

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Mark Anthony Bayne, #250241,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE THIRTEENTH JUDICIAL CIRCUIT

) Case No. 2018-CP-23-5730

) **ORDER OF DISMISSAL**

) **ENTERED COMPUTER**

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JUDICIAL CIRCUIT 13

This matter comes before this Court by way of an application for post-conviction relief filed by Mark Anthony Bayne (“Applicant”) on November 9, 2018. The State’s (“Respondent”) return to the application, dated April 25, 2019, included a motion for a more definite statement. An evidentiary hearing in this matter was held before the undersigned via the WebEx virtual platform on November 8, 2021. Everyone who participated did so remotely via WebEx. Applicant was present and was represented by R. Mills Ariail, Jr. Taylor Zane Smith of the South Carolina Attorney General’s Office represented Respondent. Following a thorough review of the record in its entirety and the testimony presented at the evidentiary hearing, this Court finds that Applicant has failed to prove that he is entitled to post-conviction relief, and denies the application with prejudice.¹

PROCEDURAL HISTORY

Applicant is presently imprisoned in the South Carolina Department of Corrections. The Greenville County Grand Jury indicted Applicant in September of 2015 for two counts of conspiracy (2014-GS-23-11901; -11900), carjacking (2014-GS-23-11898), kidnapping (2014-GS-

¹ The Court issued this Order and sent it to be filed with the Clerk of Court in June 2022, but the Order cannot be located in the Clerk’s filings.

On April 6-8, 2016, Applicant proceeded to a jury trial with the Honorable D. Craig Brown ("trial court") presiding. John P. Abdalla ("trial counsel") represented Applicant at that trial, and Justin William Holloway ("the solicitor") of the Thirteenth Circuit Solicitor's Office prosecuted him. At the conclusion of trial, the jury found Applicant guilty as indicted of: carjacking (2014-GS-23-11898), kidnapping (2014-GS-23-11899), armed robbery (2014-GS-23-11902), and possession of a weapon during the commission of a violent crime (2014-GS-23-11902).¹ Applicant was found not guilty of: two counts of conspiracy (2014-GS-23-11901; -11900), armed robbery (2014-GS-23-11897), and possession of a weapon during the commission of a violent crime (2014-GS-23-11897). The trial court sentenced Applicant as follows: to five years' imprisonment for possession of a weapon during the commission of a violent crime, to twenty years' imprisonment for armed robbery, to twenty years' imprisonment for kidnapping, and to ten years' imprisonment for carjacking, with credit for time served, and with all sentences running concurrently.

Trial counsel filed a timely notice of appeal. Appellate Defender John H. Strom ("appellate counsel") of the South Carolina Commission on Indigent Defense represented Applicant on appeal initially,² arguing that the trial court erred: (1) in giving an instruction pursuant to *Allen v. United States*, 164 U.S. 492 (1896), that was unconstitutionally coercive, constituted an impermissible comment upon the facts, and incorrectly instructed the jurors to consider the burden that a second trial would impose on the parties, the trial court, and future jurors; and (2) in denying trial counsel's motion for a mistrial after a witness for the prosecution testified that Applicant had previously been imprisoned. The South Carolina Court of Appeals affirmed Applicant's convictions and

¹ The carjacking and kidnapping convictions related to victim Aaron Shunk, but the armed robbery and possession of a weapon convictions related to victim David Ennis.

² Appellate counsel left the employ of the Commission on Indigent Defense on October 6, 2017, and Applicant's appeal was reassigned to Appellate Defender Robert M. Pachak, also of the Commission on Indigent Defense. At that point, appellate counsel had already filed the final brief.

sentences in an unpublished opinion. *State v. Bayne*, Op. No. 2018-UP-310 (S.C. Ct. App. filed July 5, 2018) (per curiam). The remittitur was issued on July 23, 2018.

This application for post-conviction relief followed.

CURRENT PROCEEDING

In his application for post-conviction relief, filed on November 9, 2018, Applicant raised the following claims:

1. Trial counsel was constitutionally ineffective for his:
 - a. Failure to investigate and/or prepare:
 - “Ineffective assistance of counsel to discharge his duty of due diligence to investigate the facts, evidence, and witnesses in the case”;
 - “Counsel failed to investigate evidence and discovery, to make sure that informant ‘Donald Trammell’ was registered with the South Carolina Law Enforcement Division for a major investigation. The investigator ‘Matt Owens’ failed to register ‘Donald Trammell’ with SLED, pursuant to SLED Policy 13.30. The investigator violated SLED Policy 13.30, ‘Use of informants in investigations.’ Furthermore, Vickie Trammell and Nicki Gardner were not registered with SLED for this investigation;
 - “Counsel failed to spend adequate time with Petitioner reviewing discovery with him”;
 - “Ineffective assistance of counsel for failure to provide a proper defense for physical evidence in the case”;
 - “Ineffective assistance of counsel for failure to have a valid strategy for trial”;
 - “Counsel failed to properly and fully investigate the case”;
 - “Counsel failed to properly and fully prepar [sic] Petitioner for testimony in the case”;
 - “Counsel failed to adequately investigate the alleged crime scene or the allegations so as to be prepared [sic] to present testimony through direct and cross-examination of relevant evidence related to the matter”; and
 - “Counsel failed to provide Petitioner with a copy of discovery in the case so Petitioner could assist with the case”;
 - b. Failure to call witnesses and/or cross-examine witnesses:
 - “Counsel failed to interview or call as a witness a number of people who would have relevant information in this matter”;
 - “Counsel failed to impeach the State’s witness David Ennis

- because the Petitioner had a right to face his accuser and challenge their [sic] testimony at trial"; and
- "Counsel failed to challenge the testimony of the State's witnesses and failed to adequately object and preserve objections to portions of the witness's testimony, and failed to effectively cross-examine the witnesses on their testimony";
- c. Failure to challenge arrest and/or indictments:
- "Counsel failed to challenge or move to quash the indictment before the jury is sworn [sic], that indictment is not sufficient"; and
 - "Counsel failed to request a preliminary hearing so Petitioner could more adequately be informed about case";
- d. Failure to move:
- "Counsel failed to move for a pre-trial motion for a directed verdict";
 - "Counsel failed to move for a motion to sever (sic) the charges"; and
 - "Counsel failed to move for a pre-trial motion to suppress the evidence from the case;
- e. Failure to object and/or preserve objections:
- "Counsel failed to object to hearsay";
 - "Counsel failed to put on the record, after a bench conference, what objection and ruling was made by the State on page 258 of the trial transcript so as to preserve the issue for appellate review";
 - "Counsel failed to put on the record, after a bench conference, what objection and ruling was made by the state on page 276 of trial transcript so as to preserve the issue for appellate review; and
 - "Counsel failed to move for a mistrial when the solicitor, on page 347 of the trial transcript, violated a cardinal rule and expressed his own opinion of the Petitioner's guilt. Furthermore, counsel waited until the jury left the courtroom to deliberate before he made his objection to these remarks"; and
- f. "Ineffective assistance of counsel for abandonment of his client during trial."

At the start of the November 8, 2021, hearing before this Court, Respondent noted that Applicant's counsel had said by phone on November 3, 2021, that Applicant would proceed at the hearing upon the following claims only:

1. Trial counsel was constitutionally ineffective for:
 - a. Not calling David Ennis as a witness at trial;
 - b. Not exploring the possibility that Applicant's son was involved in

- the crime instead of Applicant;
- c. Not investigating witnesses, including Donald Trammel and other unspecified witnesses;
 - d. Not objecting to the introduction of evidence of Applicant's prior bad acts;
 - e. Declining the trial court's offer to give a curative instruction to the jury regarding the evidence of Applicant's prior bad acts; and
 - f. Not using fingerprint evidence to impeach Trammel's credibility.

Applicant confirmed for this Court that Applicant would be proceeding only upon the claims that Respondent had mentioned. This Court finds that Applicant has abandoned or waived all claims other than these, and only these claims will be addressed in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Before this Court are: the records of the Greenville County Clerk of Court for Applicant's convictions and sentences; Applicant's records from the South Carolina Department of Corrections; the transcript from Applicant's trial; Applicant's direct appeal records, including the parties' final briefs, the record on appeal, the Court of Appeals' dispositive opinion, and the remittitur; and all filings in this matter. Set forth below are the relevant findings of facts and conclusions of law with regards to the claims that Applicant advanced at the evidentiary hearing, as required by S.C. Code Ann. §17-27-80 (1985).

Applicant's claim that trial counsel was constitutionally ineffective for not calling David Ennis as a witness at trial.

Applicant was tried for his participation in two different armed robberies, and related crimes, that took place back-to-back on the same day at the same location. The prosecution alleged that Aaron Shunk, the victim in the first robbery, was removed from his truck at gunpoint, moved to a different location, held until he was able to escape on foot during a subsequent disturbance, and had his truck stolen by the robbers. The prosecution also alleged that the disturbance was

caused by the arrival of David Ennis, the victim in the second robbery, from whom the armed robbers then took cash and personal property. The jury found Applicant guilty of some of the crimes relating to Shunk and not guilty of others, and likewise found Applicant guilty of some of the crimes relating to Ennis and not guilty of others.

Applicant alleges that trial counsel was ineffective for not calling Ennis as a defense witness at trial. Timothy Brochin of the Greenville County Sheriff's Office testified at trial that he had been dispatched after Ennis made a call to 911 to report an armed robbery. Trial Tran. 97, 101. Detective Brochin testified, while being cross-examined by trial counsel, that Ennis had identified Vickie Trammel ("Vickie"), Nikki Gardner ("Gardner"), and Donald Trammel ("Donald") as participants in the robbery, but had not identified anyone else. Trial Tran. 108. Detective Brochin testified that Ennis, upon being shown a photograph of Mark Bayne, Jr., Applicant's son, without a beard, had said that the second male robber had looked similar to the man in the photograph shown to him, but had had a scruffier beard, and that he could not say with absolute certainty that Applicant's son had been the other robber. Trial Tran. 110. Detective Brochin could not testify as to whether Ennis subsequently identified Applicant's son as being the robber after viewing a different picture of the son because Detective Brochin had not been involved in that. Trial Tran. 110-11.

Matthew Owens of the Greenville County Sheriff's Office testified at trial that Ennis met with him couple of days after Detective Brochin had shown the photograph of Applicant's son to Ennis. Trial Tran. 282. Deputy Owens testified that Ennis identified both Donald and Applicant's son as the robbers. Trial Tran. 280-81. Deputy Owens knew that Applicant's son was, in fact, Applicant's son, and testified that Applicant's and Applicant's son's physical appearances were "strikingly very similar. Long hair, facial hair, the -- I guess the weight. They -- they look very

alike." Trial Tran. 282. After Deputy Owens talked with Vickie, Donald, Applicant's daughter, and Applicant's son, he became confident that Applicant's son had not been involved in the robberies, and even helped Applicant's son get a personal recognizance bond, and convinced the Solicitor's Office to dismiss the charges against him. Trial Tran. 282-84. Deputy Owens testified that Ennis had looked at a photograph of Applicant's son that had been posted on Facebook, and that Ennis told him that the person in the photograph had been the robber. Trial Tran. 290. Deputy Owens testified that he felt that Applicant's son "look[ed] like him," except that Applicant's son had longer hair in the photograph. Trial Tran. 290. Deputy Owens testified that Applicant's son had not had a beard in the photograph, but agreed that he had had a beard when he talked to him, and that it was his understanding that Donald's accomplice had had a scruffy beard. Trial Tran. 292-93.

Vickie testified at trial that her husband was one of Applicant's first cousins, and she identified Applicant as one of the robbers, and as the robber who had struck Shunk during the robbery. Trial Tran. 111, 124-25. Gardner testified that she had previously lived with Applicant's wife, that she is Applicant's cousin and had known him for her entire life, and that Applicant participated in the robbery of Shunk. Trial Tran. 144, 148-49, 166. Gardner testified that Applicant told her after the robbery that he and others had wanted to take methamphetamine from Ennis. Trial Tran. 171-72. She testified that she saw Applicant wiping down Shunk's truck a few days after the robbery. Trial Tran. 175. Donald testified at trial that he knew Applicant, that Donald had committed crimes against Shunk, and that Applicant had approached Ennis with a shotgun. Trial Tran. 214, 224, 244-46.

At a certain point during the trial, the solicitor asked the trial court for a bench warrant for Ennis's arrest because Ennis had left the courthouse before he had been called to the stand, had

not returned to the courthouse, and had been refusing to answer his phone. Trial Tran. 194. Ultimately, Ennis did not testify at Applicant's trial. Trial counsel moved for a directed verdict, arguing, in part, that such was warranted because Ennis had not testified during the prosecution's case-in-chief, but the trial court denied that motion. Trial Tran. 295-98. Trial counsel argued in closing that Ennis had not shown up to testify. Trial Tran. 355.

Applicant testified before this Court that he and trial counsel met on multiple occasions. He testified that trial counsel showed him documents in discovery that were from Ennis. He testified that he and trial counsel discussed the fact that Ennis had positively identified Applicant's son as the man with the shotgun during the crimes, which he said that they had learned from a supplemental report of Deputy Owens. He testified that Ennis had told Owens, after seeing one or more photographic lineups that included a photograph of Applicant, that the lineups did not include a photograph of the person who had robbed him. He testified that Ennis had already accused two people, neither of which was Applicant, of committing the crime. He testified that Ennis accused Donald and Applicant's son of robbing him. He testified that trial counsel had asked him to give him a reason that Ennis would lie by saying that the robber had been Applicant instead of Applicant's son, and that he had not been able to do so. He testified that trial counsel had not discussed with him the procedure that Deputy Owens used to conduct the lineup for Ennis. He testified that he told trial counsel that Ennis needed to be present to testify at trial because Ennis was the victim and Ennis's statement to law enforcement officers contradicted the statement given by "Mr. Brown."³ He testified that he told trial counsel that he would not testify against his own

³ Applicant failed to give information with which this Court could know the identity of "Mr. Brown," or to know his relevance to this case.

son. He testified that he had decided from the beginning that he would not testify at trial "because of anything that might incriminate [himself]" and because "of [his] son's involvement."

Applicant testified that there was testimony at his trial that Ennis had identified Applicant's son as the one who committed the crime instead of identifying Applicant. He testified that Ennis did not testify at all at trial. He testified that the solicitor said at trial that Ennis told him that trial counsel had directed him to the wrong courtroom and that he left when no one else ever showed up. He testified that trial counsel did not speak with Ennis until the day of trial. He testified that trial counsel cross-examined Deputy Owens about the identification of Applicant's son. He testified that Deputy Owens testified that Applicant and Applicant's son both had had long hair and "scruffy" beards, but testified that Deputy Owens' testimony had not been true because Applicant had had long hair and tattoos at the time of his arrest, while his son had had a crew cut without being tattooed so extensively. He denied that trial counsel had cross-examined Deputy Owens about that identification of Applicant's son. He testified that he should have had the chance to confront Ennis at trial and to allow Ennis to testify as to the real identity of the robber. He testified that he was found guilty because Ennis did not testify at trial. On cross-examination, Applicant testified that he had asked his counsel in this matter to help him contact Ennis, and that it was his understanding that his counsel had done so, but had not received a response from Ennis.

Trial counsel testified before this Court that Applicant told him that he was not guilty. He testified that he discussed with Applicant in advance of trial the fact that people would testify against him, and that Applicant told him that those people would be lying. He testified that he felt certain that he went over with Applicant the witness statements and police reports in discovery. He testified that his general practice was to ask clients before a trial for reasons that witnesses might be lying. He testified that he called witnesses and talked to people, but heard nothing that

made him think he needed to change his witness list. He testified that he did not remember whether he spoke to Ennis before trial about what Ennis would say. He testified that he discussed with Applicant the possibility that Applicant's son had been involved in the crimes, and remembered that Applicant did not want to take the stand in order to implicate his own son. He testified that people other than Ennis placed Applicant at the scene of the crimes, though. He testified that he would have raised more argument about Applicant's son had Applicant testified, but felt that Applicant's decision not to testify limited his ability to raise those arguments. He testified that he did not recall Applicant's asking him to call Ennis as a witness. He testified that he normally does not subpoena victims for criminal trials. He testified that he normally hopes that victims do not testify in criminal trials. He testified that he thought that he had discussed with Applicant whether Ennis's testimony would help or hurt the defense, but could not remember that conversation. He testified that he did not think that they discussed the possibility that Ennis would give testimony at trial that Applicant did not commit the crimes because Ennis was a witness for the prosecution whose testimony would hurt the defense more than help it.

Trial counsel testified that the solicitor was going to call Ennis as a witness at trial, and that trial counsel went outside of the courtroom and talked to Ennis, but saw that Ennis had left when he subsequently went back out of the courtroom. He testified that he had not said anything to Ennis to cause him to leave, but had merely asked Ennis about his testimony. He testified that he did not remember Applicant's being upset at Ennis's absence or requesting that trial counsel get Ennis back to testify. He testified that, if Applicant had done so, he would have made a bigger issue at trial about Ennis's leaving. He testified that he remembered Applicant being happy that Ennis was not available to testify for the prosecution. He testified that he personally thought at the time that

it would be to Applicant's benefit if Ennis was not present to testify. He testified that he had thought that Ennis's absence was a positive development for Applicant's defense.

All defendants have a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984); *Lomax v. State*, 379 S.C. 93, 665 S.E.2d 164 (2008). A post-conviction relief applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that his lawyer was constitutionally ineffective, he must prove that the conduct of his lawyer "so undermined the proper functioning of the adversarial process that [that conduct] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland*. First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting *Strickland*). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). In order for a post-conviction relief applicant to successfully prove that his defense attorney's performance was deficient, the applicant must prove "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quotation omitted). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." *Id.* (citations omitted). The "preeminent authority for all" courts when they are considering an applicant's claim of constitutional

ineffectiveness requires that the courts be highly deferential to a defense lawyer's performance because:

[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Id. at 444-45, 334 S.E.2d at 815-16 (quoting *Strickland*). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. "The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen." *Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (quotation omitted).

Second, the deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for [the lawyer's] unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "Representation is an art, and an act or omission that is unprofessional in one case may be sound of even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether a lawyer's performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. at 697. Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief applicant to prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. *Id.* at 690.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to Ennis's absence from trial. Trial counsel testified that he does not normally call victims as defense witnesses when he is representing criminal defendants at trial, and that he, in fact, hopes that the victims do not testify at all. Trial counsel's normal practice is in line with the prevailing professional norms of criminal defense lawyers, and Applicant has not proven otherwise. Neither has Applicant given this Court any reason to find that trial counsel should have deviated from that common practice with respect to Ennis. Trial counsel's testimony that he thought that Ennis's testimony would have been harmful to the defense is credible, and was reasonable under the circumstances. Applicant's testimony that he told trial counsel to call Ennis as a witness at trial because he expected Ennis to support the defense is not credible in light of trial counsel's more credible testimony that Applicant did not tell him to call Ennis as a witness, and that Applicant had been happy that Ennis left the courthouse.

This Court finds that Applicant has failed to prove that there was a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's

performance. An “applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.” *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998)); *see also Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (holding that the PCR court’s finding that Dempsey was prejudiced by trial counsel’s failure to call an expert at trial to rebut the State’s expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). An applicant’s “mere speculation” what a witness’s testimony at trial would have been “cannot, by itself, satisfy the applicant’s burden of showing prejudice.” *Glover v. State*, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995). Applicant did not call Ennis as a witness at the hearing before this Court.⁴ Thus, Applicant has failed to meet his burden in proving any prejudice from Ennis’s absence from trial.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not calling Ennis as a witness at trial because Applicant has failed to prove that there was any deficiency in trial counsel’s performance and because he has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant’s claim that trial counsel was constitutionally ineffective for not exploring the possibility that Applicant’s son was involved in the crime instead of Applicant.

Gardner testified at trial that Applicant told her after the robberies that Applicant and others had wanted to take methamphetamine from Ennis. Trial Tran. 171-72. Gardner identified

⁴ If Applicant’s testimony is to be believed, Ennis was apparently unwilling to reply to Applicant’s counsel in this matter, which is further evidence that Ennis’s testimony would not have aided Applicant’s defense.

Applicant as the person who robbed Ennis, and she did not so identify Applicant's son. Trial Tran. 173. Gardner testified that she saw Applicant wiping down Shunk's truck a few days after the robbery. Trial Tran. 175. Trial counsel elicited testimony from Detective Brochin that Ennis identified Vickie, Gardner, and Donald from photographs, but had been unable to identify anyone else. Trial Tran. 107-08. Deputy Owens testified that Ennis identified Applicant's son and Donald as two of the robbers. Trial Tran. 280. When being cross-examined by trial counsel, Deputy Owens testified that Ennis had looked at a photograph of Applicant's son that had been posted on Facebook, and that Ennis told him that the person in the photograph had been the robber. Trial Tran. 290. Deputy Owens disagreed with trial counsel's assertion that Applicant's son, as shown in the photograph, looked like Applicant. Trial Tran. 290. Deputy Owens agreed with trial counsel that he had not been present during the robberies. Trial Tran. 294. During his closing argument, trial counsel argued that Ennis identified Applicant's son, and not Applicant, as one of the robbers. Trial Tran. 348. After the trial court charged the jury, trial counsel moved for a mistrial on the basis that the solicitor argued in closing that Applicant was trying to cast blame on his own son despite the fact that Applicant had not testified, but the trial court denied the motion. Trial Tran. 380-81.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to the possibility that Applicant had been incorrectly identified as the robber and that Applicant's son was actually the one who was guilty. Applicant admitted that he and trial counsel discussed Ennis's identification of Applicant's son as the robber, and that Ennis had not identified Applicant himself. Trial counsel did use Ennis's identification of Applicant's son in Applicant's defense at trial. Trial counsel elicited testimony from Detective Brochin about Ennis's identification of Applicant's son and cross-examined Deputy Owens about

it. Trial counsel argued in closing that Ennis identified someone other than Applicant. Trial Tran. 351. Trial counsel did what Applicant alleges that he did not do, in that he "explored" the possibility in trial that the victim had incorrectly identified Applicant. Trial counsel credibly testified that he did not explicitly argue that Applicant's son was the robber because Applicant decided not to testify and because Applicant did not want to implicate his son in any way. Applicant's own testimony before this Court corroborates trial counsel's testimony on this point. Trial counsel did what he could do while respecting the boundary that Applicant had set.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's performance. Two law enforcement officers testified at trial that Ennis had identified Applicant's son as one of the robbers, so the jury knew of the identification. The jury heard testimony about the similarities and differences in appearance between Applicant and his son. Applicant's co-defendants testified as to his involvement. The jury was able to weigh the credibility of the evidence and determined that the solicitor had proven beyond a reasonable doubt that Applicant was guilty. Applicant has not proven that there is a reasonable likelihood that he would have been found not guilty had trial counsel handled the issue of Applicant's son differently.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not exploring the possibility that Applicant's son was involved in the crime instead of Applicant because Applicant has failed to prove that there was any deficiency in trial counsel's performance and because he has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not investigating witnesses, including Donald Trammel and others.

Applicant testified before this Court that he and trial counsel discussed Donald's testimony, and that trial counsel told him that a detective was having issues with Donald's telling lies. He answered in the affirmative when asked if he asked trial counsel "to investigate or provide [him] with any additional information with regard to Donald Trammel or other witnesses in the case." He testified that he had asked trial counsel to investigate Fred Edmond in order to find out who had been present during the robberies. He testified that Mr. Edmond was the man who owned the home where the crimes took place. He testified that Mr. Edmond's testimony could have corroborated Ennis's testimony. He denied that trial counsel had told him about any conversations that trial counsel had had with Edmond. He denied that trial counsel had given him any information about Edmond. He testified that Boyd Morgan and Larry Trammel ("Larry") had also been present, and that trial counsel never investigated or talked to either of them. He affirmed that Larry had been married to Vickie and was Gardner's father. He testified that he told trial counsel that Larry had been the man behind the home and not Applicant, and that Applicant had had nothing to do with the crimes at all.

Trial counsel testified that he discussed with Applicant on more than one occasion Applicant's belief that the witnesses against him would lie at trial. Though he could not remember definitively, he testified that he felt certain that he had discussed with Applicant before trial what he expected each witness to testify to at trial. He thinks that there were recordings in discovery of law enforcement interviews of the witnesses, and he thinks that he would have watched or listened to those recordings himself and then discussed them with Applicant. He testified that he only talks to a client's co-defendants if he gets permission beforehand from the co-defendants' lawyers and he feels that it is in his client's interest to do so. He testified that he did not have an investigator

working on Applicant's case, but did call witnesses and talked to people. He could not remember if he had spoken to Donald, Larry, or Cory Morgan ahead of Applicant's trial. He testified that he contacted or attempted to contact every person whom Applicant asked him to contact. He testified that he did not learn any information from speaking to people that caused him to change his witness list. He testified that he may have contacted the South Carolina Department of Social Services in order to obtain the information that he used to cross-examine Gardner at trial, and testified that he does that if he feels that a situation warrants such action. He could not remember if he had discussed Edmond with Applicant.

Trial counsel testified that he could not remember whether or not he talked with Ennis in advance of Applicant's trial. He testified that he would have spoken to Ennis, or attempted to do so, if Applicant had asked him to do so. He testified that he had talked with "the guy that worked for the lock company" before the trial, but could not remember the substance of that discussion, although he did not think that the man's information was helpful to the defense. He testified that he is sure that he tried to contact Donald, but does not remember with certainty.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to his investigation into witnesses. Applicant named multiple people whom he contends that trial counsel should have "investigated," but gave only one justification for the desired investigation: in order to determine which people were present during the robberies.⁵ There is no evidence that the people whom Applicant named, with the exception of

⁵ When Respondent objected to Applicant's testimony that it was Larry, and not Applicant, was the person behind Edmonds' home during the robbery, arguing that Applicant lacked personal knowledge because he was alleging that he was not present when the robberies took place, Applicant blurted out, saying, "I never said I --," but his statement was cut short. Applicant's spontaneous statement seems to be an admission that he was present at Edmonds' home when the robberies took place, or at least an admission that he was not denying that he was present.

the people who testified at trial, would have been able to provide trial counsel with any helpful information. Trial counsel credibly testified that he talked to or tried to talk to any person whom Applicant asked him to talk. In that, trial counsel performed an independent investigation, and did all that was required of him according to prevailing professional norms. If there were additional alleged witnesses whom Applicant wanted trial counsel to talk to beyond those whom trial counsel talked to or tried to talk to, trial counsel's lack of contact with them is due to Applicant's failure to identify them for him.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of trial would have been different but for the alleged deficiency in trial counsel's performance. A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing *Kibler v. State*, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. *Skeen v. State*, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997). An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." *Bannister*, at 303, 509 S.E.2d at 809; *see also Dempsey*, at 370, 610 S.E.2d at 815 (holding that the PCR court's finding that Dempsey was prejudiced by trial counsel's failure to call an expert at trial to rebut the State's expert was merely speculative when Dempsey failed to have an expert testify at his PCR hearing). An applicant's "mere speculation" what a witness's testimony at trial would have been "cannot, by itself, satisfy the applicant's burden of showing prejudice." *Glover*, at 499, 458 S.E.2d at 540. Applicant did not present

testimony from any of the people whom he alleges that trial counsel should have interviewed or "investigated," so he has failed to meet his burden with respect to the prejudice prong of *Strickland*.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not investigating witnesses because Applicant has failed to prove that there was any deficiency in trial counsel's performance and because he has failed to prove that there was any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not objecting to the introduction of evidence of Applicant's prior bad acts, and for declining the trial court's offer of a curative instruction regarding the evidence of Applicant's prior bad acts.

Applicant raised two independent claims: that trial counsel was constitutionally ineffective for not objecting to the introduction of evidence of Applicant's prior bad acts and that trial counsel was ineffective for declining the trial court's offer of a curative instruction regarding the evidence of Applicant's prior bad acts. Because these two claims are so closely related, this Court will consider them together.

At the beginning of trial, trial counsel asked the trial court and the solicitor to instruct the witnesses that they should not reference Applicant's criminal record. Trial Tran. 37. Trial counsel noted that, at that point, Applicant did not have plans to testify. Trial Tran. 37. The solicitor agreed with trial counsel's request and said that he would discuss it with his witnesses. Trial Tran. 37. Trial counsel also wanted the trial court to limit the solicitor's ability to impeach Applicant's credibility with evidence regarding Applicant's three 1998 convictions for armed robbery. Trial Tran. 41. The trial court took the issue under advisement at that time. Trial Tran. 44.

When Gardner testified during the prosecution's case-in-chief, the following exchange occurred:

Q: Okay. When did you meet [Applicant's wife]?

A: When I was younger, as a child. But from when I can remember her was back in – when I can actually remember her is when he had – he hadn't been released from prison long.

Trial Tran. 149. There was an off-the-record bench conference immediately after that line of testimony. Trial Tran. 149. After that, the trial court sent the jury out of the courtroom. Trial Tran. 149. Trial counsel moved for a mistrial on the ground that the jury had been made aware through Gardner's testimony that Applicant had been imprisoned previously. Trial Tran. 150. Gardner told the trial court that she had not meant to refer to Applicant's criminal record and that the solicitor had instructed her not to do so. Trial Tran. 152. The trial court denied the motion and found that a curative instruction would cure any prejudice, but said that he would give trial counsel the opportunity to argue the issue again on the following day. Trial Tran. 153-54. Trial counsel asked for additional time in which to consider whether he would request a curative instruction. Trial Tran. 155. Trial counsel did not want to request one "so quickly because it almost draws more attention to it," and agreed with the trial court's characterization of a curative instruction as a "kind of double edged sword." Trial Tran. 155.

On the following day, trial counsel again argued that there should be a mistrial. Trial Tran. 201. The trial court again denied the motion and gave trial counsel more time in which to consider whether to request a curative instruction. Trial Tran. 205. After the solicitor rested his case, trial counsel renewed his motion for a mistrial, and the trial court denied it again. Trial Tran. 294-98. Applicant chose not to testify. Trial Tran. 302. During the charge conference, the trial court suggested that he give a curative instruction. Trial Tran. 303. Trial counsel discussed the issue

with Applicant. Trial Tran. 305. Trial counsel ultimately told the trial court that "we," ostensibly meaning both trial counsel and Applicant, did not want the trial court to give a curative instruction. Trial Tran. 305-06.

Trial counsel testified before this Court that he decided not ask for a curative instruction because he did not want to remind the jury of the fact of Applicant's having been in prison. He testified that he felt that a curative instruction would have merely drawn attention to the fact. He testified that he almost always decides not to ask for curative instructions. He testified that he was "almost certain" that he discussed that decision with Applicant before he made it.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to the introduction of evidence of Applicant's prior bad acts. Trial counsel secured the solicitor's agreement on the record before trial began that the prosecution's witnesses would not reference Applicant's prior criminal record. Despite having been told not to do so by the solicitor, Gardner referenced the fact that Applicant had been in prison in the past. Trial counsel immediately asked for a bench conference. Once the jury left the courtroom, the trial court asked trial counsel to put the issue "on the record" so that "the record [would be] protected for [Applicant]." Trial Tran. 149-50. Trial counsel stated that his objection was to Gardner's reference to Applicant's prison sentence, which he argued violated the limitation put on the solicitor at the beginning of trial, and asked for a mistrial. Trial Tran. 150. The trial court's offer to give a curative instruction proves that the trial court agreed with trial counsel's argument about the inadmissibility of Gardner's testimony and was sustaining the objection. Trial counsel did everything that he could have been expected to do in order to prevent the introduction of evidence of Applicant's criminal record. Applicant has not given any example of what more trial counsel could have done, and has not proved that trial counsel was required to do more. As

Applicant has failed to prove the deficiency prong of *Strickland* as to this claim, there is no need for this Court to consider the prejudice prong.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to trial counsel's decision not to request a curative instruction. Trial counsel had valid, strategic reasons for not requesting a curative instruction: he did not want the jury to be reminded of the fact and he did not want to draw attention to the fact. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (finding that the PCR court erred in finding that trial counsel was ineffective because, among other reasons, trial counsel had articulated at the PCR hearing his strategy of not requesting a curative instruction because they tend to highlight for the jury that which he wanted to keep out, which the Supreme Court found was a valid justification) (citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992)). Gardner's reference to Applicant's having been in prison was brief, did not include details about the length of the sentence, did not include details about the crime or crimes for which Applicant was serving time in prison, and was not revisited in the remainder of the trial. Under those circumstances, trial counsel's decision not to revisit the issue with the jury was reasonable according to prevailing professional norms.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to the introduction of evidence of Applicant's prior bad acts because trial counsel did object to the introduction of that evidence, so Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to the claim. This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for declining the trial court's offer to give a curative instruction because trial counsel's decision not to request

a curative instruction was a valid, reasonable, and strategic one under the circumstances, so Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to the claim. These claims are denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not using fingerprint evidence to impeach Donald Trammel's credibility.

Before this Court, Applicant's counsel stated that he was not aware of any fingerprint evidence in Applicant's case. Applicant then testified that trial counsel had not discussed with him any evidence from fingerprints or deoxyribonucleic acid ("DNA") in the case. He testified that he had known that Donald was lying when Donald testified that he had never been inside the stolen truck. Trial counsel testified before this Court that he was not aware of any fingerprint evidence related to Donald. He testified that he would have used fingerprint evidence to impeach Donald at trial if any such evidence had existed, unless he had overlooked the evidence. He did not believe that he had missed any such evidence in Applicant's case because he never forgets his oversights, although he could not say with certainty that there had been no such evidence in this case. The solicitor testified before this Court that he could not remember if there had been any forensic evidence in the case related to Donald, but he testified that he was sure that he would have called an expert in forensics as a witness at trial if there had been such evidence.

This Court finds that Applicant has failed to prove that there was any deficiency in trial counsel's performance with respect to fingerprint (or DNA) evidence. Applicant, without credibility, testified that there was fingerprint and DNA evidence proving that Donald had been inside the stolen truck, but presented this Court with no evidence to support the allegation.⁶ Trial

⁶ Applicant testified that his own counsel had given him DNA evidence on the morning of the hearing before this Court, but Applicant's counsel stated that he had no knowledge of any fingerprint or DNA evidence.

counsel credibly testified that he was not aware of any such evidence and that he would have made use of it if there had been. The solicitor could not remember if forensic evidence relating to Donald existed, but credibly testified that he likely would have used such evidence if it had existed. As such, this Court concludes that there was no forensic evidence linking Donald to the stolen truck.

This Court finds that Applicant has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had forensic evidence linking Donald to the truck—if such had existed—had been introduced at trial. Shunk testified at trial about his truck, which was a tan or gold 2007 Dodge Ram 1500 Laramie. Trial Tran. 82. There was evidence at trial that Donald came into contact with Shunk's truck during and after the robbery, or had been around it or touched it, which could have explained the presence of Donald's fingerprints or DNA, if any, on or inside the truck. Trial Tran. 85, 94-95, 127-28, 166-67, 178-80, 185, 190, 223-24, 239-40, 250-51, 263. Even if there had been some forensic evidence linking Donald to the truck, such would not been something with which Donald's credibility could have been impeached, or at least not effectively, because neither Donald nor the solicitor staked Donald's credibility on whether or not he touched Shunk's truck. Additionally, Applicant has not proven that the presence of Donald's fingerprints or DNA would have negated, rebutted, or disproven the evidence of Applicant's guilt or proven his innocence. The solicitor argued in closing that, even if the evidence indicated that someone other than Applicant may have removed him from his truck and held him against his will, the jury could find Applicant guilty under the theory of accomplice liability. Trial Tran. 321-22.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not using fingerprint or DNA evidence to impeach Donald's credibility because he has not proven that there was any deficiency in trial counsel's performance with respect to the

alleged forensic evidence and because he has failed to prove that there would have been any prejudice resulting from trial counsel's failure to introduce such evidence, even if it had existed. This claim is denied and dismissed with prejudice.

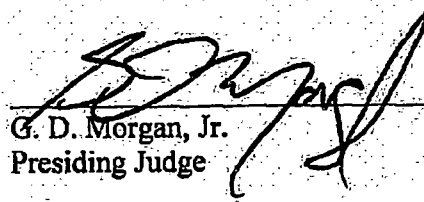
CONCLUSION

Based on all the foregoing, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 21st day of November, 2022.


G. D. Morgan, Jr.
Presiding Judge

Greenville, South Carolina

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