

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SALUDA COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2020-CP-41-00093

Kyle Wayne Way, #382833 Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant, Kyle Wayne Way, appeals the order of the Honorable Kristi F. Curtis, filed on or about February 26, 2024, and received by the undersigned on March 28, 2024.



April 4, 2024

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA)	FOR THE ELEVENTH JUDICIAL CIRCUIT
)	
Kyle Wayne Way, #382833)	Case No.: 2020-CP-41-00093
)	
Applicant,)	
)	
v.)	
)	ORDER OF DISMISSAL
State of South Carolina,)	
)	
Respondent.)	
)	
)	
)	
)	

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed by Kyle Wayne Way (“Applicant”) on May 8, 2020, and amended on October 7, 2022, and again on March 27, 2023. The Court convened an evidentiary hearing into the matter on April 4, 2023, at the Lexington County Courthouse. Applicant was present at the hearing and represented by Ashley A. McMahan, Esquire. Zachary W. Jones, of the South Carolina Attorney General’s Office, represented Respondent. After reviewing all records and evidence before the Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is currently confined in the South Carolina Department of Corrections. Applicant was arrested on March 16, 2017, following an investigation into allegations Applicant sexually abused his thirteen-year-old biological sister over a period of several months.

During its May 2017 term, the Saluda County Grand Jury indicted Applicant for second-degree criminal sexual conduct (CSC) with a minor (2017-GS-41-1175). During its November

2019 term, the Saluda County Grand Jury indicted Applicant for third-degree CSC with a minor. (2019-GS-41-344). On November 18, 2019, Applicant proceeded to a jury trial before the Honorable Walton J. McLeod, IV. Andrew Bishop, Esquire (Counsel) represented Applicant. Assistant Solicitors Robbie McNair and Melanie Darko prosecuted the case. On November 21, 2019, the jury convicted Applicant of third-degree CSC with a minor and acquitted him of second-degree CSC with a minor. Judge McLeod sentenced Applicant to fifteen years' imprisonment. Applicant did not appeal.

II. CURRENT APPLICATION

In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

1. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) "Invalid arrest warrants/4th Amendment"
 - (b) "Constitutional violation"

2. State concisely and in the same order the facts which support each of the grounds set out in (1):
 - (a) "Warrants was [*sic*] not issued under section 17-13-140"
 - (b) "No commitment order to be detain [*sic*] to detentional [*sic*] center under section 24-5-10."

Applicant requests relief in the form of a new trial.

Applicant amended his application on October 7, 2022, raising the following allegations:

1. Ineffective assistance of Counsel – John A. Bishop
 - a. Failure to file a direct appeal.

Applicant amended his application on October 7, 2022, raising the following allegations:

2. Ineffective Assistance of Counsel
 - a. Erroneously advised Applicant as to parole eligibility. *See Smith v. State*, 329 S.C. 280, 494 S.E.2d 626 (1997).

Applicant also asked to be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing. Based on Applicant's testimony during the hearing, the Court deems the following additional issues presented:

1. Ineffective Assistance of Counsel
 - a. Failure to adequately explain Applicant's plea options after Applicant was indicted for third-degree CSC with a minor;
 - b. Failure to adequately cross-examine Victim as to the reason for the incriminating text messages between her and Applicant;
 - c. Failure to challenge Captain Price's testimony that Applicant had admitted to kissing Victim and had said his feelings for Victim were more than those of a brother;
 - d. Failure to expose witnesses' changing stories:
 - i. Victim gave inconsistent statements during her forensic interviews and at trial;
 - ii. Older Sister's trial testimony differed from her earlier statement;
 - iii. Younger Sister's trial testimony differed from her earlier statement;
 - e. Failure to adequately argue the directed verdict motion.

No evidence was presented at the evidentiary hearing concerning the allegations raised in Applicant's initial PCR application. Therefore, the Court deems those allegations abandoned, and will address only the allegations raised in the two amended applications or presented at the hearing.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Before the Court are Applicant's records from the South Carolina Department of Corrections, the transcript of Applicant's trial, the records of the Saluda County Clerk of Court regarding the subject convictions, and the original and amended applications for post-conviction relief. This Court has reviewed the records submitted to it by the parties, the legal arguments made by the attorneys, and

the pleadings. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented:

Ineffective Assistance of Trial Counsel

Applicant's allegations of ineffective assistance of Trial Counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "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 v. Washington*, 466 U.S. 668, 686 (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*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures 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). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690).

The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). “[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Yarborough*, 540 U.S. at 6; *see also* *Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (“[C]ounsel’s performance need not be optimal to be reasonable.”).

Second, counsel's deficient performance must have prejudiced 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. “This does not require a showing that counsel’s actions ‘more likely than not altered the outcome,’ but the difference between *Strickland*’s prejudice standard and a more-probable-than-not standard is slight and matters ‘only in the rarest case.’” *Harrington*, 562 U.S. at 111–12 (quoting *Strickland*, 466 U.S. at 697). “The likelihood of a different result must be substantial, not just conceivable.” *Id.* at 112. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” *United States v. Basham*, 789 F.3d 358, 371–72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)). The court need not examine both deficiency and prejudice in every case; if it is easier to dispose of a claim of ineffective assistance on the ground of lack of prejudice, that course should be followed. *Strickland*, 466 U.S. at 697.

A: Failure to file direct appeal

Applicant argues Counsel was ineffective for failing to file a direct appeal or to consult with Applicant about the possibility of appeal. The Court finds this allegation to be without merit.

Counsel has a constitutionally imposed duty to consult with a defendant about an appeal *only* when there is reason to think (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). In addition, to prove prejudice, an applicant must demonstrate a reasonable probability that he would have timely appealed but for counsel's deficiency. *Id.* at 484. Evidence that there were nonfrivolous grounds for appeal or that the defendant promptly expressed a desire to appeal is highly relevant to this determination. *Id.* at 485.

At the evidentiary hearing, Applicant admitted he never asked Counsel to pursue an appeal. Counsel also testified that Applicant neither requested an appeal nor made any other indication that he wanted to challenge the conviction. Counsel further testified he did not see a basis for filing a notice of appeal because he could not see any meritorious issues for appeal. Applicant did not present any nonfrivolous grounds that would have justified an appeal. As "evidence that there were nonfrivolous grounds for appeal or that the defendant in question promptly expressed a desire to appeal" is "highly relevant" to the prejudice analysis, the Court finds Applicant has failed to meet his burden of proving prejudice from Counsel's failure to consult with him about filing an appeal. *Flores-Ortega*, 528 U.S. at 485. As the failure to prove prejudice is dispositive, the Court need not reach the deficiency prong. *Strickland*, 466 U.S. at 697.¹ Accordingly, this allegation is denied and dismissed with prejudice.

¹ Even where the post-conviction relief court finds an applicant was denied the right to a direct appeal due to the ineffective assistance of counsel, the court may not grant post-conviction relief on that basis. *Davis v. State*, 288 S.C. 290, 291 n.1, 342 S.E.2d 60, 60 n.1 (1986). Instead, the proper remedy is for the applicant to petition for belated review of direct appeal issues pursuant to the procedure set forth in *Davis*. *Id.* Therefore, even if Applicant had met his burden as to this allegation, the remedy he requested—a new trial—would not be available.

B: Erroneous advice regarding parole eligibility

Applicant argues Counsel provided erroneous advice regarding his parole eligibility. The Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified Counsel sent him a letter after he went to prison telling him he would be eligible for parole after four years. Counsel recalled sending the letter, and he testified that he still believed Applicant would be parole eligible after four years. The SCDC records for Applicant, which were among the materials provided to the Court, reflect Applicant's projected parole date as "8/23/2023." This would, in fact, be slightly less than four years after Applicant's conviction. The Court finds Counsel gave correct advice regarding Applicant's parole eligibility and, therefore, was not deficient as to this allegation. Furthermore, since Applicant testified he received Counsel's letter after he had already been convicted, the Court finds this advice could not possibly have affected the outcome of the trial. Accordingly, this allegation is denied and dismissed with prejudice.

C: Failure to reevaluate Applicant's plea options after CSC 3rd charge

Applicant argues Counsel was ineffective for failing to renew discussions regarding pleading guilty after Applicant was charged with third-degree CSC with a minor. The Court finds this allegation is without merit.

Applicant testified he was initially charged with second-degree CSC with a minor and was offered the option of pleading to assault and battery instead for a sentencing range of 0–10 years. He rejected that offer. Shortly before trial, he was charged with third-degree CSC with a minor. Applicant testified that Counsel warned him that he might be in some trouble because of the new charge. Applicant argued Counsel should have explained the plea offer better and should have attempted to revive it after the third-degree CSC with a minor charge was added.

Counsel testified that Applicant was offered a straight-up plea to assault and battery, with the sex offender registry left open, rather than proceeding to trial on the CSC charges. Counsel further testified he explained the differences between the assault and battery plea offer and the CSC charges Applicant was facing if he continued to trial. Counsel testified Applicant refused to plead guilty because he maintained his innocence.

The Court finds Counsel's testimony credible as to this issue. Accordingly, Applicant has failed to prove that Counsel's discussions regarding the plea offer were inadequate or that Applicant's decision not to accept the offer was based on Counsel's advice, as opposed to Applicant's own refusal to admit guilt.²

Accordingly, Counsel's performance was not deficient, and this allegation must be denied and dismissed with prejudice.

D: Failure to cross-examine Victim regarding text messages

Applicant argues Counsel was ineffective for failing to adequately cross-examine Victim about the reasons for the romantic text messages between her and Applicant. The Court finds this allegation is without merit.

At trial, the State introduced as evidence multiple text messages Applicant sent to Victim, where he described himself as her "boyfriend" or "husband," described Victim as his "girlfriend"

² In addition, the only "prejudice" that resulted from this alleged deficiency is that Applicant received a trial. "It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); see *Strickland*, 466 U.S. at 684 ("[T]he Sixth Amendment right to counsel exists . . . in order to protect the fundamental right to a fair trial."); see also *id.* at 686 (holding the purpose of the "constitutional requirement of effective assistance" is "to ensure a fair trial."). Absent any impropriety in Applicant's trial, the mere allegation that Applicant was prevented from bargaining away his trial rights cannot, by itself, amount to prejudice justifying a grant of PCR.

or “wife,” and expressed a longing to hold and kiss Victim and distress at being parted from her. Victim also sent similar messages to Applicant. (Nov. 20, 2019, Tr.pp.76–91).

At the evidentiary hearing, Counsel testified the defense strategy was to explain that Applicant and Victim did not really mean the things they were texting to each other. Rather, they created a false persona, pretending that Applicant was a boy in love with Victim, so that Victim would not be bullied at school. The text messages were, ostensibly, an elaborate ruse so that Victim could show her friends that her “boyfriend” was communicating with her. Applicant gave this explanation for the text messages on direct examination. (Nov. 20, 2019, Tr.p.161, line 4–p.162, line 20). Counsel elicited from Victim on cross-examination that she was being bullied at school and that Applicant had decided to text her friends, pretending to be her boyfriend. (Nov. 18–19, 2019, Tr.p.160, lines 12–18). At closing argument, Counsel argued Applicant had participated in this “fake relationship” for a legitimate reason, and that “nothing ever transgressed from the fake relationship to the real world.” (Nov. 20, 2019, Tr.p.23, line 23–p.24, line 23).

Applicant now claims Counsel should have more thoroughly cross-examined Victim about the reasons for the incriminating texts between her and Applicant. The Court finds, however, that Counsel acted reasonably in presenting the defense strategy, both by eliciting the purportedly legitimate purpose of the texts from Applicant on direct examination and by arguing to the jury that the text relationship never carried over into real life. Furthermore, there is no reason to believe that Victim would have testified favorably if Counsel had pressed her on this point. On the contrary, Victim testified that she and Applicant genuinely considered each other boyfriend and girlfriend and that Applicant eventually considered her his wife, as reflected in the text conversations. (Nov. 18–19, 2019, Tr.p.88, line 25–p.90, line 13.)

Applicant bears the burden of proving that, had Counsel more thoroughly cross-examined Victim on this issue, Victim's testimony would have been helpful to the defense. However, Applicant has presented no evidence to support that conclusion. Therefore, the Court finds Applicant has failed to prove either deficiency or prejudice as to this allegation; accordingly, this allegation is denied and dismissed with prejudice.

E: Failure to challenge Captain Price's testimony about Applicant's statement

Applicant argues Counsel did not adequately challenge the testimony of Captain Price, who testified at trial that Applicant had verbally admitted kissing Victim on the mouth and having feelings for Victim that were more than those of a normal brother-and-sister relationship. Applicant denies that he ever gave such a statement. The Court finds this allegation is without merit.

At the outset of Applicant's trial, the trial court conducted a hearing outside the presence of the jury to determine the admissibility of Applicant's verbal statement to Captain Price pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964). (Nov. 18–19, 2019, Tr.pp.34–47). Captain Price testified at that hearing that Applicant was read his rights and gave a written statement³ during an interview on March 3, 2017. (Nov. 18–19, 2019, Tr.pp.38–40). Captain Price further testified that Applicant gave a verbal statement admitting “that he did have feelings for his sister that were more than what a—what would be a normal brother-and-sister relationship” and that he had kissed the Victim on the mouth on two different occasions. (Nov. 18–19, 2019, Tr.p.43, lines 8–18; p.44, lines 8–13). The court asked Counsel whether he was contesting the admissibility of the statement,

³ The written statement was read during Applicant's trial. The substance of the statement was that Applicant denied any wrongdoing and claimed he sent texts to Victim pretending to be her boyfriend, and later husband, so that she wouldn't be bullied at school. (Nov. 20, 2019, Tr.pp.62–64).

and Counsel replied, “I wasn’t contesting the admissibility of the written statement. We have some issues with what was verbally said outside of his written statement.” (Nov. 18–19, 2019, Tr.p.44, line 20–p.45, line 2). Ultimately, the trial court ruled “that the statement was voluntarily made after *Miranda*. Whether the jury believes it or not will be up to them at a later date. But I’ll certainly hold that it’s voluntary and admissible for *Jackson v. Denno* purposes.” (Nov. 18–19, 2019, Tr.p.47, lines 3–8).

During the evidentiary phase of the trial, the State called Captain Price to testify before the jury about Applicant’s statements. Captain Price again testified that Applicant had given a written statement, and he read that statement to the jury. (Nov. 20, 2019, Tr.pp.62–64). He then testified that Applicant had made a verbal statement admitting that he had kissed the Victim on the mouth on two occasions and had feelings for her that were more than a normal brother-and-sister relationship. (Nov. 20, 2019, Tr.pp.64–66). On cross-examination, Captain Price testified Applicant had described the kiss as a “peck.” (Nov. 20, 2019, Tr.p.68, lines 9–13).

Applicant testified during his trial. He admitted that he had kissed Victim “on the side of the lips” and that he had described it to Captain Price as a “peck.” (Nov. 20, 2019, Tr.p.171, line 24–p.172, line 6). Applicant testified he never kissed Victim in a sexually arousing way. (Nov. 20, 2019, Tr.p.174, lines 18–20). On cross-examination, Applicant denied telling Captain Price he had kissed Victim directly on the mouth, and he also denied telling Captain Price he had held hands with Victim at the track at school. (Nov. 20, 2019, Tr.p.193, lines 2–24). During closing arguments, Counsel argued to the jury that Applicant did admit to giving Victim a “peck” but that he did not say his feelings for Victim were more than those of a brother and sister. (Nov. 21, 2019, Tr.p.24, lines 9–12).

The Court finds Counsel's performance as to this issue was not deficient. Counsel challenged the admissibility of Applicant's verbal statement at a *Jackson v. Denno* hearing outside the presence of the jury. Although he was unsuccessful in keeping the statement out of evidence, he was able to elicit from both Captain Price and Applicant that the kiss was described as a "peck," as opposed to a kiss of a sexual nature. Applicant was able to deny or minimize aspects of the verbal statement as related by Captain Price. Furthermore, Counsel argued to the jury that Applicant had only admitted to giving Victim a "peck" and denied telling Captain Price about having inappropriate feelings for Victim. The Court finds Counsel made reasonable efforts to exclude, minimize, or rebut Captain Price's recollection of Applicant's verbal statement. Moreover, Applicant has not presented any other arguments, evidence, or strategies Counsel could have pursued in challenging Price's testimony that might have obtained a different result. Therefore, Applicant has not met his burden of proving Counsel was deficient in this respect, nor has he proved the outcome of his trial would probably have been different but for Counsel's conduct. Therefore, this allegation of ineffective assistance is denied and dismissed with prejudice.

F: Victim's inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim's forensic interviews and her testimony at trial. The Court finds this allegation is without merit.

On direct examination, Victim testified she gave two forensic interviews. She admitted that, in her first interview, she told the forensic interviewer that "nothing happened" between her and Applicant. (Nov. 18–19, 2019, Tr.p.137, line 23–p.138, line 6). She also admitted later telling the interviewer that she had been forced or drugged every time she had sexual contact with

Applicant, which was not true. (Nov. 18–19, 2019, Tr.p.138, lines 8–14). Counsel cross-examined Victim about the inconsistencies between her testimony and the statements she had made to the forensic interviewer, and Applicant admitted she had lied to the forensic interviewer because she thought her parents would go to jail if she told the truth. (Nov. 18–19, 2019, Tr.pp.145–46).

In his closing statement, Counsel capitalized on Victim’s admission by arguing to the jury that “[n]ot one person witnessed any sexual activity between [Applicant] and [Victim]. The only one who testified to this was [Victim] . . . who admitted to lying in her forensic interview.” (Nov. 21, 2019, Tr.p.20, lines 7–15).

The Court finds that the inconsistencies between Victim’s statements in her forensic interviews and her testimony at trial were exposed both on direct examination and on Counsel’s cross-examination of Victim. Counsel was able to use those inconsistencies to impeach Victim’s credibility during his closing argument to the jury. Applicant has not demonstrated any additional inconsistencies that were not addressed. For these reasons, the Court finds Applicant has failed to prove Counsel was deficient in this regard, and this allegation is denied and dismissed with prejudice.

G: Older Sister’s inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim’s older sister’s testimony and her earlier statement she gave on April 25th of 2016. The Court finds this allegation is without merit. At the evidentiary hearing, Applicant testified Older Sister gave a statement on April 25th of 2016, but that her testimony at trial differed from her statement with regard to the sleeping arrangements of Victim and her siblings and whether Older Sister ever saw indications of sexual activity. However, Applicant did not produce this alleged statement, nor did he explain specifically what the purported inconsistency was or how it was

material to his case. There is no reference to any prior statement by Older Sister, inconsistent or otherwise, in the transcript of her testimony at trial. Therefore, the Court finds Applicant has not met his burden of proving either deficiency or resulting prejudice as to this allegation.

H: Younger Sister's inconsistent statements

Applicant argues Counsel failed to adequately expose the inconsistencies between the Victim's younger sister's forensic interview and her testimony at trial. The Court finds this allegation is without merit.

On direct examination at Applicant's trial, Younger Sister testified she once walked in on Applicant and Victim in Victim's bedroom when Victim was not wearing any pants. Victim told Younger Sister not to tell anyone. At other times, Applicant would ask Younger Sister about Victim's undergarments or whether she was talking to any boys at school. Younger Sister testified Applicant was supposed to be sleeping on the couch, but she would sometimes hear him going into Victim's bedroom at night. (Nov. 20, 2019, Tr.pp.94–98).

On cross-examination, Counsel asked Younger Sister about a forensic interview she had given. Younger Sister admitted that she told the interviewer she did not see or suspect that anything was going on between Applicant and Victim. She also admitted she lied about the sleeping arrangements in that interview. Younger Sister testified she lied to the interviewer because she was scared for Victim. (Nov. 20, 2019, Tr.p.102). In his closing statement, Counsel brought up these inconsistencies in Younger Sister's testimony and argued to the jury that Younger Sister "admitted to not mentioning anything inappropriate that she saw between [Applicant] and [Victim] when she gave her forensic interview" (Nov. 21, 2019, Tr.p.21, lines 10–22).

The Court finds that Counsel did, in fact, expose the inconsistencies between Younger Sister's statements in her forensic interview and her testimony at trial. Counsel was able to use

those inconsistencies to impeach Younger Sister's credibility during his closing argument to the jury. Applicant has not demonstrated any additional inconsistencies that were not addressed. For these reasons, the Court finds Applicant has failed to prove Counsel was deficient in this regard, and this allegation is denied and dismissed with prejudice.

I: Directed verdict motion

Applicant argues Counsel failed to adequately argue the directed verdict motion at trial. The Court finds this allegation is without merit. Counsel testified at the evidentiary hearing that he made the directed verdict motion merely to preserve it on the record; he believed there was an abundance of evidence in the record to support the charges, so the motion was not likely to succeed. The Court agrees with Counsel's assessment of the evidence and finds that Applicant has failed to prove Counsel was deficient or that a directed verdict motion would probably have been granted but for Counsel's failure to more vigorously argue for it. Therefore, the Court finds Applicant has not met his burden of proving either deficiency or prejudice as to this issue. Accordingly, this allegation is denied and dismissed with prejudice.

IV. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the 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. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. The Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 2nd day of February, 2024.

Kristi Curtis
 KRISTI F. CURTIS
 Presiding Judge
 Eleventh Judicial Circuit

Sumter, South Carolina