

The Rucker Law Firm, LLC
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Greenville, SC 29607
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January 30, 2017

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S.C. SUPREME COURT

Attn: Ashli Thompson
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: The State of South Carolina, Respondent, v. Robert Lee, Jr., Appellant,
#34883
Case No. 2014-CP-42-1251

Dear Ms. Thompson:

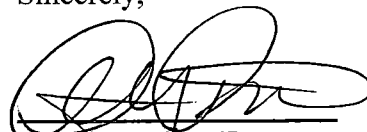
Per our conversation, enclosed for filing is a notice of appeal in the above case. This notice was served on the respondent on August 25, 2016. As we discussed, your office does not show receipt of the notice of appeal previously, so we are re-sending to your office for filing.

Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.

Please let us know if anything further is required. Thank you for your assistance in this matter.

Sincerely,



Brandt Rucker, Esq.
Allyson Rucker, Esq.
The Rucker Law Firm, LLC

128 Millport Circle, Suite 200
Greenville, SC 29607
Attorney(s) for Appellant

cc: Alicia A. Olive, ESq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Circuit Court

The Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-CP-42-1251

State of South Carolina,

Respondent,

v.

Robert Lee, Jr. , #348883,

Appellant.

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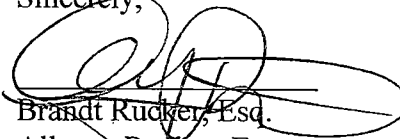
S.C. SUPREME COURT

Notice of Appeal

Robert Lee, Jr. appeals the order of the Honorable R. Ferrell Cothran, Jr., dated July 11, 2016. Appellant received written notice of entry of this order on July 27, 2016.

August 25, 2016

Sincerely,



Brandt Rucker, Esq.

Allyson Rucker, Esq.

The Rucker Law Firm, LLC

128 Millport Circle, Suite 200

Greenville, South Carolina 29607

(864) 271-9925

Attorney(s) for Appellant

cc:

Other Counsel of Record:

Alicia A. Olive, Esq.

S.C. Attorney General's Office

PO Box 11549

Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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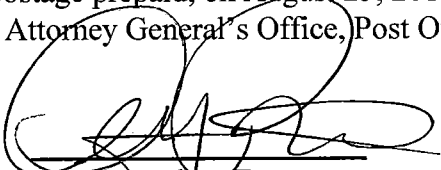
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S.C. SUPREME COURT

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 August 25, 2016, addressed to its attorney of record, Alicia A. Olive, Esq., SC Attorney General's Office, Post Office Box 11549, Columbia, South Carolina 29211.


Brandt Rucker, Esq.
Allyson Rucker, Esq.
The Rucker Law Firm, LLC
128 Millport Circle, Suite 200
Greenville, SC 29607
Attorney(s) for Appellant

August 25, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Robert Lee, Jr., #348883,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

Case No. 2014-CP-42-2364

ORDER OF DISMISSAL
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S.C. SUPREME COURT

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This matter comes before the Court by way of an Application for Post-Conviction Relief filed June 13, 2014. Respondent made a Return on November 18, 2014. The Court convened an evidentiary hearing into the matter on January 11, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by J. Brandt Rucker, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Brendan M. Delaney, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In October 2010, the Spartanburg County Grand Jury indicted Applicant for murder (2010-GS-42-5387). Brendan M. Delaney, Esquire, ("Counsel") represented Applicant. November 28-December 1, 2011,

Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to a term of life imprisonment.

Applicant filed a timely notice of appeal. Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Lee, Op. No. 2014-UP-169 (S.C. Ct. App. filed April 16, 2014). The Remittitur was returned to the circuit court on May 2, 2014.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel,
2. Due Process violations.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

A. Summary of Testimony

Applicant testified that Robert Hall was initially appointed to represent him. Applicant testified he met with Counsel about four or five times. He stated that the first couple of meetings were not long but that the last two meetings were longer.

Applicant testified the first couple of meetings were short and lasted approximately fifteen minutes. Applicant testified he underwent a competency evaluation and that he was found

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competent to stand trial. He stated that Counsel did not mention an insanity defense. Applicant testified that he was offered a plea of forty-five years and he told Counsel he would not plead guilty. Applicant testified regarding the statements that he made to authorities. Applicant testified that a hearing was held before trial in which two of the statements were addressed. Applicant testified that when he gave the first statement to police he thought it would look good if he cooperated.

Applicant testified that at the first interview he did not ask for an attorney and did not invoke his right to remain silent. Applicant testified the officers informed him that his mother was in the building and she wanted to talk to him. Applicant testified that he gave his second statement after he had invoked his right to counsel. Applicant stated he did not know he was not supposed to talk to them. Applicant stated he had already signed up for an attorney and that he asked where his attorney was. He stated that the officer asked another officer to get his attorney.

Applicant testified he did not realize his statements were hurting him. Applicant stated he did not feel he was able to go over all of the detail with Counsel. He testified he did not feel prepared. Applicant testified that Counsel should have objected to self-defense being taken off the table. Applicant also testified that the State referenced a photo that was not admitted into evidence in his closing argument.

Applicant mentioned a letter that the victim had allegedly written on May 16 to Applicant but stated Counsel could not get the letter in. No letter was presented at the PCR hearing.

Counsel testified that he took over the case when Hall was conflicted out. He stated he was appointed about a year before trial and that he had plenty of time to prepare. Counsel testified that he recalls he probably met with Applicant approximately half a dozen times before

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trial. He stated that Applicant was not cooperative during the course of his representation. Counsel testified that he requested an evaluation because Applicant was not being responsive in their meetings. Counsel testified he filed Brady and Rule 5 motions for discovery and that the State timely provided discovery. Counsel testified he tried to review all discovery with Applicant but that Applicant did not want to see it and that Applicant "couldn't handle it." Counsel testified he would start reviewing the discovery with Applicant and Applicant would shut down and did not want to see it. Counsel testified that he went over the materials with Applicant's mother and that he took her back with him once when he met with Applicant. Counsel testified that he discussed with Applicant the elements of the charges and what the state was required to prove. Counsel testified that he recalls a forty-year plea offer being made.

Counsel testified the main evidence against Applicant at trial was that there was a bloody palm print on the wall of the victim's apartment and the print belonged to Applicant; Applicant fled and was found at a female friend's house; Applicant showed investigators where he tossed the murder weapon in the river, though it was not recovered; someone saw Applicant's car suspiciously parked behind the victim's apartment; and the victim's body was found on his family's land.

Counsel testified that his main strategy at trial was to try to discredit the State's witnesses, he had no alibi and there was not much else that he could rely on for the defense. Counsel testified that it was Applicant's decision not to testify and they discussed that his prior inconsistent statements could be used against him. Counsel testified that a hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), at his request, to determine whether Applicant's statements were admissible, but that the trial judge ultimately ruled the statements

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were admissible. He testified that he made objections when he felt that something objectionable was raised during trial.

Counsel testified he called the witness he thought could testify to the victim's propensity for violence. He testified that Sheera Lee testified regarding the victim's propensity for violence. He stated that the issue had not come up before with those witnesses, but that they were present in the courtroom and he had an opportunity to discuss it with them at recess. He stated that the first time he spoke with Sheera was at trial.

On cross-examination, Counsel was asked about whether he objected to the solicitor's comments in closing. Counsel stated that he did not recall any statement as being objectionable. Counsel stated he did not recall having a strategic reason for not objecting, but that he did not think there would be a basis for it. Counsel stated he did not ask for a jury charge on the defense of accident because the victim had three stab wounds and one of the injuries was consistent with the knife being twisted.

Counsel testified that he did not object to the solicitor's statement in closing that the knife had been twisted, but agreed that the forensic pathologist testified that one of the wounds indicated that either the knife turned or the person turned. (Tr. p. 506, lines 9-15). Counsel also agreed that the forensic pathologist's testimony concerning how the victim's body appeared was consistent with the solicitor's comments in closing. (Tr. p. 496, lines 4-7; p. 549, lines 4-6).

B. Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective

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assistance of counsel as a ground for relief, the applicant must prove 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Regarding Applicant's claims of ineffective assistance of counsel, this Court finds the Applicant has failed to meet his burden of proof. This Court finds that Applicant's attorney demonstrated the normal degree of skill, knowledge, professional judgment, and representation that are expected of an attorney who practices criminal law in South Carolina.

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Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler, 286 S.C. 441, 334 S.E.2d 813. This Court further finds counsel adequately conferred with the Applicant, conducted a proper investigation, and provided thorough representation. This Court finds that counsel's representation did not fall below an objective standard of reasonableness.

Failure to suppress statements

Applicant alleges that Counsel was ineffective for failing to suppress his statements to police. This Court finds this allegation is meritless. "A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Parker, 381 S.C. 68, 75, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007)). "The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (citing State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct.App.2007)). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007)). "In criminal cases, appellate courts are bound by fact finding in response to preliminary motions where there has been conflicting testimony or where the findings are supported by the evidence and not clearly wrong or controlled by an error of law." State v. Parker, 381 S.C. 68, 74, 671 S.E.2d 619, 622 (Ct. App. 2008) (quoting State v. Asbury, 328 S.C. 187, 193, 493 S.E.2d 349, 352 (1997)). In general, "[i]n determining whether a defendant's will was overborne in a particular case, the court[s] [have] assessed the totality of all the surrounding circumstances both the

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characteristics of the accused and the details of the interrogation." Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). The factors courts consider include (1) the youth of the accused, (2) his education and intelligence, (3) the lack of any advice to the accused regarding his constitutional rights, (4) the length of detention and whether questioning was prolonged or repeated, and (5) use of physical punishment including the deprivation of food or sleep. Schneckloth, 412 U.S. at 226-27 (collecting cases). However, none of these factors is determinative. Id.

Here, Counsel made a pretrial motion pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the admissibility of Applicant's statements made to authorities prior to trial. The court ruled that the statements made on June 16 and 30 were freely and voluntarily made. The record reflects Applicant's statements were made voluntarily and were not the product of coercion, deception, or intimidation. See Moran v. Burbine, 475 U.S. 412, 421 (1986) (holding Miranda waiver must be voluntary "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception."). Applicant never asked for the interview to end, and he never invoked his right to counsel. Applicant testified at the PCR hearing that he never asked for counsel during these interviews. Applicant was provided his preinterrogation rights several times, the investigator went over them again directly prior to the June 16 interview and testified he appeared to understand those rights, and Applicant never exercised those rights. The June 16 interview took place at City Hall, was video-recorded, and lasted less than an hour and a half. Counsel challenged the June 30 statement and trip to the river based on the fact that Applicant submitted an application for a public defender on June 17. However, the trial judge found that there was no evidence that any one in law enforcement was

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aware he had applied for an attorney, and Applicant never indicated to law enforcement that he wished to have counsel appointed or that he wished to have counsel present. Further, Applicant testified at the PCR hearing that he never asked to have his attorney present.

This Court finds Counsel made the appropriate motion to determine the admissibility of the statements, and that Applicant has failed to show any deficient performance in this regard. Moreover, this Court finds Applicant has failed to show any alleged deficiency prejudiced him. As stated above, Applicant signed the appropriate waiver forms and made no indication to his interviewers that he did not understand. Applicant never invoked his right to an attorney or asked the investigators to cease the questioning. There is no indication in the record, and Applicant provided no testimony at the PCR hearing, that his confession was involuntary. Therefore, this Court finds there is no reasonable probability that but for the alleged error of Counsel, the result of the proceeding would have been different. Accordingly, this allegation is without merit and is hereby denied and dismissed.

Failure to adequately consult with Applicant and failure to prepare

Applicant provided testimony at the PCR hearing that Counsel failed to adequately consult with him prior to trial. Even if meetings with Applicant were brief, "this fact alone is not indicative of inadequate trial preparation." Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) ("[B]revity of time spent in consultation, without more, does not establish that counsel was ineffective.")). To establish counsel failed to adequately prepare for trial, applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Moorehead v. State, 329 S.C. 329, 495 S.E.2d 768 (1998).

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329, 496 S.E.2d 415 (1998) (failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result). When claims of ineffective assistance of counsel are based on lack of preparation time, an applicant challenging his conviction must show specific prejudice resulting from counsel's lack of time to prepare. U. S. v. LaRoache, 896 F.2d 815 (4th Cir. 1990). Counsel stated he met with Applicant at least half a dozen times. He stated that he tried to review all of the discovery with Applicant but that Applicant would shut down and could not handle it. Concerned over this, Counsel had Applicant undergo a competency evaluation. The results of the evaluation were made part of the trial court record, and provided that Applicant was competent to stand trial. Further, Counsel conducted an investigation that was reasonable under the circumstances. Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011) (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)).

This Court finds trial counsel conducted a proper investigation, adequately conferred with Applicant, and was competent in his representation. Applicant has failed to satisfy his burden of proving that Counsel was deficient in this regard.

This Court further finds Applicant has failed to show he was prejudiced any alleged defect in this regard. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Even without the confession, the evidence against Applicant, though much of it was circumstantial, was substantial. Applicant and the victim had been in a lengthy relationship, had previously lived together, and had children together. Applicant's bloody palm print was

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found in the victim's apartment after she went missing, which, according to testimony, appeared to have been cleaned. The blood from the palm print matched the victim. A knife was missing from a butcher block in Applicant's home. A neighbor testified she heard commotion coming from the victim's apartment that sounded like someone was fighting and saw Applicant's car suspiciously parked behind the victim's apartment the morning following the night she was last seen alive. Another neighbor stated they saw him carry a heavy blanket to the car. Applicant's vehicle had debris from his family's property on Tibbs Dr. There was testimony at trial that the victim had recently broken up with Applicant and spent time in a safe home. Applicant's family members saw him parked on the Tibbs property the morning of the victim's disappearance, and he stated he was there looking for discarded items. Lastly, the victim's body was found on the Tibbs property and the cause of death was stabbing. Applicant has failed to point to any additional information that Counsel could have uncovered, and has failed to show that but for any alleged error of Counsel, the results of the trial would have been different. Accordingly, this Court finds this allegation is without merit and it his hereby denied and dismissed.

Jury Instructions

Applicant contends that Counsel was ineffective for failing to request a jury charge on accident and for not objecting to taking the self-defense charge off the table. This Court finds this allegation is without merit. "The law to be charged to the jury is determined by the evidence presented at trial." State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (citing State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989)). "The trial judge should charge only the law applicable to the case, as the purpose of jury instructions is to enlighten the jury. State v. Bee, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989) (citing State v. Fair, 209 S.C. 439, 40 S.E.2d 634 (1989)).

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(1946); State v. Rivers, 186 S.C. 221, 196 S.E. 6 (1938)). Providing instructions to the jury which do not fit the facts of the case may tend to confuse the jury. Id.

Self-defense is shown if:

(1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life, and; (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). "A self-defense charge is not required unless it is supported by the evidence." State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008).

Counsel requested an instruction on self-defense, voluntary manslaughter, and involuntary manslaughter. The judge declined to charge self-defense, finding self-defense was not applicable because there was no evidence that Applicant feared for his life or was actually in danger of losing his life, and the evidence established that he was in control of the deadly weapon. Counsel formally objected to the judge's refusal to charge self-defense, and that was the sole issue raised in Applicant's direct appeal. The Court of Appeals affirmed Applicant's conviction. This Court finds this allegation that Counsel was deficient for failing to object to the trial judge's refusal to charge self-defense is without merit. Counsel requested the charge and preserved his objection for appellate review. Accordingly, Applicant has failed to show either deficiency or prejudice with respect this allegation.

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This Court likewise finds Applicant has failed to show Counsel's performance was deficient due to his failure to request a charge of accident. "For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon. State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (finding no error for failing to charge accident where defendant contended the gun accidentally discharged but presented no evidence that he was acting in self-defense (citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945))). Counsel testified he did not request the defense of accident because the victim was stabbed multiple times. In addition, one of the wounds was consistent with the knife being twisted. Because the trial judge determined that there was no evidence that Applicant was acting in self-defense, there was likewise no evidence supporting a defense of accident. See Palacio v. State, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments"); see also Arnette v. State, 306 S.C. 556, 557, 413 S.E.2d 803, 804 (1992) (counsel not ineffective for failing to advise of potential defense where no evidence exists to support the defense).

Likewise, Applicant has failed to show prejudice with regard to this allegation. Given the trial judge's refusal to charge self-defense and the Court of Appeals' affirmation of that refusal, there is no reasonable probability that but for the alleged error, the result of the proceeding would have been different. See State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975) ("No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence.").

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Accordingly, Applicant has failed to show either deficient performance or prejudice with regard to this allegation. Therefore, this allegation is without merit and is hereby denied and dismissed.

Closing Arguments

Lastly, Applicant alleges Counsel was ineffective for failing to object to the solicitor's closing argument that allegedly referred to photographs that were not in evidence, and referring to the injury as being the result of a twisting knife.

This Court notes that where an objection is made to a closing argument, the trial court has broad discretion in dealing with the propriety of the solicitor's closing argument. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). In addition, Appellate courts will not disturb the trial court's ruling regarding a closing argument unless there is a clear abuse of discretion. Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (citing State v. Rudd, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct. App. 2003)). A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). "Unquestionably, the solicitor was permitted to comment on the evidence adduced during trial and the inferences to be drawn from it." Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (citing State v. Pitts, 256 S.C. 420, 428, 182 S.E.2d 738, 742 (1971)). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2003).

(2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997).

Here, as a result of Counsel's objections at trial, photographs of the victim showing her intestines protruding from the wound in her abdomen were excluded from evidence. In closing arguments, the solicitor made the comment: "I wish you could have seen the picture of the body of Ms. Rosa as she was pulled out of the dirt, her intestines bloating out of her body." (Tr. p. 549, lines 4-6). The solicitor also commented that the wound was a "stab with a twist." (Tr. p. 547, lines 23-p. 548, line 4). Counsel testified that he did not object to the solicitor's statement in closing that the knife had been twisted, but agreed that the forensic pathologist testified that the one of the wounds indicated that either the knife turned or the person turned. (Tr. p. 506, lines 9-15). Counsel also agreed that the forensic pathologist's testimony concerning how the victim's body appeared was consistent with the solicitor's comments in closing. (Tr. p. 496, lines 4-7; p. 549, lines 4-6). This Court finds Applicant has failed to show that the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. See Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (reversing grant of PCR where solicitor's argument comparing applicant to cockroaches and calling him dirty did not so infect trial with unfairness as to deny applicant due process and noting substantial evidence); Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) (affirming denial of PCR and finding that though counsel was deficient for failing to object to improper statement, there was no prejudice because evidence showed applicant had made a damaging statement, child victim had gonorrhea, and applicant had access to her). Both of the solicitor's comments were supported by the evidence introduced at

trial. The forensic pathologist had already testified about the extent of the victim's injuries, including the bloating of her intestines, and the fact that the stab was consistent with either her body twisting or the assailant twisting the knife. The solicitor's comments did nothing more than comment on the inferences to be drawn from the evidence adduced at trial. Accordingly, this Court finds Applicant has failed to show Counsel's was deficient for not objecting to the solicitor's closing argument.

Likewise, Applicant has failed to show that there is a reasonable probability that but for the alleged deficiency, the outcome of the trial would have been different. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). Even though the solicitor mentioned that a photograph had been excluded from evidence, the jury had already heard medical testimony about the injuries and about the appearance of those injuries. The solicitor's comments contained no description that had not already been presented to the jury through testimony at trial. Furthermore, the trial judge instructed the jury that closing statements are not evidence. (Tr. p. 86).

Accordingly, this Court finds Applicant has failed to establish either deficiency or prejudice with respect to this allegation. Therefore, the allegation is without merit and is denied and dismissed.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

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IV. CONCLUSION

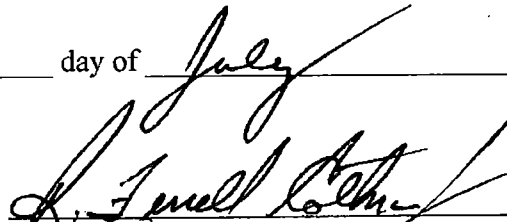
Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

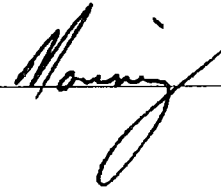
AND IT IS SO ORDERED this 11 day of July, 2016.


 THE HONORABLE R. FERRELL COTHRAN,
 Presiding Judge

M. HOPE BLACKLEY

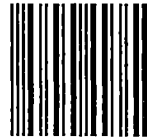
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S.C. SUPREME COURT

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