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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Kirk Griffin, Circuit Court Judge

Case No. 2021-CP-10-2893

Michael T. Barnes,

Petitioner,

vs.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner, Michael T. Barnes, gives notice of his intent to appeal the order of dismissal in this case, filed April 17, 2024.

Respectfully submitted,

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April 27, 2024

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AG

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Michael T. Barnes, #318499, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-10-2893 **ORDER OF DISMISSAL**

FILED
2024 APR 17 AM 11:21
JULIE J. ARMSTRONG
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Michael T. Barnes (Applicant) on June 21, 2021. Respondent made its return requesting an evidentiary hearing. On April 19, 2023, an evidentiary hearing convened before the Honorable R. Kirk Griffin. Applicant was present and represented by Elizabeth Franklin Best, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, the Court heard testimony from Applicant and Assistant Public Defender Marth Kent-Jenkinson.[1] Following a thorough review of the transcript and the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the Department of Corrections serving a forty-five-year sentence. In April 2006, the Charleston County Grand Jury indicted Applicant for murder (2006-GS-10-2169) and attempted armed robbery (2006-GS-10-2170). These charges arose from the fatal shooting of Kyle Clark (Victim) on December 23, 2005. Co-defendants Oliver Nelson and Quinton Summers were also indicted for these charges[2].

[1] Public Defender Beattie Butler, who also represented Applicant, passed away prior to the PCR hearing.
[2] In the transcript, the codefendants are referred to as Minor 1 and Minor 2.

2006-GS-10-2169; 2006-GS-10-2170

On November 2-3, 2006, Applicant proceeded to a jury trial before the Honorable R. Markley Dennis. Public Defenders Beattie Butler and Martha Kent-Jenkinson represented Applicant, and Assistant Solicitor Trip Lawson prosecuted the case. The jury convicted Applicant as indicted, and Judge Jefferson sentenced him consecutively to thirty years for murder and fifteen years for attempted armed robbery.

Applicant filed a notice of appeal, which was perfected by Chief Appellate Defender Robert M. Dudek through the filing of an Anders brief. The Court of Appeals dismissed pursuant to Anders, and the remittitur was sent December 1, 2009.

On January 7, 2011, Applicant filed his first PCR application (2011-CP-10-146), which was summarily dismissed based on the statute of limitations. Applicant filed a petition for a writ of certiorari in the Supreme Court of South Carolina, which was denied. The remittitur was sent March 23, 2017.

On April 6, 2018, Applicant filed a petition for habeas corpus in the federal district court (6:18-874-JFA-KFM). On March 5, 2019, his petition was dismissed due to failure to prosecute.

In August 2020, Applicant filed a common law petition for a writ of certiorari in the Supreme Court of South Carolina (2020-001360) requesting an order permitting him to file a successive PCR application. On June 3, 2021, the Supreme Court granted the petition, determined the clerk of court exceeded the scope of its ministerial duties when it returned Applicant's initial, timely PCR application without filing it,[3] and granted Applicant thirty days to file a PCR application in the circuit court.

[3] The initial application was mailed to the clerk of court on November 18, 2010, but the clerk of court returned it without filing it because Applicant used the wrong form.

SUMMARY OF TRIAL TESTIMONY

Applicant was indicted for the fatal shooting of Kyle Clark (Victim) on December 23, 2005. At trial, Minor 1 testified he lived with Minor 2 and knew Applicant "from being with a girl in the neighborhood." He stated on the day of the shooting, two men drove up, asked for cocaine, and showed Minor 1 a "wad of money." Minor 1 testified he found Minor 2—who could probably get some cocaine—and told him the man was looking for cocaine and had a lot of money. He stated Applicant was walking with Minor 2, and Applicant gave him and Minor 2 guns. Minor 1 testified Applicant also had a gun, which he had previously described as a .380 Army edition. When asked why Applicant gave them guns, Minor 1 replied, "We were going to rob them."

Minor 1 testified they approached the men in the vehicle and Applicant "pulled out his gun and he and the dude started tussling." (Tr. 117). He stated the passenger broke loose and ran away, and the driver began backing up. As he drove off, Minor 1 heard two gunshots. He testified he did not fire his weapon or see who fired the guns. (Tr. 102-18).

Minor 2 testified he was outside that day selling crack cocaine when Minor 1 called and said "that some dude in the trailer park got a lot of money." (Tr. 154). He stated he believed Minor 1 wanted to rob the men, and they went to get Applicant and "told him what was going to happen." (Tr. 154-55). Minor 2 testified Applicant gave them guns: Minor 2 had a .22 automatic, Minor 1 had a revolver, and Applicant had a .38. (Tr. 156-57). Minor 2 stated Applicant approached the truck; the passenger got out; and he, Minor 1, and Applicant pulled their guns. He stated the passenger tried to run but Applicant "popped him on the head with the gun." (Tr. 159). The passenger ran off and the driver tried to leave in the truck; as the driver was pulling away, Minor 2 stated he "almost hit me and I shot at the door." (Tr. 160). Minor 2 testified Applicant also shot at the truck. (Tr. 161).

Applicant testified in his defense and claimed he never intended to rob anyone, never pulled a gun, and never shot at anyone. (Tr. 303). He stated Minor 1 and Minor 2 approached him and told him the men in the truck wanted to purchase cocaine, and Applicant planned to sell them cocaine. (Tr. 305-07). He testified after he gave the passenger cocaine, the passenger did not give him money; Applicant tried to snatch the drugs back and they began fighting. Applicant stated he turned and saw Minor 1 and Minor 2 with their guns out. (Tr. 308). He testified the passenger gave him the drugs and ran off; Applicant ran when someone said they were going to call the police. Ultimately, the jury convicted Applicant of murder and armed robbery.

CURRENT APPLICATION

On June 21, 2021, Applicant filed a PCR application alleging counsel was ineffective based on the following:

> 1. Failed to investigate and specifically failed to interview co-defendants who testified other persons-—namely Adrian, Angela, Maria, and Antonio—were in the area. "Such an interview could have aided them in a presenting a credible defense or formulate a plan how best to proceed based upon what each co-defendant would testify too."
>
> 2. Failed to make timely and necessary objections in the following incidents:
>
> > i. "Allowed the State to establish the color of a tee shirt worn by a codefendant by leading questions that was entered as evidence." (Tr. 146-47).
> >
> > ii. "Allowed the State to in essence instruct the witness to give information of a tussling event." (Tr. 160 ln. 3-8).
> >
> > iii. "Allowed the State without objection or argument to introduce another set of facts other than the facts other than the facts relied upon for probable cause at the preliminary hearing." (Tr. 232-36).
> >
> > iv. "Allowed the State to introduce exhibits into evidence without first corroboration. (Tr. 180).

v. "Allowed the State without objection to leading about specific persons namely Deangelo Simmons." (Tr. 213-15).

vi. "Allowed the State to over dramatize by using his head to demonstrate the entry and exit of the bullet wounds after charts were already corroborate and entered into evidence as exhibits." (Tr. 251-52).

vii. "Allowed the state to make reference to the possible location of the murder weapon allegedly from a phone conversation during closing arguments without any corroboration." (Tr. 322-65).

viii. "Allowed the State without objection to mischaracterize testimony not given that the defendant fired the fatal bullet." (Tr. 357 ln. 17-21).

ix. "Allowed the State without objection to say that the fatal bullet was a .380 when there was no corroboration." (Tr. 363).

3. Failed to elicit a cautionary instruction when the State led the witnesses or at any point during the States closing based on mischaracterization of evidence.

4. Failed to argue for the dismissal of the attempted armed robbery charge when the only testimony presented was that of Applicant that he "tussled with Viera in order to retrieve the drugs that he gave Viera." (Tr.307-09).

5. Elicited testimony from Agent Paavel that bolstered the State's case, which shows counsel did not conduct a pretrial investigations into the type of weapon that killed the victim. (Tr. 289-90). Counsel's mischaracterization that the bullet that struck Kyle Clark was a .380 caliber was prejudicial because there was no corroboration that the victim was killed by a .380. (Tr. 346).

6. Failed to argue for dismissal of the murder charge when only evidence presented was who supposedly possessed what type of weapon and that the larger caliber of weapon cause the victim's death. "The Fifth amendment states you have the right to be tried only on a grand jury indictment. Competent defense counsel certainly should have been on notice that the offense of possession of pistol in regards to the deadly weapon charge the trial judge charged the jury on in reference to which elements constitute

> murder. Defendant argues that there was insufficient evidence to support the instructions."

Applicant also raised the following allegations of prosecutorial misconduct:

> a. Improper vouching and bolstering of State's main witness [codefendant Minor 1) "by indicating a personal belief in the witness credibility during closing arguments when evidence existed that both codefendants made on two occasions false statements to the authorities about their involvement;
>
> b. Mischaracterization of evidence: solicitor stated during closing that he had the automatic and testimony showed the fatal bullet was a .380 automatic when there was testimony that the same nine millimeters can fire .380 cartridges;
>
> c. Solicitor told the jury that "the gun that was the projectile, the bullet that went through Kyle Clarks head";
>
> d. The solicitor mislead the jury during closing by stated "since there has been some testimony about it, let's talk about who fired the fatal bullet and the evidence that Michael Barnes is the one that fired the fatal bullet."[4]

On April 3, 2023, Applicant served an amended application raising the following:

> 1. Counsel failed to use the proffer agreement at trial, entered into by the State and Oliver Nelson, to impeach Nelson when he testified;
>
> 2. Counsel failed to object to the jury instruction that malice can be inferred from the use of a deadly weapon.

At the PCR hearing, Applicant proceeded only on the claims of ineffective assistance of counsel in his original and amended application.

[4] Respondent filed an amended return and motion to dismiss the prosecutorial misconduct claims as refuted by the record. Following a hearing, the Court issued an order on April 5, 2022, dismissing the prosecutorial misconduct claims without prejudice due to ongoing discovery. This Court finds Applicant did not renew any prosecutorial misconduct claims or introduce any additional evidence of prosecutorial misconduct at the PCR hearing, and thus did not prove any allegation of prosecutorial misconduct.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the records before it, including the Clerk of Court records of the underlying convictions; Applicant's records from the South Carolina Department of Corrections; the trial transcript, the records of Applicant's direct appeal; and the records of this PCR application. This Court has further had the opportunity to observe the witnesses presented at the PCR hearing, closely pass upon their credibility, and weigh their testimony accordingly.[5] 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 facts and conclusions of law as required by section 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). In evaluating claims of ineffective assistance of counsel, courts apply the two-pronged test outlined in Strickland v. Washington, 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. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," and an applicant must overcome this presumption to receive relief. Id.; Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove the deficiency prejudiced him 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.

[5] This Court will reference PCR testimony where relevant below.

Failed to Investigate[6]

Applicant first alleges counsel was ineffective for failing to conduct a pretrial investigation. Specifically, he contends counsel failed to interview his codefendants, who testified that other persons (namely Adrian, Angela, Maria, and Antonio) were in the area of the shooting. He further contends interviewing the codefendants could have aided counsel in presenting a credible defense or formulating a plan on how best to proceed based upon what each codefendant would testify to. This Court finds Applicant did not prove this claim.

At the PCR hearing, Applicant denied shooting Victim. He testified he was aware his codefendants had provided statements but did not know they would be the State's main witnesses. Applicant stated he had only known the co-defendants about three months prior to trial.

Initially, this Court finds Applicant did not prove deficiency. Applicant's primary contention is counsel was deficient for not interviewing his codefendants—both of whom were charged with the same offenses, represented by counsel, and who testified against Applicant at trial. This Court finds it is not reasonably likely the codefendants' attorneys would have allowed counsel to speak to them. Thus, counsel's failure to interview the codefendants was reasonable under prevailing professional norms and not deficient.

Applicant likewise did not prove prejudice. First, it is not reasonably likely the codefendant's attorneys would have permitted counsel to interview them due to their pending charges. Additionally, although Applicant generally alleged that interviewing the codefendants could have aided counsel in presenting a defense, he did not specifically set forth *how* such interviews would have aided the defense. Finally—and critically—Applicant did not present any testimony (through, for example, calling any of the aforementioned witnesses) or any other

[6] This section addresses allegation one of the original application, as set forth above.

evidence that counsel would have uncovered upon a further investigation that reasonably would have changed the outcome of trial and thus did not meet his burden of proving prejudice.[7] See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (providing a PCR applicant must produce witnesses at the PCR hearing or otherwise admit their testimony in accordance with the rule of evidence to establish prejudice from counsel's failure to call those witnesses at trial). Thus, this claim is denied.

Failed to object – Red shirt[8]

Applicant next contends counsel was ineffective for allowing the State to establish the color of Minor 1's shirt by leading questions. In support of this allegation, Applicant references the following exchange between the solicitor and State witness Margaret Rollison:

> Q. Okay. What color shirt did [Minor 1] run into the house with?
> A. A white (sic).
> Q. No.
> A. No, a red.
> Q. Okay. What did he put on?
> A. A white.

(Tr. 146-47). Immediately prior to this testimony, however, Rollison had testified Minor 1 went to her house wearing a red shirt and changed into a white shirt. (Tr. 146). Rollison identified the color of Minor 1's shirt with a non-leading question first, which was followed up with clarifying questions. (Tr. 146-47). This Court finds the foregoing is not objectionable, and counsel's failure to object was reasonable within prevailing professional norms and not deficient. Likewise, it is not reasonably likely an objection would have changed the outcome. Thus, Applicant did not prove

[7] At the PCR hearing, Applicant entered into evidence proffer agreements between the State and his codefendants; Minor 1's statement to police; and the disposition of Minor 1's charges through the Department of Juvenile Justice. As discussed below, the proffer agreements in and of themselves would not have reasonably changed the outcome of trial had counsel used them; Minor 1's statement was largely consistent with his trial testimony; and the disposition of Minor 1's charges occurred *after* this trial and thus was not available for counsel to use.

[8] This section addresses allegation (2)(i) of the original application, as set forth above.

deficiency or prejudice, and this claim is denied.

Failed to object – tussling event[9]

Applicant contends counsel was ineffective for allowing the solicitor to instruct Minor 2 to testify about a tussling event. In support, he references the following:

> Q. You said that they tussled?
> A. Yes, ma'am.
> Q. Did you see if he ever got any money?
> A. No, ma'am.
> Q. You didn't see or he didn't?
> A. He didn't.

(Tr. 160, ln. 3-8). This allegation lacks merit. Minor 2 was asked a question to which he could have responded with a "yes" or a "no." (Tr. 160). Further, immediately before this testimony, Minor 2 testified Applicant "[p]opped [Victim] on the head with the gun." (Tr. 159). This Court finds the foregoing did not constitute leading, and counsel's failure to object was reasonable within prevailing professional norms and not deficient. Likewise, it is not reasonably likely an objection would have changed the outcome. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object – Evidence introduced that was not at preliminary hearing[10]

Applicant contends counsel was ineffective for allowing "the State without objection or argument to introduce another set of facts other than the facts relied upon for probable cause at the preliminary hearing." (Tr. 232-36). In his application, he references counsel's cross-examination of Detective Kelly Spears:

> Q. Detective Spears, I just want to make sure that I have this clear. At the preliminary hearing you gave a recitation of the facts of this case to the preliminary hearing judge.
> A. Yes.
> Q. In that recitation you stated that both juvenile codefendants'

[9] This section addresses allegations (2)(ii) of the original application, as set forth above.
[10] This section addresses allegation (2)(iii) of the original application, as set forth above.

> statement corroborate the fact that the Defendant had the nine millimeter in this hand, that the 15-year-old had the .22 or the .25, and that the 13-year-old had an Old Skool Revolver?
> A. Yes.

(Tr. 232-33). Thereafter, on redirect, Investigator Spears clarified that when she first interviewed Minor 2, he could not specifically identify the weapon. However, in a subsequent interview with his attorney, Minor 2 identified the weapon as a .380. (Tr. 233-36).

This allegation lacks merit. Applicant failed to set forth a valid, legal objection counsel should have made or allege specific facts to support a finding ineffective assistance of counsel. This Court finds counsel's failure to object here was reasonable under prevailing professional norms and not deficient. Likewise, it is not reasonably likely an objection would have changed the outcome. Thus, Applicant did not prove deficiency or prejudice.

Failed to object – exhibits that were not first corroborated[11]

Applicant next contends counsel was ineffective for "allow[ing] the State to introduce exhibits into evidence without first corroboration. In support, he references page 180, where Exhibits 1 through 24 (photographs) were entered without objection. At the PCR hearing and in his application, Applicant failed to allege specific facts to support a finding of ineffectiveness or articulate a valid, legal objection counsel should have made, and thus failed to prove deficiency. Likewise, Applicant failed to set forth what objection would have led to the exclusion of this evidence or changed the outcome of trial. Finally, Applicant did not introduce these pictures at the PCR hearing, leaving this Court to speculate as to whether they were in fact objectionable or prejudicial. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

[11] This section addresses allegation (2)(iv) of the original application as set forth above.

Failed to object - leading[12]

Applicant next contends counsel was ineffective for "allow[ing] the State without objection to leading about specific persons namely Deangelo Simmons." In support, he cites the following exchanges between the solicitor and Detective Spears:

> Q. Now I believe you were in the courtroom when Mark Wilson, also known as Boo Boo, testified; is that right?
> A. Yes.
> Q. He made reference to someone named Deangelo Simmons. Do you recall Angelo Simmons being detained at some point?
> A. Deangelo—
> Q. Or stopped at some point?
> A. He was stopped. . . .

(Tr. 213).

> Q. Was DeAngelo Simmons, or any of the people with him, identified by Dobry Viera?[13]
> A. No, he was driven by and he did not identify any of those as the subjects.
> Q. So those people were released?
> A. Yes.

(Tr. 214). This allegation lacks merit. Here, Detective Spears was asked questions to which she could have responded with "yes" or "no." Counsel's failure to object was reasonable within prevailing professional norms and not deficient. Applicant has failed to specifically point to any other portion that he contends should have been objected to based on leading. Applicant has likewise failed to articulate forth a valid, legal objection counsel should have made that would have reasonably changed the outcome. Thus, Applicant did not prove deficiency or prejudice.

Failed to object – State's dramatization[14]

Applicant asserts counsel was ineffective for allowing "the State to over dramatize by using

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[12] This section addresses allegation (2)(v) of the original application as set forth above.
[13] Viera was the victim who survived.
[14] This section addresses allegation (2)(vi) of the original application as set forth above.

his head to demonstrate the entry and exit of the bullet wounds after charts were already corroborate and entered into evidence as exhibits." (Tr. 251-52). This allegation lacks merit. Here, the solicitor asked the pathologist to "use my head to show [the jury] where the entrance wound was." The pathologist then used a diagram to aid him in demonstrating where the entrance wound and exit wounds would have been. (Tr. 251-52). This was permissible demonstrative evidence, and counsel's failure to object was reasonable within prevailing professional norms and not deficient. Further, Applicant has failed to set forth a valid, legal objection counsel should have raised or any other specific facts to support a claim that counsel should have objected to any of the State's evidence. Applicant likewise failed to show a reasonable likelihood that an objection would have excluded the State from using this demonstrative evidence or otherwise changed the outcome of trial. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object – reference to location of murder weapon[15]

Applicant argues counsel was ineffective for allowing "the State to make reference to the possible location of the murder weapon allegedly from a phone conversation during closing arguments without any corroboration." (Tr. 322-65). This allegation lacks merit.

Initially, Applicant cited to a range of pages in his application but did not otherwise specifically reference where the State made "reference to the possible location of the murder weapon allegedly from a phone conversation." This Court has reviewed the transcript pages cited by Applicant (Tr. 322-65) and does not see any reference during the State's closing argument to a phone conversation that discussed the location of the murder weapon. These pages do, however, reference phone conversations Applicant had with "Tyrell" and "Tina." During cross-examination, Applicant agreed he asked Tyrell "to go find something out behind your house." (Tr. 322-23).

[15] This section addresses allegation (2)(vii) of the original application as set forth above.

When asked whether it was the gun, Applicant replied he had a bag of clothes in the backyard. (Tr. 323-26). When questioned again about whether he was referencing a gun, Applicant maintained it was clothes. (Tr. 325-26). During closing, the solicitor argued:

> When you think about credibility, think about the story that [Applicant] told you when he was talking about talking to his friend, Tyrell, on the phone, that he was telling Tyrell that his clothes were being kept in the back yard down by the dogs by the fence. Do you really believe that is where he kept his clothes? He had a house, he was staying at Minor 2's mama's house, but yet he is going to keep his clothes in the back yard? (Negative gesture). You think about that when you think about his credibility, and when you are thinking about the hand of one being the hand of all.

(Tr. 365). At the PCR hearing, Applicant averred counsel should have objected on the basis this testimony was speculative.

Applicant has not set forth a valid, legal objection counsel should have made. To the extent he contends the foregoing was speculative, this Court finds the foregoing argument was a reasonable inference from Applicant's testimony about his conversation with Tyrell. To the extent Applicant asserts this conversation was not otherwise corroborated, the solicitor's argument was a reasonable inference from Applicant's testimony and did not need further corroboration to support the argument. Applicant has not set forth a valid, legal objection counsel should have made. Likewise, it is not reasonably likely an objection here would have been sustained or changed the outcome of trial. Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object – mischaracterization of testimony[16]

Applicant contends counsel was ineffective for not objecting to the solicitor's following argument, "Since there has been some testimony about it, let's talk about who fired the fatal bullet and the evidence that [Applicant] is the one who fired the fatal bullet." (Tr. 357). Applicant

[16] This section addresses allegation (2)(viii) of the original application as set forth above.

contends counsel was ineffective for "allow[ing] the State without objection to mischaracterize testimony not given that the defendant fired the fatal bullet." This allegation lacks merit.

Initially, this argument must be viewed in the context of the entire argument. Here, the solicitor set forth evidence from which the jury could conclude Applicant was guilty, and that argument spanned five pages and included evidence that Minor 2 identified Applicant as the shooter. (Tr. 357-61; 360 ln. 20-21). The solicitor was submitting to the jury his version of the case, which was not improper. Thus, counsel's failure to object was reasonable within prevailing professional norms and not deficient. Applicant has not set forth a valid, legal objection counsel should have made, nor has Applicant set forth an objection that would have reasonably likely changed the outcome. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to object – mischaracterization of testimony[17]

Applicant asserts counsel was ineffective for allowing "State without objection to say that the fatal bullet was a .380 when there was no corroboration." This allegation lacks merit. At trial, Brian Sommerfeldt testified he analyzed a projectile recovered from Victim's vehicle (State's Ex. 30) and determined its size was consistent with "between an.380 auto and a nine millimeter Luger." (Tr. 203-05). SLED firearm identification expert Vello Paavel testified the cartridge (Ex. 30) was "most consistent with being a bullet that would be loaded in a .380 auto caliber cartridge." (Tr. 295-97, 300). Paavel agreed a .380 automatic caliber bullet "can be fired from some nine millimeter caliber pistols." (Tr. 300).

During closing, the solicitor argued, "Given that [Applicant] has admitted in one of his last statements admits that he had the automatic, he had the automatic, and we have the testimony that

[17] This section addresses allegation (2)(ix) of the original application as set forth above.

the fatal bullet was a .380 automatic. The testimony was that nine millimeters can fire .380." (Tr. 363). The solicitor then clarified,

> There is an issue that [Applicant] came in and said that he had a nine millimeter from the start, he said he had a nine from the start. We looked for the guns, we didn't find guns. I don't know what kind of guns they had, I don't know if they had nine millimeters, for all I know they all .380's. He thought that he was getting out of it by saying that he had a nine. I don't know what he had. But what we all know is that he had the only gun that would fire an automatic, based on the statements and testimony of each. That was the gun, that was the projectile, the bullet that went through [Victim]s head. Those are the reasons that we think that you can be comfortable that [Applicant] being the shooter.

(Tr. 363-64). The foregoing argument was a reasonable inference from the evidence presented and not objectionable. Applicant has not set forth a valid, legal objection to the foregoing and thus has not met his burden of proving deficiency or prejudice. Thus, this claim is denied.

Failed to request cautionary instruction[18]

Applicant contends counsel was ineffective for not eliciting a cautionary instruction when the State led the witnesses or at any point during the States closing based on mischaracterization of evidence. This allegation lacks merit. Initially, although Applicant raised several allegations of failure to object, Applicant did not set forth any objectionable, improper leading by the State. This Court likewise finds Applicant did not set forth with specificity any portion of the State's closing argument that mischaracterized the evidence. Ultimately, Applicant has not established any basis for counsel to request a cautionary instruction and thus failed to meet his burden of deficiency or prejudice. Thus, this claim is denied.

Failed to argue dismissal of armed robbery charge[19]

Applicant asserts counsel was ineffective for failing to argue the dismissal of the attempted

[18] This section addresses allegation (3) of the original application as set forth above.
[19] This section addresses allegation four of the original application, as set forth above.

armed robbery charge when the only testimony presented was Applicant's testimony that he "tussled with Viera in order to retrieve the drugs that he gave Viera." (Tr.307-09). This allegation lacks merit. At trial, Minor 1 and Minor 2 both testified they discussed robbing Victim with Applicant, and Applicant provided the guns. (Tr. 113, 115-17, 154-57). Minor 1 and Minor 2's foregoing testimony was sufficient direct evidence to survive a directed verdict motion, and Applicant did not set forth an argument counsel should have made that reasonably would have resulted in a directed verdict on the armed robbery charge. Applicant thus did not prove deficiency or prejudice, and this claim is denied.

Elicited testimony from Agent Paavel[20]

Applicant contends counsel was ineffective for eliciting testimony from Agent Paavel that bolstered the State's case, which shows counsel did not investigate the type of weapon that killed Victim. (Tr. 289-90). He further contends counsel's mischaracterization that the bullet that struck Victim was a .380 caliber was prejudicial because there was no corroboration that the victim was killed by a .380. (Tr. 346). This allegation lacks merit.

During closing, trial counsel argued Applicant had a nine-millimeter gun, whereas the cartridge that killed Victim was a .380-millimeter cartridge. (Tr. 346-47). Counsel further attempted to undermine both Minor 1 and Minor 2's credibility; specific to Minor 1, counsel argued that Minor 1 initially stated Applicant had a nine-millimeter, but later identified it as a .380 after the SLED report identified the cartridge. (Tr. 347-48). To support these arguments, counsel called Agent Paavel, who testified the cartridge that was recovered from Victim's car was more consistent with a .380-millimeter cartridge than a 9-millimeter cartridge. Agent Paavel's testimony provided trial counsel a basis to separate the 9-millimeter gun that Applicant admitted to having

[20] This section addresses allegation five of the original application, as set forth above.

from the fatal cartridge. Additionally, Agent Paavel's testimony helped bolster counsel's arguments that (1) Applicant was not involved in the armed robbery or murder and (2) Minor 1 and Minor 2 were not credible. Viewed from counsel's perspective at the time this testimony was elicited, this strategy was reasonable under prevailing professional norms and not deficient. See Strickland, 466 U.S. at 689 ("It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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." (internal citation omitted)). Further, it is not reasonably likely the outcome would have been different had Agent Paavel *not* testified. Without Agent Paavel's testimony, the State still had evidence from which it could argue a 9-millimeter—which Applicant admitted to having—could have fired the fatal cartridge. (Tr. 203-05). In fact, the State's argument in this regard was stronger *without* Agent Paavel's testimony, and Applicant has not shown a reasonable likelihood the outcome would have been different had counsel *not* called Agent Paavel. Thus, Applicant did not prove deficiency or prejudice, and this claim is denied.

Failed to argue dismissal of murder charge[21]

Applicant contends counsel was ineffective for failing to argue for dismissal of the murder charge when the only evidence presented was who supposedly possessed what type of weapon and that the larger caliber of weapon caused Victim's death. He further avers, "The Fifth amendment states you have the right to be tried only on a grand jury indictment. Competent defense counsel

[21] This section addresses allegation six of the original application, as set forth above.

certainly should have been on notice that the offense of possession of pistol in regards to the deadly weapon charge the trial judge charged the jury on in reference to which elements constitute murder." He contends the State did not present sufficient evidence to support the charge. This allegation lacks merit. At trial, Minor 2 testified he and Applicant shot at Victim. (Tr. 161). Minor 1 and Minor 2 likewise testified the three of them discussed robbing Victim. (Tr. 113, 115-17, 154-57). Under the theory of accomplice liability, it did not matter which gun fired the fatal bullet. Based on Minor 1 and Minor 2's testimony—which was sufficient direct evidence to survive a directed verdict motion—counsel's argument was reasonable under prevailing professional norms and not deficient. Applicant likewise did not set forth an argument that would have reasonably led to the Court direct a verdict on murder. This claim is thus denied.

Impeachment of Nelson[22]

Applicant contends counsel was ineffective for not impeaching Oliver Nelson (Minor 1) with the proffer agreement. This allegation lacks merit.

At the PCR hearing, Applicant entered as part of Exhibit 1 a proffer agreement between Minor 1 and the State, Minor 1's statement, Minor 1's juvenile commitment orders (dated November 13, 2006, and January 4, 2007). As Exhibit 2, Applicant entered a proffer agreement between Minor 2 and the State. Applicant testified he was aware of Minor 1's proffer agreement but did not know about Minor 2's proffer agreement. He likewise stated he did not know his codefendants would be sentenced in the Department of Juvenile Justice (DJJ), and he averred the jury should have known they would remain in the DJJ.

This Court finds Applicant failed to prove counsel was ineffective in this regard. The proffer agreements themselves are merely agreements between the codefendants and the solicitor's

[22] This section addresses allegation one of the amended application.

office; as part of the agreement, "the State does not agree to make any prosecutive decisions on the Client's behalf or to enter into a cooperation agreement, plea agreement, immunity or non-prosecutive agreement. The State makes no representation about the likelihood that any such agreement will be reached in connection with this proffer." (Ex. 1 & 2 pg. 1). The codefendants agree to be truthful and forthright at all stages including trial; in exchange, the State agrees not to use their statements against them at their own trial. The agreements do not provide the codefendants will be sentenced through DJJ—in fact, the agreements specifically provide the State is not agreeing to make any prosecutive decisions or enter into any plea agreement or non-prosecutive agreement as a result of the proffer. Applicant did not specify how the proffer agreements, in and of themselves, could have been used for impeachment, and thus failed to prove deficiency or prejudice in this regard.[23]

Further, this Court finds Minor 1's DJJ commitment orders occurred *after* Applicant's trial and were not available to counsel for impeachment at trial. Thus, Applicant cannot show deficiency or prejudice in this regard. Finally, this Court has reviewed counsel's cross-examination of Minor 1 (and Minor 2) and finds it was reasonable under prevailing professional norms and not deficient. (Tr. 130-38). Specifically, counsel cross-examined Minor 1 about the fact he was in DJJ and whether he wanted to remain in DJJ or go to "adult court." (Tr. 132). Counsel also cross-examined Minor 1 about whether he initially lied to police.[24] (Tr. 133-35). Applicant failed to specify what additional issues counsel should have raised on cross-examination that would have reasonably changed the outcome and thus failed to prove deficiency or prejudice. Thus, this claim is denied.

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[23] To the extent this allegation can be construed as a claim that counsel did not effectively use Minor 1's statement for impeachment, this Court has reviewed the statement and finds it is not materially different than Minor 1's trial testimony and thus did not provide a basis for additional impeachment.

[24] Although Applicant raised this allegation in relation to counsel's impeachment of Minor 1 (Nelson), this Court notes counsel also cross-examined Minor 2 about the fact he was in DJJ, hoped to remain in DJJ rather than General Sessions, and hoped the State would give him a deal. (Tr. 167-71).

Failed to object – inferred malice charge[25]

Applicant contends counsel was ineffective for failing to object to the jury charge that malice could be inferred from the use of a deadly weapon. Applicant did not prove counsel was ineffective in this regard.

An attorney's performance must be viewed with regard to the law in existence at the time of trial. The Supreme Court has declared, "We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of the trial." State v. Gilmore, 314 S.C, 453, 457, 445 S.E.2d 454, 456 (1994). Here, Applicant was tried in 2006—thirteen years before State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), established precedent that did not allow this jury instruction. At the time of Applicant's trial, this was a proper charge; thus, counsel was not ineffective for failing to object.

[Conclusion and signature page follows]

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

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice. Should Applicant wish to appeal, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. 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 of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appellate procedures.

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 10th day of April, 2024.

R. KIRK GRIFFIN
Presiding Judge
Ninth Judicial Circuit

Sumter, South Carolina