

FILED

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Chad Stephen Hayes, #3609

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Case No. 2017-CP-32-01247

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

RECEIVED

Mar 28 2024

SC Court of Appeals

This matter comes before this Court by way of a pro se application for post-conviction relief filed by Chad Stephen Hayes ("Applicant") on April 14, 2017. The State's ("Respondent") return to the application was served on Applicant on July 31, 2017. An evidentiary hearing in this matter was held before the undersigned at the Lexington County Courthouse on April 11, 2022. Applicant was present and was represented by Aimee J. Zmroczek. 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 evidence 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.

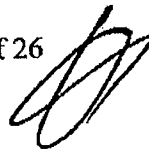
PROCEDURAL HISTORY

Applicant is currently imprisoned in the South Carolina Department of Corrections ("SCDC"). During its May of 2013 term, the Lexington County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2013-GS-32-01420) and second-degree criminal sexual conduct with a minor (2013-GS-32-01423). During its June of 2014 term, the Grand Jury indicted Applicant for contributing to the delinquency of a minor (2014-GS-32-01684) and three counts of attempting or committing a lewd act upon a child (2014-GS-32-01680; -01681;

-01683). On July 28, 2014, through August 1, 2014, Applicant proceeded to a jury trial with the Honorable Thomas A. Russo (“the trial court”) presiding. Robert T. Williams, Sr. (“trial counsel”), represented Applicant at that trial. Suzanne Mayes and Rhonda Wallace Patterson (collectively, “the solicitors”; individually, “the solicitor”), both of the Eleventh Circuit Solicitor’s Office (“the Solicitor’s Office”), prosecuted Applicant. At the conclusion of trial, the jury found Applicant guilty as indicted. The trial court sentenced Applicant as follows: for second-degree criminal sexual conduct with a minor (-1423), to imprisonment for fifteen years; for attempting or committing a lewd act (-1680), to imprisonment for fifteen years; for attempting or committing a lewd act (-1681), to imprisonment for fifteen years; for attempting or committing a lewd act (-1683), to imprisonment for fifteen years; for contributing to the delinquency of a minor (-1684), to imprisonment for three years; and for first-degree criminal sexual conduct with a minor (-1420), to imprisonment for twenty-five years, which would run consecutively to all of the other sentences, which would all run concurrently to one another.

Trial counsel filed a timely notice of appeal. James K. Falk (“appellate counsel”) and Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense represented Applicant on appeal.¹ Appellate counsel argued on appeal that the trial court erred in: (1) qualifying the solicitors’ expert in child abuse assessment; and (2) allowing the expert to testify as both a forensic interviewer and an expert in child abuse assessment. The South Carolina Court of Appeals affirmed in an unpublished opinion, finding that neither issue had been preserved for direct appellate review. *State v. Hayes*, Op. No. 2017-UP-092 (S.C. Ct. App. filed February 22, 2017) (per curiam). The remittitur was issued on April 9, 2018.

¹ Appellate counsel was appointed to represent Applicant by a South Carolina Court of Appeals order dated October 21, 2015, in accordance with the 2015 Appellate Practice Project.



CURRENT PROCEEDING

On April 14, 2017, Applicant filed his pro se application for post-conviction relief raising multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for not adequately impeaching the solicitors' witnesses; and (2) trial counsel was constitutionally ineffective for failing to make appropriate objections and legal arguments.

On July 27, 2018, Applicant, through counsel, filed an amended application raising multiple claims, which this Court interprets as follows: (1) trial counsel was constitutionally ineffective for failing to object to improper and prejudicial judicial comments made during the court's opening remarks to the jury; (2) trial counsel was constitutionally ineffective for introducing and discussing Applicant's previous lawyer, who had been arrested; (3) trial counsel was constitutionally ineffective for failing to challenge or preserve a challenge to the indictments, which were overly broad and vague and improperly presented at trial; (4) trial counsel was constitutionally ineffective for failing to request a more definite statement for the purpose of presenting an alibi defense; (5) trial counsel was constitutionally ineffective for failing to request an in camera competency evaluation of the juvenile witnesses; (6) trial counsel was constitutionally ineffective for failing to investigate the statute of former counsel and properly argue and preserve the search warrant suppression issues; (7) trial counsel was constitutionally ineffective for failing to move for the recusal of the Solicitor's Office after learning that they relied on information obtained from a former victim's advocate due to her position in the Solicitor's Office and allowing her to testify as a detective; (8) trial counsel was constitutionally ineffective for failing to obtain an expert to independently examine the computer evidence and challenge the certainty of the solicitors' digital forensic expert; (9) trial counsel was constitutionally ineffective for failing to investigate and present the testimony of a deoxyribonucleic acid ("DNA") or

gynecological expert witness; (10) trial counsel was constitutionally ineffective for failing to request and examine records to prepare for cross-examination and impeachment purpose; (11) trial counsel was constitutionally ineffective for failing to object to the improper introduction of 404(b) evidence of bad character; (12) trial counsel was constitutionally ineffective for failing to object to and preserve the issue for appeal regarding the impermissible hearsay, bolstering, and vouching by expert and lay witnesses; (13) trial counsel was constitutionally ineffective for failing to present witnesses to impeach or contradict unsubstantiated and improper 404(b) evidence; (14) trial counsel was constitutionally ineffective for failing to request and preserve objections regarding jury charges; (15) trial counsel was constitutionally ineffective for failing to object to improper hearsay and solicitor comments, and prejudicial comments during closing argument; and (16) appellate counsel was constitutionally ineffective for failing to raise and brief issues one, three, six, and twelve.

At the start of the April 11, 2022, hearing before this Court, Applicant confirmed that he was withdrawing some of the claims raised in his amended application.² This Court finds that Applicant has abandoned and waived all claims but those specifically addressed below.

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 Lexington County Clerk of Court for Applicant's convictions and sentences; Applicant's records from SCDC; the transcript from Applicant's trial; Applicant's appellate records, including the notice of appeal, the motion to appoint appellate counsel, the Court of

² At the end of that hearing, this Court asked each party to submit a post-hearing brief with short arguments on the claims that Applicant raised during the hearing. Respondent submitted its post-hearing brief by a letter dated June 15, 2022. As of the date of this order, Applicant has not submitted a post-hearing brief.



Appeals' order appointing appellate counsel as co-counsel for Applicant, the parties' final briefs, the record on appeal, the Court of Appeals' opinion, and the remittitur; the exhibits admitted into evidence during the April 11, 2022, hearing; 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 objecting to allegedly improper judicial remarks.

Applicant alleges that the trial court made improper statements during its opening remarks to the jury. The trial court told the jurors before they had been sworn that they would be required to render a verdict based only on the evidence presented "during the course of the trial." Trial Tran. 41-42.³ The trial court told the jurors that they would have to judge the case "on the facts that are presented here in court. So please adhere to that." Trial Tran. 42. The trial court told the jurors that their deliberations would not begin until they had seen all of the evidence, heard the lawyers' closing arguments, and heard its jury charges. Trial Tran. 43-44. At that point, the trial court dismissed the panel for the evening. Trial Tran. 47. When court resumed on the following day, the trial court described for the jurors the trial as "a search for the truth in an effort to make sure that justice is done for the parties that are before the Court." Trial Tran. 178. The trial court said that the search for "the truth" and the pursuit of justice can be slow, deliberate, and repetitive. Trial Tran. 178. The trial court said that trial counsel and the solicitors were advocates for the parties and were there to help the jury in its "search for truth." Trial Tran. 179. The trial court said that the jurors would take an oath to "try this case and to reach a fair and just verdict." Trial Tran. 179. At that point, the jury was sworn. Trial Tran. 179.

³ Citations styled this way are references to the trial transcript.



The trial court said that its introductory remarks were not a charge on the law. Trial Tran. 179. The trial court said that it was the jury's duty "to decide whether or not the State has met" its burden of proof. Trial Tran. 180. The trial court said that the jury was "to determine those facts from the testimony that you hear from the witnesses and any other evidence that may be introduced during the course of this trial." Trial Tran. 181. The trial court said that the jury was to apply the law as given by the court to the facts determined from the evidence admitted at trial. Trial Tran. 181. The trial court said that the jury's solemn responsibility was to render its verdict "based solely on the evidence as it is present to you during the course of this trial and on the law as I instruct it to you." Trial Tran. 182. The trial court told the jury that the evidence consisted of the testimonies of the witnesses and the exhibits admitted. Trial Tran. 183. The trial court said that, when the jurors were determining what the "true facts" were, they would have to decide about each witness's credibility. Trial Tran. 184.

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).

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.

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).

As an initial matter, Applicant alleges in his amended application alleges that the trial court made a preliminary comment that the jury was to be on a "search for truth and justice", but this Court cannot find that language as given during the trial court's preliminary remarks to the jury. Nevertheless, this Court turns now to the deficiency prong of *Strickland*. There was no case law at the time of Applicant's trial that would have required trial counsel to object to the aforementioned judicial remarks. At the hearing before this Court, trial counsel testified that he was familiar with

State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), but felt that the trial court's comments were not so detrimental to the defense that they warranted trial counsel's objecting and drawing more attention to them. He testified that he did not know that the trial court was going to make those remarks, but that that was a common thing that that trial judge did. In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), and *Daniels*, our Supreme Court was concerned with instructions that the trial courts gave to the respective juries during its jury charges. In *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018), our Supreme Court first criticized this sort of "seek the truth" language being given by a trial court during its preliminary remarks to the jury; however, this opinion was not published until after Applicant's trial had already taken place.⁴ It represented an extension of the law that trial counsel was not required to foresee. Our Supreme Court "has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." *Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993). Trial counsel was not required to make the objection that Applicant has identified, and, even if he was so required, he gave a valid reason for not doing so that was reasonable under the circumstances. See *Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765, 774 (Cl. App. 2007) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.") (quotation and citations omitted). Thus, Applicant has failed to satisfy the deficiency prong of *Strickland*.

Applicant has failed to show that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel objected. In *Beaty*, our Supreme Court found that there was not prejudice sufficient for a reversal after reviewing the entirety of the trial court's

⁴ Applicant's amended application admits that his trial took place before *Beaty* was published by alleging that trial counsel should have raised or preserved "the issue later decided in [*Beaty*]."

opening comments and the trial record. *Id.* at 34, 813 S.E.2d at 506. In this case, the trial court instructed the jury in multiple instances to restrict its consideration to the evidence admitted and the law as given, and otherwise properly instructed the jury. There is no prejudice here and Applicant has failed to satisfy the prejudice prong of *Strickland*.

Applicant has failed to prove that trial counsel was constitutionally ineffective for not objecting to allegedly improper judicial remarks because he has not proven that there was any deficiency in trial counsel's performance, because trial counsel had a valid reason for not making the objection specified, and because Applicant has failed to prove any resulting prejudice. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for introducing and discussing Applicant's previous lawyer Richard Breibart.

Applicant alleges that trial counsel should not have referred to Breibart, Applicant's former lawyer. In his opening statement, trial counsel mentioned that Applicant had previously hired Breibart to represent him, and said that Applicant "could have done a little bit better on that one." Trial Tran. 191. At the hearing before this Court, trial counsel testified that Breibart went to federal prison. He thought that the fact of Breibart's representation of Applicant had already been brought out for the jury before trial counsel gave his opening statement. First, Applicant has not proven that trial counsel should have refrained from mentioning Breibart's name in front of the jury, meaning that he has failed to satisfy the deficiency prong of *Strickland*. Second, Applicant has not proven that there is a reasonable likelihood that the outcome of trial would have been different but for the reference to Breibart. All that he has done is speculate that the reference could have caused him to suffer prejudice. With all of the other evidence admitted pointing to Applicant's guilt, one sentence from trial counsel's opening statement could not have affected the jury's verdict. Applicant has failed to satisfy the prejudice prong of *Strickland*.



Applicant has failed to prove that trial counsel was constitutionally ineffective for introducing and discussing Breibart because he has not proven that there was any deficiency in trial counsel's performance and because he has failed to prove that there was a reasonable likelihood that the outcome of trial but have been different but for the alleged deficiency. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not challenging the indictments due to their being overly broad and vague and improperly presented at trial, or for not preserving such a challenge.

At the hearing before this Court, trial counsel testified that he did not challenge the indictments on the basis that they were not specific enough because he has done so in other cases in the past without success. He testified that there are appellate opinions in South Carolina that allow a wider range of dates for alleged instances of sexual abuse against children since victims are children, and do not remember events as well as adults. He testified that some of the allegations referred to an incident on New Year's Day, which he felt was specific enough since children are better able to remember events if they coincide with some other big event. He testified that he felt that he did a good enough job preserving for appellate review an issue with an indictment's use of "and/or/any" when referring to the three minor victims. He testified that he reviews indictments to see if there is a sufficient basis to have them dismissed. He felt that the indictments in this case were sufficient for him to work with Applicant to prepare a defense.

This Court finds that Applicant has failed to satisfy the deficiency prong of *Strickland*. "The indictment is a notice document." *State v. Gentry*, 363 S.C. 93, 103, 610 S.E.2d 494, 500 (2005) (citations omitted). Our Supreme Court recently reiterated the following concerning indictments:

The primary purpose of an indictment is threefold: to put the defendant on notice of the elements of the offense; to allow him to decide whether to plead guilty or

stand trial; and to enable the trial court to know what judgment to pronounce following a conviction. The indictment must list the offense with sufficient certainty and particularity. Importantly, in determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practice eye in view of all the surrounding circumstances. Further, one is to look at the surrounding circumstances that existed pre-trial, in order to determine whether a given defendant has been prejudiced, *i.e.*, taken by surprise and hence unable to combat the charges against him. Whether the indictment could be more definite or certain is irrelevant. Notably, the threshold for an indictment to be valid is generally not high.

State v. Lewis, 434 S.C. 158, 863 S.E.2d 1, 8 (2021) (citations and quotations omitted). Applicant was indicted for sexual abuse of four minors who were all sisters of one another. The solicitor agreed to proceed to trial upon only the indictments relating to three of the four victims, as the fourth was not present for trial. Trial counsel's judgment that the date range in the indictments did not render them overly broad was reasonable. *See State v. Baker*, 411 S.C. 583, 592, 769 S.E.2d 860, 865 (2015), n.5 (reversing Baker's convictions because the trial court erred in denying the defense's motion to quash overly broad indictments that covered a non-specific, six-year period; "Had the indictments alleged that the conduct occurred during the summer months of the years 1998 through 2004, *i.e.*, June 1 until September 1, we believe the indictments would have been sufficient."); *State v. Tumbleston*, 376 S.C. 90, 98-102, 654 S.E.2d 849, 853-55 (Ct. App. 2007) (finding that the indictments did not need to specify the precise time of each offense charged because time was not a material element of each offense and the three-year period covered by the indictments occurred before the grand jury returned the indictments); *State v. Thompson*, 305 S.C. 496, 500-01, 409 S.E.2d 420, 423 (Ct. App. 1991) (instructing that the specific date of an offense does not need to be alleged in an indictment if it is not a material element of the offense, as long as the indictment apprises the defendant of what he must be prepared to defend against at trial and gives a time before the date of the indictment and is within any applicable statute of limitations). The indictments adequately put Applicant on notice of the things that he would have to defend

against. Applicant has failed to show that there was a basis upon which trial counsel was required to make a challenge to the fact of the indictments.

This Court finds that Applicant has failed to satisfy the prejudice prong of *Strickland*. Applicant has not provided this Court with any evidence that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel made some challenge to the indictments or that the trial court would have been required to concur with that challenge from trial counsel.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not challenging the indictments due to their being overly broad and vague and improperly presented at trial, or for not preserving such a challenge, because Applicant has not satisfied the two prongs of *Strickland*. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not requesting a more definite statement so as to present an alibi defense.

This Court finds that Applicant has failed to satisfy the deficiency prong of *Strickland*. Our Supreme Court has stated that:

The literal significance of the word "alibi" is "elsewhere"; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the time at the time of its commission, having been at another place at the time, he could not have committed the crime. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And since an alibi derives its potency as a defense from the fact

that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.

State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 864-65 (2015) (quoting *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980)). Trial counsel testified before this Court that Applicant admitted to doing all of the actions alleged by the prosecution except for taking photographs of the minor victims while they were nude in a tree. He testified that Applicant essentially admitted to the dates and times alleged by the victims. An employee from Applicant's workplace testified at trial that Applicant was not at work on New Year's Eve, which was a date on which the victims alleged some of the crimes occurred. That would have contradicted any alibi defense that Applicant put up for the New Year's Eve nude photography. Applicant admitted that he shaved the victims' pubic areas.⁵ Trial counsel testified that the defense was that Applicant's actions with respect to the victims were not sexual in nature and not that Applicant did not do the actions at all. Under those circumstances, trial counsel could not credibly have put up an alibi defense, and trial counsel's decision not to do so was reasonable. *See Brown*, at 481, 652 S.E.2d at 774 ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

This Court finds that Applicant has failed to satisfy the prejudice prong of *Strickland*. Applicant has presented no evidence that could support an alibi defense for the time periods in question, which is fatal to this claim. *See Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 279-80 (2019) (citing a previous holding that an applicant is required to produce an alibi witness at a PCR hearing or otherwise admissibly produce that witness's testimony in order to prove that his lawyer was ineffective for not interviewing or calling that witness). Any alibi evidence that

⁵ Trial counsel felt that the things that Applicant admitted to having done were unusual.

Applicant did produce would have been severely undermined anyway by the other evidence of his actions.

Applicant has failed to prove that trial counsel was constitutionally ineffective for not requesting a more definite statement so as to present an alibi defense because he has failed to meet his burden of either prong under *Strickland*. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not arguing and preserving an issue with the search warrant.

Applicant includes this claim in his amended application but presented no evidence or argument to support it at the PCR hearing. 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. An applicant must overcome the presumption that his lawyer's conduct fell within the wide range of reasonable professional assistance in order to receive relief. *Cherry*, 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." *Dunn*, 141 S. Ct. at 2410. This Court finds that Applicant's failure to put any evidence or argument before it constitutes a waiver and abandonment of the claim and a failure to meet his burden of proof.

Notwithstanding Applicant's failure to support this claim in any way, the claim fails on the merits, too. Trial counsel made a Fourth Amendment suppression argument at trial. Trial Tran. 160. After Applicant gave a statement to law enforcement officers and was arrested, the officers secured a search warrant for his home. Trial Tran. 85. The officers did not find Applicant's laptop during that search. Trial Tran. 88. The officers returned later, at which time Applicant's mother



surrendered Applicant's laptop to them. Trial Tran. 90, 99. Applicant's mother testified at trial that she had signed the laptop over to the officers. Trial Tran. 157. She testified that Applicant had made her his agent. Trial Tran. 158-59. The officers testified that they were going to return to Applicant's home with a search warrant for the seizure of the laptop if Applicant's mother had not turned it over to them voluntarily. Trial Tran. 128, 164. The officers then secured another search warrant so that they could examine the laptop forensically. Trial Tran. 101. Trial counsel argued that it was not clear whether Applicant's mother had had the authority to give Applicant's laptop to the officers. Trial Tran. 163. One of the officers testified that she had heard Applicant say that his mother was his agent and heard him ask her to use his laptop. Trial Tran. 132. Applicant discussed on recorded jail phone calls the fact that his mother was or had been his agent. Trial Tran. 133. The trial court ruled that Applicant's mother consented to the seizure of the laptop. Trial Tran. 167. The trial court ruled that the mother had authority over the laptop at that time. Trial Tran. 168. When the solicitor introduced the laptop into evidence during trial, trial counsel renewed his objection to it. Trial Tran. 666. The trial court admitted, over trial counsel's objection, photographs of the victims that were pulled from Applicant's computer during the forensic examination. Trial Tran. 680-81. Trial counsel renewed his previous motions at the close of the prosecution's case. Trial Tran. 707. After the jury found Applicant guilty, trial counsel renewed his previous motions. Trial Tran. 788. Trial counsel made a Fourth Amendment argument at trial and preserved the issue. Applicant's claim fails not only for want of proof and argument, but also because the record proves definitively that trial counsel did the very thing that Applicant alleges he did not. Thus, Applicant has failed to prove that trial counsel performed deficiently. This claim is denied and dismissed with prejudice.



Applicant's claim that trial counsel was constitutionally ineffective for not trying to recuse the Solicitor's Office after learning that it relied upon information obtained from a former victim's advocate due to her position in the Solicitor's Office and for allowing the person to testify at trial as a detective.

April Bayne Sykes testified at trial that she was employed at the South Carolina Law Enforcement Division ("SLED"). Trial Tran. 118. The implication from the questions asked of Sykes was that she was a detective at SLED. Sykes testified that she had previously worked at the Solicitor's Office as both an investigator and as a victim's advocate. Trial Tran. 119, 632. Trial counsel testified before this Court that he did not think that Sykes' testimony was slanted in any way. Applicant has not put forth any reason that Sykes' past roles at the Solicitor's Office made her role as a witness itself objectionable. Applicant has not supplied any evidence that there was any impropriety in Sykes' role as a witness. Applicant has failed to satisfy the deficiency prong of *Strickland*. The claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not having an expert conduct an independent forensic examination of the computer evidence and challenge the certainty of the prosecution's expert.

At trial, one of the victims testified that Applicant took nude photographs of the victims and that she saw him looking at the photographs on his laptop. Trial Tran. 290. One of the victims testified that Applicant had more than one camera. Trial Tran. 313. One of the victims testified that Applicant had multiple computers. Trial Tran. 317. One of the victims testified that she had seen nude photographs of the victims printed out and located in Applicant's bedroom. Trial Tran. 390. Law enforcement officers conducted a forensic examination of Applicant's laptop. Mike Phipps, the solicitors' digital forensics expert, testified that he found thumbnails of nude photographs of the victims on the laptop. Trial Tran. 676.

Applicant's expert testified before this Court that a casual observer who saw the thumbnails of the nude photographs displayed on the laptop might think that he or she had seen photographs



that were saved to the computer. He agreed that someone at least viewed the contraband photographs on the laptop, either by viewing the originals or the thumbnails thereof. He agreed that someone had manipulated the sizes of the thumbnails of the nude photographs. He could not say what camera was used to take the contraband photographs. He could not determine on what dates the photographs were taken or accessed. He could not determine from the data he found the identity of the person who took the photographs. He agreed that the photographs were present under the user profile on the laptop registered to "Chad," which is Applicant's name. He agreed that he did not identify during his examination any metadata additional to the data that the solicitors' expert described at trial.

Trial counsel, who was present in the courtroom for the testimony of Applicant's expert, testified that he did not think that the evidence from the laptop was a big deal. He testified that Applicant admitted to taking nude photographs of the victims. He testified that he felt that he had adequately cross-examined the solicitors' expert at trial. He testified that he would not have called Applicant's expert as a witness at Applicant's trial because he did not think that the expert provided information that would have been helpful to the jury and because he thought that the expert's testimony was difficult to understand. He contrasted the testimony of Applicant's expert with the testimony of the solicitors' expert by saying that the solicitors' expert was more down to earth and made the subject easier to understand.

Applicant has failed to prove the deficiency prong of *Strickland*. He has offered no reason for the Court to find that prevailing professional norms would have required a defense lawyer in trial counsel's situation to obtain an independent forensic expert. Applicant has not proven that there was anything that trial counsel should have done that he did not do, or that there was anything that he should have done differently. Trial counsel's statement that, after hearing the testimony of



Applicant's expert, that he would not have called him as a witness at trial was reasonable under the circumstances.

Applicant has also failed to prove the prejudice prong of *Strickland*. His expert's testimony was technical and lacked the needed explanation to render it usable for a jury. The expert did not offer any evidence showing that the solicitors' expert gave false or misleading testimony, and did not offer any evidence, by his own admission, beyond what was offered by the solicitors' expert. The solicitor used photographic evidence relating to the computer to corroborate the victims' testimony, and Applicant's expert did nothing to weaken that corroboration.

This Court finds that Applicant has failed to prove that trial counsel was constitutionally ineffective for not having an expert conduct an independent forensic examination of the computer evidence and challenge the certainty of the prosecution's expert because he has failed to satisfy either the deficiency or prejudice prong of *Strickland*. The claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for failing to request an examine records to prepare for cross-examination and impeachment in order to contradict unsubstantiated and improper 404(b) evidence.

Trial counsel said in his opening statement that there were allegations that Applicant had beaten the victims and hit his grandmother with a frying pan. Trial Tran. 192. Trial counsel elicited testimony from one of the victims that Applicant broke the victims' mother's tailbone over a piece of fish. Trial Tran. 327. Trial counsel elicited testimony from one of the victims that Applicant had committed acts of violence against his father and mother. Trial Tran. 329. Trial counsel elicited testimony from one of the victims that Applicant had stabbed her with a fork. Trial Tran. 329. One of the victims testified that Applicant was violent toward the victims and their mother. Trial Tran. 461-63. Trial counsel testified before this Court that he asked the questions because he wanted to



cause the jury to think that the victims' allegations must be false. He testified that it was hard to imagine that Applicant would have hit his grandmother in the head with a frying pan, as one of the victims had alleged. He testified that he had hoped that, if the jurors thought that the victims' stories were outlandish, they would doubt the victims' credibility. Trial counsel's strategy was valid and reasonable under the circumstances. See *Brown*, at 481, 652 S.E.2d at 774 ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel."). As such, Applicant as failed to satisfy the deficiency prong of *Strickland*. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not objecting to impermissible hearsay, bolstering, and vouching and the qualification of experts and lay witnesses, and for not preserving the issues for appellate review.

Applicant presented no evidence or argument at the PCR hearing to support this claim. 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. An applicant must overcome the presumption that his lawyer's conduct fell within the wide range of reasonable professional assistance to receive relief. *Cherry*, 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." *Dunn*, 141 S. Ct. at 2410. This Court finds that Applicant's failure to put any evidence or argument before it constitutes a waiver and abandonment of the claim and a failure to meet his burden of proof.

Notwithstanding Applicant's abandonment of the claim, this Court finds that Applicant's claim fails on the merits. Laurie Caldwell, who was previously a forensic interviewer at a



children's advocacy center, testified at trial. Trial Tran. 487-89. She explained what a forensic interview is and that she conducted the forensic interview of one of the victims. Trial Tran. 491-93. In an in camera hearing, trial counsel said that he wanted to avoid any issues with the witness's testimony and *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013). Trial Tran. 500. After the recording from the forensic interview of one of the victims was published, Caldwell testified that that victim told her during the interview that Applicant had penetrated her vagina. Trial Tran. 504. Caldwell also testified about the fact that that victim had spoken directly into the camera during the forensic interview when Caldwell was not present. Trial Tran. 505. The trial court then qualified Caldwell as an expert in child abuse assessment even though trial counsel did not stipulate to the qualification. Trial Tran. 510-11. The trial court did not abuse its discretion in qualifying Caldwell as an expert. Once Caldwell was qualified, she went on to give testimony about topics such as delayed disclosure, grooming, and a minor victim's relationships with his or her parents. Trial Tran. 511-21. The witness did not give an opinion, directly or indirectly, that she believed that the victim was telling the truth about the allegations against Applicant. The testimony was not objectionable as improper vouching or bolstering. Any hearsay testimony was completely harmless because the victim interviewed in the recording testified at trial and the recording of the interview had just been played for the jury. Applicant has failed to satisfy the deficiency prong of *Strickland*, so this Court denies and dismisses the claim with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not making or preserving objections to jury charges.

Applicant argues that the trial court improperly charged the jury that the victims' testimony did not need to be corroborated, and that trial counsel should have objected to that charge, and that trial counsel should have requested a charge pursuant to *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013). Applicant presented no evidence or argument at the PCR hearing to support this claim.



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. An applicant must overcome the presumption that his lawyer’s conduct fell within the wide range of reasonable professional assistance in order to receive relief. *Cherry*, 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.” *Dunn*, 141 S. Ct. at 2410. This Court finds that Applicant’s failure to put any evidence or argument before it constitutes a waiver and abandonment of the claim and a failure to meet his burden of proof.

Notwithstanding Applicant’s abandonment of the claim, the claim fails on the merits, too. The trial court instructed the jury that it was to determine which witnesses were credible and that “[t]he testimony of a victim need not be corroborated or confirmed in prosecutions for 1st degree criminal sexual conduct with a minor.” Trial Tran. 770-71. Section 16-3-675 of the South Carolina Code provides that “[t]he testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658,” which includes offenses for which Applicant was tried and convicted.⁶ Our appellate courts held repeatedly for more than two decades before Applicant’s trial that it was not error for a trial court to instruct the jury, in accordance with the statute, that the testimony of a victim in a trial for the offense of criminal sexual conduct with a minor did not need to be corroborated. After Applicant’s trial, the Supreme Court issued its opinion in *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016), holding that it no longer condoned the giving of the

⁶ If anything, the trial court mistakenly limited the applicability of the corroboration charge to the first-degree offense.



corroboration jury instruction. At the time of trial, the instruction as proper and trial counsel would have had to have been clairvoyant to predict that it would one day be disfavored. *See Thornes*, at 309-10, 426 S.E.2d at 765-66 (explaining that the South Carolina Supreme Court “has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”). The trial court also gave a general charge on the difference between direct and circumstantial evidence. Trial Tran. 769. There was no need for the trial court to give a *Logan* charge because the prosecution’s case did not “[rely] on circumstantial evidence.” *Logan*, at 99, 747 S.E.2d at 452. The prosecution’s case, as the solicitor argued in closing, was built upon “overwhelming direct evidence not from one victim, not from two, but from three.” Trial Tran. 732. Trial counsel was not required to request a *Logan* charge and Applicant has failed to satisfy the deficiency prong of *Strickland*. This claim is denied and dismissed with prejudice.

Applicant’s claim that trial counsel was constitutionally ineffective for not objecting to improper hearsay and comments from the solicitor’s closing argument.

The only allegedly improper comment from the solicitor that Applicant identified at the PCR hearing was the following argument in closing from the solicitor:

When [Applicant] got that call [from law enforcement officers], he was tipped off, and I can guarantee you he put the wheels in motion to start getting rid of evidence, and that was his goal, that was his goal, and he almost got away with it. He almost got rid of the evidence. Cameras were gone, the memory cards were gone, computers were gone. Even those pictures that he had printed out with that fancy printer he had, that all-in-one printer that he keeps in his house, even those pictures that he kept in the drawer of his bed, gone.

Trial Tran. 731. Applicant has not proven that the comment was improper and, if so, whether it “so unfairly prejudiced [him] as to deny him a fair trial.” *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019) (citations omitted). The solicitors presented evidence from the victims that Applicant had multiple computers and multiple cameras and had printed photographs of the victims in the nude. One of the law enforcement officers called Applicant to arrange an interview



after the victims disclosed the sexual abuse. When the officers subsequently searched Applicant's home, they did not find any of the computers or cameras or printed nude photographs, although there was evidence in the home that those items had been present previously. As trial counsel agreed at the PCR hearing, it was reasonable to infer from those facts that Applicant had disposed of evidence after learning of the victims' disclosures. The solicitor's closing argument that Applicant had disposed of evidence before the officers searched his home was a fair one based on the facts of the case. As such, trial counsel was under no obligation to object to this comment from the solicitor. Applicant has failed to satisfy the deficiency prong of *Strickland*. This claim is denied and dismissed with prejudice.

Applicant's claim that trial counsel was constitutionally ineffective for not raising objecting to testimony from the victims due to their lack of competency to testify.

Trial counsel testified at the PCR hearing that he did not request a competency hearing before the minor victims testified at trial because it appeared to him that they knew right from wrong and could testify comprehensibly. He agreed that one of the victims had been in special needs classes at school. He testified that he had formed his opinion on the victims' competency to testify after viewing the recording of the forensic interview. Applicant has given no reason that trial counsel was required to challenge the competency of the victims to testify. He has not proven that they were not competent. And he has not proven that there is a reasonable likelihood that the outcome of trial would have been different had trial counsel requested a hearing on the victims' competency. Applicant has failed to satisfy the deficiency and prejudice prongs of *Strickland*, so his claim is denied and dismissed with prejudice.



Applicant's claim that appellate counsel was constitutionally ineffective for not raising certain issues on appeal.

Applicant questioned appellate counsel at the PCR hearing only about allegedly improper closing argument from the solicitor and his decision not to file a petition for a writ of certiorari to the Court of Appeals after Applicant's convictions were affirmed. Applicant has therefore waived and abandoned any other claims concerning appellate counsel. Applicant asked appellate counsel generally about allegedly improper closing argument from the solicitor but did not identify exactly what argument he contends was improper, asking only if appellate counsel looks at closing arguments for things that constitute improper bolstering. Applicant has failed to meet his burden on this point due to the lack of specific information that this Court could use to evaluate his arguments. However, in light of the evidence admitted, Applicant has failed to prove that there is a reasonable likelihood that his convictions would have been overturned had appellate counsel made some argument about the solicitor's closing argument. Furthermore, no issues regarding closing argument were raised by trial counsel, so any such issues likely would not have been preserved for direct appellate review anyway.

Applicant asked appellate counsel to explain the reason that he did not seek a writ of certiorari after the Court of Appeals affirmed Applicant's convictions. There is no duty on an appellate lawyer "to pursue rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal." *Douglas v. State*, 369 S.C. 213, 215, 631 S.E.2d 542, 543 (2006). As a matter of law, Applicant cannot prevail on a claim that appellate counsel should have taken a discretionary action, like filing a petition for a writ of certiorari to the Court of Appeals. Thus, Applicant cannot satisfy the deficiency prong of *Strickland*, and his 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 South Carolina Department of Corrections.

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

[Signature], South Carolina

[Signature]
George M. McFaddin, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

CHAD S. HAYES, # 360913

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

AFFIDAVIT OF SERVICE

The undersigned hereby certifies that a true copy of the filed Order of Dismissal has been served upon applicant's counsel by mailing one copy in the United States mail, postage prepaid, addressed to:

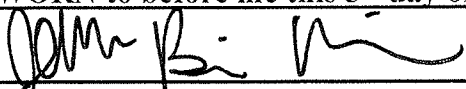
**Ms. Aimee J. Zmroczek, Esquire
A.J.Z. Law Firm, LLC.
PO Box 11961
Columbia, SC 29211**

This 5th day of February 2024.



William Corbett, Jr.
Legal Assistant for Respondent

SWORN to before me this 5th day of February 2024.


Notary Public for South Carolina.

My Commission Expires: 3/29/2032

2017-CP-32-01247

