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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

2022-CP-42-01514

Jacory Foster..... Appellant,

v.

The State, ... Respondent.

NOTICE OF APPEAL

Jacory Foster appeals the Honorable Perry H. Gravely's Order of Dismissal dated May 5, 2023.

This 31 day of May, 2023.

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STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Jacory Foster, #335911, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT Case No. 2022-CP-42-01534 **ORDER OF DISMISSAL**

This matter is before this Court by way of application for post-conviction relief filed by Applicant Jacory Foster (hereafter the "Applicant") after the dismissal of Applicant's direct appeal by an unpublished opinion. See State v. Foster, 2022-UP-053 (S.C. Ct.App. filed Feb. 9, 2022). Applicant's initial application was filed *pro se* and alleged that trial counsel was ineffective by failing to object to and/or stipulating to various evidentiary issues, failed to object to the jury venire, and failed to present a third-party guilt defense. Susannah C. Ross, Applicant's appointed Post-Conviction Relief (hereafter "PCR") counsel, filed an amended application that provided some clarification and additional details to the original *pro se* application and added that trial counsel was ineffective by failing to object to the inferred malice charge.

On April 18, 2023, an evidentiary hearing was conducted before this Court at the Spartanburg County Courthouse. Applicant and attorney Ross were present. Respondent the State of South Carolina was represented by Assistant Attorneys General Andrew N. Cole and Blake Kennedy, both with the South Carolina Attorney General's Office. Applicant and trial counsel, Brendan M. Delaney, both testified at the evidentiary hearing. At the evidentiary hearing Mrs. Ross added additional clarity to the application and she asked this Court to conform the application to the testimony presented at the evidentiary hearing.

Prior to the hearing, this Court thoroughly reviewed the record of materials that were supplied to it ahead of time, which materials included the: (1) application for PCR and return; (2) materials from Spartanburg County; and (3) direct appeal documents and remittitur, including the trial transcript from October 21-24, 2019 (311 pages) and an index of exhibits that were introduced at the trial.[1] Based on the record, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below.

PROCEDURAL HISTORY

The records before this Court[2] establish that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its May 2018 term, the Spartanburg County Grand Jury indicted Applicant for murder (count one) and possession of a weapon during a violent crime (count two) (2018-GS-42-02228) and armed robbery (count one) and possession of a firearm during commission of a violent crime (count two) (2018-GS-42-02229). During its May 2019 term, the Spartanburg County Grand Jury indicted Applicant for use of a person under eighteen to commit a violent crime (2019-GS-42-2445).

A jury trial was conducted on October 21-24, 2019, with the Honorable J. Derham Cole

[1] The actual trial exhibits were not included in the packet of materials produced to the Court; however, none of the trial exhibits were raised or addressed during the PCR hearing nor, in this Court's determination, are any of the trial exhibits relevant to the issues raised at the PCR hearing.

[2] Again, the records before this Court included the application for PCR and return; the materials from Spartanburg County; and the direct appeal documents and remittitur, including the trial transcript from October 21-24, 2019 (311 pages) and an index of exhibits that were introduced at the trial. The trial exhibits themselves were not included in the record at the PCR hearing; however, in this Court's determination, the trial exhibits were not necessary, nor were they referenced at the evidentiary hearing. This Court has reviewed the record in its entirety.

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presiding. Applicant was represented by Public Defender Brendan M. Delaney. Prosecuting on behalf of the Seventh Circuit Solicitor's Office were Derrick Bulsa and Lauren Brown. The jury acquitted Applicant of using a person under eighteen years of age to commit a crime but found Applicant guilty as indicted on all other counts. Judge Cole sentenced Applicant to life imprisonment for murder,[3] thirty years' imprisonment for armed robbery, and five years' imprisonment for the corresponding weapons possession charge with the armed robbery.

Applicant filed a timely notice of appeal on October 30, 2019, that was perfected by David Alexander through filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Foster, 2022-UP-053 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on March 11, 2022.

CURRENT APPLICATION

Applicant filed his PCR application *pro se* on April 29, 2022, alleging that he is detained unlawfully for the following reasons (stated verbatim):

1. Ineffective Assistance of Counsel.
    a. Failure to object.
        i. Counsel was ineffective when Counsel stipulated to allowing report to be submitted without expert testimony.
        ii. Counsel was ineffective when Counsel stipulated to a fact the State could not prove.
        iii. Counsel failed to object when the registered voters list systemically excluded an identifiable class of persons from group which juries are drawn.
        iv. Counsel failed to challenge confession.
    b. Failure to present defense.
        i. Counsel failed to present third-party guilt defense.

The State filed a Return and Motion for a More Definite Statement on June 29, 2022, and

[3] Applicant was not sentenced on the corresponding weapons' possession charge pursuant to S.C. Code § 16-23-490.

concurrently requested an evidentiary hearing. Mrs. Ross was assigned as PCR counsel for Applicant and, on February 10, 2023, she filed an Amended Application for PCR, which she states is intended to supplement the original *pro se* application, stating that there was ineffective assistance of counsel at the Applicant's trial due to:

a. Failure to effectively cross examine witnesses Regina Foster and failing to object to redirect (p.162, l. 19)
b. Stipulating to ballistics evidence (p.190)
c. Failing to make a Batson Motion due to racial makeup of the jury; and
d. Failing to object to inferred malice charge (p.285, l. 21)

These issues were further clarified at the evidentiary hearing and Mrs. Ross moved to conform the application with the testimony from the evidentiary hearing. The previously stated issue regarding the ballistics evidence was either supplanted or modified with an objection to the introduction of certain cell phone and/or text data (R.118-124). Finally, the Applicant testified at the evidentiary hearing that he was not challenging the exclusion of any potential jurors during the jury strike process based on race, but he objected to the jury venire as a whole because pulling the prospective jurors solely from the list of registered voters in the county allegedly resulted in a racially skewed jury pool. Other than the record discussed above, the only exhibit entered at the evidentiary hearing was a copy of the jury strike sheet from the trial (Applicant's Exhibit 1).

SUMMARY OF TESTIMONY AT TRIAL[4] AND THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING

Applicant conspired with Derrick Bennett and Regina Foster to lure Kiyounnie Jackson to an abandoned house for a sham weed deal to rob him. (R. 58–60). Bennett was the boyfriend of Foster's sister. (R. 130-31). Foster never met Applicant before the night of the shooting. (R. 131). Foster had known the decedent, Jackson, for eight years. (R. 133).

According to Foster, Bennett and Applicant directed her to log into Facebook and message

[4] The factual summary from the trial is the same as set forth in the return to the PCR application.

Jackson to come sell her weed. (R. 133-35). She used Applicant's phone to log into Facebook and Bennett told her what to write. (R. 134-35, 157). Through Foster's Facebook account, Jackson was told to come to an abandoned house. (R. 136-37). Foster, Applicant, and Bennett drove to the house, where they waited on Jackson and directed him to the abandoned house when he arrived. (R. 137-40). Foster opened the door for Jackson and ran to the bathroom. (R. 141). Applicant was in a room next to the bathroom and Bennett was in another room, both armed with pistols. (R. 141). Foster did not know if Jackson had a pistol. (R. 141). Foster heard Jackson call her name, gunshots, and "scattering and scuffling, and then it was silent." (R. 142). Foster waited in the bathroom for a few minutes, then emerged to find Jackson on the floor. (R. 142-43).

Foster ran out the front door and the red car in which they arrived was gone. (R. 143). A friend picked up Foster and took her to an apartment with Applicant and Bennett. (R. 144-45). They eventually made their way to Applicant's girlfriend's apartment and Foster's sister took her clothes and an iPad and burned them. (R. 148-49, 151).

Foster claimed to see Bennett and Applicant split up some money. (R. 149-50). Bennett had a gun he took from Jackson. (R. 150). Foster, her sister, and Bennett then left Applicant and went to Jonesville. (R. 152). Bennett told Foster's sister that he was going to have to kill Foster. (R. 152). Foster's sister gave her a phone and Foster texted her mom for help. (R. 152). The police entered the trailer in Jonesville and apprehended Foster, her sister, and Bennett. (R. 207-08). The police took a firearm from Bennett, but it was not the gun that fired the shots that killed Jackson. (R. 208).

Foster's sister, Reyna Jeffries, testified that Bennett and Applicant left that night and when they returned they were "in a panic." (R. 168-69). Jeffries saw posts on Facebook about Jackson and asked Applicant what happened. (R. 171). Jeffries claimed Applicant volunteered that he shot

Jackson. (R. 171). Jeffries burned Foster and Applicant's clothing and threw a gun down a manhole. (R. 172). The State charged Jeffries with accessory after the fact to both murder and armed robbery. (R. 175). Takesha Meadors, who was briefly part of the group that evening, claimed Applicant only responded to her, "shots fired." (R. 183).

At trial, Applicant testified that he and Bennett hung out that day smoking marijuana. (R. 230-31). Applicant met Bennett through his brother and had only known him for a couple of weeks. (R. 230). Applicant knew that Bennett had a reputation for robbing people and "doing all type of crazy things." (R. 235). Bennett and Applicant ran out of weed and Bennett started trying to find more. (R. 231). While driving around, they saw Foster walking by a mailbox. (R. 234). Bennett told her to get into the car and she did. (R. 234). Applicant had never seen Foster before that night. (R. 234). Bennett told Foster to contact Jackson and Foster began texting him. (R. 235). They drove straight to the abandoned house. (R. 234-35). Everything Foster did, she did only at Bennett's instructions. (R. 235). Applicant had never heard of Jackson before that day. (R. 236). When they got to the house, they climbed in a back window. (R. 236-37). Applicant said he thought they went to the house to buy weed from Jackson, but that Bennett then decided he was going to rob Jackson. (R. 237). Applicant testified he was unarmed and never intended to rob or kill anyone. (R. 237). When Jackson arrived, he heard him calling Foster's name and then saw him walking in the hallway. (R. 238). He heard gunshots but did not see Bennett shoot Jackson. (R. 238-39). Bennett started going through Jackson's pockets and Applicant jumped out the window and ran to the car. (R. 239). Applicant went to the first apartment and then took everyone to his girlfriend's apartment. (R. 240-41). At that time, Bennett still had his gun and a gun that he took off Jackson. (R. 240). Bennett tried to give Applicant a share of the money, but Applicant testified that he refused. (R. 242).

Applicant testified on his own behalf at his PCR evidentiary hearing. Applicant testified about the perceived lack of contact with his public defender trial attorney (Mr. Delaney), the inconsistent testimony of Foster, and his opinion regarding the Spartanburg County jury venire. Applicant testified that his trial attorney maybe only met with him three times prior to the trial. He said that he filed a motion to relieve his trial attorney but, since he was not able to secure separate counsel, he was forced to go to trial with the public defender. Applicant said he felt like his trial attorney was not prepared to go to trial. He believes that his trial attorney should not have stipulated to the introduction of the ballistics report. At the hearing, Applicant added that the introduction of certain cell phone and/or text messages was improper since there was insufficient evidence at the trial to link the cell phone to Applicant.

Applicant testified that his trial attorney should have cross examined Foster regarding her inconsistent statements. Foster may have provided up to four inconsistent statements and her sister at least three inconsistent statements. Applicant testified that Foster's pre-trial statements directly implicated Applicant as the shooter, but Applicant acknowledged at trial that Foster testified that she could not identify who the shooter was because she was hiding in a different room. Generally, Applicant testified that he was not involved in the planning of the robbery or the shooting of Jackson; albeit, on cross examination he acknowledged that he was present during the crimes and he was aware that Foster and Bennett lured Jackson to the house. Applicant understood that the State's theory at trial was the hand of one is the hand of all. Applicant acknowledged that his trial attorney was trying to present to the jury that his mere presence at the location of the crimes was not sufficient for a conviction. Applicant acknowledged that, upon his trial attorney's request, the trial judge charged the jury on the doctrine of mere presence.

Trial Counsel discussed his typical practice is to meet with his clients, like Applicant, with

more frequency and longer duration in the months prior to trial. Trial counsel testified that he wants to have the most current knowledge of the case directly before trial, rather than fully prepare the case early on when more than a year can pass between the initial assignment of the case and it coming up for trial. Trial counsel testified that he informed Applicant of this preparation strategy early on, but it is common for persons like Applicant to complain. Trial counsel had at least eight in-person visits in the detention center with Applicant while Applicant was awaiting his trial date. Trial counsel also testified that he thoroughly discussed with Applicant that a reasonable trial strategy was to present a case showing that Applicant did not know Foster or Bennett and should be considered separate from the crimes, even though he was present when they were committed. As a trial strategy, it was decided that trial counsel would not object to certain evidence regarding Jackson to downplay the cause of his death and to try to highlight the separation of Applicant from the crimes.

At the evidentiary hearing, Applicant challenged the validity of the Spartanburg County jury venire. Applicant testified that there were only seven black persons in the entire jury pool and only one black person, Juror No. 184, was seated on the jury panel. Neither the State nor the defense raised any Batson challenges after the initial jury strike and before the court recessed around 4:00 pm the first day of the trial. The next morning, before opening statements, defense counsel informed the trial judge that it was brought to his attention the prior evening that Juror No. 184 knew several of Applicant's family members and grew up in the same community in Spartanburg County. (R.45-46) The State informed the trial judge that Jackson's mother also recognized Juror No. 194. Both the State and defense counsel represented to the trial court that had they known of these connections between Juror No. 194, Applicant, and Jackson, they both likely would have struck the juror. Therefore, by agreement, Juror No. 194 was replaced with the

first alternate juror.

Applicant said at the evidentiary hearing that he specifically was *not* challenging the jury panel based on specific jury strikes. Rather, Applicant expressed the opinion that the jury venire was improper at the start because the jury pool was pulled solely from the list of registered voters in the county. Applicant asserted that this method of calling jurors could exclude an identifiable class of persons from the venire as a whole. Applicant did not present any testimony or evidence regarding how the jury pool or jury selection process was conducted. Applicant's trial counsel testified that the jury was selected using the same random selection process that he has observed over more than twenty years in practice. Trial counsel also noted that, in his experience, the juries in Spartanburg County are predominantly white and that the venire and subsequent jury for the trial was typical. Finally, trial counsel confirmed that he wanted to excuse Juror No. 194 because the connection of that juror with Applicant could be a wild card and that the State agreed to striking Juror No. 194

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged multiple instances of ineffective assistance of trial counsel and asserts that as a result of counsel's purported errors, he is entitled to have his conviction reversed and proceed back to the court of general sessions for a new disposition of his case.

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

"A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution." Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 740 (2004), reh'g den. (Oct. 6, 2004), cert den. (March 21, 2005) (citing Strickland v. Washington, 466 U.S. 668 (1984)). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Id.; see also Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688.

"The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." Butler, at 442, 334 S.E.2d at 814 (citing Griffin v. Martin, 278 S.C.

620, 300 S.E.2d 482 (1983)). "Where allegations of ineffective assistance of counsel are made, the question becomes, whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Butler, supra. (internal quotations omitted; citing Strickland, supra.).

The U.S. Supreme Court outlined a two-prong test for determining effective assistance of counsel. "First, a defendant must show that counsel's performance was deficient. Under this prong, the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (internal quotations omitted; citing Strickland, supra.). "The second prong of the Strickland test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (internal quotations omitted; citing Strickland, supra.). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), reh'g den. (March 29, 2018) (citations omitted). "Thus, an applicant must show both error and prejudice to be granted relief in a PCR proceeding." Von Dohlen, 360 S.C. at 603, 602 S.E.2d at 741.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" Harrington v. Richter, 562 U.S. 86, 110 (2011) (quoting Strickland, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Strickland, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable

miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." Harrington, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it 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." Strickland, 466 U.S. at 689; see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires 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. Id. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed at the time of counsel's conduct." Strickland, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of

counsel that are alleged not to have been the result of reasonable professional judgment." Id. The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; see also Harrington, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Harrington, 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," **not** whether it deviated from best practices or most common custom. Id. (quoting Strickland, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial."

Id. at 687 (emphasis added). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), reh'g den. (March 29, 2018).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Id. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. Id.

Preliminary Discussion Regarding Trial Strategy

As a preliminary matter, before addressing the specific issues raised by the Applicant, the Court notes that much of what Applicant now complains about relates to a deliberate and specific trial strategy that was discussed with Applicant before the trial commenced. Where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel. Solomon v. State, 347 S.C. 635, 637, 557 S.E.2d 666, 667-668 (2001) (with client consent, and pursuant to a specific trial strategy, counsel intentionally waived the option to have the jury consider a "not guilty" verdict); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992), reh'g den. (Aug. 31, 1992) (counsel articulated a valid reason why he did not call several witnesses at trial, who counsel explained the witnesses "vacillated when offering their recollections" and did not have actual evidence that the victim husband actually committed

suicide); Truesdale v. Moore, 142 F.3d 749, 754 (4th Cir. 1998) (At a resentencing hearing before a jury that was different than the jury in the original trial of this case, counsel's strategy to not delve into the guilt aspect of the case and instead "try to maximize the mitigation" was found not ineffective.)

In this case, Applicant and two other persons were indicted for the same crime of luring Jackson to an abandoned house under the guise of buying drugs from Jackson and then robbing and shooting him.[5] Applicant testified at the trial that he did not shoot Jackson and that he did not take any of the stolen money from Jackson. This testimony was repeated at the evidentiary hearing. Foster testified at trial that she did not know who shot Jackson and that afterwards she saw Bennett in possession of Jackson's gun. The gun that shot Jackson was never found. The State prosecuted Applicant's case first and argued the theory of the hand of one is the hand of all.[6] Applicant's defense was that although he was present at the abandoned house when the crimes occurred, Bennet shot and robbed Jackson and that Applicant did not participate in the crimes. Applicant claimed he was merely and unfortunately present. Therefore, at trial, defense counsel emphasized testimony and evidence tending to show that Applicant should be considered more like a bystander and chose not to highlight the evidence of the killing itself. Given the circumstances of this case, defense counsel articulated a reasonable reason for employing this trial strategy. See Stokes, supra.

As discussed above, Applicant failed to present any evidence to establish that his trial counsel suggested and presented an improper trial strategy based on the particular facts of this case. Applicant's objections and assertions now regarding the defense of his case are merely

[5] However, Foster, who was 17 years old at the time of the crime, was not indicted for use of a person under eighteen to commit a violent crime.

[6] The subsequent dispositions of the indictments against Foster and Bennett have no bearing on the issues raised in Applicant's PCR hearing. Foster testified at the trial and was cross examined with the fact that she had been indicted for the same crimes, except for the use of an underage person for the commission of the crime. Foster testified that she had not been offered any deals to testify in the trial. Bennett did not testify at the trial.

speculative and do not meet the burden of proof he must establish for relief. Accordingly, to the extent that Applicant's complaints at the evidentiary hearing are resolved by the use of an acceptable trial strategy, Applicant's claims pertaining to ineffective assistance of counsel regarding the use of a particular defense strategy at trial are **DENIED.**

Cross Examination and Objections Regarding Foster

Applicant testified at the PCR hearing that Foster changed her testimony between her early statements to the police and her testimony at trial. Applicant testified that Foster's early statements directly accused Applicant of shooting Jackson. However, at trial Foster testified that she could not identify who shot Jackson because she was in a separate room hiding. During the cross examination of Foster, defense counsel pointed out Foster's possible biases and her possible collusion with Bennett and with other witnesses. Defense counsel also pointed out that Foster and Applicant met for the first time the day of the underlying crimes. The State's redirect of Foster, which Applicant now claims should have been objected to, merely clarifies that although Foster and Applicant had not met previously, Applicant was the person who was at the abandoned house with Foster and Bennett. This Court finds that Applicant has not demonstrated that the cross examination of Foster was not reasonable under the prevailing professional norms, see Cherry, 300 S.C. at 117, 386 S.E.2d at 625, and therefore, Applicant's claims regarding the testimony of Foster are **DENIED.**

Stipulating to Certain Discovery

Applicant argues that defense counsel should not have stipulated to the ballistics report. At the evidentiary hearing this argument was modified to include an objection to the introduction of certain telephone/text evidence. According to the trial transcript (R.190-191), the ballistics report showed that five cartridge cases that were found in the abandoned house were all fired from

the same firearm, and that four spent rounds that were found in the house, two of which were taken from Jackson's body, were also fired from the same firearm, but the report cannot say that the same firearm was linked to both the shell casings and the spent rounds. Again, the gun that was used to shoot Jackson was never found. Defense counsel testified at the evidentiary hearing that the stipulation to the ballistics report was part of the trial strategy to downplay this type of testimony. This Court finds Applicant's argument fails to impinge this trial strategy. See Stokes, supra.; Truesdale, supra.

The State called Officer Inderjit Kaur to provide information regarding a cell phone. (R.118-123) Officer Kaur pulled Facebook Messenger messages off a cell phone and produced these messages in the form of printed screen shots. These screen shots were marked for identification as Exhibit 51 during Officer Kaur's testimony. Officer Kaur provided no additional testimony. Foster testified next. Foster identified Exhibit 51 as a copy of the Facebook Messenger discussion that took place between her account and Jackson. (R.133-135) Over defense counsel's objection that Officer Kaur did not sufficiently authenticate whose phone the Facebook Messenger conversation was taken from, Exhibit 51 was entered. In the evidentiary hearing, Applicant pointed out the confusion in the testimony regarding whose phone was used to message Jackson—whether it was Applicant's or Foster's phone—but Foster's testimony clearly stated that Bennett was the person directing the text conversation with Jackson. Applicant's claims regarding either the ballistic report or the cell phone, including the Facebook messages, does not satisfy the burden that Applicant must prove under Strickland and, therefore, are **DENIED**.

The Jury Venire

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." State v. Shuler,

344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001), reh'g den. (May 23, 2001), cert. den. (Oct. 15, 2001) (citation omitted). "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a Batson [v. Kentucky, 476 U.S. 79 (1986)] hearing if the opposing party requests one." Id. (citation omitted) "Whether a Batson motion has occurred must be determined by examining the totality of the facts and circumstances in the record." Id. (citation omitted) "The opponent of the strike carries the ultimate burden of persuading the trial court the challenged party exercised strikes in a discriminatory manner." Id. (citation omitted).

At the evidentiary hearing, Applicant said that he was not challenging the specific jury strikes in his case, but he was challenging the makeup of the jury venire generally. As a preliminary matter, this Court first recognizes that the reason the State and the defense agreed to remove Juror No. 184 from the jury panel was race neutral. Applicant's trial counsel confirmed at the evidentiary hearing that neither side wanted a potential wild-card juror on the panel. This Court then reviews the Applicant's challenge of the jury venire generally, which method of drawing jurors from the voter rolls has already been found constitutional.

"The sixth amendment right to a trial by jury has been made applicable to the states via the fourteenth amendment." State v. Hill, 394 S.C. 280, 288, 715 S.E.2d 368, 373 (2011) (citation omitted) (overruled in part regarding the use of a specific jury charge by State v. Stukes, 416 S.C. 493, 787 S.E.12d 480 (2016), reh'g den. July 15, 2016)). "The right to trial by jury contemplates a jury drawn from a pool broadly representative of the community and impartial in a specific case." Id. However, "the Constitution does not require that a juror selection process be a statistical mirror of the community." U.S. v. Burgess, 836 F.Supp. 336, 340 (D.S.C. 1993) (citation omitted). "Where a defendant moves to quash a jury venire or challenges the panel or array, the burden is on him to introduce or offer strong and convincing evidence in support of his motion, and the

failure to prove such contentions is fatal." Hill, at 288, 715 S.E.2d at 373 (citation omitted). Challenges based on merely attorney statements or unsworn and unsupported testimony is insufficient. See Id.; Burgess, 836 F.Supp. at 340.

> In order to establish a prima facia violation of the fair cross-section requirement, the defendant must show that (1) the group excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to a systematic exclusion of the group in the jury selection process.

Hill, at 289, 715 S.E.2d at 373 (citation omitted); Burgess, 836 F.Supp. at 341 (citation omitted).

Applicant provided no studies, reports, or other testimony at the evidentiary hearing why it was improper for Spartanburg County to use the voter rolls for the initial jury venire. Applicant testified that his jury was not diverse, but his trial counsel testified that the jury pool in Spartanburg County is predominantly white and the jury panel in Applicant's case was not atypical. Applicant provided no support for his objection to the jury venire. "A showing of mere statistical underrepresentation, without evidence of actual discriminatory or exclusionary practices is insufficient to establish a prima facie violation of the sixth amendment fair cross-section requirement." Burgess, 836 F.Supp. at 340. In fact, South Carolina recognizes that "[the] contention [that the use of voter registration rolls in selecting a jury is unconstitutional] has been generally rejected on the basis that voter registration lists are the most representative source of a community." State v. Hyman, 276 S.C. 559, 564, 281 S.E.2d 209, 212 (1981) (overruled on other grounds regarding improper jury charge for implied malice by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), reh'g den. (Sept. 27, 2019)); see also U.S. v. Cecil, 836 F.2d 1431, 1447 (4th Cir. 1988), reh'g and reh'g en banc den. (Feb. 5, 1988) ("We are aware of no case in which exclusive reliance on voter registration lists has been invalidated." (citation omitted)); Burgess, at 341 ("The Fourth Circuit has resoundingly approved of this method of selecting jurors.).

For the reasons discussed above, Applicant does not meet his burden regarding his objection to the jury venire in Spartanburg County generally and, therefore, his challenge to the jury is **DENIED**.

Inferred Malice Charge

Applicant alleges that his trial counsel should have objected to the implied malice charge to the jury, which is found in the trial transcript starting at line 15 on page 285. At the evidentiary hearing, PCR counsel clarified that she was arguing that the combination of the malice charge plus other charges effectively lowered the State's burden of proof. Jury charges should be considered as a whole in light of the evidence and issues as presented during the trial. Hyman, 276 S.C. at 569, 281 S.E.2d at 214 (citing State v. Tucker, 273 S.C. 736, 259 S.E.2d 414 (1979)). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct.App. 2003), reh'g den. (March 20, 2003), cert. den. (Feb. 19, 2004). "The substance of the law is what must be charged to the jury, not any particular verbiage." Id. at 318-319, 577 S.E.2d at 464. "A jury charge which is substantially correct and covers the law does not require reversal." Id. at 319, 577 S.E.2d at 464.

The implied malice charge that was charged to the jury in Applicant's trial merely explains that malice may be inferred. Importantly, the charge does not include as an example that the use of a deadly weapon could be used to infer malice. The absence of such an example is the correct version of the implied malice charge. "[R]egardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in

the record." State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), reh'g den. (Sept. 27, 2019). The implied malice charge from Applicant's trial provides a general statement of the law. Moreover, the appellate courts have recently affirmed that the implied malice charge does not shift or lower the burden of proof for the State. See State v. Brown, 438 S.C. 146, 154, 881 S.E.2d 771, 775 (Ct.App. 2022), reh'g den. (Jan. 4, 2023) ("inference charges are not burden-shifting if they are permissive and not mandatory.") Applicant's claims regarding the implied malice charge are **DENIED**.

Third-Party Guilt Defense

In his original application, Applicant claims trial counsel was ineffective for failing to present a third-party guilt defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. Strickland, 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. Id. (quoting Washington v. Strickland, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. Id. "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." Id. at 681 Id. (quoting *Washington*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690).

South Carolina adopted the third-party defense evidentiary rule in State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). This rule, as originally referenced in Gregory, requires the trial

judge to apply a probative value verses prejudicial analysis regarding the admission of evidence that someone other than the defendant at trial is guilty of the crimes that were charged.

> [E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party.

Holmes v. South Carolina, 547 U.S. 319, 328 (2006) (quoting Gregory, 198 S.C. at __, 16 S.E.2d at 534-535) (internal quotations and internal citations omitted). In Holmes, The U.S. Supreme Court found that the original intent and analysis outlined in Gregory was valid but subsequent cases that shifted the analysis to an evaluation of the strength of the prosecution's case, where a strong case for the prosecution could prevent the defendant from putting forward any evidence of third-party guilt, "violates a criminal defendant's right to have a meaningful opportunity to present a complete defense." Holmes, 547 U.S. at 331 (internal quotations and citations omitted).

During Applicant's trial, testimony was presented to the jury that someone other than Applicant was responsible for robbing and shooting Jackson. Applicant explicitly testified that he was not the person who shot or robbed Jackson. Defense counsel explained at the evidentiary hearing that the defense strategy was to try to convince the jury that Applicant was merely present and not an active participant in the crimes. A review of the trial transcript shows that the State did not object to the introduction of this type of testimony on behalf of Applicant. Indeed, the State's theory was that it did not matter whether Applicant directly participated in the crimes or not because Applicant was guilty under the theory of the hand of one is the hand of all. Although it was not explicitly labeled as such, Applicant presented a third-party defense theory to the jury and, therefore, Applicant's claim regarding the third-party defense is **DENIED**.

CONCLUSION

Based on the evidence presented at the evidnetiary hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to Strickland and Rule 71.1, SCRCP. This Court finds trial counsel adequately conferred with Applicant; logically and realistically evaluated the circumstances of his case; provided effective and competent representation; and that the objection to the jury venire is insufficient. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant Jacory Foster remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this 5th day of May, 2023.

Perry H. Gravely
Seventh Judicial Circuit

Greenville, South Carolina

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Perry H. Gravely
Judge

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May 8, 2023

Spartanburg County Clerk of Court
The Honorable Amy Cox
PO Box 3483
Spartanburg, SC 29304

Re: Jacory Foster
2022-CP-42-01534

Dear Ms. Cox:

Please file the enclosed Order signed by Judge Perry H. Gravely regarding the above referenced matter.

Please contact me if you have any questions.

Very truly yours,

Laura D. Colwell

Laura D. Colwell
Administrative Assistant to
Judge Perry H. Gravely
13th Judicial Circuit

/ldc

Enclosure