the existence of the defense beyond a reasonable doubt. *State v. Drej*, 2010 UT 35, ¶ 15, 233 P.3d 476; *see also* UTAH CODE §§ 76-1-501 to –502 (2003).

[14] We cite to the version of the statute in effect at the time the acts underlying Ross's trial occurred. The Utah Code was subsequently amended to remove the affirmative defense of extreme emotional distress from the aggravated murder and murder statutes and place it in the special mitigation statute. 2009 Utah Laws 1029–31 (amending UTAH CODE § 76-5-202). The language of extreme emotional distress remained the same between the two statutes, until the legislature amended the special mitigation statute in 2019. *See* 2019 Utah Laws Ch. 312 (amending Utah Code section 76-5-205.5).

The shift from an affirmative defense to a special mitigation statute is significant in that it changes the burden of proof from requiring the state to disprove an affirmative defense, once asserted, beyond a reasonable doubt to requiring the defendant to prove the ground for special mitigation by a preponderance of the evidence. Therefore our discussion of the burden of proof at Ross's trial may not be relevant for any extreme emotional distress cases under the special mitigation statute.

have experienced an extreme emotional reaction and loss of self-control under the circumstances." *Ross II*, 2012 UT 93, ¶ 28.

¶99 We have previously stated that

> a person acts under the influence of extreme emotional distress when he is exposed to extremely unusual and overwhelming stress that would cause the average reasonable person under the same circumstances to experience a loss of self-control and be overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions.

State v. White, 2011 UT 21, ¶ 26, 251 P.3d 820 (citation omitted) (internal quotation marks omitted).[15] While an "external triggering event" is required, it need not constitute a "highly provocative triggering event that was contemporaneous with [the] loss of self-control." *Id.* ¶¶ 30, 32–33 (citation omitted) (internal quotation marks omitted). Accordingly, we are not limited to examining the immediate context of a murder to determine if an individual acted under extreme emotional distress. Rather, as we reasoned in *White*:

> [A] reaction to an event must be evaluated in its broader context. This context is relevant, maybe essential, to acquiring an accurate picture of the past experiences and emotions that give meaning to that reaction. Those past experiences must be taken into account to determine whether an individual is acting "under the influence of extreme emotional distress."

Id. ¶ 31. And we concluded that the "standard requires a trier of fact to put herself in the shoes of a reasonable person in the defendant's

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[15] In *Ross II*, we relied on *State v. White* for our discussion of extreme emotional distress. *See Ross II*, 2012 UT 93, ¶¶ 29, 33, 48. More recently, we have addressed extreme emotional distress in *State v. Lambdin*, 2017 UT 46, ¶¶ 12–54, 424 P.3d 117, and *State v. Sanchez*, 2018 UT 31, 35–60, 422 P.3d 866. Both *Lambdin* and *Sanchez* discuss extreme emotional distress under the special mitigation statute, *see Lambdin*, 2017 UT 46, ¶ 12; *Sanchez*, 2018 UT 31, ¶ 38, but otherwise their discussion is consistent with our understanding of extreme emotional distress in *Ross II* and today. Indeed, in *Sanchez* we recognized *Ross II* as "articulating a substantively identical test for a predecessor extreme emotional distress affirmative defense statute." 2018 UT 31, ¶ 38.

situation to determine whether the defendant's reaction to a series of events was reasonable." *Id.* ¶ 37.

¶100 While the statute "requires a reasonable explanation or excuse" for the extreme emotional distress, it does not require a reasonable explanation for "any subsequent action taken by the defendant." *State v. Sanchez*, 2018 UT 31, ¶ 47, 422 P.3d 866 (citing *State v. Lambdin*, 2017 UT 46, ¶ 34, 424 P.3d 117). Therefore, the jury is not required to find that the killing itself was reasonable to find that the defendant acted under extreme emotional distress. *Lambdin*, 2017 UT 46, ¶¶ 34–35.

¶101 Ross claims that trial counsel was ineffective because he failed to ask for an [extreme emotional distress] jury instruction at the close of evidence. As we stated in *Ross II*, "When claiming extreme emotional distress, a defendant must present only a minimum threshold of evidence to establish the affirmative defense." 2012 UT 93, ¶ 29. And we acknowledged that "the trial record suggests that the defense likely would have been available to Mr. Ross." *Id.* ¶ 32.[16] The district court concluded below that Ross likely would have received the jury instruction had he sought it. We agree.

¶102 But the conclusion that Ross would have likely received the jury instruction is not sufficient to demonstrate prejudice. He must also persuade us that there is a reasonable probability that the result of the trial would have been different—that is, at least one juror would have been persuaded that Ross had committed the homicide under extreme emotional distress.

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[16] We reached this conclusion in *Ross II* based on the testimony given at trial that Ross and Christensen had been in a romantic relationship, that Ross "became upset" after discovering that Christensen had spent the night with May, that he repeatedly demanded that Christensen tell May about her sexual relationship with Ross, and finally, that Ross said, "I can't let her hurt you like she hurt me," immediately before fatally shooting Christensen. *Id.* ¶¶ 33–34. We agree with this assessment but make one note. May's developed testimony below that Ross remained in control of himself during the exchange prior to the murder undercuts our prior assessment of Ross's emotional state in the minutes leading up to the murder. *Compare Ross II*, 2012 UT 93, ¶¶ 33–34, 46–47, *with supra* ¶ 57.

¶103 The question before the jury would have been whether a reasonable person, under the circumstances immediate to and leading up to the murder of Christensen, would have "experience[d] a loss of self-control" and become "overborne by intense feelings" upon Christensen's refusal to tell May that she and Ross had recently been sexually intimate and her refusal to accede to Ross's other demands. *See White*, 2011 UT 21, ¶¶ 26, 37 (citation omitted) (internal quotation marks omitted); *see also id.* ¶ 37 ("The standard is . . . whether a reasonable person facing the same situation would have reacted in a similar way."). In addition to finding that a reasonable person would have lost self-control under such circumstances, the jury would also have needed to find that Ross was subjectively acting under extreme emotional distress when he murdered Christensen.

¶104 The district court concluded that in light of the evidence that the State was prepared to present, Ross failed to demonstrate that he would have prevailed on the affirmative defense. We agree. The district court's conclusions highlight—and the additional evidence presented in the hearing shows—that Ross had a history of violence towards Christensen, that Ross was aware of Christensen's relationship with May for months prior to the murder. *White* instructs us that this context leading up to the murder—Ross's awareness of Christensen's relationship with May, and Christensen's attempts to sever the relationship with Ross—can inform the assessment of whether a reasonable person would have experienced extreme emotional distress. *See id.*¶¶ 30–33, 37.

¶105 The district court pointed to the State's evidence that would have shown that Ross "was controlling and abusive during his relationship with Ms. Christensen," to the extent that Christensen and her family were "terrified" of Ross and she moved homes to escape him. Exemplifying the abuse and control Ross exerted, he told Christensen's father that Christensen was "[his] bitch now." And Sister testified that she had seen Ross "slap," "push," and "tell [Christensen] . . . what she could and couldn't do," and that she had observed bruises on her sister's body. On an occasion when he was unable to find Christensen, Ross kidnapped and threatened Sister, telling her that "she'd better be afraid of him. . . . [Y]ou're going to die tonight."

¶106 Christensen initially refused to date May because of her fear of Ross and urged May to have a "contingency plan" in case Ross harmed either of them. The State was prepared to present this evidence in support of an argument that Ross did not act under extreme emotional distress at the time he killed Christensen—rather

"this is who he is. . . . This is how he reacts. This is his violent nature." The State would use the police report regarding when Ross kidnapped Christensen's sister as evidence that Ross had a "history of anger and violence" toward anyone dating Christensen.

¶107 The district court also noted that the State was prepared to put on evidence that Ross had been dating other women and that Ross had been aware of Christensen's relationship with May for months prior to the killing. This evidence would have undercut the objective prong of extreme emotional distress. That is, that a reasonable person would not have lost control in these circumstances.

¶108 And finally, May provided additional testimony in the evidentiary hearing, which clarified that when "Ross initially came to the door before the murder, he showed no emotion and appeared to be in control of his actions." May described that Ross had a "blank expression" and showed "no emotion." May clarified his testimony given at the original trial where he stated that "[t]he mood changed a little bit where like at first when he came in he was asking questions, and then once he pulled out the gun, the situation became a lot more intense." He explained that he was "referring to [Ross's] line of questioning" and that Ross "pulled a gun" out and "badger[ed]" Christensen with questions. He confirmed that his trial testimony was not about Ross losing control of himself. May's testimony is crucial as he was the only witness who could testify directly to whether Ross acted under the subjective influence of extreme emotional distress.

¶109 The State's evidence disproves Ross's characterization that he was "subject to extreme emotional distress upon the discovery of his girlfriend in bed with another man." Rather, the State's evidence demonstrates that Ross had terrorized Christensen and her family to the point that Christensen clandestinely moved homes to evade him and that Ross had known about Christensen's relationship with May for months prior to the murder.

¶110 Ross does not engage with the State's evidence on appeal, but rather clings to his argument that we should not be considering the State's rebuttal evidence to assess prejudice at all. And he only makes conclusory statements that "there is a reasonable likelihood that the jury would have found that Mr. Ross was under extreme emotional distress when he committed the crime."

¶111 The demonstration of prejudice must be a "demonstrable reality," however, not simply a "speculative matter." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citation omitted) (internal quotation

marks omitted). "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 693 (1984). "Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* (citation omitted). "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. He has failed to meet this standard.

CONCLUSION

¶112 The district court correctly concluded that Ross did not suffer prejudice as a result of his appellate counsel's deficient performance—her failure to raise the ineffective assistance of trial counsel claim on direct appeal. The district court properly considered all of the evidence before it that showed what evidence would have been introduced had Ross's trial counsel done as Ross now wishes and requested a jury instruction on extreme emotional distress. The State's additional evidence would have likely come in to rebut the defense and it would have effectively undercut both the defense and tarnished Ross's case in the eyes of the jury. Because Ross has failed to show that there was a reasonable probability that the outcome of the proceeding would have been different if trial counsel had requested the jury instruction, he fails to demonstrate that he was prejudiced by appellate counsel's omission of the ineffectiveness claim. We affirm.