VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 15th day of December, 2016.

Steve Whitt, Appellant,

against Record No. 151080
Circuit Court No. CL1091-14

Harold W. Clarke, Director,
Department of Corrections, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Buchanan County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the judgment of the circuit court.

On October 8, 2009, Whitt called 911 to speak with a police officer. He spoke to Investigator Mike Thompson and invited him to his residence. Investigator Thompson drove to the residence with his partner, Investigator Eric Breeding. Upon arriving, Investigator Thompson turned on a recording device in his pants pocket.

Whitt sat on a couch in the living room. Investigator Thompson sat on an opposing couch. A coffee table was between them. Investigator Breeding initially remained standing by the door, but sat next to Investigator Thompson when Whitt directed him to do so. Whitt began questioning Investigator Thompson about an upcoming grand jury proceeding. At some point, Whitt instructed Investigator Breeding "to stand up" and "go over by the door." Investigator Breeding complied.

As the conversation progressed, Whitt became angry and aggressive. He told the Investigators that he had a gun under his seat cushion and that he was going to shoot them. Investigator Breeding observed an object protruding from under the cushion. Whitt was straddling the object, and his hand was hanging between his legs inches away from it. Whitt's hand remained close to the object as he stated, "when I reach someone's going to die."

When Whitt leaned forward and moved his hand up toward the coffee table, Investigator Thompson "seized the opportunity" by leaping across the coffee table and tackling him. During the scuffle that ensued, Investigator Thompson attempted to restrain Whitt's arms so that "he couldn't get to whatever was under the cushion." Investigator Breeding testified that Whitt's arm was at the "back of the seat" and he "believed" Whitt was "going for it."

The Investigators subdued Whitt and took him to their vehicle. They placed him in handcuffs but did not advise him of his *Miranda* rights. Investigator Thompson asked Whitt why he threatened to kill them. Whitt responded that he "wanted to see how [they] wanted to play the game." When Whitt told the Investigators that he did not have a gun, Investigator Breeding stated that he saw Whitt go for the "handle of something under [his] seat." Whitt responded, "I wanted to see if you were going to be a trooper and you was [sic]."

While still at the Investigators' vehicle, Whitt asked if they could just "forget this one." Investigator Breeding explained that they had "no choice" but to arrest him because he claimed to have a gun under his cushion and "went for it." Whitt responded that he "had to make [Officer Breeding] a believer to get [his] attention." When Whitt asked if he could lock the doors of his residence, Investigator Thompson stated that he could not because he was "under arrest." The Investigators later obtained a search warrant for Whitt's residence. Under the cushion, they found a twelve-and-a-half-inch knife. They did not recover any firearms.

Whitt was charged with two counts of attempted capital murder. At trial, Whitt's counsel objected "to any statements made by [Whitt]" after the arrest because he was not advised of his *Miranda* rights. The Commonwealth argued that under Code § 19.2-266.2, such objections must be raised in writing before trial. The trial court overruled the objection.

Whitt testified that he placed the knife under the cushion before the Investigators arrived and intentionally sat over it with his legs apart. He explained that he wanted the Investigators to kill him because of a number of personal tragedies including the deaths of a friend and his stepmother, a tumor on his right lung, and the struggles of his father.

In its closing argument, the Commonwealth contended that Whitt took an overt act in furtherance of his intent to kill the Investigators by reaching for the knife. It cited Whitt's post-arrest statements, characterizing them as "an admission" that he "went for the [knife]." The Commonwealth also argued that sitting over the knife and positioning the Investigators

constituted overt acts.

The jury convicted Whitt of two counts of attempted capital murder. He appealed to the Court of Appeals, arguing that the evidence was insufficient "regarding the elements of intent and overt, but ineffectual action." *Whitt v. Commonwealth*, 61 Va. App. 637, 646, 739 S.E.2d 254, 258 (2013) (en banc). The Court of Appeals affirmed his convictions. *Id.* at 662, 739 S.E.2d at 266. A subsequent appeal to this Court was refused.

Whitt filed a pro se petition for a writ of habeas corpus in the circuit court. In his petition, he argued that he received ineffective assistance of counsel at trial because

> [t]here was a knife involved in the case and [his] statements were used only against him at trial and without them [he] could not have been convicted . . . . There was also no *Miranda* warning given to the petitioner before [he] was questioned. If counsel would have pursued the suppression hearing, it would have been revealed to the court . . . [that] [t]he statements that [he] gave to the arresting officers were given when the officers questioned him without reading the petitioner his *Miranda* rights.

He concluded that had his post-arrest statements been suppressed, there is a "reasonable possibility that the trial would have resulted in a different outcome." The circuit court dismissed the petition. It found that "there were no viable bases upon which [trial counsel] could have successfully pursued motions to suppress," and that Whitt "failed to show that he was prejudiced by any act or omission of his [trial counsel]."

On appeal, Whitt argues that the circuit court erred by dismissing his petition. He claims that his trial counsel provided ineffective assistance by not timely seeking to suppress his post-arrest statements pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). "Whether an inmate is entitled to habeas relief is a mixed question of law and fact, which [the Court] review[s] de novo." *Dominguez v. Pruett*, 287 Va. 434, 440, 756 S.E.2d 911, 914 (2014).

In *Strickland v. Washington*, the United States Supreme Court established a two-prong test to assess whether an attorney's representation was ineffective. 466 U.S. 668, 687 (1984). First, a petitioner must establish that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. Second, this deficient representation must "be prejudicial to the defense." *Id.* at 692. An ineffective assistance claim fails if the petitioner makes an insufficient showing on either prong. *Dominguez*, 287 Va. at 440, 756 S.E.2d at 914.

Assuming without deciding that Whitt's trial counsel provided deficient representation by not timely seeking to suppress his post-arrest statements, Whitt is not entitled to habeas relief because he did not demonstrate that he was prejudiced in the manner required by *Strickland* and its progeny.

In analyzing the "prejudice" component, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. To prove the judgment was affected by counsel's error,

> [t]he [petitioner] must show that there is 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.

Id. at 694.

Under Whitt's attempted capital murder charges, the Commonwealth was required to prove that Whitt intended to kill the Investigators and that he committed a direct, overt act toward this end. *Howard v. Commonwealth*, 207 Va. 222, 227, 148 S.E.2d 800, 804 (1966). The overt act need not be the "last proximate act to the consummation of the offense," but it must be something more than mere "preparation[]." *Anderson v. Commonwealth*, 195 Va. 258, 261-62, 77 S.E.2d 846, 848 (1953). Whitt contends that he was prejudiced because the evidence, without his post-arrest statements, failed to demonstrate that he committed such a direct, overt act by reaching for the knife.

We disagree. Investigator Breeding testified that during the scuffle Whitt was "going for" the knife. This testimony would have been admissible regardless of any motion to suppress and demonstrates an overt act. Additionally, the Commonwealth did not seek to prove an overt act only by showing that Whitt reached for the knife. The evidence also established that Whitt invited the Investigators to his house, placed them close to the pre-positioned knife, and sat directly over the knife. These are also overt acts. When a defendant lures potential victims into close quarters and proximity with a pre-positioned deadly weapon, the evidence need not demonstrate that he actually brandished the weapon for an overt act to be established. *See*

Sizemore v. Commonwealth, 218 Va. 980, 985, 243 S.E.2d 212, 215 (1978) ("Whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt, and this court will not destroy the practical and common sense administration of the law with subtleties as to what constitutes preparation, and what [constitutes] an act done toward the commission of a crime.").

Thus, even if Whitt's post-arrest statements and the testimony he gave at trial are eliminated, the remaining evidence demonstrated a series of overt acts. There is therefore no "reasonable probability" that, absent the post-arrest statements, the fact finder could have had a reasonable doubt as to whether Whitt committed an overt act. *Strickland*, 466 U.S. at 694-95 ("[T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."). Whitt's argument that an overt act could not be proven without his post-arrest statements simply does not address the weight of the Commonwealth's evidence on this issue. He has therefore failed to "undermine[] the reliability of the result of the proceeding." *Id.* at 693-94.

This is not to suggest that when the remaining evidence is sufficient to support a verdict there can be no prejudice. This is not a sufficiency analysis, but a determination of whether there is a reasonable probability of a different outcome had the petitioner received effective assistance of counsel. *Id.* at 694. Under this standard, however, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. 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.* at 693 (citation omitted).

Whitt cites to *Grueninger v. Director, Virginia Dep't of Corr.*, 813 F.3d 517 (4th Cir. 2015) to argue that Whitt's post-arrest statements could have had a pervasive effect on the outcome of the trial. In *Grueninger*, the petitioner, without being advised of his *Miranda* rights, "confess[ed]" during custodial interrogation to "performing oral sex on [his daughter]," "ejaculating on his daughter," and "shav[ing] his daughter's pubic hair." *Id.* at 521, 527, 531. These statements were admitted against him at trial. *Id.* at 521-22. Because "a confession can have . . . a devastating and pervasive effect" on the outcome of a trial, the court determined that suppressing these statements would have produced a reasonable probability that the result of the

proceeding would have been different. *Id.* at 531-32. The court also recognized that the nature of the statements "almost certainly would have left an indelible impression on the court as it conducted its bench trial." *Id.* at 531.

There is a marked difference between Grueninger's statements and Whitt's. Not only can Grueninger's statements be accurately characterized as a "confession," but they were also "deeply disturbing." *Id.* Whitt's statements, on the other hand, are not emotionally provocative and are only inferentially relevant. Whitt never admitted that he reached for the knife, he simply did not deny doing so when the Investigators implied that he did. The statements also fall short of a "confession" as they do not acknowledge all facts necessary for a conviction. *See Caminade v. Commonwealth*, 230 Va. 505, 510, 338 S.E.2d 846, 849 (1986) (A confession is "a statement admitting or acknowledging all facts necessary for conviction of the crimes," while an admission admits of "facts tending to prove guilt but falling short of an admission to all the essential elements of the crime."). Thus, Whitt's post-arrest statements could not have had anywhere near the devastating and pervasive effect on the trial as Grueninger's. Whitt's reliance on *Grueninger* therefore is unpersuasive.

For the foregoing reasons, we affirm the judgment of the circuit court.

Justice Kelsey took no part in the consideration of this case.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Patricia L Harrington

Clerk