THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. G.D. Morgan Jr., Circuit Court Judge

Case No. 2021-CP-07-01235

Varsheen Smith, #211467, Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Varsheen Smith, Petitioner, appeals the attached Order of Dismissal issued by the Honorable G.D. Morgan Jr. on March 25, 2024. Petitioner, through counsel, received notice of the entry of the Order on April 1, 2024.

Date: April 4, 2024

Christopher R. Geel
Geel & Gentry, LLC
PO Box 21771
Charleston SC 29413
843-277-5080

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTEENTH JUDICIAL CIRCUIT
Varsheen Antuan Smith, SCDC #211467, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-07-01235 **ORDER OF DISMISSAL**

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Varsheen Antuan Smith (Applicant) on July 8, 2021. On November 16, 2022, an evidentiary hearing convened before the Honorable G.D. Morgan, Jr. Applicant was present and represented by Christopher R. Geel, Esquire. Assistant Attorney General Lauren Mims represented the State. At the hearing, Applicant testified on his behalf and called as a witness trial counsel Courtney Gibbs.

On July 25, 2023, this Court issued an order granting post-conviction relief. Thereafter, Respondent timely filed a Motion to Alter or Amend Order Granting Post-Conviction Relief pursuant to Rule 59(e), SCRCP. Following a thorough review of the records before this Court and the testimony and evidence presented at the evidentiary hearing, this Court grants Respondent's motion to alter or amend. Further, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a twenty-five-year sentence. In March 2016, the Beaufort County Grand Jury indicted Applicant for kidnapping (2015-GS-07-01890), possession of a handgun by person convicted of a violent

crime (2015-GS-07-01908), and possession of a weapon during a violent crime (2015-GS-07-01909). On February 21-22, 2018, Applicant proceeded to a jury trial before the Honorable Brooks P. Goldsmith. Courtney Gibbes, Esquire, represented Applicant. Assistant Solicitors Mary Jones and Kimberly Smith prosecuted the case. The jury convicted Applicant as indicted, and Judge Goldsmith sentenced him concurrently to twenty-five years for kidnapping and five years for each weapon charge.

Applicant filed a timely notice of appeal that was perfected by Chief Appellate Defender Robert M. Dudek, who filed a brief pursuant to Anders.[1] Thereafter, the Court of appeals requested briefing on two issues: (1) Is the issue of whether trial court erred in allowing evidence of Monte Ver'mon Steve's death preserved for appellate review? and (2) Did the trial court err by permitting the State to present evidence of Steve's death? On June 9, 2021, the Court of Appeals issued an opinion affirming. State v. Smith, 2021-UP-199 (S.C. Ct. App. filed June 9, 2021). The remittitur was sent June 29, 2021.

BRIEF SUMMARY OF TRIAL TESTIMONY

At trial, the State relied primarily on the testimony of victim Andre Frazier, who testified he went to the home of his friend Ver'mon Monte Steve (Victim) on October 25, 2015. Prior to arriving at Victim's house, Frazier called to ensure Victim was home. (Tr. 84-91).

Frazier testified he saw Applicant, who was Victim's roommate, with Tyrone Wallace outside Victim's apartment when he arrived. Frazier testified he knew both men and had known Applicant since childhood. (Tr. 91-93). Frazier stated he asked where Victim was, but Applicant and Wallace ignored his question. Frazier testified,

> And he kind of kept on and I asked him again, Where's [Victim]. I said [Victim]. And he was like, Let me holler at you right quick.

[1] Anders v. California, 386 U.S. 738 (1967).

> And then I asked him again, Where's [Victim]. Let me holler at you. And I asked him again, Where [Victim]. Man, [Victim] in the house. I kind of believed him, but knowing that that was my best friend and what type of guy he was I took that, but I started walking toward the house. As I started walking toward the house, he came behind me and [Wallace] came behind him and I kind of feel a funny situation.

(Tr. 95). Frazier stated Applicant put a pistol into his stomach and told him to go inside. (Tr. 95-97). Once inside, Applicant put the gun to the back of his head and tied his hands behind his back. (Tr. 98-100). Frazier testified Applicant called him a snitch, accused him of "slipping," and said, "Funny time you came up here." (Tr. 100-01). Frazier further testified Applicant hit him in the head with the gun and stuffed a rag in his mouth. (Tr. 100-103).

Frazier testified he went into a room with Applicant while Wallace went elsewhere. When Applicant left the room, Frazier dialed 911, but he ended the call because he was worried the kidnappers would overhear the operator. (Tr. 104-07). Frazier stated Applicant and Wallace returned, and Applicant's mood had changed. He explained Applicant previously looked "pretty evil," "but now he didn't look evil like he was." (Tr. 107). Frazier testified Applicant told Wallace to let him go. (Tr. 107). Frazier surmised he was released because a police officer was outside and Applicant and Wallace were afraid the police would discover them. (Tr. 108-09, 151, 161).

Once outside, Frazier stated he and Applicant walked around the corner. Frazier saw a phone light up by an abandoned house and thought it might be Victim hiding. Frazier testified Applicant walked over by the side of the house with his gun and beckoned, "[Victim], come out, come out, wherever you are . . . ." (Tr. 140-41). Frazier testified he asked Applicant where Victim was and Applicant replied, "[H]e thought that I was going to shoot him and he ran." (Tr. 111).

After Frazier left, he tried to call Victim but was unable to reach him. Frazier initially

thought Victim "ran" or went into hiding. (Tr. 111-12, 146). When asked why he did not call the police that evening; Frazier explained,

> Because, for number one, I have kids. I know what kind of guy he is, so I had to really think what I was going to do, you know, make sure that I made the right choice to know what I was going to do. . . . When he said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriends' house[s], because he had a few girlfriends.

(Tr. 111-12). Frazier testified he was scared and could not sleep. (Tr. 112). He later contacted Victim's mother and told her Victim was missing. (Tr. 152-54).

Victim's mother, Janice Steve, testified she last saw Victim the Sunday before he disappeared. After learning Victim was missing, she filed a missing person's report. (Tr. 68-71).

Investigator George Erdell, who interviewed Frazier, testified Frazier was nervous during his interview, which devolved to fear. Investigator Erdell stated Frazier cried "pretty hard" and "was probably about as scared as [he had] ever seen anybody in an interview." (Tr. 206).

Shabonda Milledge testified Applicant called her on October 26, 2015, and asked where Frazier lived; she refused to tell him. Milledge remained in contact with Applicant until November 16. She testified Applicant told her the police were looking for him, and she asked why he was running if he was not guilty. Milledge stated Applicant would not tell her where he was calling from; at first he used a local number but later used an out of state number. (Tr. 244-47, 254). On November 16, Applicant was arrested in Georgia. (Tr. 256). On November 18, Monte's remains were discovered; thereafter, Wallace—but not Applicant—was charged with his murder. (Tr. 210).

CURRENT APPLICATION

On July 8, 2021, Applicant timely commenced this PCR action alleging he is being held in custody unlawfully due to the following:

1. Ineffective assistance of trial counsel

a. Failure to object to inflammatory remarks by witnesses;
b. Failure to object to inadmissible bad character evidence;
c. Failure to object to witness bolstering/vouching;
d. Failure to properly argues and preserve mistrial motion for appellate review;
e. Failure to object to improper comments by prosecutor during closing argument; and

2. Ineffective assistance of appellate counsel
   a. Failure of appellate counsel to raise preserved and meritorious issues on direct appeal.

On November 16, 2022, Applicant amended his application. At the evidentiary hearing, he proceeded on the following grounds:

Ineffective assistance of counsel:

1. Failed to object to inflammatory remarks by witnesses (Tr. 40-45, 111, 181, 205-06);

2. Failed to object to inadmissible bad character evidence (Tr. 246-47);

3. Failed to object to witness bolstering/vouching (Tr. 181, 205-06, 220, 274);

4. Failed to redact the portion of Defendant's interview that mentioned Defendant had previously been in prison (Tr. 320-22), as well as failed to properly argue and preserve mistrial motion for appellate review (Tr. 322);

5. Failed to object to improper comments by the prosecutor during closing argument (Tr. 275, 282, 285);

6. Failed to present phone records (disclosed among Rule 5 materials) that challenged the State's version of events.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Beaufort County Clerk of Court records of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the records from this 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 carry 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 (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). 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. 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. 668. 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). The proper measure of performance is whether an 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). 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.

Failed to object to inflammatory remarks by Frazier[2]

Applicant first contends counsel was ineffective for failing to object to inflammatory remarks by Frazier. In support, Applicant cites to Frazier's response when asked why he did not call police the evening of the kidnapping:

> Because, for number one, I have kids. I know what kind of guy he is, so I had to really think what I was going to do, you know, make sure I made the right choice to know what I was going to do. And not that, I was looking for [Victim] that night. When [Applicant] said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriend's house . . . .

(R. 111-12). Frazier averred he was scared and couldn't sleep that night. (R. 112). This Court finds Applicant has failed to show counsel was ineffective in this regard.

At the PCR hearing, counsel agreed any comment on Applicant's character would be objectionable, and she acknowledged that in hindsight she "probably could have objected to" the comment "I know what kind of guy he is." She clarified, however, that "there is a fine line between [Frasier] being scared, you know, what he would testify to about his impressions during what he alleged happened versus a general characterization of his character." She averred testimony that Frazier was afraid was not objectionable. (PCR 27-31).

Initially, Applicant did not identify in his application or at the PCR hearing the legal basis for which counsel should have objected other than to say this testimony was inflammatory.

[2] This section addresses a portion of allegation 1 in Applicant's amended application. The remainder of allegation 1 will be discussed in the following section.

Without identifying an objectionable legal basis, Applicant did not prove deficiency.[3] Further, it is not reasonably likely the outcome would have been different had counsel objected. Critically, Frazier was testifying about why he did not immediately call police the night of the kidnapping. Based on Frazier's extensive testimony about the kidnapping itself, Frazier would understandably be afraid of Applicant. Although Frazier said "I know what kind of guy he is," he did not otherwise elaborate on Applicant's character or testify to any prior bad acts by Applicant (other than the kidnapping itself, which Applicant was on trial for). Thus, it is not reasonably likely this passing statement, "I know what kind of guy he is," impacted the outcome of trial—especially in light of Frazier's extensive, admissible testimony about the kidnapping. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object to inflammatory remarks by law enforcement

Applicant also contends counsel was ineffective for failing to object to inflammatory remarks by law enforcement. This Court finds Applicant has failed to show counsel was ineffective in this regard.

During Captain Gruel's testimony, the solicitor asked why he told Applicant that no one would have reported this incident, and trial counsel objected based on speculation. (R. 180). The solicitor responded, "Personal experience in law enforcement, I think that he can testify to that." The trial court replied, "I'm not sure that question is supported by the evidence." Following a sidebar, the trial court overruled the objection. (R. 180). Thereafter, Captain Gruel testified,

> [T]here was a slight delay in the incident and it being reported. And in our line of work and in my experience there is a code of silence,

[3] This Court further finds the statement in and of itself is not so inflammatory as to be objectionable. To the extent Applicant is relying on Rule 404(b), during his testimony, Frazier merely said, "I know what kind of guy he is." (Tr. 111-12). This was generic testimony provided by a person who accused Applicant of kidnapping him; thus, any assessment of "what kind of guy he is" could relate directly to Frazier's account of the incident itself and does not rise to the level of impermissible bad act evidence. Likewise, to the extent Applicant relies on Rule 403, this Court finds the mere statement "what kind of guy he is" was not unduly prejudicial—especially in light of Frazier's extensive testimony about what Applicant did to him during the kidnapping itself.

> particularly with incidences that we deal with, it's kind of been heard about the no snitch rule so it's tough at times and very common for people not to provide us or report important—to come forward with information that they know about a crime.

(R. 181). During Investigator Erdel's testimony, he stated Frazier did not call to report his kidnapping. When asked whether he had experienced that before, he replied, "You know, there is kind of a street mentality, so to speak. You know, people are typically afraid for any number of reasons, they don't want to be labeled a snitch, they may want to handle it themselves. It's not uncommon for things like that to go unreported." (R. 205). Investigator Erdel stated Frazier was "pretty nervous" about talking to police. (R. 205-06). He explained, "I would say that his nervousness kind of devolved as the interview progressed to outright fear. He cried pretty hard. Probably—he was probably about as scared as I have ever seen anybody in an interview and that is saying something. He was pretty scared." (R. 206).[4]

This Court finds Applicant has not shown counsel was ineffective for not objecting to this testimony. Initially, the foregoing testimony regarding Frazier's fear and the fact that people often are not forthcoming with law enforcement due to fear of "snitching" is not inflammatory enough to warrant an objection. Applicant has failed to set forth the legal basis for an objection to this testimony and thus failed to prove counsel was deficient in this regard. Likewise, it is not reasonably likely Applicant suffered prejudice due to counsel's failure to object to the foregoing. Applicant has not identified the legal basis for an objection to this testimony, and thus has not shown a likelihood this evidence would have been excluded had counsel objected.[5] Further—and

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[4] Applicant also referenced a portion of a pretrial hearing regarding the admissibility of Milledge's testimony; however, that testimony was not before the jury and thus does not support the claim that counsel was ineffective for not objecting to inflammatory evidence. (R. 40-45).

[5] Notably counsel *did* object to Captain Gruel's testimony about why people are not forthcoming with law enforcement, but that objection was overruled. To the extent Applicant relies on Rule 404(a) to support this claim, the foregoing testimony by Captain Gruel and Investigator Erdel does not relate to Applicant's character and thus does not violate Rule 404. See Rule 404(a), SCRE (providing evidence of a person's character or a trait of character is generally not admissible to prove action in conformity therewith). Further, testimony about the anti-snitch code was

critically—in light of Frazier's extensive testimony about the kidnapping itself, it is not reasonably likely the outcome would have been different had the foregoing been stricken or excluded. In other words, it was reasonable for Frazier to be afraid of Applicant based on Frazier's extensive, admissible testimony about the kidnapping itself. Thus, Applicant did not prove prejudice.

Failed to object to inadmissible bad character evidence[6]

Applicant next contends counsel was ineffective for not objecting to inadmissible bad character evidence. In support of this claim Applicant cites the following exchange that occurred during Milledge's testimony:

> Q Okay. From October 26th until about November 16 of 2015, were you in communication with the defendant?
> A I was.
> Q And you actually spoke with him on the phone?
> A Yes, Ma'am.
> Q Did you ever ask him about [Frazier]?
> A I just asked him questions like, if he wasn't guilty of what they were accusing him of, why was he running. He asked me more questions about [Frazier].
> Q What was he asking you about [Frazier]?
> A He just asked me, you know, stuff like if I spoke to [Frazier] and is [Frazier] accusing him of what they said and stuff like that.
> Q Okay. Did you tell him the police were looking for him?
> A He told me that.

(R. 246-47).[7] This Court finds Applicant has not counsel was ineffective in this regard.

The foregoing testimony does not constitute inadmissible bad character evidence.

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probative in (1) explaining why some individuals delay disclosing information to law enforcement and (2) contradicting Applicant's argument that Frazier was not credible because he did not notify law enforcement right away about the kidnapping. (Tr. 151-52, 289-90). Thus, it is not reasonably likely a court would have found the probative value of this testimony was "substantially outweighed by the danger of undue prejudice." Rule 403, SCRE. Finally, the officer's perception of Fraizer's fear was legitimate evidence to rebut the inference that Frazier's delayed disclosure implied he was not being truthful, and testimony that Applicant left South Carolina because he was guilty is not testimony that would be inadmissible under Rule 404 or Rule 403. Overall, the foregoing testimony is not inflammatory enough to warrant an objection and does not amount to inadmissible bad character evidence or evidence that would have been excluded under Rule 403. Thus, Applicant did not prove deficiency or resulting prejudice.

[6] This section addresses allegation two of the amended application.

[7] Milledge's testimony was discussed pretrial; counsel objected to any mention that Applicant was on probation or was afraid he would fail a drug test. (R. 40-45).

Milledge's testimony does not relate to Applicant's character at all, much less imply that Applicant was "acting in conformity therewith." See Rule 404(a), SCRE. Further, Milledge's testimony that Applicant knowingly ran from police and was concerned about what Frazier might say was probative of Applicant's guilt and was not unfair, confusing, or misleading; thus, the probative value of this testimony was not substantially outweighed by the risk of undue prejudice. See State v. Pagan, 369 S.C. 201, 208-09, 631 S.E.2d 262, 266 (2006) ("Flight from prosecution is admissible as guilt. The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities. It is sufficient that circumstances justify an inference that the defendant's actions were motivated as a result of his belief that police officers were aware of his wrongdoing and were seeking him for that purpose. Flight or evasion of arrest is a circumstance to go to the jury." (internal citations omitted)). Thus, counsel was not deficient for not objecting to Milledge's testimony based on Rule 404 or 403. Further, based on the foregoing, it is not reasonably likely this testimony would have been excluded under Rule 404 or Rule 403. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object to witness bolstering / vouching[8]

Applicant next contends counsel was ineffective for failing to object to improper witness bolstering and vouching. In support, Applicant relies on Captain Gruel and Investigator Erdel's aforementioned testimony about the "no-snitch rule" and the typical delay in people reporting crimes. (Tr. 180-81, 205-06). Applicant also relies on Investigator Erdel's testimony that he further investigated to attempt to corroborate Frazier's story, including pulling a video from the gas station to verify "his account of the time leading up to getting to the residence" and the CAD

[8] This section addresses allegation three of the amended application.

data from the 911 call "to verify the times and kind of pinpoint when those calls took place." (Tr. 206-07). Finally, Applicant relies on additional testimony from Investigator Erdell that Frazier was "afraid" of what would happen if he cooperated with law enforcement, and a portion of the State's closing argument that referenced Investigator Erdell's testimony that Frazier was afraid. (Tr. 220, 274). These portions of the transcript, however, do not amount to improper corroboration, improper lay opinion testimony, improper vouching, or improper bolstering. Thus, Applicant has not shown counsel was ineffective in this regard.

Captain Gurel and Investigator Erdel's testimony regarding the "no-snitch" code was based on their experience in law enforcement and was admissible to explain to the jury why Frazier may not have initially reported the kidnapping. Likewise, testimony about Frazier's fear was admissible as the officers' perception of his demeanor and did not amount to improper corroboration, vouching, or bolstering. The foregoing does not amount to an opinion that the investigation corroborated Frazier's account of the kidnapping. Rather, this was admissible to explain why Frazier may have delayed reporting the kidnapping, and there was no basis to object based on vouching, bolstering, improper corroboration, or lay-opinion testimony. Cf. State v. Acker, 435 S.C. 716, 728, 869 S.E.2d 873, 879 (Ct. App. 2022) (finding testimony about why a child may delay disclosing abuse "provided context for the jury and assisted jurors in understanding . . . why a child might delay disclosure"). Applicant has not set forth any law to show the foregoing amounted to improper lay-opinion testimony, corroboration, vouching, or bolstering and thus has not met his burden of proving deficiency.

Likewise, Applicant did not set forth any law to show Investigator Erdel's testimony about his investigation constituted improper corroboration, vouching, or bolstering. During this testimony, Investigator Erdel was merely explaining what he did after speaking to Frazier, and this

Court finds this testimony did not amount to improper corroboration, vouching, or bolstering. Further, this Court finds counsel articulated a valid strategy in not objecting to Investigator Erdel's testimony about the gas station video and the CAD data. Specifically, counsel explained she wanted to bring out the time Frazier was at the gas station because "it kind of messed up what [Frazier] was saying as far as his timeline." Counsel likewise articulated a valid strategy in attempting to use the State's case against them in terms of the CAD data and Frazier's timeline. Thus, Applicant did not prove deficiency.

Finally, it is not reasonably likely the outcome would be different had counsel objected to this testimony. Initially, this Court finds it is not reasonably likely an objection on these grounds would have been sustained. It is also not reasonably likely, based on Frazier's account of the kidnapping itself and his identification of Applicant as someone he knew, that the outcome would have been different had the foregoing testimony been excluded. Thus, Applicant did not prove prejudice, and this claim is denied.

Failed to redact portion of interview and properly argue and preserve mistrial motion[9]

Applicant contends counsel was ineffective for failing to redact a portion of Applicant's police interview where he stated he had recently been released from prison. He further contends counsel was ineffective for failing to properly argue and preserve a mistrial motion related to this issue. This Court finds Applicant did not prove counsel was ineffective in this regard.

Although this Court finds counsel was deficient for not ensuring this portion of the interview was redacted, this Court finds Applicant did not prove prejudice. Specifically, it is not reasonably likely the outcome would have been different had counsel ensured this was redacted because it was cumulative to other properly-admitted evidence. The State presented evidence

[9] This section addresses allegation four of the amended application.

through the Clerk of Court that Applicant had previously been convicted and sentenced for second-degree burglary. (Tr. 258-59). This testimony was properly admitted to support Applicant's charge of possession of a firearm by a person convicted of a crime of violence. (Tr. 266-67). See S.C. Code Ann. 16-23-30 (providing it is illegal for an individual convicted of a violent crime to possess a handgun); State v. Benton, 338 S.C. 151, 155, 526 S.E.2d 228, 230 (2000) ("[E]vidence of other crimes is admissible to establish a material fact or element of the crime charged."); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) ("[E]vidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime."). Thus, testimony was before the jury that Application had previously been convicted and sentenced of another crime—and had been previously incarcerated. Although counsel may not have ensured that Applicant's statement about previously being in prison was redacted after the State agreed to redact it, it is not reasonably likely the admission of this statement changed the outcome of trial when it was merely cumulative to properly-admitted evidence of Applicant's prior conviction. (Tr. 45-46, 258-59). Cf. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Likewise, and for the same reason, it is not reasonably likely a properly preserved mistrial motion would have changed the outcome of Applicant's trial or appeal on this issue.[10] (Tr. 321-22). Thus, Applicant did not prove prejudice from counsel's failure to ensure his statement was redacted or counsel's failure to properly preserve a mistrial motion.

[10] Although the State argued the mistrial motion was untimely, the trial court did not deny it on that ground but ultimately denied it because "there was also evidence that he was already . . . convicted of something before." (Tr. 321-22). Thus, it is not reasonably likely a timely mistrial motion would have changed the trial court's decision.

Failed to object to improper comments by solicitor during closing[11]

Applicant asserts counsel was ineffective for failing to object to improper comments by the solicitor during closing argument. This Court finds Applicant did not prove counsel was ineffective in this regard.

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Id. However, "[s]olicitors are bound to rules of fairness in their closing arguments." Id.

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Id. "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In support of finding counsel ineffective on this ground, the PCR Court relied on the following statements from the solicitor's closing argument:

> We heard Investigator Erdel say that [Frazier] was scared, he was terrified, he was upset, he was in fear. He was frightened and he was crying. He even went so far to say that he put his fear and the top of anybody he had ever questioned and he told you that he's been in law enforcement since the '90s. [Frazier] is a scared man. And rightfully so.

(Tr. 274).

[11] This section addresses allegation five of the amended application.

People weren't calling the police like they should. And [Frazier] fell subject to that. He told you he was scared of this man. This man is a big intimidator. You heard that on the recording. And more importantly he told you, I have kids. I have two kids that I take care and they live with me and I have to think about their safety. I'm raising those kids, no one else. [Frazier] couldn't be a snitch. You don't live in this world, you don't live on those streets having the title snitch. And [Frazier] wasn't going to do that, he had children that he had to live for.

(Tr. 275).

Will you talk, [Applicant]? It depends, that is what he said. He is there to talk about this missing roommate and a kidnapping at gun point of somebody and he finds it comical. He is laughing. He's smirking. He does not care. He is smug.

(Tr. 282).

What do we know after all of this happens, after [Frazier] is kidnapped, after Monte goes missing? That man right there, like the coward that he is, he flees. He runs away and he hides in rural Georgia. He's not there visiting his wife. Or is girlfriend is in Walterboro, so maybe he is visiting his wife in Georgia, but that is beside the point. No, he is not there visiting his wife. He's hiding. He told Shabonda, I know the police are looking for me. She didn't ask him that, he gives her this information.

So does he come in? No, he runs, he hides, and it takes the U.S. Marshals to track him down and find him and it takes a Beaufort police officer to bring him back to South Carolina. He doesn't visit any family, he was hiding from this courtroom.

(Tr. 282-83).

And finally, possession of a weapon by a person convicted of a crime of violence. I wonder what this shows you? This isn't the first time Mr. Smith has seen the inside of a courtroom. He's been convicted of burglary. Breaking into somebody's house. The Judge is going to instruct you that burglary in South Carolina is defined as a crime of violence.

(Tr. 285).

I want to leave you with one last thing, and that is Versheen Smith. Look at this man. This is a man who doesn't care. This is a man who thinks that he is invincible. This is a man who things that nobody is going to snitch on him. This is not a man who is going to tell the truth. This is a man who was just told his roommate is missing and this is how he's acting. A man that laughs at a missing person. A man that laughs at kidnapping. That is an evil man. And that is what Andre told you. He said, He is an evil man. And a man that can have that sort of reaction is speaking with police is not only

> an evil man, he is a guilty man. And I ask that you use your common sense. And you know that this man, this evil man who finds all of this comical for another person's nightmare is just a laugh to him. He is an evil man and a guilty man.

(Tr. 286).

Initially, this Court finds the solicitor's comments were reasonable inferences from the evidence presented at trial. Additionally, it is not reasonably likely the outcome would have been different had counsel objected. See Strickland v. Washington, 466 U.S. 668 (1984) (providing an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel); id. ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed."). Viewed in the context of the solicitor's entire closing argument as well as the transcript, these comments did not "so infect the trial as to make the resulting conviction a denial of due process." Vasquez, 388 S.C. at 459, 698 S.E.2d at 567; c.f. Darden v. Wainwright, 477 U.S. 168 (1986) (finding prosecutor's improper comments—which included statements such as "He shouldn't be out of his cell unless he has a leash on him" and "I wish that I could see him sitting here with no face, blown away by a shotgun"—did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process"). Thus, it is not reasonably likely the outcome would have been different had counsel objected.

Failed to present phone records that challenged State's version of events[12]

Applicant asserts counsel was ineffective for failing to properly present phone records. This Court finds Applicant did not prove counsel was ineffective in this regard.

Initially, trial counsel *did* highlight the number of calls that took place during the timeframe of the kidnapping. During cross-examination of Investigator Erdel, counsel elicited testimony that Applicant's phone placed calls at 7:40 pm, 7:41 pm, 7:45 pm, 7:50 pm, and 8:04 pm—all of which

[12] This section addresses allegation six of the amended application.

were in the timeframe of the kidnapping. (Tr. 236-37). Likewise, during closing argument, counsel argued,

> [Applicant] had called Monte. I got that out through the investigator by his phone records. **[Applicant] at the exact time that he was supposedly kidnapping Andre Frazier, at about 7:40, he called Monte. And 7:41 he called Monte. And 7:50 he called Monte. That is about the exact same time where Andre was talking about he was getting tied up.** And you remember, Andre said he didn't call Monte, he never called Monte on the phone. Well, that is not true, it is proven on the records.

(Tr. 288-89, emphasis added). Counsel *did* elicit the number of calls placed during the timeframe and argued they were placed at the same time Frazier was kidnapped. Because counsel raised this argument to the jury, Applicant did not prove deficiency.[13]

Likewise, Applicant did not prove prejudice. Based on the transcript, Applicant told law enforcement he called Monte while Frazier "was there because he was looking for him." (Tr. 234). Thus, the calls corroborated Applicant's statement that Frazier was at his house looking for Monte and do not in and of themselves exonerate Applicant. Further, the calls placed between 7:20[14] and 8:16 pm—the approximate timeframe of the kidnapping—do not exonerate Applicant or show he could not have committed the kidnapping. Of the 17 calls during this timeframe, only two lasted more than one minute: a 238-second (under four minutes) call placed at 7:21 p.m. and a 66-second call placed at 7:45 pm. Based on Frazier's testimony that Applicant was not in the room with him the entire time, it would have been feasible for Applicant participate in these short calls *and* be involved in the kidnapping. Thus, it is not reasonably likely that further highlighting the number of calls here would have changed the outcome of trial, and Applicant did not prove prejudice.

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[13] The phone records themselves do not show Applicant was using his phone during a "substantial period of time" while the kidnapping took place. Notably, of the 17 calls placed between 7:21 pm and 8:16 p.m., only two lasted for longer than a minute: a 238-second call at 7:21 pm, and a 66-second call at 7:45 pm.

[14] Law enforcement recovered video showing Frazier at a nearby gas station around 7:15 pm; Frazier testified he went to the gas station prior to going to Monte's house. (Tr. 89-81, 206, 224).

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. This, this application is denied and dismissed with prejudice. Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgement. See Rule 203, SCAC. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). If applicant wishes to seek appellate review, PCR counsel must serve and file a notice appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 2nd **day of** March **, 2023**

G.D. MORGAN, JR.
Presiding Judge
Ninth Judicial Circuit

Greenville, South Carolina.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2021CP0701235

Varsheen Antuan Smith		South Carolina State Of	
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☒ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ Other: **Order of Dismissal**

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

ORDER INFORMATION

Order of Dismissal

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

s/ G. D. Morgan, Jr	2773	3/12/2024
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **March 25, 2024**, and a copy mailed first class or placed in the appropriate attorney's box on **March 25, 2024**, to attorneys of record or to parties (when appearing pro se) as follows:

Christopher Reginald Geel PO Box 21771 Charleston, SC 29413

Danielle Dixon PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Jerri Ann Roseneau - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.