W
WALLER LAW GROUP

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SEP 21 2017
S.C. SUPREME COURT

September 19, 2017

Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Terrell Scott vs. State of South Carolina
C/A No: 2012-CP-38-0968

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Scott in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: Ruston W. Neely, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
SEP 21 2017
S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Maitè Murphy, Circuit Court Judge

2012-CP-38-00968

Terrell Scott, #313126,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Terrell Scott, #313126, appeals the Amended Order of Dismissal denying his Application for Post-Conviction Relief filed June 9, 2017, and served on counsel by letter dated August 31, 2017, issued by the Honorable Maitè Murphy, Presiding Judge, First Judicial Circuit.

Jonathan D. Waller
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ATTORNEY FOR PETITIONER

This 6 day of September, 2017.

Other Counsel of Record:
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2012-CP-38-00968

Terrell Scott, #313126,

Appellant,

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STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Ruston W. Neely, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 19 day of September 2017, to his office located at P.O. Box 11549, Columbia, SC 29211.

Lauren Waller

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	IN THE COURT OF COMMON PLEAS FIRST JUDICIAL CIRCUIT
Terrell Scott, #313126, Applicant, v. State of South Carolina, Respondent.	2012-CP-38-0968 **AMENDED ORDER OF DISMISSAL**

This matter comes before the Court pursuant to Applicant's Motion Pursuant to Rule 59(e) SCRCP, to Amend filed June 20, 2016. An Order of Dismissal was issued by the Court on June 2, 2016. In his motion Applicant asks the Court to amend its ruling to include an analysis on the allegation regarding the investigation into witness Daniel Young. This Court grants the motion and substitutes the prior order with this Amended Order of Dismissal.

Applicant filed an application for post-conviction relief (PCR) filed June 15, 2012. Applicant then filed a second application on July 31, 2012 (2012-CP-38-01158). Respondent requested that the cases be merged. On January 11, 2013, the Court issued an order dismissing the second application while considering it an amendment to the first application. Respondent filed a Return on January 14, 2013, requesting an evidentiary hearing be convened. Jonathan D. Waller, Esquire, was appointed by the Orangeburg Clerk of Court. Applicant filed an amended application on May 23, 2014, setting forth the allegations. An evidentiary hearing was held on May 21, 2015, at the Dorchester County Courthouse. Applicant was represented by Counsel Waller. J. Clayton Mitchell, Esquire, of the South Carolina Attorney General's Office represented Respondent.

ATTORNEY GENERAL'S OFFICE

RECEIVED 6-14-17

ADMINISTRATIVE INSTRUCTIONS

_____FILE _____END

_____HAND _____MADE

_____REPLY _____.

_____OTHER _____TRANSCRIPT

_____PEN RECORDS _____CLERK RECORDS

_____OTHER: _____

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At the PCR hearing, Applicant testified on his own behalf. Also testifying were Applicant's trial counsel Michael R. Culler, Jr., Esquire, and Glenn Walters, Sr., Esquire. This Court had before it the Orangeburg County Clerk of Court records, Applicant's South Carolina Department of Corrections records, appellate records, the PCR application, the Return, the amended application, and the transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Orangeburg County Clerk of Court. Applicant was indicted at the April 2007 term of the Orangeburg County Grand Jury for Murder (2007-GS-38-0640). During the May 2009 term of the Orangeburg County Grand Jury, Applicant was indicted for Armed Robbery (2007-GS-38-0480). Counsel Walters and Counsel Culler represented him. On May 12-14, 2009, Applicant proceeded to a jury trial before the Honorable James C. Williams, Jr. On May 15, 2009, Applicant was found guilty of Armed Robbery and not guilty of Murder. Judge Williams sentenced Applicant to thirty (30) years' imprisonment for Armed Robbery.

Applicant appealed his conviction, and following the submission of an Anders brief, the South Carolina Court of Appeals dismissed the appeal. State v. Scott, 2012-UP-136 (Ct. App. filed February 29, 2012). The Remittitur was sent on March 16, 2012.

In this action, Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Ineffective assistance of trial counsel in:
   a. Failing to file notice of alibi defense;
   b. Failing to request an alibi jury instruction, and/or object to the jury instructions;
   c. Failing to object to the solicitor's statements during closing arguments;
   d. Failing to investigate Applicant's contact with Witness Daniel Young;

e. Failing to object and/or ask for a curative instruction to Witness Daniel Young's testimony;
f. Failing to properly show bias of Witness Daniel Young;
g. Failing to challenge indictment before the jury was sworn;
h. Failing to properly conduct and prepare for the Neil v. Biggers hearing;
i. Failing to object to the lineups entered into evidence;
j. Failing to make a motion for directed verdict, and failing to renew all objects at close of all evidence;
k. Failing to object to the gun being entered into evidence;
l. Failing to retain an expert in eyewitness identification.

II. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the 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, 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, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 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. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use 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, courts measure an attorney'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.

III. 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 has reviewed the Clerk of Court records regarding the subject convictions, the transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. 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.

Alibi

Applicant alleges Counsel were ineffective in failing to file a notice of alibi defense as required by Rule 5, SCRCrimP. He also alleges Counsel were ineffective in failing to request an alibi jury instruction. Applicant testified that he relayed information regarding an alibi to Counsel Walters. He testified at trial and at the PCR hearing that he was with his wife, Ieisha Scott, at the time of the incident. Counsel Walters testified that Applicant alluded to an alibi during their discussion. Counsel Walters explained that Applicant could not keep his story straight and kept confusing the dates on which he was allegedly shopping with his wife. He described Applicant's statements on the issue as a moving target. Counsel Walters also noted Applicant's wife was reluctant to help or give any testimony. Counsel Walters testified that he did not know what Applicant would say when he was put on the stand.

Applicant's mother, Angel Fields, also testified in his defense. She testified that Applicant was at home with her the night of December 23, 2006. But on cross examination by

the solicitor, Ms. Fields conceded that Applicant may have gone out that night to buy a pack of cigarettes. (Trial Tr. p. 686, lines 9-25). Ms. Fields was also confused about when Applicant was married, testifying that he was married on either December 16th or December 18th of 2003. This testimony conflicted with Applicant's testimony. Counsel Walters cited these credibility concerns in his justification for not pursuing an alibi jury instruction. Ms. Fields also did not come forward with the alleged alibi information until around three months after the incident.

Notice of Alibi

This Court finds Applicant failed to meet his burden in proving Counsel were ineffective in failing to file a notice of alibi. "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only *less likely* the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). Applicant has failed to provide this Court with sufficient evidence to establish a *physical impossibility* that he was involved in the robbery and murder.

Counsel Walter's testimony is credible and persuasive on the issue. Applicant was unable to provide a firm alibi and confused the dates in his discussions with Counsel Walters. This Court questions Applicant's credibility just as Counsel did in his representation. Ms. Fields's testimony at the trial does not form the basis for an alibi defense either because she conceded that Applicant could have left the house to buy cigarettes. (Trial Tr. p. 667, lines 9-18; p. 686, lines 17-20). Ms. Fields was also not able to account for Applicant's whereabouts through the night as she had to have gone to sleep at some point. This Court is further persuaded by Applicant's trial testimony where he refers to the night in question as Christmas Eve instead of

December 23rd. (Trial Tr. p. 667, line 8 – p. 668, line 17). It was reasonable for Counsel not to have filed a notice of intent to seek an alibi defense.

This Court was also not presented with any evidence to show that if Counsel had filed a notice of alibi defense that he would not likely have been convicted. Rule 5, SCRCrimP provides a remedy for the failure to file a notice: "If either party fails to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by either party." Both Applicant and his mother were able to testify to the alleged alibi. The more appropriate challenge is to Counsel's failure to request a jury charge on alibi. There is also overwhelming evidence of Applicant's guilt which is fully discussed below.

Alibi Jury Instruction

This Court also finds Applicant failed to meet his burden in proving Counsel were ineffective in failing to request an alibi jury instruction. The Court incorporates its analysis above in addressing this allegation. "To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime." State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). "A simple denial of one's presence at the scene does not constitute an alibi." Id.

It was reasonable for Counsel to not request a jury charge on alibi. Applicant testified that he was shopping with his family that day. (Trial Tr. p. 654, line 15 – p. 655, line 3). He then recounts that he had dinner at his house, played dominos, and then went to bed. (Trial Tr. p. 658, lines 9-13). Ms. Fields testified that Applicant could have left the house sometime that night to buy cigarettes. Importantly, Applicant testified that he went shopping with his family and was at the house on *Christmas Eve*. (Trial Tr. p. 658, lines 14-16). The crimes were committed either

late December 23rd or in the early morning hours of December 24th. The testimony is insufficient to warrant an alibi jury charge because it fails to establish that Applicant could not have been present at the incident. Counsel Walter's testimony that he did not believe Applicant's testimony to constitute an alibi is persuasive.

It is clear Counsel's strategy was to impeach the cooperating codefendants and to strongly emphasize the lack of physical evidence. Counsel Walters explained at the hearing that he was throwing everything he could at the State's case and that included presenting Applicant and his mother's testimony to the jury. Counsel did not pursue the alibi defense because he had other more viable defense strategies. Therefore, Counsel was not ineffective in failing to request the trial court charge the jury on an unsubstantiated alibi.

Even assuming Counsel was deficient in failing to request an alibi charge, he has not met his burden in proving the result of the trial would likely have been different. As noted, there is overwhelming evidence of Applicant's guilt including the testimony from his two codefendants implicating him as the ringleader. See Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013) (applicant failed to show prejudice resulting from trial counsel's failure to request an alibi jury instruction where there was overwhelming evidence of guilt). This allegation is denied and dismissed.

Solicitor's Closing Argument

Next, Applicant alleges Counsel were ineffective in failing to object to comments made by the solicitor in his closing argument. Specifically, he refers to the following:

> I asked him – you know, he brought up the fact that he'd just gotten married. Okay. And I can't remember if he December 16th or 18th. It was one of those two dates, 16th or 18th, 2006. They had just gotten married. That's why I was spending so much time with my newlywed wife and that's why I know I was clean shaven at that time because I thought – well, you know, not much I can do with that. You know, we don't hear from the wife. Because if I obviously would have asked the

> question of her, she would have had to answer. And I assume he didn't think that his mother was going to be asked that question.

(Trial Tr. p. 784, line 14 – p. 785, line 2). Applicant argues that it was improper for the solicitor to comment on Applicant's wife not testifying because it improperly shifts the burden of proof from the State to the defendant.

The State's closing argument must be confined to the evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 468 S.E.2d 620 (1996).

This Court finds Applicant failed to meet his burden in proving Counsel deficient. Counsel Walters did not believe the comments warranted an objection. Counsel Walters noted that the solicitor is prohibited from commenting on whether the defendant testifies. He explained that he believed he had a read on the jury and that the defense was in good shape. Applicant was acquitted of the murder charge. Counsel Walters testified that objecting during closing argument can do more bad than good and that he does not routinely object during closing arguments. This was a reasonable strategy in not raising an objection.

This Court does not find it likely that an objection to the comments would have been sustained. The law is clear that a solicitor cannot comment on a defendant's failure to testify at trial Doyle v. Ohio, 96 S.Ct. 2240 (1976); Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001). But, the solicitor is allowed to comment on a defendant's failure to present witnesses at trial when defendant presents evidence *and* there are witnesses accessible to him who are or should be aware of material and relevant facts and whose testimony would presumably aid him. Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998). This Court finds the objection would likely have been overruled as the solicitor was within his bounds to comments on Applicant's failure to call his wife as a witness.

Further, Applicant has failed to show how an objection would have likely changed the result of the trial. See Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) (holding the State's improper argument did not infect the trial with unfairness and result in prejudice when the argument "came at the very end of closing argument and [was] limited in duration"). Here, the solicitor's comment was only a couple of sentences long and was made near the end of his argument and therefore did not prejudice Applicant. Finally, the Court still finds that overwhelming evidence bars it from finding any prejudice. See State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (App. 2000), aff'd in part, rev'd in part 564 S.E.2d 103 (2002) (employing a harmless error analysis when a defendant's failure to call a witness to corroborate his alibi defense, when the defendant neither testified nor called any witnesses). This allegation is denied and dismissed.

Witness Daniel Young

Next, Applicant alleges Counsel were ineffective in failing to investigate Applicant's communications with Witness Daniel Young. He also alleges Counsel were ineffective in failing to object to Young's testimony regarding Applicant's alleged prior bad acts and in failing to highlight Young's alleged bias. Young was a cooperating witness for the State and, testified that Applicant previously planned this robbery and had actually offered Young an opportunity to participate in the robbery. (Trial Tr. p. 494, lines 6-22). Young testified that Applicant's codefendant, Maurice Cheeseboro, was also involved in these discussions. (Trial Tr. p. 495, lines 18-22). Young spoke to Applicant after the robbery and murder and was told that it was successful but that the victim flinched like he wanted to reach for something so Applicant shot the victim. (Trial Tr. p. 498, line 3 – p. 499, line 8). Applicant recounted the incident to Young while they were in jail together. (Trial Tr. p. 503, lines 2-9).

The Court will address the allegations regarding Young in turn.

Investigate

Applicant alleges Counsel were ineffective in failing to investigate Applicant's contact with Young while in the Orangeburg County Detention Center. "Criminal 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) (internal citations omitted). Applicant has not provided this Court with any evidence that could have been discovered by Counsel regarding the jail conversation. Counsel Culler testified he spoke to Young's federal public defender in hopes of learning more about Young and Scott's discussion, but he did not discover any helpful information. On cross examination of Young, Counsel Culler questioned Young on his version of the jail conversation. As noted below, Counsel Culler emphasized that Young entered into a plea deal with the State in exchange for his full cooperation. He hoped to highlight Young's bias and show that he would say anything that fit with the State's theory of the case to have his charges dropped. Applicant has not provided this Court with any testimony as to the circumstances regarding Applicant and Young's conversations while at the jail. This allegation rests on speculation. See Moorehead v. State, 329 S.C. 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."). Applicant failed to present any evidence to this Court as to how this investigation could have changed the result of the trial.

Alleged Prior Bad Acts

Applicant alleges Counsel were ineffective in failing to object when Young testified that Applicant was high on cocaine during the robbery. Specifically Young testified: "He was telling me [robbery] went down, but he got, he was saying that they did the robbery and that he, you know what I'm saying, due to the fact he was on cocaine, but Scar, no, Harry, I meant, was steady flinching . . ." (Trial Tr. p. 498, lines 4-10). He then mentioned the cocaine again: "Like he wanted to reach for something. So, he had to do what he had to do because he was on cocaine." (Trial Tr. p. 498, lines 14-15).

Evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). This Court finds this testimony does not implicate Rule 404(b) and does not constitute impermissible Lyle testimony. The testimony regarding cocaine use is relevant for the jury to consider Applicant's motive and intent. See State v. Dickerson, 341 S.C. 391, 397, 535 S.E.2d 119, 122 (2000)(Evidence is not improper if the drug use has some relevant connection to the crime charge.). This testimony was relevant to Applicant's state of mind. The testimony would likely also be admissible under the theory of *res gestae*, and would also survive an objection raised under Rule 403, SCRCP. Counsel were not ineffective in failing to object to the testimony regarding cocaine. Applicant also failed to show he was prejudiced by this testimony. It was not propensity evidence and was not evidence to prove his guilt.

Bias

Next, Applicant alleges Counsel were ineffective in failing to highlight Young's bias on cross-examination. The Court finds this contention without merit.

A defendant has the right to cross-examine a witness concerning bias under the Confrontation Clause. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991). The Confrontation Clause permits a defendant to cross-examine a State's witness as to possible sentences faced when there exists "a substantial possibility the witness would give biased testimony in an effort to have the solicitor highlight to a future court how the witness cooperated in the instant case." State v. Sims, 348 S.C. 16, 558 S.E.2d 518 (2002); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (App. 2004). " 'On cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brewington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (citing 98 C.J.S. Witnesses § 560a). Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by any other evidence. SCRE 608(c); State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991).

Here, the very first question Counsel Culler asked Young was in reference to his agreement with the federal government. (Trial Tr. p. 506, lines 3-6). He then proceeded to have Young read his plea agreement into the record and to explain it to the jury. (Trial Tr. p. 506, line 25 – p. 511, line 22). This went on for pages in the transcript and shows that Counsel Culler absolutely highlighted that Young could be giving favorable testimony to the State in hopes of helping himself in the future. It was also Counsel Culler's strategy to show the jury that Young would adopt any narrative the State presented him with because he was so dependent on them in receiving a downward departure on his charges.

Further, Applicant has not presented this Court with any other means of highlighting Young's bias. This allegation is denied and dismissed with prejudice.

Indictment Challenge

Next, Applicant alleges Counsel were ineffective in failing to challenge the indictments prior to the jury being sworn. Applicant cites State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005), in support of his argument. This allegation is without merit.

Subject matter jurisdiction is the power of a court to hear a particular class of cases. State v. Gentry, 363 S.C. at 100, 610 S.E.2d at 498. An applicant may challenge the subject matter jurisdiction of the trial court at any time. Id. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Id. at 101, 610 S.E.2d at 499. Thus, an applicant challenging subject matter jurisdiction must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Furthermore, "subject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts[.]" Id. at 101, 610 S.E.2d at 499. An indictment is a notice document and any insufficiency in the indictment does not deprive the circuit court of jurisdiction. Id. at 102, 610 S.E.2d at 500. Rather, challenges to the indictment must be raised prior to the swearing of the jury or they are waived. Id. (citing S.C. Code Ann. § 17-19-90). Thus, a PCR applicant may only raise challenges to the sufficiency of an indictment by alleging ineffective assistance of counsel for failing to properly move to quash the indictment in accordance with section 17-19-90. Applicant has failed to show any issues with the indictments. He was on notice of the charges against him and the circuit court clearly exercised proper jurisdiction over the case.

Neil v. Biggers/Lineups and In Court Identification

Applicant further alleges Counsel were ineffective in their handling of the Neil v. Biggers hearing. He also alleges Counsel failed to object to the in court identification.

Neil v. Biggers Hearing/Lineups

Applicant argues Counsel failed to properly conduct and argue the Neil v. Biggers hearing. Counsel Culler and Counsel Walters both handled the hearing for the defense. Applicant did not show up for the pretrial hearing and a bench warrant was issued by the trial court. An extension hearing was held to determine the admissibility of the identifications and lineups. Seven witnesses testified and were cross examined. Counsel Walters argued that the identifications were unduly suggestive and were likely the product of misidentification. (Trial Tr. p. 162, line 25 – p. 167, line 24). The trial court ruled that the descriptions were for the most part consistent and deemed them not to be unnecessarily suggestive. (Trial Tr. p. 173, line 2 – p. 174, line 4).

This Court finds Applicant failed to meet his burden. Counsel Culler testified that he and Counsel Walters had not discussed who would conduct the hearing beforehand. He explained that they were not hanging their hats on having the identifications excluded. He believed the identifications were likely coming in. This Court finds Counsel were ineffective in failing to contemporaneously object to the introduction of the photo lineups. However, Applicant cannot show that he was prejudiced by this deficiency. The trial court was clear in its pretrial ruling that the lineup procedure did not violate of Applicant's Due Process Rights. The trial court would have properly overruled any such objection. Further, this Court was also not presented with any evidence to support its argument that the identifications were suggestive other than what was raised during the pretrial hearing. Therefore, the Court dismisses this allegation.

In Court Identifications

As to Applicant's argument that Counsel did not contemporaneously object to the in-court identification, Applicant cannot show that if such objection was made that it would have been granted. The trial court made it very clear that the identifications would be admissible in the

pre-trial suppression hearing. "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created 'a very substantial likelihood of irreparable misidentification." State v. Tisdale, 338 S.C. 607, 611, 527 S.E.2d 389, 392 (Ct. App. 2000) (citations omitted). Here, the out-of-court identification was ruled reliable and nonsuggestive. The Court does find Counsel were ineffective in failing to contemporaneously object to the in court identification, but finds Applicant has failed to meet his burden in proving prejudice. Therefore, this allegation is denied and dismissed.

Motion for Directed Verdict and Renew all Objections

Next, Applicant argues Counsel were ineffective in failing to make a motion for directed verdict and failing to renew objections at the close of all evidence. Counsel Walters did make a motion for directed verdict after the State rested. (Trial p. 647, lines 4-13). The trial court denied the motion and emphasized that six eyewitnesses testified that Applicant was responsible. (Trial Tr. p. 647, lines 14-20).

A directed verdict motion made at the close of the State's case is insufficient to preserve an issue for review unless it is renewed at the close of all evidence because once the defense presents its proof, the propriety of a directed verdict must be tested in terms of all evidence. State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996) (citing Kimbrough v. Commonwealth, 550 S.W.2d 525 (Ky. 1977) with approval). "When the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the State's evidence alone." Id. (quoting Kimbrough). If the defendant fails to move for a directed verdict at the close of all evidence, then the trial court has been denied the opportunity to pass upon the sufficiency of the evidence as it was presented to the jury. Id. (quoting Kimbrough).

Here, Applicant's allegation fails for numerous reasons. First, he has not shown that his renewed motion for directed verdict would have been granted. Second, he has not shown that if the renewed motion was denied that it would have been a successful issue on appeal. Third, there is overwhelming evidence of Applicant's guilt. Counsel did fail to renew their motion for directed verdict at the close of their case, but it is certain that the motion would have been properly denied. Viewing the evidence in the light most favorable to the State, there were six eyewitnesses who testified that Applicant took part in the robbery. As to Applicant's argument that Counsel failed to renew all previous objections, it is without merit. There is no requirement that defense attorneys renew objections to ensure their preservation. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."). This allegation is denied and dismissed with prejudice.

Gun's Admission

Finally, Applicant alleges Counsel were ineffective in failing to object to the admission of State's exhibit 21, a gun. Applicant argues the gun was not relevant to the charged crimes of armed robbery and murder. This Court finds otherwise. Counsel Walters testified that he wanted the gun to be introduced to show that the victims had a gun accessible to them. The introduction of the gun helped the defense show that the victims were involved in the drug trade and were illegally in possession of a pistol. This Court finds this was a reasonable strategy. There was also no evidence that Applicant was prejudiced by the gun. The gun did nothing to prove that Applicant was involved in the crimes. It only showed that the victims were in possession of a pistol the night of the incident. This allegation is denied and dismissed.

Overwhelming Evidence of Guilt

This Court further finds that Applicant cannot meet his burden to show that he was prejudiced by any alleged deficiencies because there is overwhelming evidence of his guilt. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt). Both codefendants who took part in the armed robbery scheme testified that Applicant hatched the plan to steal money from the victims. (Trial Tr. p. 522, line 12 – p. 523, line 23; p. 562, line 4 – p. 563, line 17). The codefendants both detailed the events that took place the night of December 23, 2006, and the early morning hours of December 24, 2006. The three victims who lived through the robbery also all testified and fully implicated Applicant in the crimes. Applicant also admitted committing the crimes while in a holding cell with Daniel Young. As a result, Applicant can show no prejudice from any of the allegations raised in his PCR application as no deficiency on behalf of trial counsel could have reasonably changed the outcome of trial.

All Other Allegations

As to any and all allegations that were raised 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.

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. Applicant failed to demonstrate counsels' performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). 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 shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 1 day of March, 2016.7

Maite Murphy

MAITE MURPHY
Presiding Judge

J. Glen, South Carolina

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC