STATE OF SOUTH CAROLINA COUNTY OF CALHOUN	IN THE COURT OF COMMON PLEAS FOR THE FIRST JUDICIAL CIRCUIT
Jerry McKnight, #371498 Applicant, v. State of South Carolina, Respondent.	Case No.: 2018-CP-09-00073 **ORDER VACATING KIDNAPPING SENTENCE AND DISMISSING REMAINING PCR APPLICATION**

. This matter comes before the Court pursuant to an application for post-conviction relief ("PCR") filed by Jerry McKnight ("Applicant") on May 30, 2018. Respondent made its return on August 24, 2020, requesting an evidentiary hearing. On September 7, 2022, an evidentiary hearing convened before the Honorable R. Kirk Griffin. Clarissa W. Joyner, Esquire, represented Applicant, and Assistant Attorney General Lauren T. Mims represented Respondent. Applicant was present at the hearing and testified on his own behalf. Applicant also called as a witness trial counsel Mark A. Leiendecker, Esquire ("Counsel"). Following a thorough review of the records before this Court and the testimony and evidence presented at the hearing, this Court finds Applicant met his burden of proof as to the claim related to the kidnapping sentence. This Court further finds Applicant did not meet his burden of proof for all other PCR claims. Thus, this Court grants relief in-part to vacate Applicant's sentence for kidnapping, denies relief on all other claims, and dismisses this application with prejudice.[1]

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In January 2015, the Calhoun County Grand Jury indicted Applicant for murder

[1] This Court's ruling to vacate is limited to Applicant's *sentence* for kidnapping. Applicant's conviction for kidnapping remains unaltered.

(2014-GS-09-0057), kidnapping (2014-GS-09-0054), and possession of a firearm by a person convicted of a violent crime (2014-GS-09-0056). On March 2-6, 2015, Applicant proceeded to a jury trial before the Honorable Maite Murphy. Mark Leiendecker, Esquire, represented Applicant.[2] Solicitor David Pascoe, Deputy Solicitor Donald N. Sorenson, and Assistant Solicitor Kyle Ward prosecuted the case. The jury convicted Applicant as indicted, and Judge Murphy imposed concurrent sentences of life for murder, thirty years for kidnapping, and five years for the weapon charge.

Applicant filed a timely notice of appeal, which was perfected by Howard W. Anderson, III, Esquire, and Chief Appellate Defender Robert M. Dudek. The South Carolina Court of Appeals affirmed. State v. McKnight, 2017-UP-406 (Ct. App. filed Oct. 25, 2017). Applicant petitioned for rehearing, which was denied. Applicant then filed a petition for writ of certiorari in the South Carolina Supreme Court, which was also denied. The remittitur was sent April 3, 2018.

FACTUAL HISTORY

Applicant's charges arose from the fatal shooting of Kymmarra Randolph ("Victim") on February 13, 2014. At trial, Kim Livingston, Victim's mother, testified she last spoke to Victim around 6:00 pm on February 13, 2014. Thereafter, she attempted to locate Victim and was informed that Victim went to St. Matthews with someone named "B." Ultimately, Livingston filed a missing person report. (Tr. 87-91). Tameka Williams, Victim's roommate, testified she last saw Victim on February 13th at their home. She testified Victim told her "B"—whom Williams identified as Bryant McKnight—was picking her up. Williams never saw Victim again. (Tr. 109-112).

[2] Applicant was tried together with his codefendant, Bryant McKnight, who was represented at trial by Martin Banks, Esquire.

Jamaal Pearce, Bryant's friend, testified that he, Bryant, and James Keller picked up Victim around 4:30 p.m. on February 13. He stated they hung out at Keller's home for a while, and Bryant and Victim later left on foot. According to Pearce, Bryant returned around 8:22 p.m. that evening and told Pearce he "had to smoke that girl." Pearse understood that to mean Bryant shot her. He recalled seeing Bryant with a revolver that night. (Tr. 154-65). Pearse recalled hearing about a burglary at the home of Bryant's and Applicant's mother earlier in 2014. (Tr. 170).

James Keller, a friend of Jamaal Pearce, testified he was hanging out with Pearce and Bryant on February 13. (Tr. 189). According to Keller, later that day, Keller, Applicant, Pearce and Bryant picked up Victim from her home. (Tr. 190). Keller stated Bryant was carrying a gun and Victim was last seen alive with Bryant. (Tr. 190; 196).

Jonathan McKnight, Applicant's cousin, testified he was hanging out with Applicant, Victim, and Bryant on February 13. (Tr. 218). Later that day, Applicant asked Jonathan to take him to his girlfriend's house. (Tr. 220). According to Jonathan, he, Applicant, Bryant, and Victim were in the car together, and Jonthan was under the impression that they were going to Applicant's girlfriend's house. (Tr. 220). The group stopped at a gas station then headed towards Elloree, SC on highway 6. (Tr. 221). Jonathan testified halfway down the road, Applicant asked to stop to urinate. (Tr. 222). After pulling over, Applicant got out of the car and asked Victim to get out of the car; she refused several times. (Tr. 222). Jonathan testified Applicant grabbed Victim and snatched her out of the car. (Tr. 223). Once outside of the car, Applicant dragged Victim to the back of the car and opened fire on her. (Tr. 223). According to Jonathan, Applicant emptied the revolver clip and handed the gun to Bryant, who reloaded the gun and shot Victim a few more times. (Tr. 223).

Jonathan testified he saw Applicant drag Victim to the side of the road, then Applicant and Bryant returned to the car. (Tr. 224). Jonthan testified Bryant and Applicant threatened him that if he told what happened, they would do the same to him. (Tr. 225). The group drove to a gas station to meet Stephon Green, at which, Bryant placed Victim's belongings in a trash bag and put it in the Green's car. (225). Jonathan testified he believed Bryant and Applicant killed Victim because they believed she was involved with the 2014 burglary that occurred at the home of Bryant's and Applicant's mother. (Tr. 229). Janice Ross, a forensic pathologist, testified she conducted an autopsy on Victim that revealed the Victim died from six gunshot wounds to the head and six wounds to the chest. (Tr. 457). Stephon Green, Bryant's friend, testified that Bryant asked him to dispose of Victim's body; Green refused. (Tr. 302). Green further testified Bryant kept Victim's cellphone and used it to respond to text messages Victim received from others. (Tr. 302-03).

CURRENT APPLICATION

In his current PCR application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel for:
    a. Failing to object on the grounds of burden-shifting to the "mandatory presumption charge to the jury" regarding inferred malice;
    b. Failing to object to the trial judge's "constructive amendment of the [kidnapping] indictment on the element of knowingly (knowledge) in his charge to the jury;"
    c. Failing "to object to the sufficiency of the indictment and motion (sic) to dismiss the indictment before the jury was sworn on grounds it didn't contain the element of knowingly and knowledge. . . " regarding the kidnapping charge;
    d. Failing to object on the grounds of burden-shifting to the trial judge's "improper unconstitutional charge to the jury. . . that kidnapping does not have to be for any personal or monetary gain for any illegal purpose, but may be for any reason whatsoever. . . .;"
    e. Failing to object to the prosecutor's closing argument asking the

jury "to convict for improper reason;"[3]

f. Failing to object to trial court's "mandatory presumption charge that the acts of one [are] the acts of all;"
g. Failing to object to the sentence of thirty years for kidnapping as being in violation of South Carolina Code Section 16-3-910 where Applicant was simultaneously sentenced for the murder conviction;
h. Failing to object to the solicitor's improper closing argument wherein the solicitor used the term "I" over fifty times.

At the evidentiary hearing, Applicant proceeded only on the following allegations of ineffective assistance of counsel:

a. Failing to object to incorrect jury charges regarding malice being inferred from the use of a deadly weapon;
b. Failing to object to improperly burden shifting the kidnapping charge due to the language used in the charge;
c. Failing to object to the mandatory presumption contained in the judge's charge and the judge's constructive amendment to the kidnapping indictment by adding the "knowing" element;
d. Failing to object to the kidnapping indictment and move for dismissal for insufficiency;
e. Failing to object to a sentence of 30 years for kidnapping when there is a concurrent murder sentence;
f. Failing to object to judge's jury charge on "hands of one, hand of all[;]" and
g. Failing to object to the solicitor's closing argument issues relating to inflaming the passions of the jury, using "I" in appealing to the community, and inciting the jury to act on behalf of the community rather than focusing on the facts and evidence.

TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Applicant's Testimony

Applicant testified he did not feel Counsel had sufficient time to prepare his case. (PCR Tr. 8). According to Applicant, Counsel met with him three times during the nine months Applicant was incarcerated and awaiting trial. (PCR Tr. 8). Applicant further testified he did not believe

[3] It appears Applicant included the same allegation twice in his current PCR application – as both Ground Four and Ground Five.

Counsel sufficiently apprised him of the evidence against him and defense strategies. (PCR Tr. 8-9). Applicant testified he did not feel the investigation conducted by Counsel was adequate because Counsel did not get "information that they should have [gotten]" from "[t]he witness that testified[.]"

Applicant further testified he believed his attorney failed to object to the judge's jury charge related to malice being inferred from use of a weapon; jury charge on the "knowing" element of the kidnapping; which was not included in the indictment; and comments the solicitor made during closing argument. (PCR Tr. 10-12). Applicant testified he believed the jury charge on kidnapping, stating kidnapping does not have to be for personal gain, improperly shifted the burden to him. Applicant testified he believed the issues raised in his application caused him to not receive a fair trial and led to his conviction. (PCR Tr. 15).

On cross-examination, Applicant testified he knew, at the time of trial, of all of the issues he listed in his application were issues, but he did not ask his attorney to object to them because he did not feel like it was his job to do so. (PCR Tr. 14). Applicant further testified he believed the outcome of his trial would have been different because the solicitor was trying to paint a bad picture of him. (PCR Tr. 21). Applicant testified that he and Counsel had a trial defense and reviewed discovery during meetings. (PCR Tr. 21-22).

On redirect, Applicant testified he went up to the eleventh grade in school, did not graduate, and does not have a high school diploma. (PCR Tr. 22). Applicant further testified that he is not trained in law and was relying on Counsel to defend him. (PCR Tr. 22-23). Applicant testified he did not understand the things Counsel explained to him. (PCR Tr. 23).

Counsel's Testimony

Counsel, Mark Leiendecker, testified he has been practicing law since 1983 (approaching 40 years), practicing exclusively in criminal law. (PCR Tr. 25). According to Counsel, the case was called for trial ten months after he was appointed to represent Applicant. (PCR Tr. 26). Counsel testified that during that time he met with Applicant several times at the detention center. (PCR Tr. 26). Counsel testified he had an investigator, Harrell, who met with Applicant half a dozen times during the ten months leading up to trial. (PCR Tr. 26). According to Counsel, the investigator worked with Applicant [to investigate] witnesses and locations involved with the crime. (PCR Tr. 26-28).

Counsel testified he explained to the court all of his meetings with Applicant, trial preparations, and that this was the primary case Counsel worked on during the ten-month time span. (PCR Tr. 27). Counsel further testified that his meetings with Applicant included discussing the State's discovery, facts of the case, physical evidence, witness statements, statements made by co-defendants, and discussions with co-defendants regarding implicating Applicant. (PCR Tr. 27). Counsel stated he discussed with Applicant Victim's cellphone, which was used by the co-defendant and tracked. (PCR Tr. 27-28). According to Counsel, it was Applicant's contention that he was not involved and was at his aunt's house during the time of the murder, and Counsel investigated potential alibi witnesses to corroborate that. (PCR Tr. 28).

Counsel testified that the State's evidence against Applicant was "problematic" for Applicant's contention that he was not involved. According to the State's evidence, Applicant purchased the gun before the crime; the same weapon was used to commit the murder; the time Applicant left his aunt's house would have been sufficient time to be involved in the crime; and a family member [Jonathan], who was both the driver and a witness to the crime, implicated

Applicant. (PCR Tr. 28-29). According to Counsel, the defense strategy for trial was to impeach Jonathan by implying that he was lying or involved in the crime himself. (PCR Tr. 29-30).

Regarding jury charges, Counsel testified that generally, he prepared requested jury charges, the State prepared requested jury charges, and the judge has standard charges. (PCR Tr. 30). According to Counsel, it was general practice for Judge Murphy to hold a jury charge conference in which objections could be made and put on the record before being submitted to the jury. (PCR Tr. 30). Counsel did not believe there was burden shifting on the kidnapping charge, and the judge instructed the jury on the law on inferred malice as it was written. (PCR Tr. 31). Counsel testified not only did he not object to the inferred malice charge but he would not have. (PCR Tr. 31). Counsel testified he did not object to the "hand of one, hand of all" jury charge because there were co-defendants in this case, and if Applicant were going to be convicted, it would not be under this theory but would be due to testimony that he was one of the gunmen. (PCR Tr. 32).

Counsel further testified that he did not move to dismiss the indictment for not containing the knowledge element of kidnapping because the indictment provided Applicant with sufficient notice about date of the offense, the crime, and the victim. (PCR Tr. 32). Counsel stated he did not object to the judge mentioning the knowledge element of kidnapping because it was his understanding that kidnapping is not an accidental offense, it requires specific intent or knowledge. (PCR Tr. 33). According to Counsel, the jury charge was proper. (PCR Tr. 33). Counsel testified he is familiar with the South Carolina Code regarding kidnapping, and stated that neither he, the prosecutor, or the judge applied the Vick standard. (PCR Tr. 33). Counsel further testified that he understood that under the Vick standard, a person convicted of murder, and sentenced to that penalty, can be tried for and convicted of kidnapping but cannot be sentenced for kidnapping on

top of, in conjunction with, or concurrent with the murder sentence. (PCR Tr. 33-34). Counsel stated Applicant should not have received sentence for the kidnapping conviction. (PCR Tr. 34).

Regarding statements made by the solicitor, Counsel testified he did not object to the closing statements because he did not believe they rose to any level of passion – asking the jury to put themselves in the place of the victim's family. (PCR Tr. 34). Counsel further testified that he did not believe the solicitor's comments that Applicant and his brother could not get away with murder was improper burden shifting or improper embellishment. (PCR Tr. 34).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Calhoun County Clerk of Court records of the underlying convictions; Applicant's records from the South Carolina Department of Corrections; the records from Applicant's appeal, including the trial transcript; and the records of the current PCR action. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to meet his burden of proof. Below are this Court's findings of fact and conclusions of law as required by Section 17-27-80 of the South Carolina Code.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. at 687-88. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove that 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.

Failure to Object, Generally

Failing to object does not automatically constitute ineffective assistance of counsel. See Millidge v. State, 422 S.C. 366, 374, 811 S.E.2d 769, 800-01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); see also id. at 380. ("[T]he proper inquiry for determining prejudice…is whether there is evidence in the record to support the trial court's finding… if so, an appellate court would necessarily have affirmed the trial court's [ruling]….").

Failure to Object to the Malice Inferred from Deadly Weapon Jury Charge

This Court finds Applicant has failed to prove Counsel was ineffective for failing to object to the trial court's jury charge that malice can be inferred from use of a deadly weapon. When evaluating a claim for ineffective assistance of counsel, counsel's conduct is to be evaluated by

the law available at the time of trial. "One of the key circumstances a court must consider in its examination of counsel's decision not to make a particular objection is whether there was any law to support the objection." Winkler v. State, 418 S.C. 643, 654, 795 S.E.2d 686, 692 (2016). The court is to evaluate counsel's decisions at the time they were made and "every effort be made to eliminate the distorting effects of hindsight." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 689). Counsel is not required to anticipate potential changes in the law that did not exist at the time of conviction. Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004).

This Court finds Applicant did not prove counsel was deficient for not objecting to the inferred malice charge because the law that existed at the time of Applicant's trial supported the charge. During Applicant's trial in 2015, the prevailing case on inferred malice from use of a deadly weapon was State v. Belcher, 421 S.C. 622, 809 S.E.2d 423 (2009), *overruled by* State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In Belcher, the Supreme Court held a jury could not be charged that it may imply inferred malice from use of a deadly weapon where evidence was presented that would reduce, mitigate, excuse, or justify the homicide. Id. There was no evidence presented at Applicant's trial that reduced, mitigated, excused, or justified the homicide; as a result, the law permitted the judge to charge the jury on inferred malice from use of a deadly weapon. Thus, Applicant did not meet his burden of proving deficient performance by Counsel, and this claim is denied.

Failure to Object to the Kidnapping Jury Charge[4]

Applicant contends Counsel was ineffective for failing to object to improper burden shifting in the kidnapping charge due to the language use in the jury charge and failing to object

[4] The following section combines Applicant's allegations (b) and (c) and addresses them accordingly.

to the judge's constructive amendment to the kidnapping charge by adding the "knowledge" element. This Court finds Applicant has failed, on both allegations, to prove Counsel was ineffective failing to object.

"The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) (quoting State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944)). When a jury charge is read as a whole, it is correct if "it contains the correct definition and adequately covers the law." State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)).

At trial, the judge charged the jury by stating the following (Tr. 822-23):

> The defendants are charged with kidnapping. The State must prove beyond a reasonable doubt that the defendants knowingly and unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away another person without authority of law.
>
> ...
>
> Knowingly means with knowledge, consciously, not accidentally.
>
> ...
>
> The kidnapping does not have to be for any personal or monetary gain, for any illegal purpose, but may be for any reason whatsoever.

Applicant also contends Counsel was ineffective for failing to object to the trial court's charge, asserting the charge is improper burden shifting. This Court finds Applicant failed to prove Counsel was ineffective in this regard and finds the charge was a correct statement of law. "[M]otive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or state of mind is in issue." State v. Sweat, 362 S.C. 117, 124, 606 S.E.2d 508, 512 (Ct. App. 2004) (quoting Danny R. Collins, South Carolina Evidence 319 (2d ed. 2000)). The trial court charged the jury regarding purpose to show that motive is not a required element for kidnapping, which may be for any reason. This Court finds the trial court's charge is a correct

statement of law and finds *credible* Counsel's testimony that he did not have a basis to object because he did not believe the charge constituted improper burden shifting. Thus, Applicant has failed to prove Counsel was deficient for failing to object.

Applicant further contends Counsel was ineffective for failing to object to the trial court's jury charge for including "knowledge" as an element of kidnapping. This Court finds Applicant failed to prove Counsel was ineffective in this regard because the charge was a correct statement of law. This Court finds the judge's charge is a correct statement of law because knowledge is an element of the crime of kidnapping. The required mens rea for kidnapping is "knowledge." State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994). This Court finds the trial court's jury charge was a correct statement of law because knowledge is an element of kidnapping. Further, this Court finds *credible* Counsel's testimony that he did not object because he believed the charge was proper and without basis for objection. Thus, Applicant has failed to meet his burden, and this claim is denied.

Applicant contends Counsel was ineffective for failing to object to the trial court's jury charge, asserting adding "knowledge" language amounts to a constructive amendment of the indictment. This Court finds Applicant failed to prove Counsel was ineffective in this regard. If a defendant is convicted of a crime, he must be convicted "of the particular offense charged in the bill of indictment." State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993) (quoting State v. Cody, 180 S.C. 417, 423, 186 S.E. 165, 167 (1936)). An indictment may be amended at trial only if the amendment does not change the nature of the offense charged. Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998).

In Granger, the Supreme Court found a defendant's indictment for trafficking more than ten grams of crack did not involve an amendment to his indictment for trafficking less than twenty-

eight grams of crack. Id. at 5. The Court compared the defendant's case to other cases in which indictments were amended, resulting in increased penalties. Id. (distinguishing facts of Granger from State v. Riddle, 301 S.C. 211, 391 S.E.2d 253 (1990) and Clair v. State, 324 S.C. 144, 478 S.E.2d 54 (1996)). The Court reasoned that the increase in penalties amounted to a change in the offense charged, and thus, an amendment of the indictment. Id.

This Court finds the trial court did not constructively amend the indictment for kidnapping. Analogous to the defendant in Granger, the trial judge's inclusion of the required "knowledge" element to kidnapping, in Applicant's case, did not increase the penalty for kidnapping resulting in a change to the nature of the offense. Rather, the inclusion of the "knowledge" element was a proper instruction on the offense of kidnapping. Further, this Court finds *credible* Counsel's testimony that the indictment for kidnapping provided sufficient notice to Applicant to apprise him of the kidnapping charge against him. This Court also finds *credible* Counsel's testimony that he did not have a basis to object because he did not believe the jury charge resulted in an amendment to the indictment. Thus, Applicant has not met his burden, and his claim is denied.

Failure to Object to the Kidnapping Indictment and Move to Dismiss for Insufficiency

Applicant contends Counsel was ineffective for failing to object to the kidnapping indictment and move to dismiss (squash) the indictment for insufficiency. This Court finds Applicant failed to prove Counsel was ineffective in this regard. An indictment is a notice document. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005); see S.C. Code Ann. § 17-19-10 ("No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury..."). An indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant of what he must be prepared to meet. Granger, 333 S.C. at 4, 507 S.E.2d at 324. An indictment charging a statutory

crime does not need precise language from the requisite statute if the indictment contains equivalent language to the statute. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

The Calhoun County Grand Jury indicted Applicant for kidnapping. Although Applicant's indictment did not include language reflecting the "knowledge" element, Counsel testified it was his opinion that the indictment was sufficient to provide notice to Applicant of the nature, timing, and victim involved in the kidnapping charge against him. This Court finds Counsel's testimony *credible*. Further, this Court has reviewed the indictment and finds the indictment gave Applicant sufficient notice of the kidnapping charge. Thus, Applicant has failed to meet his burden, and this claim is denied.

Failure to Object to the Thirty-Year Sentence for Kidnapping

This Court finds Applicant has shown he is entitled to relief for counsel's failure to object to the court's thirty-year sentence for kidnapping. A person convicted of kidnapping "must be imprisoned for a period not to exceed thirty years *unless* sentenced for murder as provided in Section 16-3-20." S.C. Code Ann. § 16–3–910 (2015) (emphasis added). Where a defendant has been sentenced for murder of a victim, such sentence precludes a sentence for kidnapping of that victim, and any such sentence should be vacated. State v. Vick, 384 S.C. 189, 201, 682 S.E.2d 275, 281 (Ct. App. 2009). A challenge to sentencing must be raised at trial to be preserved for appellate review. Id. at 202. Counsel testified he failed to object to the thirty-year sentence for kidnapping, as Applicant had already been sentenced for murder of the same victim. (PCR Tr. 33-34). The State conceded Applicant's sentence was improper but did not concede that Applicant's conviction itself was improper. (PCR Tr. 56-57). Accordingly, this Court finds that Applicant has met his burden on this claim, and his concurrent thirty-year *sentence* for kidnapping is hereby

vacated pursuant to Section 16-3-910 of the South Carolina Code. Notwithstanding, this Court does not vacate Applicant's *conviction* for kidnapping.

Failure to Object to the "Hands of One, Hand of All" Jury Charge[5]

Applicant contends Counsel was ineffective for failing to object to the trial court's jury charge on the theory of "hands of one, hand of all." This Court finds Applicant has failed to prove Counsel was ineffective in this regard. "The law to be charged must be determined from the evidence presented at trial." State v. Ward, 347 S.C. 606, 614, 649 S.E.2d 145, 149 (2007) (quoting State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). Under the "hand of one, hand of all" theory, "one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." State v. Langley, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). A defendant can be convicted "on a theory of accomplice liability" even if the indictment only charges him with the principal offense. State v. Condrey, 349 S.C. 184, 194, 562 S.E.2d 320, 325 (Ct. App. 2002) (quoting State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000)). Accomplice liability occurs when a defendant "personally commit[s] the crime or [is] present at the scene of the crime and intentionally, or through a common design, aid[s], abet[s], or assist[s] in the commission of that crime through some overt act." Id., (citing Langley, 334 S.C. at 648–49, 515 S.E.2d at 101).

The trial court charged the jury on the theory of "hands of one, hand of all[,]" by stating the following (Tr. 815):

> If a crime is committed by two or more people who are acting together in committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person

[5] Applicant raised this issue in his original PCR application and testimony was elicited at the PCR hearing on this issue.

> which happens as a probable or natural consequences of the acts done in carrying out the common plan and purpose.

This Court finds the trial court's jury charge on the "hands of one, hand of all" theory was proper. At trial, testimony was presented that Applicant and his co-defendant, acting together, held Victim against her will and killed her. As a result, the jury charge for "hands of one, hand of all" was proper because it was supported by evidence presented at trial.

Further, Applicant has failed to prove Counsel's failure to object to the charge resulted in prejudice. At trial, a witness, who was present at the crime scene, testified Applicant was actively involved in holding Victim against her will and shooting her. Counsel testified at the PCR hearing that he did not believe there was a basis to object because, regardless of the State's accomplice liability theory under "hands of one, hand of all," the witness' testimony provided sufficient evidence to find Applicant guilty of kidnapping and murder. This Court finds *credible* Counsel's testimony. Regardless of Counsel's failure to object, Applicant has not proven that an objection to the charge would have reasonably changed the outcome of the trial. Thus, Applicant has failed to meet his burden, and this claim is denied.

Failure to Object to Statements Made in Solicitor's Closing Arguments

This Court finds Applicant has failed to prove Counsel was ineffective for failing to object to comments made by the solicitor during closing arguments. "A solicitor's closing argument must not appeal to the personal biases of the jurors[,]... arouse the jurors' passions or prejudices, and...should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471 (1986).

At the end of closing arguments, the solicitor stated the following:

> And ultimately, ladies and gentlemen, your voice is going to be the strongest, loudest voice in this courtroom. What I ask of you, the people of Calhoun County, the people of the State of South Carolina, is I ask you to come back with a voice that's loud and clear, a voice that tells Jerry McKnight and Bryant McKnight that they didn't get away with murder.
>
> Prove them wrong. Find them guilty of the brutal, cold, malicious killing of 17-year-old Kymmara Randolph. Prove them wrong, find them guilty of kidnapping her, and in Jerry's case, in possessing that weapon that he was not allowed to have. Thank you. (Tr. 806).

Applicant contends Counsel was ineffective for failing to object to the solicitor's comments which inflamed the passions of the jury. This Court finds Applicant failed to prove Counsel was ineffective in this regard. In Vasquez, the South Carolina Supreme Court found a solicitor's closing comments referring to a Muslim defendant as a "domestic terrorist" so infected the trial with unfairness as to result in a denial of due process. Vasquez, 388 S.C. at 464; 698 S.E.2d at 570. The solicitor's comment drew a correlation between the conduct the defendant was indicted for to the events of September 11, 2001. Id. at 452. The Court found the comments sought to inflame the passions and prejudice of the jury because reference to the events of September 11th was not related to or supported by the evidence presented at trial. Id. at 459-460.

This Court does not find the solicitor's comments inflamed the passions or prejudices of the jury. The statements made by the solicitor in Applicant's case were supported by the evidence and testimony presented at trial, and the reasonable inferences therein, unlike the solicitor in Vasquez. Counsel testified he did not object because he believed the solicitor's comments neither gave rise to "any level of passion" nor resulted in "burden shifting or improper embellishment." (PCR Tr. 34). This Court finds Counsel's testimony *credible*. Thus, Applicant has failed to meet his burden of showing deficient performance by Counsel.

Applicant contends Counsel was ineffective for failing to object to the solicitor's use of "I" during closing in an attempt to appeal to the community. This Court does not find Counsel was ineffective in this regard. A solicitor may state or comment on their version of evidence presented. Vasquez, 388 S.C. at 458, 698 S.E.2d at 566. Counsel further testified he did not believe there was a basis to object because the solicitor's use of "I" in closing was not improper as the solicitor expressed his opinion of the facts. This Court finds Counsel's testimony *credible* and finds the solicitor used "I" to express his interpretation of the facts. Thus, Applicant has failed to meet his burden of showing deficient performance by Counsel.

Applicant contends Counsel was ineffective for failing to object to the solicitor "inciting the jury to act on behalf of the community." This Court does not find Counsel was ineffective in this regard. In Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009), the Supreme Court found counsel was deficient for failing to object when the solicitor asked the jury to "'speak up' for the child victim" during his closing argument.

This Court finds the solicitor did not ask the jury to act on behalf of the community or the victim's family. Counsel also testified he did not believe there was a basis to object because the solicitor's comments did not ask the jurors to place themselves in the position of the victim's family. The Court finds Counsel's testimony *credible*. This Court also finds the statements made by solicitor in Applicant's trial merely asked the jury, in their capacities as a jury of Applicant's peers, to render a verdict against the Applicant, unlike the comments made by the solicitor in Brown. Thus, Applicant has failed to meet his burden of showing deficient performance by Counsel.

Further, this Court finds Applicant has failed to show Counsel's failure to object to *any* of the solicitor's statements so infected the trial with unfairness as to result in a denial of due process.

In Darden, the United States Supreme Court found a prosecutor's closing comments, in a capital case, referring to the defendant as an "animal" did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Darden, 477 U.S. at 181-82. According to the Court, the prosecutor's comment did not manipulate or misstate the evidence, nor did it implicate specific rights reserved by the defendant. Id. In reaching its decision, the Court found the comments did not prejudice the defendant because the evidence against the defendant was heavy: eyewitness testimony and circumstantial evidence supported a finding of guilt. Id. at 182.

The evidence against Applicant was overwhelmingly in favor of a finding of guilt, similar to the evidentiary finding in Darden. In Applicant's trial, Applicant's cousin, who was present at the scene, testified to Applicant being involved in the kidnapping and shooting the Victim. Additionally, circumstantial evidence, such as the gun purchased before the crime being the same gun used to commit the murder and Applicant's refuted alibi, supported a finding of guilt. Thus, Applicant has failed to meet his burden. This Court finds *credible* Counsel's testimony that the evidence presented at trial was "problematic" for Applicant. Applicant has failed to show that but for Counsel's failure to object, there is a there is a reasonable probability the result of the trial would have been different. Thus, Applicant has failed meet his burden of showing both deficient performance by Counsel and resulting prejudice, and this claim is denied.

[*Space left blank intentionally; conclusion follows.*]

CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant has met his burden on the thirty-year kidnapping sentence and hereby vacates Applicant's sentence for kidnapping. Notwithstanding, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application on his remaining claims. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgement entry's written notice to secure appropriate appellate review. See Rule 203, SCAR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of denial of PCR. 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. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. Applicant's sentence for kidnapping is vacated and the remaining PCR application claims are denied and dismissed with prejudice; and
2. Applicant is to remain in custody of Respondent.

AND IT IS SO ORDERED this 13th day of October, 2023.

HON. R. KIRK GRIFFIN
Presiding Judge
1st Judicial Circuit

Sumter, South Carolina.