

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

HONORABLE R. LAWTON McINTOSH

2012-CP-04-3713

SAMMY LEE SCOTT #330564

APPELLANT,

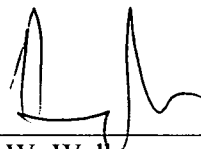
vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on April 7, 2014, addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



Hugh W. Welborn
Attorney for the Appellant
Post Office Box 173
Anderson, South Carolina 29622
(864) 226-5787
Attorney for Sammy Lee Scott #330564

Anderson, South Carolina

April 7, 2014

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IN THE SUPREME COURT
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HONORABLE R. LAWTON McINTOSH

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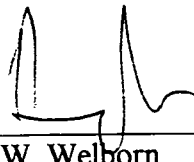
APPELLANT,

VS

STATE OF SOUTH CAROLINA,
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Attorney for Sammy Lee Scott #330564

Anderson, South Carolina

April 7, 2014

RECEIVED
APR 10 2014
S.C. Supreme Court

STATE OF SOUTH CAROLINA IN THE COURT OF (Select one.)
 COUNTY OF ANDERSON FILED - CLERK'S OFFICE ANDERSON COMMON PLEAS FAMILY COURT
) 10th JUDICIAL CIRCUIT

Sammy Lee Scott, 2013 JUN 11) CASE NO.: 2012-CP-04-3713

Plaintiff(s),) APPOINTMENT OF COUNSEL OR GAL
 -vs- COMMON PLEAS AND (Select one.)
 State of South Carolina, GENERAL SESSIONS)
 Defendant(s).) ORDER
 AMENDED ORDER

A TRUE COPY
 JUN 11 2013
 Clerk of Court

TYPE OF CASE/PROCEEDING: (Check one.)

- Post-Conviction Relief (PCR)/habeas case
- SVP case
- Minor Name Change
- Adoption
- Custody and/or Visitation
- Other:
- Juvenile
- Abuse and Neglect

It appears that Sammy Lee Scott, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other:

Therefore, it is ordered that Hugh W. Welborn, Sr., hereby is appointed as (Select one.)

counsel lead counsel (if capital PCR case) guardian ad litem
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

(If Death Penalty PCR Case) It is further ordered that _____, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 11th DAY OF June, 2013.
 Richard Shuler
 Circuit Judge Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

A TRUE COPY
 APR - 3 2014
Richard A. Kelly
 CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT

Sammy Lee Scott,
 S.C.D.C. No. #330564

Case No. 2012-CP-04-3713

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED - CLERK'S OFFICE
 ANDERSON SC
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 COMMON PLEAS AND
 GENERAL SESSIONS

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 20, 2011. Respondent made its Return. An evidentiary hearing into the matter was convened on September 17, 2013 at the Anderson County Courthouse. Applicant was present and was represented by Hugh W. Welborn, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of the Attorney General. Applicant and trial counsel testified at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the November 2006 term of the Court of General Sessions for Anderson County for murder and possession of a firearm during the commission of violent crime (2006-GS-04-3261) and four counts of assault and battery with intent to kill (2006-GS-04-3262, -3262, -3263, -3264). He was represented by Andrew Potter, Esquire. On September 8, 2008, Applicant proceeded to trial after which he was found guilty as charged. He was sentenced by the Honorable J.C. Nicholson, to confinement for a period of fifty five years (55) years for murder and five (5) years for

possession of a firearm during the commission of violent crime (2006-GS-04-3261) and five (5) years for each assault and battery with intent to kill (2006-GS-04-3262, -3262, -3263, -3264). The sentences were to be served concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Applicant was represented by Robert M. Dudek, Esquire. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Sammy Scott, Op. No. 2009-UP-540 (2011-UP-518 filed November 30, 2011). The Remittitur was filed December 21, 2011.

At the PCR hearing, Applicant moved forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. failure to successfully have Applicant's statement suppressed;
 - b. failure to have venue changed for trial;
 - c. failure to object to inadmissible hearsay testimony;
 - d. failure to object to the solicitor's use of improper leading questions.

SUMMARY OF TRIAL TESTIMONY

Joshua Black testified he was a passenger in Applicant's vehicle when the victim was shot and killed. Black detailed the past animosity his group had with the "Anderson Boys," particularly "Boot." Black could not recall who shot first, but he remembered hearing Applicant fire his shotgun from the vehicle into the crowd. Black detailed the past animosity his group had with the "Anderson Boys," particularly "Boot." After that, Applicant turned his mother's car around and they left Publix. As Applicant was headed back to Clemson, at speeds between 80 and 90 m.p.h., Blacked turned around and saw another car catching up to them. Black thought that someone might be coming to shoot his group. Therefore, he warned Scott and Verner. He laid down in the back seat and Applicant pointed the shotgun out of the window at the other vehicle, which was Brandon Keasler driving his mother's jeep. The other car slowed down and

someone in it identified the occupants of the jeep. Applicant soon arrived at the apartment complex where Applicant's sister lived, as did the other cars. Black testified that the trip from Anderson had only lasted ten minutes. After he went into Applicant's sisters apartment and used the bathroom, Black went to his girlfriend's house. He went to Scott's residence the next day. Scott and others were watching the news. That was when Black learned that Javaris C. "victim" had been killed.

Kyle, Whitney and Nicki, Applicant's sister, got into Whitney's car and they followed Applicant, Josh Black and Troy Verner into Anderson. Scott was driving his mother's black Kia SUV. Kyle did not know why they were headed to Anderson. The group first went to the Wal-Mart parking lot. However, the police were running people out of the parking lot. So, both cars left that location and they went to the Publix parking lot. "It was packed full of cars and people standing everywhere." Almost as soon as the car in which Kyle was riding pulled up, "that's when everything started, all the shooting and everything." Kyle heard gunshots as soon as his group stopped. When he looked, he saw Scott stick a "long gun" out of the driver's window of the Kia and fire shots into the crowd of people in the parking lot. As soon as Scott had stopped shooting, he sped out of the parking lot. Kyle testified Applicant's sister later told him that he "didn't see shit." Verner also made a contemporaneous statement regarding the course of events. Kyle turned hostile which led to his impeachment from a prior statement provided to police.

Markesha Smith testified that she was twenty at the time of trial. She knows Scott, his mother and Nicki. On the night of July 9, 2006, she rode with her cousin, Latoya, to Club Maley, in Anderson. When the club closed early in the morning of July 10th, she got rode in Brian Keasler's car to the Wal-Mart parking lot. Patrice Gaines, Patricia Durham and Brittany Young were also in Brian car. She had been told that Scott "had a beef with somebody" named "Boot"

and everyone was to meet at Wal-Mart.” She noted most of the partygoers that night ended up in the Walmart parking lot. She told Brian to park his car at a nearby location due to prior instances of assaultive conduct that involved Boot. The car remained in a nearby bank parking lot. She testified she heard gunshots. Brian followed the two other vehicles that left the scene: the car driven by Whitney, and the Applicant’s vehicle. When Brian pulled alongside the Kia, Scott “leaned out the car and pointed a [long] gun at us” because he did not recognize his friends and he thought that someone had followed him from Publix. He did not withdraw his weapon until Markesha reached Verner on his cell phone and told him to put the weapon down. Although Markesha and the others in Brandon’s car were scared and Markesha thought she was going to die, Keasler followed his friends to Nicki’s apartment. In all, the trip to Nicki’s had only lasted fifteen or twenty minutes. After all three vehicles were parked and the various people exited them, Nicki took the gun out of the Kia and into her apartment and told everyone, “[y]’all didn’t see nothing.” When Nicki returned, she said that she had the gun. Scott then “apologized for pointing the gun at us[, a]nd Troy . . . walked up to the car and he was like, ‘Yeah, I don’t know about this gangster shit.’ ” She left shortly after and was unaware someone was killed in Anderson.

Brandon Keasler’s testimony mostly followed Markesha’s testimony. He recalled parking his vehicle in the bank parking lot for the same reason provided by Markesha. He also recalled Applicant pull a gun at his vehicle. Afterwards, Brandon followed his friend’s back to Nicki’s apartment. In line with Kyle, he testified Applicant’s sister told the group, “[y]ou don’t know nothing. You didn’t see nothing.” He witnessed Applicant’s sister take Applicant’s gun into her apartment.

Patrice Gains testified to being in the vehicle with Brandon and Markesha. Patrice recalled Markesha’s startling phone conversation in the ride out of Anderson. Similarly, Patrice

testified that Nicki told them not to say anything and they agreed not to tell. Nicki then took the gun from the Kia and take it into her apartment. Patrice thought that the gun was two or three feet long. Patricia Durham's testimony mirrored Gains' testimony. Patricia did not see the shooting, but testified Applicant's sister telling the group at her apartment that "you didn't see anything." Brittany Young was the final occupant in Brandon's car to testify. She recalled hearing gunshots. As they were driving back, their car "pulled up next to" Applicant's vehicle, and someone riding with Brittany screamed that Applicant was holding a gun out of the window. She then saw Scott pointing a gun out of the window of his car.

The victim's friends at the murder scene testified. Torrey Acker testified that a lot of people soon came to the lot, but most were still in their cars when the trouble began. He testified Torrey and the victim were getting out of their cars when he heard two shotgun blasts. The first shot hit the victim. The second shot hit James Burns. He knew that Shanquil Martin had been shot in the neck but he did not know who had fired the shots. However, he was certain that the shotgun blasts were fired from behind him because he felt glass and debris hit him from behind, and that he saw Harkness "Boot" in front of him seconds later. Torrey looked up several seconds later. At that point, he saw "Boot" driving the Delta 88, "circle "right around in front of us, and pointing a [handgun]." Boot returned fire.

James Burns' testified to the shooting. He testified that the shots he heard were fired by a shotgun and "sounded like 12-gauge buckshot. He identified persons in his social circle at the scene: Pete Dial, Jeremy Dial, the victim, and "Boot." James saw the victim, who was four feet in front of him, get hit in the head by the first shot and fall. James was also struck in the top of his back and the top of his shoulder by a blast. He immediately panicked and ran until he

collapsed. His friends got him into a car and took him to the hospital. Because of a risk of bleeding to death or paralysis, doctors did not remove the buckshot pellets from his body.

Sydney Chester was present at the murder scene. He testified he heard a shot that “sounded like a shotgun,” and the shots fired from the brown car sounded like they were from a .22 caliber pistol. Due to the excitement created by the events, he was unsure about sequence. He identified the shots fired from the brown car to sounding like that of the presumed .22 caliber pistol. Sydney immediately began running when he heard the shots. He was hit in the ankle. Shanquil Martin was also present at the murder scene and recalled hearing the sound of separate guns being fired. He testified the shots that created a “loud boom” preceded the subsequent quieter shots. He was shot in the neck, as he ran to Pete Dial’s truck. He testified that medical personnel removed shotgun pellets from his body.

Pete Dial testified to his friendship with the victim. He was present at the Publix parking lot when shooting occurred. Neither Pete nor his brother exited their parked vehicle. He initially heard a loud shotgun blast followed by shots he believed came from a handgun. He testified that he heard five to ten shots in total. Jeremi Dial offered similar testimony. Jeremi testified that he did not hear any other gunshots prior to hearing the shotgun being fired. After this, he heard more shots that “sounded like a handgun.” Jeremi thought that the shotgun was fired from behind him because he did not see anything in front of him. He never saw anyone with either a shotgun or a handgun.

India Galloway testified to being present at the murder scene. She testified that there were a lot of cars and a lot of people in the lot. Everyone “was sitting there talking,” until “Boots” Delta 88 went by in front of her. “After that, that’s when the shooting had started.”

Although she did not know what kind of gun was being used, the shots were louder than a handgun. Also, they were coming from one gun and from behind her.

In Applicant's initial statement to police, he claimed an alibi defense. However, after his arrest, he admitted his guilt.

I was at Brock's Trailer Park in Pendleton. My mom went to Wal-Mart in . . . Clemson. She picked me up from Brock's around 8 or 9 p.m. Me, my momma, Troy Vernon and Darion (phonetic) went back to my house in Clemson. I asked momma could I see the car. She said yes.

As soon as I went home, I got in the car. Me and Troy went to Creekwood Apartments. Troy was driving. We went there to pick up Josh. People said ["]Let's go to these n-----s' house,["] n-----s because they think we're scared to go to the club. I started talking, I started thinking and people were boasting my head up. [(Sic)].

On the way to Anderson I went to the woods and got the shotgun. The gun was in the woods near my house . . . I got the gun earlier that day and . . . put it there. I got the gun from . . . some crack head in Pendleton. I paid \$ 45 for it. It had one shell in it I got two more from the crack heads.

After I got it out of the woods, we went straight to Anderson. As soon as we got there in Anderson, we was near the mall and some girls yelled out of the window , it was going down at Wal-Mart.

Troy was still driving. He turned around and went to Wal-Mart on Liberty Highway. I saw all kinds of cars coming out. They were saying it was going down over here across the street. Troy was still driving and we followed them to a store with the green word written on it. We pulled in the parking lot and stopped.

Boot was out of the car in front of us. There [were] people meeting up like they were about to fight. A shot went off behind us. I shot in the air once and tried to shoot Boot two times. Troy was driving off and that was when I tried to shoot at Boot.

Nicki and Brittany [were] following us when I was shooting. I did not know she was behind us until I saw everybody leaving.

We then drove to Nicki's apartment. Nicki took the car from me, from Troy because she said we [were] not supposed to have it. Nicki took the car to mama's house and Whitney followed her. Nicki and Whitney came back and I stayed at Nicki's house. I did not get any shells out of my mama's car.

I know what I was aiming at and it was Boot's car. I am going to work with police and try to get the gun back.

The pathologist testified that the victim died as a result of three buckshot wounds to his person. Police recovered pieces of shotgun shells at the murder scene. A SLED ballistics expert testified that four lead pellets retrieved at autopsy were "most consistent with aught or double aught buckshot pellets. Furthermore, A pellet recovered from Shanquil Martin "was consistent with being an aught pellet or larger." Projectile parts found, which had been recovered from the parking lot, were "most consistent with the plastic-over-powder wads that are loaded into some 12-gauge Remington brand shot shells that are used with buckshot pellets;" and a lead fragment recovered in the lot was consistent with being a fragment of a buckshot pellet. Lead fragments recovered from the trunk of the victim's car, the passenger side door jamb of Pete's Explorer, and the front right fender of India's car were" could possibly have come from buckshot pellets, or been buckshot pellets or fragments from pellets." Johnny Mahaffey, an inmate housed with Applicant at the Anderson County Detention Center, testified Applicant detailed the shooting to him.

SUMMARY OF PCR TESTIMONY

Applicant alleged counsel was ineffective for failing to object to nearly two dozen instances of improper hearsay testimony and the solicitor's improper use of leading questions. Applicant also alleged counsel was ineffective for failing to make a motion for a change of venue. Applicant testified he met with counsel three or four times prior to his trial. Counsel reviewed the State's evidence with him. Yet, Applicant felt that counsel was not fully prepared to take his case to trial. Applicant desired a change of venue because the victim's family and the rival faction in the underlying offense were from Anderson County. Applicant discussed this issue with his family prior to trial. As a result, Applicant alleged counsel was ineffective for

failing to make a motion for a mistrial. Last Applicant alleged counsel could have done a better job in moving to suppress Applicant's statements.

At the PCR hearing, counsel testified to his course of conduct during the representation. He independently reviewed the State's evidence and discussed his impressions of the strength of the State's case. Counsel explained that only reasonable defense available would be self-defense. Counsel explained the doctrine of transferred intent to Applicant. Applicant's statements and the plethora of the State's evidence of Applicant's guilt constricted counsel's ability to pursue other possible defenses. Counsel testified that this was a "frustrating case" because Applicant made a damaging statement. Counsel noted that trial itself was grueling four day long exercise where over twenty witnessed testified. There were over a dozen eye-witnesses. The eyewitnesses were bifurcated into the group of persons from Clemson who were associated to Applicant and the group of persons from Anderson. Most of the later group had no knowledge of Applicant's identity. The common denominator was Ricky "Boot" Harkness. "Boot" was at the forefront of the feud between the factions. As a result, counsel developed a strategy to emphasis "Boot's" role in the shooting that resulted in injury to innocent third-party bystanders. Counsel strategically decided not to object to favorable hearsay testimony that complemented Applicant's version of the facts. Counsel testified that not find it useful to object just for the sake of making an objection. He testified, "sometimes hearsay helps you" where it can be twisted to the client's benefit. Instead, counsel focused on making important objects to improper testimony that directly concerned Applicant's involvement in the murder. Counsel executed the best performance he could in representing Applicant at trial. He moved to suppress Applicant's statement and moved for a change in venue among other things.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668, 104 S.Ct. at 2064. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, supra. Second, counsel's deficient performance must have 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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court's records regarding the subject

convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and exhibits from the prior proceedings, and, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

As a general matter, this Court finds counsel's performance sound. Counsel's preparations were fastidious and proficient. This Court finds counsel's testimony more credible than Applicant's testimony. He independently evaluated the State's evidence. Under the circumstances, counsel tried Applicant's case to best of his ability. Although counsel did not make several timely objections to minor improper hearsay testimony and the solicitor's use of leading questions, undoubtedly Applicant received the benefit of credible counsel. Furthermore, Applicant's conviction was supported by overwhelming evidence of guilt.

A.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to successfully have his statements suppressed at trial. "As a general rule, it is an exception to the hearsay rule that a defendant's out of court statement may be testified to by the witness who heard an oral statement, or received a written statement." State v. Hambright, 310 S.C. 382,426 S.E.2d 806 (Ct. App. 1992). "Anything that a defendant has stated, which is relevant to any question involved in the trial, is admissible in evidence against him." State v. Pittman, 137 S.C. 75, 134 S.E.514 (1926); This is true, so long as the statement, if made to police during custodial interrogation, was voluntarily made. State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). In determining whether a defendant's statement should be admitted, the trial judge should not rely on whether the statement is in fact true, only whether it is voluntary and legally admissible. Rogers v. Richmond, 365 U.S. 534, 81 S.Ct. 735 (1961). This Court finds counsel's

performance here reasonable. Counsel independently evaluated Applicant's statements and discussed possible suppression defenses with Applicant. A Jackson v. Denno¹ hearing was convened in Applicant's case where counsel challenged the voluntariness of the statements and sufficiency in the administration of Miranda. (App.pp.67-95). Applicant has failed to produce any credible evidence to show what else counsel could have done here to merit suppression. Regardless this allegation rests on mere speculation. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice."). Additionally Applicant does have standing to challenge the admission of statements he made prior to being in custody. (App.p.284). Therefore, this allegation is denied and dismissed.

B.

This Court finds Applicant's allegation that counsel was ineffective for failing to make a motion for a change of venue is without merit. A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). This Applicant presented no evidence that showed he did not receive a fair trial nor could have received a fair trial in Anderson County. See Sheppard v. State, 357 S.C. 646, 655, 594 S.E.2d 462, 467 (2004) ("Applicant presented no evidence that showed he did not mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant.") (internal citations omitted). A change of venue is only necessary in the few circumstances. Applicant has failed to show this or

¹ Jackson v. Denno, 378 U.S. 368 (1964).

PCR action resulted in an ordinate amount of publicity for this circuit. In comparison to numerous other murder prosecutions in Anderson County, Applicant's case received nominal publicity. Therefore this allegation is denied and dismissed.

C.

Applicant raised eighteen (18) separate allegations that counsel was ineffective for failing to object to hearsay. Additionally Applicant raised several allegations regarding counsel's failure to object to the solicitor's improper use of leading questions. This Court finds Applicant failed to prove counsel was ineffective on each instance at issue. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. Conversely, statements offered not for the truth of the matter asserted, but rather as evidence of notice, do not constitute hearsay. Player v. Thompson, 259 S.C. 600, 610, 193 S.E.2d 531, 535 (1972). "[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice." State v. Vick, 384 S.C. 189, 199, 682 S.E.2d 275, 280 (Ct.App. 2009). "Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." Id. An insubstantial error is harmless when guilt is proven by competent evidence such that no other rational decision could be reached or when the evidence is merely cumulative of other evidence. Id. at 199-200, 682 S.E.2d at 280.

First, this Court finds Applicant's allegation that counsel was ineffective for not objecting to Detective Tribble's improper hearsay testimony is without merit. (Trial Transcript p.276). Investigative testimony does not constitute hearsay. See Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) ("An out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.").

This Court finds Applicant's allegations that counsel was ineffective for not objecting to improper hearsay statements from his companions who traveled in a separate car from the murder scene to be without merit. Applicant raised six separate instances of counsel's alleged failure to object here: (1) Patrice's testimony that everyone in the car "started screaming" where the discussion revolved around Applicant; (2) Patrice's repeated testimony on cross-examination; (3) Brittany's testimony that people in the car were screaming exclaiming that Applicant was presenting a weapon at them from adjoining vehicle; (4) Markesha's testimony regarding her conduct during the drive. (5) Brittany's testimony that Applicant's companions behaved frantically after the murder at his sister's apartment. (Trial Transcript p.157; p.159; p.162; p.125; p.165). Applicant failed to prove that any of the above testimony warranted an objection. Furthermore, every person in Brandon's vehicle at the relevant time testified at Applicant's trial. See State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006). An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2)."); see also State v. Garcia, 334 S.C. 71, 77, 512 S.E.2d 507, 510 (1999) ("Under Rule 803(1), SCRE, a statement describing or explaining an event or condition is admissible if "made while the declarant was perceiving the event or condition, or immediately thereafter."). Last, this Court finds counsel's decision to cross-examine Brittany to attack the reliability of the testimony based upon the chaos of the event to constitute sound trial strategy. See Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Next, this Court finds Applicant's allegation that counsel was ineffective for failing to

object to James' and Sydney's testimonies regarding receiving medical treatment for gunshot injuries to be without merit. (Trial Transcript p.221; p.229). Both victim witnesses testified offered generic testimony to being treated for gunshot injuries. It is certainly admissible for a lay witness to testify to retrieval of a commonly identified pellet projectile from his body. Lay witnesses are permitted to offer opinion testimony when such testimony is rationally related to the witness's perception, does not require special knowledge, and may assist the jury's understanding of the witness's testimony. See Rule 701, SCRE.State v. Blurton, 342 S.C. 500, 509, 537 S.E.2d 291, 296 (Ct. App. 2000) rev'd, (on other grounds).

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to object to several instances where hearsay testimony was offered regarding past animosity the group of friends had with the "Anderson Boys." In particular, Applicant claims counsel should have objected to Markesha's and Black's testimonies regarding the group's prior and continued altercations with "Boot." (App.p.119; p.124; pp.170-71; p.189). As a result of overwhelming evidence of guilt, counsel rationally brought out the theory of theory of third-party causation during trial. The defense theory at least suggested possible diminished culpability despite evidence to the contrary. This Court finds that certainly counsel's decision to not object here benefited Applicant's case. See Whitehead, 308 S.C. at 122, 417 S.E.2d at 531.

This Court finds Applicant failed to meet his burden to prove counsel was ineffective for not renewing objections to Markesha, Brandon, and Patricia's testimonies that Applicant's sister directive and them to not cooperate with police and her conduct as a co-conspirator. (Trial Transcript p.130; pp.142-43; p.158). Counsel provided no valid reason why he abandoned the object after objecting on the matter during Kyle's testimony. (Trial Transcript p.115). As a result of counsel failure to renew the objection to this particular testimony throughout the trial, the

issue was found to be unpreserved on appeal. Regardless Applicant has not met his burden to prove that he would have succeeded on the appeal had the issue been properly preserved. Additionally, any detrimental impact was cumulative after the trial judge sustained counsel's original objection. Therefore, these allegations are denied and dismissed.

Last, this Court finds Applicant failed to meet his burden to prove counsel was ineffective for failing to object to leading questions posed by the solicitor. "The true test of whether a question is leading and therefore improper on direct examination is whether, as said by the Court, it suggests the answer." State v. Cook, 204 S.C. 295, 28 S.E.2d 842, 846 (1944) "The law gives the trial judge wide discretion when ruling on an objection to a question on the ground that it is leading." State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31, (1980). "A case will rarely be reversed on the ground that the trial judge permitted leading questions, and then only if there has been a clear abuse of discretion resulting in prejudice to the objecting party." Belue v. City of Greenville, 226 S.C. 192, 84 S.E.2d 631 (1954). Applicant cites to several instances from the solicitor's direct examination of Joshua Black to support the allegation. (App.p.177; p.181). However, this Court finds the leading was permissible in this instance. See State v. Hoffman, 257 S.C. 461, 470, 186 S.E.2d 421, 425 (1972) ("The reason for the rule permitting leading questions to an adverse witness on cross-examination is the assumed hostility of such witness to the cross-examiner's cause; and where an adverse witness is shown to be friendly toward or biased in favor of the cross-examiner the reason for the rule ceases to exist and leading questions may not be used in examining such witnesses."). Additionally, Applicant cites to the solicitor's re-direct examination of Torrey Acker in support of the allegation. (Trial Transcript p.209). This Court notes the question was impermissible, but that it was cumulative to the witness's testimony on direct examination. (Trial Transcript p.200). Therefore, these allegations are denied and

dismissed.

D.

This Court also finds Applicant's conviction and sentence were supported by overwhelming evidence of guilt. "When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this Court will not set aside a conviction for insubstantial errors not affecting the result." State v. Livingston, 282 S.C. 1, 6, 317 S.E.2d 129, 132 (1984). Numerous eyewitnesses and Applicant himself established Applicant shot into a crowd and injured several persons and killing one person. The State's pathologist and SLED ballistics expert corroborated that a shotgun was the murder weapon. This Court finds Applicant's assertion that counsel's continued failure to object during the trial compounded together to warrant relief is unfounded. Respondent correctly noted that a cumulative error analysis has not been recognized in this South Carolina. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (2012). This Court further notes that even if South Carolina allowed relief to be granted based on combined prejudicial effects of one or more errors, Applicant still would not have met his burden to prove prejudice under Strickland's second prong.

E.

Except as discussed above, this Court finds that the Applicant affirmatively abandoned the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's

failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCPP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 27 day of March, 2014.

Anderson, S
RCW


R. LAWTON MCINTOSH
Presiding Judge
Tenth Judicial Circuit

_____, South Carolina

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April 7, 2014

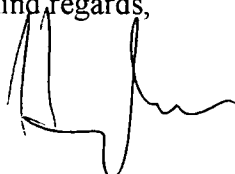
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Dear Sir/Madam:

In Re: Sammy Lee Scott #330564 vs State of South Carolina

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Esquire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/bmg

cc: Office of the Appellate Defense
cc: Office of the Attorney General
cc: Client

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Greenville P&DC 296

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