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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Horry County Court of Common Pleas
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2025-000602

Nicholas J. McIver, # 00376157,.....Petitioner,

v.

State of South Carolina,.....Respondent.

APPENDIX - VOLUME III

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¹ This Appendix incorporates the documents incorporated in the Record on Appeal that was filed in Petitioner's direct appeal (App. Case No. 2018-000824) and considered by the lower court.

from discovery with Applicant. This Court finds *credible* Counsel's testimony that he met with Applicant a number of times prior to trial. This Court finds *credible* Counsel's testimony that he conducted an investigation of Applicant's case including visiting the crime scene prior to trial. This Court finds Counsel's preparation was reasonable under prevailing professional norms and thus, was not deficient. This Court further finds Applicant failed to prove prejudice by showing what other information Counsel could have discovered or what other defenses Counsel could have prepared if Counsel had spent more time. Thus, Applicant failed to meet his burden.

Failure to Object to and Challenge State's Theory of Hand of One, Hand of All

This Court finds Applicant failed to prove Counsel was ineffective for failure to object to and challenge the State's theory of hand of one, hand of all. This Court finds *credible* Counsel's testimony that he believed the State proceeding under inconsistent theories was beneficial to the defense's theory that the State could not prove who shot and killed Victim. Counsel testified that, in his experience, it was not his standard practice to object to opening statements. Counsel testified that in opening argument the State was merely arguing their theory of the case. Counsel further testified he could ascertain no strategic benefit in making an objection to the State's opening statement. This Court finds *credible* Counsel's testimony that he did not think the State could prove hand of one, hand of all because he did not believe there was evidence of a plan between Applicant and his co-defendant. This Court finds Counsel articulated a reasonable strategic decision for not objecting to the State's opening argument and alleged inconsistencies in its theory. Thus, Applicant failed to meet his burden.

Failure to Object to the Trial Judge's Jury Charge on Hand of One, Hand of All

This Court also finds Applicant failed to prove Counsel was ineffective for failing to object to the trial judge's jury charge on hand of one, hand of all. Failing to object does not automatically

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constitute ineffective assistance of counsel. *See Millidge*, 422 S.C. at 374, 811 S.E.2d at 800-01 (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). The law to be charged must be determined from the evidence presented at trial. *See State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000).

This Court finds Applicant failed to prove prejudice by showing the result of trial would have been different but for Counsel's failure to object to the trial judge's charge. The State presented evidence at trial that Applicant and his co-defendant acted together to dump Victim's body just moments after Victim was shot. (R. 89). Applicant was seen on video surveillance placing an object from his waistband into his truck after returning with his co-defendant to the hotel in the victim's car shortly after the murder. (R. 422-25). This Court finds there was evidence in the record to support the trial judge's jury charge on the hand of one, hand of all theory of accomplice liability. Moreover, Counsel testified he had no legal or good faith basis upon which to object to the jury charge. He further testified that the instruction highlighted the defense's overall theory regarding the factual deficits in the State's case. Thus, Applicant failed to meet his burden.

Failure to Object to State's Presentation of Conflicting Theories

This Court finds Applicant failed to prove he was prejudiced by Counsel's not objecting to the State's presentation of a hand of one, hand of all theory while presenting evidence that Applicant was the principal. Failing to object does not automatically constitute ineffective assistance of counsel. *See Millidge*, 422 S.C. at 374, 811 S.E.2d at 800-01 (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue). The proper inquiry for determining prejudice for failing to object and preserve an issue for appellate review is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's

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ruling.” *See id.* at 380, 811 S.E.2d at 800.

In *Bradshaw*, the Supreme Court held the state’s inconsistencies in the prosecutor’s arguments regarding whether the defendant or his co-defendant shot the victim did not prejudice the defendant where the defendant and his co-defendant acted together in committing an armed robbery that led to the victim’s death. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). The defendant and his co-defendant committed an armed robbery that left one victim wounded and another dead. *Id.* at 178. The defendant pled guilty and admitted to participating in the robbery and shooting the wounded victim but denied shooting the deceased victim. *Id.* The defendant pled guilty under the state’s theory of accomplice liability. *Id.* 178-80. In the defendant’s co-defendant’s trial, the state proceeded under a theory that the co-defendant was the principal. *Id.* The Court determined the state proceeding on inconsistent theories in the separate proceedings did not violate due process because the identity of the triggerman was immaterial to the defendant’s conviction for murder, and the defendant failed to show how the state’s inconsistent arguments affected the nature of his guilty plea. *Id.* at 186-87.

This Court finds Applicant failed to prove he was prejudiced by Counsel’s failure to object to the State proceeding under a hand of one, hand of all theory of accomplice liability while presenting evidence Applicant was the principal. This Court finds there was no good faith basis for Counsel to challenge the State’s theory because State presented sufficient evidence to proceed under either a theory of accomplice liability or a theory that Applicant was the principle. Moreover, Counsel testified that as a matter of strategy he did not object because the State’s inconsistent theories worked to the defense’s benefit and highlighted the weaknesses of the State’s case against the Applicant. This Court finds Applicant failed to show a reasonable likelihood that the result of trial would have been different but for Counsel’s failure to object or that the issue would have been

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successful on appeal as the Court of Appeals determined the State presented extensive circumstantial evidence that Applicant acted as the principal. *State v. McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). Thus, Applicant failed to meet his burden.

Failure to Object to the Solicitor's Comments in Opening and Closing Arguments

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the solicitor making comments in closing arguments that were not supported by evidence in the record. This Court finds Applicant failed to specify which comments by the solicitor that Counsel should have objected to. Further, this Court has reviewed the solicitor's opening and closing arguments and finds the solicitor's opening and closing arguments did not so infect the trial with unfairness as to result in a denial of due process. *Fortune v. State*, 428 S.C. 545, 549-50, 837 S.E.2d 37, 39-40 (2019) (stating improper comments do not automatically require reversal, the inquiry is whether the solicitor's comments so infected the trial with unfairness as to result in a denial of Applicant's due process right to a fair trial). Thus, Applicant failed to meet his burden.

Failure to Move for Severance of the Trial from Applicant's Co-Defendant

This Court finds Applicant failed to prove Counsel was ineffective for failing to move for severance of the trial and seek a separate trial from his co-defendant. Criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. *State v. Halcomb*, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009). There is no clearly defined rule for determining when a defendant is entitled to a separate trial, and a severance should only be granted when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a co-defendant's guilt. *Id.* at 440, 676 S.E.2d at 153. A defendant that contends he should have been tried in a separate trial must demonstrate that he was prejudiced by a joint trial by showing that he would have obtained

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a more favorable result in a separate trial. *Id.* at 441, 676 S.E.2d at 154.

This Court finds Counsel made a reasonable strategic decision to not seek a separate trial. This Court finds *credible* Counsel's testimony that he thought about moving for a separate trial and believed he would have discussed the decision with Applicant. Counsel testified that although he doesn't recall the specifics but would have advised Applicant of the positive and negative aspects of each approach. This Court finds *credible* Counsel's testimony that he does not recall Applicant insisting on being tried separately from his co-defendant. This Court does not find *credible* Applicant's testimony that Counsel failed to discuss a severance motion with him. This Court finds *credible* Counsel's testimony that it is not typical to put every strategic decision made in a case on the record. This Court finds *credible* Counsel's testimony that Applicant's co-defendant gave a statement to law enforcement that implicated Applicant as the shooter, and the statement could not be used against Applicant in a joint trial under *Bruton*.⁶ Applicant testified he discussed his co-defendant's statement with Counsel, and Counsel discussed *Bruton* with Applicant. This Court find *credible* Counsel's testimony that Applicant's co-defendant's statement was not helpful to the Applicant. This Court finds *credible* Counsel's testimony that the video surveillance of Applicant using Victim's credit cards and driving her car after the murder were damaging to Applicant. Although Counsel testified that in hindsight, severance might have helped Applicant, this Court is not to evaluate Counsel's performance in hindsight. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689) (stating the court is to evaluate counsel's decisions at the time they were made and "every effort be made to eliminate the distorting effects of hindsight"). Additionally, this Court finds Applicant failed to prove that a motion for severance would have been granted by the trial court but for Counsel's failure to request

⁶ *Bruton v. United States*, 391 U.S. 123 (1968) (holding use of a co-defendant's statement in a joint trial where the co-defendant did not take the stand violated the defendant's 6th Amendment right to confront witnesses).

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a separate trial. This Court finds Counsel exercised reasonable judgment under prevailing professional norms at the time of Applicant's trial.

Further, this Court finds Applicant failed to prove he was prejudiced by being tried in a joint trial with his co-defendant. This Court does not find *credible* Applicant's testimony that he believed he would not have gotten convicted of murder if he received a separate trial. This Court finds there was sufficient evidence for the jury to convict Applicant of murder if he were tried separately, including evidence of Applicant driving Victim's car, using her credit cards, placing a gun-like object from his waistband into his truck, and attempting to cover-up the crime by burning Victim's car after the murder. This Court finds Applicant failed to prove he would have obtained a more favorable result in a separate trial from his co-defendant. Thus, Applicant failed to meet his burden.

Failure to Object to the Photo Lineup and the Minor Witness' Identification of Applicant on the Basis of the Minor Witness' Age and Competency

This Court finds Applicant failed to prove Counsel was ineffective for failing to object to the minor witness' photo lineup and identification of Applicant and argue the identification was unreliable due to the minor witness' age and competency. A witness is presumed to be competent. Rule 601(a), SCRE. Disqualification of a witness is within the discretion of the trial court, and a witness may be disqualified if the trial court determines that the witness is incapable of expressing himself as to be understood, or the proposed witness is incapable of understanding the duty to tell the truth. Rule 601(b), SCRE. The party opposing a witness' competence has the burden of proving the witness is incompetent. *State v. Needs*, 333 S.C. 134, 143, 508 S.E.2d 857, 861 (1998). The proper inquiry for determining prejudice for failing to object and preserve an issue for appellate review is whether there is evidence in the record to support the trial court's finding, such that "an appellate court would necessarily have affirmed the trial court's ruling." *See Millidge*. at 380, 811

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S.E.2d at 800.

This Court finds the record reflects the minor witness was a competent witness as determined by the trial court.⁷ The minor witness (SH), aged 9, testified that she knew what a lie and the truth are. (R. 274). The witness testified and explained what a lie is and knew that it was bad to tell a lie. (R. 274). Counsel testified that as a matter of strategy he did not feel an objection regarding the minor's testimony was a "winning argument." As a result, Counsel did not object on the basis of the minor witness's competence and age. This Court finds Applicant failed to prove he was prejudiced by Counsel's failure to object to and challenge the minor witness' age and competence because Applicant failed to show an objection would have been successful as the minor witness testified that she knew the difference between the truth and a lie. This Court also finds Applicant failed to prove prejudice by showing the issue would have been successful on appeal if Counsel had object to and challenged the witness' age and competence because the Court of Appeals determined the trial court did not abuse its discretion in admitting the minor witness' identification and determination the identification was reliable. *McIver*, Op. No. 2021-UP-353 (Ct. App. filed Oct. 13, 2021). Further, Applicant failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's failure to object and challenge the minor witness' age and competency. Thus, Applicant failed to meet his burden.

Counsel's Statements in Opening and Closing Arguments

This Court finds Applicant failed to prove Counsel was ineffective for making arguments in opening and closing arguments that "acquiesced" the State's theory of hand of one, hand of all, and argued the guilt of Applicant for grand larceny and other crimes. This Court finds *credible* counsel's testimony that he argued in opening and closing arguments that Applicant was guilty of

⁷ The trial Court held an in-camera hearing to determine the minor's competency as a witness.

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grand larceny and accessory after the fact because he did not want to lose credibility with the jury by arguing against crimes in which there was overwhelming evidence such as the surveillance videos of Applicant using Victim's credit cards and driving her car. Moreover, Counsel testified he did not want to risk insulting the jury's intelligence by arguing to the contrary. Counsel testified that he discussed this approach as a matter of strategy with the Applicant prior to the trial. Counsel further testified that his was a viable strategy in light of the Court's jury instruction regarding multiple offenses. This Court also finds *credible* Counsel's testimony that he believed the State's inconsistencies in its theory of hand of one, hand of all highlighted deficiencies in the State's case and was helpful to Applicant, and Counsel's arguments refuted the theory. This Court finds Counsel articulated a reasonable strategic decision for making the arguments in opening and closing arguments. Although Counsel testified that in hindsight, he maybe would not have made those arguments, this Court is not to evaluate Counsel's performance with hindsight. *Edwards*, 392 S.C. at 456, 710 S.E.2d at 64. Thus, Applicant failed to meet his burden.

Failure to Request a Jury Charge on Evidence of Cover-Up

This Court finds Applicant failed to prove Counsel was ineffective for failing to request a jury charge that evidence of covering up a crime is not evidence of guilt. This Court is unaware of a jury charge on "cover-up" evidence. Moreover, it is likely that such an instruction could be an inappropriate comment on the facts analogous to that of evidence of flight. Counsel testified that he researched this issue in great detail prior to trial relying on *State v. Ballington*, 346 S.C. 262, S.E.2d (Ct. App. 2001) and realized this was a "double edged sword" that could be detrimental to the Applicant's case. However, Applicant failed to prove he was prejudiced by Counsel's failure to request a jury charge on "cover-up evidence or a cover up charge" because the Court of Appeals determined the State presented more than just flight and cover-up evidence. As a result, Applicant

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failed to show a reasonable probability the result of trial would have been different but for Counsel's failure to request a jury charge on cover-up evidence. Thus, Applicant failed to meet his burden.

CONCLUSION

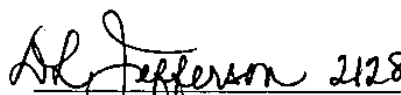
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice. Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty (30) 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 an 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 appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED THIS 10th day of March 2025.

Charleston, South Carolina
At Chambers


Hon. DEBRA L. JEFFERSON
Presiding Judge
Fifteenth Judicial Circuit

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