IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY

COURT OF COMMON PLEAS

WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

2013-CP-32-0099

Scott Parker,.....Petitioner.

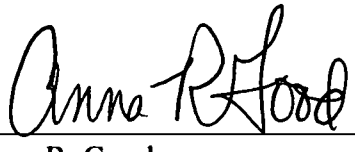
vs

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

NOTICE OF APPEAL

Scott Parker appeals the Honorable William P. Keesley's June 3, 2014, order denying post-conviction relief to the Petitioner. Undersigned counsel received notice of entry of the order on June 16, 2014. A copy of the order on appeal is attached to this notice.

Respectfully submitted,



Anna R. Good
Law Office of Anna Good, LLC
1720 Main Street, Suite 303
Columbia, South Carolina 29201
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Attorney for the Petitioner.

June 17, 2014.

Walt Whitmire
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, SC 29211-1549

IN THE STATE OF SOUTH CAROLINA

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WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

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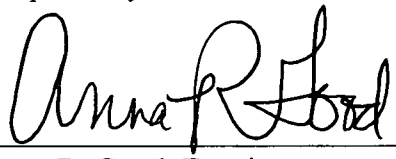
PROOF OF SERVICE

I, Anna Good, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to the attorney of record, Walt Whitmire, P.O. Box 11549, Columbia, South Carolina 29211-1549. I further certify that all parties required by Rule to be served have been served this 17th day of June 2014.

Respectfully submitted,



Anna R. Good, Esquire
Law Office of Anna Good, LLC
1720 Main Street, Suite 303
Columbia, South Carolina 29201

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **9th of June 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Anna Rawl Good
1720 Main St. Ste. 303 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Walter Whitmire
PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

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

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

ORIGINAL

2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
Scott D. Parker,	)	C.A. No. 2012-CP-32-0099
S.C.D.C. No. 197951,	)	
	)	
Applicant,	)	
	)	
v.	)	**ORDER OF DISMISSAL**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

RECEIVED
JUN 18 2014
S.C. Supreme Court

2013

FILED
2014 JUN -3 P 12:20
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 8, 2013. Respondent made its Return. An evidentiary hearing into the matter was convened on April 14, 2014 at the Lexington County Courthouse. Applicant was present and was represented by Anna R. Good, Esq. Respondent was represented by Assistant Attorney General Walt Whitmire.

WAW #1

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County. Applicant was indicted at the April 2009 term of the Court of General Sessions for Lexington County for criminal sexual conduct with a minor at least 14 years of age but less than 16 (2009-GS-32-00822) and four counts of criminal sexual conduct with a minor 11 to 14 years of age (2009-GS-32-00849, -00850, -00851, and -00852). John Wesley Locklair III, Esq., represented Applicant. On October 7, 2010, a jury found Applicant guilty. The Honorable R. Knox McMahon sentenced Applicant to twenty (20) years imprisonment for charges 2009-GS-32-00822, -00849, -00850, and -00851.

Those charges are to be served concurrently. Applicant was sentenced to twenty (20) years imprisonment for -00852. That charge is to be served consecutively.

A notice of appeal was filed on Applicant's behalf and was perfected by Appellate Defender Dayne C. Phillips of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion. (Op. No. 12-UP-592, filed on October 12, 2012). The Remittitur soon followed.

At the PCR hearing, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
   a. failure to investigate and prepare Applicant's case for trial;
   b. failure to adequately cross-examine State witnesses;
   c. failure to adequately advise Applicant on his right to testify;
   d. failure to object to State witness Heather Smith's qualifications and testimony;
   e. failure to object to comments made by the solicitor during the State's closing argument;
   f. failure to object to the trial judge's jury instruction on reasonable doubt.

WPC #2

SUMMARY OF TESTIMONY AT THE PCR HEARING

Applicant testified that Eleventh Circuit Public Defender Rob Madsen was his original attorney. He stated that counsel was substituted on his case four months prior to trial based upon Mr. Madsen's conflict of interest. Applicant stated he met with counsel on two occasions prior to trial. He stated the first meeting lasted less than thirty minutes. At the second meeting, they reviewed the State's evidence. He alleged that counsel failed to adequately investigate and prepare his case for trial. He stated that he wanted counsel to investigate phone records that allegedly showed that the victims continued to call him after his arrest. He further stated that the

victims had called him thirty to forty times a day during the applicable timeframe. He recalled that he specifically requested that counsel review this matter. He stated that he did not disclose to counsel the identity of the unnamed woman that he told police would exculpate him. Upon Respondent's cross-examination questioning, he was unable to state the identity or location of this unknown woman. He only stated that her name was Lisa. Her testimony was not proffered.

Applicant alleged that counsel failed to subpoena victim Trey's Department of Social Services records in a timely fashion. He claims that these records were necessary for impeachment purposes. Yet, he acknowledged that he did not disclose particular known information on victim Trey's records at the Department of Juvenile Justice records that may have necessitated further investigation. He stated that he had known the victims from birth, and he attended school with the mothers of the victims.

WPC #3

Applicant alleged that counsel was ineffective for failing to properly cross-examine the victims and their mothers. He stated that he cared for and treated the victims as if they were his children because they were raised in broken homes. He stated that Trey's mother fabricated the events that led to his arrest and conviction because he quit providing her financial support. He further stated that counsel should have cross-examined the victims regarding an alleged history of immoral conduct exhibited by their mothers. Counsel additionally alleged counsel was ineffective for failing to impeach State witnesses with their prior convictions.

Applicant alleged counsel failed to properly advise him on his right to testify prior to trial. He stated that he made the decision not to testify because counsel advised him that the solicitor would cross-examine him on his prior lewd act conviction. He stated that he received improper advice and supported his claim by citing the trial judge's ruling that limited any

specific mention of lewd act. He noted that he was afraid that the jury would learn about his prior lewd act conviction.

Applicant alleged counsel failed to object to State witness Heath Smith's alleged improper testimony. He stated that Smith's testimony improperly bolstered the credibility of the victims. In addition, Applicant also alleged counsel was ineffective for failing to consult an independent expert on the matter in rebuttal.

Applicant alleged counsel failed to object to prejudicial comments made by the solicitor during the State's closing argument. He referenced the solicitor's comment to the jury that "twenty-five feet sits a predator," and the comment that a "room would always be available for the Applicant at the Masters Inn." He explained that he rented the motel room for reasons related to his employment, and that the reference in this fashion to the location of the alleged events was unduly prejudicial and improper.

WPH #4

Counsel testified to his course of conduct during the representation. He noted his prior experience in the representation of criminal defendants that includes taking nearly twenty cases to trial. He testified to the circumstances that led to his involvement on Applicant's case. Attorney Madsen approached him and requested counsel's substitution once the conflict of interest was discovered. He discussed the status of the case on numerous occasions with Attorney Madsen. Discovery materials along with Attorney Madsen's personal notations regarding the matter were provided to counsel. He stated that Attorney Madsen utilized a private investigator (P.I.) on Applicant's case. He noted that the P.I. previously was his employee. He remarked upon the quality of the P.I.'s work and noted that the P.I. had spoken with several relevant witnesses. Counsel provided a brief synopsis of the State's evidence and theory of the case. He formulated a defense theory of the case that centered upon inconsistent accounts from

the victims. He briefly met with Applicant prior to trial and noted that he was not a practically helpful client. Counsel opined that Applicant remained in a state of denial throughout the representation. He discussed the charges and State's evidence with Applicant. He noted that he only spent a handful of hours discussing the case with Applicant. He noted his general policy is not to be "hand holder" when the consultations yield little benefit to a client's case.

Counsel recalled the failed plea negotiations and noted it was evident the State was preparing for trial when he learned the victims were not going to waiver about testifying against Applicant. As a result, counsel stated he formulated a defense theory of the case that centered upon attacking the credibility of the victims. He noted he utilized a multifaceted plan of attack in this matter. He desired to focus on inconsistencies in the accounts of offenses from each victim. He further honed in on facts that showed victim Trey had made previous false accusations of child abuse. He also elicited testimony from victim Scottie to support the defense theory that his disclosure was suggestive. He rejected the efficacy of cross-examining the victims on the alleged moral failings of their mothers. He opined this line of questioning would have placed him in an untactful position in the eyes of the jury. He stated that that both victims came across as credible during their testimony. He also rejected the efficacy of cross-examining the victims on their alleged unsolicited phone calls to Applicant after allegations of child molestation surfaced. He believes that this line of questioning would have been more harmful to Applicant's case than helpful. He elaborated that Applicant was the adult in the situation. Therefore, he was concerned that eliciting testimony regarding the phone calls would have provided further evidence of Applicant's morally questionable relationship with the adolescent victims. He rejected the benefit of cross-examining the victims on their prior sexual knowledge at the time of the disclosures. He noted it was objectively unreasonable to assert the two victims in this case did

not have prior sexual knowledge aside from any alleged abuse by the Applicant. He determined that it would not be beneficial to attempt this line of inquiry.

Counsel stated that he preserved Applicant's appellate rights regarding the manner in which discovery was disclosed by the solicitor. He stated he had no indication of the existence of relevant D.J.J. materials in this case until the solicitor happened upon them. He stated there was no reasonable basis here to necessitate an independent investigation from the defense team.

In retrospect, counsel was uncertain that State witness Smith's testimony warranted an objection. He stated that Smith did provide beneficial testimony that showed that prior recantations from a child heightened the possibility of a false disclosure. Furthermore, he stated that he felt that her effectiveness was reduced by eliciting testimony that she had never met with either victim. Counsel could not recall a basis to object to her expert qualifications.

Counsel stated that he advised Applicant on the potential benefits and detriments of testifying at trial. He noted that Applicant never expressed a desire to testify. He noted that Applicant appeared reticent and expressed trepidation at the possibility of testifying. Counsel opined that there was a strong likelihood Applicant would have inadvertently opened the door to the lewd act conviction had he testified. Regardless, counsel asserted that Applicant never changed his posture on the matter throughout the representation.

In retrospect, counsel waivered on whether he should have objected to comments made by the solicitor during the State's closing argument. He noted the commonplace practice of the prosecutors to use strong verbiage in a closing argument. He stated that is his policy to refrain from objecting during a solicitor's closing argument unless it was absolutely necessary. Yet, he did state that the solicitor comments at issue would have merited an objection. Counsel opined that the comments probably constituted harmless error.

APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his 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).

WPC #7

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 records regarding the subject convictions, the application for post-conviction relief, the transcripts and documents from the prior proceedings, 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 matter of general impression, this Court does not find Applicant be a credible witness. His claims relate to a variety of perceived errors and omissions on the part of trial counsel.

A.

Applicant has failed to meet his burden to prove counsel was ineffective for failing to investigate Applicant's case. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). This Court finds counsel's testimony here credible. This Court finds Applicant has failed to produce the purported phone records that he alleged counsel was ineffective for failing to investigate. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (applicant's allegations, alone, will not support a finding of prejudice when applicant claims counsel was ineffective for failing to investigate witnesses; instead, applicant must show the results of an investigation would have resulted in a different outcome at trial). Therefore, the allegation is denied and dismissed.

Applicant failed to prove counsel was ineffective for not inquiring into victim Trey's collateral D.J.J. investigations. Applicant was best situated to inform counsel of the prosepect of beneficial impeachment materials on the victims, their mothers, and other State witnesses based

on his longstanding relationships with the State's key witnesses. He has failed to show the presence of any evidence that would have reasonably necessitated counsel or the P.I. to look into the matter prior to trial. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of 'ineffectiveness' for which relief can be granted."). This Court notes our courts have never extended a duty of clairvoyance to criminal defense attorneys. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial."). Therefore, this allegation is denied and dismissed.

Applicant has failed to meet his burden to prove counsel was ineffective for failing to undergo sufficient preparation prior to trial. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012). Counsel has presented no credible evidence in support of this allegation. See Skeen v. State, 325 S.C. 210, 214–15, 481 S.E.2d 129, 132 (1997) (finding applicant was not entitled to post-conviction relief where there was no evidence presented at the PCR hearing to show how additional preparation would have had any possible effect on the result of the trial). Therefore, this allegation is readily denied and dismissed.

B.

This Court finds counsel provided convincing reasons for not expanding his cross-examinations of the victims on the matters referenced by Applicant. A valid trial strategy cannot support the basis of a finding of ineffective assistance of counsel. Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). "The Supreme Court has specified, furthermore, that such

an individual 'must convince the court' that such a decision 'would have been rational under the circumstances.' Padilla v. Kentucky, 559 U.S. ----, ----, 130 S.Ct. 1473, 1485, (2010). The challenger's subjective preferences, therefore, are not dispositive; what matters is whether proceeding to trial would have been objectively reasonable in light of all of the facts." United States v. Fugit, 703 F.3d 248, 260 (4th Cir. 2012). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).

Counsel provided sound reasoning for not questioning the victims on the alleged immoral conduct of their mothers. See Huggler v. State, 360 S.C. 627, 635, 602 S.E.2d 753, 757 (2004) ("Moreover, given that this was a sexual abuse case involving children, it may have been prudent for counsel to limit cross-examination to the issues he thought were most important.") This allegation is denied and dismissed.

WPM #10

Counsel provided sound reasoning for not utilizing the Applicant's phone records in his cross-examination of the victims. This Court finds counsel's testimony here credible. There has been no showing that pursuing the phone records further would have been likely to change the result of these cases, and the court accepts as reasonable the attorney's determination that any such effort could reinforce Applicant's alleged inappropriate relationship with the victims. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (finding counsel's decision to not call witnesses reasonable where their testimony would have been of no value to the case and they made inconsistent statements in the past). This Court finds counsel provided sound reasoning on his decision not to question the victims on the prior sexual knowledge at the time of disclosures. The benefits of this line of questioning were merely speculative and uncertain. Similarly, the

allegation that counsel failed to adequately impeach State witnesses with their prior convictions is entirely unsubstantiated and speculative. Therefore, these allegations are denied and dismissed.

Counsel exhibited exemplary performance in his cross-examination of the victims and their mothers on motive. "It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Burt v. Titlow, ---- U.S. ----, 134 S. Ct. 10, 16, 187 L. Ed. 2d 348 (2013). Counsel elicited testimony that showed victim Trey's mother had a personal distaste for Applicant. He elicited testimony that established Applicant's decision to no longer provide the victims gifts as a motive for fabrication among other things. Applicant has failed to present credible evidence to show that counsel's performance here was lacking. This Court finds that any additional questioning on motive would have been cumulative and probably diminish Applicant's case. See Edwards, 392 S.C. at 459, 710 S.E.2d at 66 ("The case before us today is not one where the proffered evidence would have exonerated Petitioner had it been presented. Instead, Marshall's testimony simply would have been cumulative to evidence already introduced through other witnesses."). Therefore, this allegation is denied and dismissed.

C.

Applicant has failed to meet his burden to prove counsel was ineffective for failing to properly advise him on his right to testify. "Failure to inform a client of his Fifth Amendment rights and the consequences of exercise and waiver of those rights falls below an objective standard of reasonable representation." Brown v. State, 340 S.C. 590, 595, 533 S.E.2d 308, 310 (2000). "The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment

with prior convictions." Id, at 594, 533 S.E.2d at 310. This Court finds counsel's testimony substantially more credible than Applicant's testimony on the matter. Applicant has failed to overcome counsel's credible testimony that Applicant never desired to testify. In addition, the trial judge addressed the matter with Applicant in a thorough colloquy. See Id., at 595, 533 S.E.2d at 310 ("An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right."). The record shows Applicant was provided sufficient time to alter his decision post-colloquy and made the decision not to testify. Regardless, Applicant has offer evidence in this PCR case that is sufficient to meet Strickland's prejudice prong. See Id., at 596, 533 S.E.2d at 311. Therefore, the allegation is denied and dismissed.

D.

Applicant has failed to meet his burden to prove counsel was ineffective for failing to object to State's witness Heather Smith's qualification as an expert in the field of child sexual abuse. This Court finds that relevant law at the time of trial supported the trial judge's qualification of the witness. See State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993). Therefore, this allegation is denied and dismissed.

Applicant failed to prove counsel was ineffective for failing to object to Smith's testimony that allegedly bolstered the credibility of the victims. (Trial Tr. p.344). This Court finds Counsel provided sound reasoning for not objecting here. Counsel noted that her testimony was in part helpful for the defense. Victim Trey had previously recanted his false allegations of child abuse against his mother. See Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002) (finding that trial counsel articulated an objectively reasonable strategy for his failure to object and was not ineffective). Regardless, Applicant failed to prove the testimony at issue constituted improper

bolstering. This Court finds Applicant failed to prove the alleged error here constituted prejudice in light of his convincing evidence of guilt. See State v. Kromah, 401 S.C. 340, 361–62, 737 S.E.2d 490, 501 (2013) (subjecting the erroneous qualification of a forensic interviewer to a harmless error analysis). Therefore, this allegation is denied and dismissed.

E.

Applicant failed to meet his burden to prove counsel was ineffective for failing to object to comments made by the solicitor during the State's closing argument. A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). The proper inquiry is not whether the Solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Even if the court were to find that solicitor reference to Applicant as a predator was objectionable, there is no showing that the comment rendered the trial unfair. In the context of the offense for which he was charged and convicted, and the evidence before the jury, the Applicant has failed to prove that the failure to object to this comment likely changed the outcome of the trial. (Trial Tr. p.360). See State v. Lee, 269 S.C. 421, 237 S.E.2d 768 (1977) ("[S]tatement that defendant was a "menace to society" could not be considered prejudicial since that concept forms the very basis for crimes involving moral turpitude."). The law does not

require counsel to raise every available non-frivolous defense. Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). Therefore, this allegation is denied and dismissed.

Applicant failed to prove counsel was ineffective for failing to object to the solicitor's comment that "the Masters Inn will always have a room available with a single bed." (Trial Tr. p.360). This Court finds the comment did not constitute a 'Golden Rule violation.' See State v. Reese, 370 S.C. 31, 38, 633 S.E.2d 898, 901 (2006). "A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice.") There is no proof that this argument falls within a prohibited effort to have the jurors put themselves in the victim's place.

This Court also finds that the comment at issue was not sufficiently prejudicial to warrant reversal. The comment constituted an inference on the evidence presented that supported the State's theory of the case. See Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007) (concluding any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsel's statements as evidence). Again, in the context of the offense for which he was charged and convicted, and the evidence before the jury, the Applicant has failed to prove that the failure to object to this comment likely changed the outcome of the trial. Therefore these allegations are denied and dismissed.

WPA #14

F.

Applicant's allegation that counsel was ineffective for failing to object to the trial judge's allegedly erroneous and prejudicial jury instruction on reasonable doubt is without merit. [Where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by

counsel's failure to object. Pauling v. State, 350 S.C. 278, 285, 565 S.E.2d 769, 772 (2002).] This Court finds any objection to the trial judge's instruction on reasonable doubt would have been ill-founded. State v. Darby, 324 S.C. 114, 115, 477 S.E.2d 710 (1996) ("At trial, the trial judge defined reasonable doubt as "the kind of doubt that would cause a reasonable person to hesitate to act." This charge was approved by this Court in State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991)."). Therefore this allegation is denied and dismissed.

G.

Except as discussed above, this Court finds that the Applicant affirmatively abandons 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.

WAH #15

CONCLUSION

Based on all the foregoing, 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), SCRCP; 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 30th day of May, 2014.

William P. Keesley

#16

WILLIAM P. KEESLEY
Presiding Judge
Eleventh Judicial Circuit

Edgefield, South Carolina

FILED
2014 JUN -3 P 12:20
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2013CP3200099

Scott D Parker #197951	State Of South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

6/6/2014

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only