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S.C. SUPREME COURT

February 28, 2018

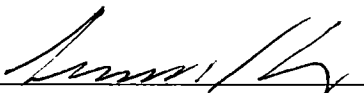
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Richard Todd Culberson v. State
2016-CP-42-0417

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,


Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Spartanburg County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601
PHONE: (864) 242-0029
E-MAIL: SUSANNAH@ROSSENDERLIN.COM

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 05 2018

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Grace Gilchrist Knie, Circuit Court Judge

2016-CP-42-0417

Richard Todd Culberson, Appellant,


v.

The State, Respondent.

NOTICE OF APPEAL

Richard Todd Culberson appeals the Honorable Grace Gilchrist Knie's Order of Dismissal filed November 1, 2017, and the Order Denying Motion for Reconsideration files February 16, 2018.

This 28 day of February, 2018.


Susannah Ross, Attorney at Law
330 E. Coffee St.
Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
Valerie Giovanoli, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for Respondent

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Richard Todd Culberson, #355804

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2016-CP-42-0417

**ORDER OF DISMISSAL
WITH PREJUDICE**

CLERK OF COURT
SPARTANBURG COUNTY
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M. HOPE BLACKLEY

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Richard Todd Culberson (Applicant) on January 29, 2016. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on September 19, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by Susannah Ross, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. Solicitor Barry Barnette (Solicitor), Chris Brough, Esquire, (Counsel) and Tiffany Butler, Esquire, (Appellate Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, and Applicant's supplemental application.

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. Applicant was indicted at the March 2013 term of the Spartanburg County Grand Jury for assault with intent to commit criminal sexual conduct, first degree (2013-GS-42-1814), assault and battery first degree (2013-

GS-42-1811), kidnapping (2013-GS-42-1812), and attempted armed robbery (2013-GS-42-1813). Matthew Shealy, Esquire, represented Applicant. Solicitor Barry Barnette represented the State. On June 16-18, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 20 years each for assault with intent to commit criminal sexual conduct, first degree, kidnapping, and attempted armed robbery, and to 10 years for assault and battery, first degree.

Applicant filed a timely notice of appeal and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Culberson, Op. No. 2015-UP-546 (S.C. Ct. App. filed December 2, 2015). The Remittitur was returned on December 21, 2015.

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

1. Ineffective Assistance of Counsel, in that:

- a. "Trial Counsel was ineffective for failing to object to improper comments and pre-trial remarks made by prosecution during closing arguments
 - i. "the prosecution advised the jury that the state didn't have to prove this case beyond a reasonable doubt (See Tr. P. 105, Lines 16-21). This is erroneously lead the jury to believe the State didn't have to meet the burden of proof. The law states the defendant must be found guilty beyond a reasonable doubt as instructed by the judge in his charge to the jury (p. 112, lines 1-5)(p. 113, lines 3-11)(Tr. P. 114, lines 11-13).
 - ii. "Trial counsel failure to object to improper closing remarks amounted to performance below the objective standard of reasonableness."
- b. "Trial counsel was ineffective for failing to pursue issue of mistaken identity when victim started to Mr. Faron Cox that the perpetrator was black man in a grey hoodie (Tr. Of the third day of trial, Tr. P. 147, line 21-25)(Tr. p. 48, lines 1-5). The defendant at trial was and is a white male.

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- c. "Trial counsel was ineffective when he failed to pursue misidentification defense where Petitioner didn't have scar on his hand, the right or the back of his hand, nor a scar between his ring finger (Tr. p. 124, lines 11-25)(Tr. p. 125, lines 1-25).

On or about June 21, 2017, Applicant, through counsel, filed a supplemental application alleging:

1. Ineffective Assistance of Counsel for:
 - a. "failure to object to improper rebuttal testimony,"
 - b. "failure to effectively impeach rebuttal witnesses,"
 - c. "failing to argue for delay to present alibi witness,"
 - d. "releasing alibi witness from subpoena,"
 - e. "failure to effectively object to State bolstering his witness with untrue facts contrary to prior testimony (See trial transcript p. vol II, 35, l.3, & pp. 142, l.14 & 143, l. 3), and"
 - f. "failure to object to improper argument the State's closing argument. (See trial transcript p. 97, l.21, p. 101, l. 17, p. 105, l. 17, & p. 108.)"
2. Ineffective assistance of appellate counsel for failing to brief issues of:
 - a. "error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence, (See trial transcript vol II, 35-3 & pp. 142-14 & 143-3)"
 - b. "denial of due process when Judge allows trial attorney to release alibi witness from subpoena, (See trial transcript vol II p. 79) and"
 - c. judge error of allowing the reply testimony of Stephanie Eubanks and Kelly Rudicill"

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FACTS ADDUCED AT TRIAL

Victim, an employee of Carolina Ob-Gyn for approximately thirty years, arrived early to work on the morning of January 24, 2013. (R. p.142, lines 9-16.) She was meeting a maintenance man before the office opened at 8:00 a.m., and she arrived around 7:05 a.m. (R p. 144, lines 12-18.) Victim was wearing scrubs, a corduroy coat, and gloves. (R. p. 144, lines 22-24.) Her purse was on her right arm. (R. p. 148, lines 5-7). Victim walked to the entrance of the building. (R. p. 146, line 12.). She felt a tug on her coat, and as she turned, Appellant stabbed her in the right

shoulder with a screwdriver. (R. p.146, lines 15-17.) Appellant grabbed Victim's breast, and pushed her against the glass door. Victim testified at this point she didn't know where her purse was. (R. 146, lines 19-23.) She struck her head and back on the glass, and slid down to the floor. (R. p. 146, lines 24-25.) As Victim was lying on the ground, Appellant started pulling at the waistband of her pants. (R. p. 147, lines 3-4.) When Victim realized what Appellant was doing, she began kicking him. (R. p. 147, line 7.) Appellant stabbed Victim again on her right side under her rib, and "that's about the last thing I knew." (R. p. 147, lines 8-9.) Victim testified she was in shock, and didn't know how long she was lying on the ground. (R. p. 161, lines 13-18.) She was found later by an elderly couple who called 911. (R. p. 147, lines 12-13.) Her purse was found on the opposite corner of the room, diagonally across from where Victim was attacked. (R. p. 151, lines 11-19.)

Victim was able to describe her attacker to law enforcement. (R. p.168, lines 10-11.) A BOLO went out that morning with Appellant's description. (R. p. 258, lines 10-12) At one point, city officers stopped Appellant four miles away for questioning about another matter, but let him go. (R. 195, lines 11-16.) Officers found Appellant again later that day and recognized him from the BOLO. (R. p. 259, lines 7-12.) The officer obtained his identification, but did not yet detain him, and Appellant walked across the street to another business. (R. p. 261, lines 1-10.) When officers followed Appellant across the street, they were told by the employees of the business that Appellant had exited the rear of the building. (R. p. 262, lines 1-12.) When officers arrived at his address, which was his parent's house, they found Appellant's mother cutting his hair (R. p. 214 lines 15-21.) Investigators also found the hoodie and jacket that matched the Victim's description. (R. p. 217, lines 18-19.) Appellant was taken into custody and arrested later that day.

(R. 218, lines 5-6.) Victim was able to identify Appellant from a photo lineup. (R. p. 197, lines 1-25.)

SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant believed Counsel was ineffective for making an improper statement in his opening statement to the jury. Specifically, Applicant referred to Vol. I, page 96, lines 22-25, in which Applicant believes Counsel's statement, "I don't think ultimately you're gonna be able to find my client not - - guilty cause I just don't think they can carry their burden," was improper.

Applicant recalls asking Counsel where his alibi witness, Heather Holstrom, was during his trial. Counsel had to look for her and when he found her, Counsel said she was intoxicated. Applicant testified he did not know if his alibi witness, Heather Holstrom, had been subpoenaed and that Counsel had released her before Applicant knew what was going on. Applicant explained that although there was a colloquy with the court during trial in which he told the court he did not want her to testify drunk, he did not mean he did not want her to testify at all. (Tr. Vol. II, p. 77-79). Applicant believes Counsel should have had her arrested to force her to sober up so that she could testify. Applicant claimed he did not want the alibi witness testifying at his trial drunk because she might testify to something crazy. Applicant denied Heather was his friend, but rather just another drunk like him.

Applicant admitted he has been a petty criminal his whole life, but he always pled guilty to the crimes he committed. Applicant insisted he was innocent in this case. Applicant claims he only met with Counsel three times and believes Counsel should have come to meet with him more. During the meetings, Counsel only discussed issues with the distance between the scene of the crime and the bus stop. Applicant wanted Counsel to look into Ricky from Vic Bailey's.

Applicant testified he had gone to Vic Bailey's and asked Ricky for few dollars that morning and Heather was with him. Ricky told Applicant that he needed to call his father because his father was going to have surgery. Applicant testified he called his father from Vic Bailey's and his father informed Applicant there was a check at the father's house for Applicant. After hearing this, Applicant decided to go to his father's house. He was going to his father's house for a check, not for a haircut. However, Applicant admitted he got a haircut because he knew he was going to jail for the probation violation. Applicant claims Ricky could testify to his change of plans that morning after his phone call with his father. Applicant testified he and Heather then went to the bus stop when he saw the police. He knew that the police were after him because he had warrants for a probation violation, so he ran.

Applicant testified Counsel and other people at the jail told him not to testify at trial. Applicant believes he should have testified at trial and Counsel's advice to the contrary was erroneous. Applicant believed Counsel should have objected to the Solicitor's closing when the Solicitor referenced the QT video and describing what it looked like Applicant was doing. (Tr. vol. II, p. 103). Applicant claims nothing in the evidence matched him being the attacker. Applicant testified the only thing the police got right was that he was wearing a gray hoodie. Applicant claimed that DNA tests did not connect him to the crime. Applicant believes Counsel should have requested a DNA test of gloves the victim was alleged to have worn while driving from Lyman Lake to work. Applicant also expressed his opinion that he had good teeth. The victim had described her attacker as having bad teeth. (Tr. vol. I, p. 152). Applicant believes Counsel did not investigate his dental hygiene or argue the mischaracterization of his teeth. [Trial counsel cross examined witness about describing bad teeth on p. 168, 169 & 171]

Applicant complained that the Solicitor was yelling at trial and Counsel never did the same and that Counsel was not animated and objecting enough. Applicant also took a polygraph test conducted by law enforcement. Applicant alleges Counsel should have requested an independent polygraph examination in response to the results of the one conducted by law enforcement.

Applicant testified Counsel should have objected during the Solicitor's cross examination of his identification expert witness when the Solicitor was asking her if she considered the victim's job duties for the last thirty years as a nurse in her assessment of the case. (Tr. vol. II, pg. 35). Applicant also believes Counsel should have objected to the Solicitor asking the expert if she considered the victim receiving counseling after the incident in which she had to replay the event. (Tr. vol. II, p. 35). Applicant testified the questions asked of the expert by the Solicitor were contrary to the facts that were presented, in that the victim had described her duties *at that time* as head nurse. (Tr. vol. I, p. 55; p. 143). He also believes Appellate Counsel was ineffective for not briefing the overruled objection to the Solicitor's question of the expert witness.

II. The Solicitor testified to the following:

Solicitor Barry Barnette has practiced law since 1990. He is and was at the time of this trial the Seventh Judicial Circuit Solicitor. Solicitor did not assume facts not in evidence when he cross examined the defense's expert witness. Not only did the victim testify both pre-trial and during trial that she was a head nurse, but also that she had worked for Carolina OB-GYN for thirty years. It was a reasonable inference based on common sense and common knowledge what a nurse's duties are. Furthermore, it was not a fact in controversy. However, the defense

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had made the case about identity so the argument about a nurse's duties was fair to suggest the victim was able to correctly identify her attacker.

The Solicitor testified he did not agree with the transcript in that it reads him saying in closing, "we don't have to prove this case beyond any reasonable doubt." The Solicitor is very familiar with the burden placed upon the State and would never willfully mislead a jury to think anything less. The chances that he misspoke that greatly are slim. The Solicitor testified that he has said in closing that the State does not have to prove the case beyond *any* doubt, which is most likely what he said in this case. The Solicitor is familiar with the transcripts transcribed by Pamela Faucette and is aware of past discrepancies in her transcripts.

The Solicitor recalled the alleged alibi witness, Heather Holstrom. His office helped Counsel track her down to a soup kitchen. It was the Solicitor's understanding that she was intoxicated when found. Regardless, the Solicitor had pulled her criminal history in anticipation of her testimony. After using her criminal history report to refresh his recollection, he listed numerous offenses for which he could use to impeach Heather.

The Solicitor did not believe he made a Golden Rule Arguments during his closing. (Tr. vol. II, p. 97). The Solicitor explained that a Golden Rule Argument asks the jury to put themselves in the victim's shoes in order to render a verdict the victim would want. The Solicitor's argument in this case was directed at the defense of mistaken identity.

The Solicitor also did not believe his description of what was on the video of Applicant in the QT store that was admitted into evidence was improper. The video was admitted into evidence by the defense and available for the jury to view. The Solicitor's description of the events caught on the video were fair argument for closing. Additionally, to the extent Applicant complains the Solicitor was implying Applicant was stealing something on the video, the

Solicitor noted that the transcript reads "it seems like *she* put it underneath his coat." (Tr. vol. II, p. 103). (Emphasis added).

III. Counsel testified to the following:

Matthew Shealy has been practicing criminal law for 8 years as an Assistant Public Defender. He was appointed to represent Applicant. Counsel recalls meeting Applicant approximately 7-8 times either at the jail or in the courthouse. Counsel filed a discovery motion and obtained discovery. He reviewed all of it with Applicant and discussed the evidence the State had against him. Applicant always maintained that he did not commit the crime and that he was with Heather Holstrom the entire night before the crime as well as the morning of the crime. Both Applicant and Heather Holstrom were homeless. Applicant's version of events was that he slept in that morning. He and Heather then went to Main Street Motel in order to get drugs from an old man. Applicant gave Counsel the hotel room in which he believed the old man lived. Next, Applicant and Heather went to hold a sign. After that, they went to the QT convenient store. After the QT, they went to Vic Bailey's where Applicant called his father. Then, they went to Applicant's parents' house. Applicant had implied to Counsel that Heather was his girlfriend.

Counsel believed a strength in Applicant's case was the video footage showing him at the QT, 4.5 miles away from the crime scene, only an hour and ten minutes after the attack. Because Applicant was homeless, he did not have a car. Counsel believed it would not make sense for him to walk 4.5 miles to the QT after attacking the nurse. Additionally, he was able to confirm with Applicant's parents that he was at their house after the QT, which was in a different direction from the crime scene as the QT. This also did not make sense to Counsel - why Applicant would walk 4.5 miles in one direction only to turn around and go back to his parents' house.

house. The nurses pavilion, where the crime occurred, was not close to anything which also did not make sense why Applicant would have been out there so early in the morning. Counsel investigated the route and felt it would be a strong argument at trial.

Counsel pursued Applicant's alibi witness. Counsel found that she was serving a short sentence in the county jail. Counsel, with his office's investigator, Donald Stepp, went to the jail and spoke with Heather about the date in question. Counsel testified Heather could only state she was with Applicant, however, she could not provide any details of what they did or where they went as Applicant had done previously. Additionally, Counsel did not recall Heather being on the QT video footage. Therefore, although Counsel fully prepared and anticipated calling Heather to testify because a second person to claim Applicant was with her would be beneficial, Counsel questioned how much benefit she would contribute. Counsel subpoenaed Heather for trial. However, she was not present on the date of the trial. Counsel addressed the court and requested a recess in order to try to track her down, which was granted. (Tr. vol. II. pp. 72-75).

The original address Heather had given to Counsel and his investigator belonged to that of a padlocked church. Counsel's only other idea as to where she may be found was the soup kitchen. During the recess granted by the court, Counsel and his investigator went to the soup kitchen, where they found Heather. Heather was accompanied by a paramour who seemed agitated with their presence and their desire to talk to Heather about Applicant's trial. It was quickly apparent to Counsel and the investigator that Heather was under the influence of alcohol and maybe drugs. Counsel recognized that he could not call an intoxicated (incompetent) witness to testify in his client's case. Counsel also realized that his only other option would be to have her arrested in order for her to sober up in the "drunk tank." Counsel's opinion on that option was that her testimony may not be favorable to the defense if they had her arrested and

forced to come testify. Counsel made the decision to return to the courthouse without the alleged alibi witness. Counsel returned to the courthouse to discuss the matter with Applicant. Applicant agreed that he did not want Heather to testify while intoxicated. This was also discussed on the record. (Tr. vol. II. pp. 77-79).

Additionally, Counsel investigated and pursued a mistaken identity defense. Counsel knew that the victim had identified his client from a lineup. He procured the services of an expert witness qualified in mistaken identity, Dr. Dawn McQuiston. Counsel came across Dr. McQuiston when she spoke at a Public Defender's conference. Counsel also found another eye witness, Faron Cox, who testified that the victim initially stated it was a black male who attacked her. Unfortunately, he was the only witness at the scene that alleged to have heard the victim say black male. Counsel also subpoenaed the QT manager, Brian Baird, in order to admit the QT surveillance footage of Applicant in the QT store that morning. Counsel also presented Martha Culberson, Applicant's step-mother, to testify that he did in fact come to their house and that she cut his hair. Lastly, Counsel called his investigator, Curtis Jones, to testify regarding the times and distances between the nurse's pavilion, the QT store, and Applicant's parents' house.

Counsel did not see anything objectionable about the Solicitor calling rebuttal witnesses for the purpose of offering testimony in contradiction to that of Faron Cox with regard to the race of the attacker. Counsel realizes the race of the attacker had not become a fact in controversy until he presented Faron Cox. Also, Counsel did not see anything objectionable to the Solicitor's reference to the job duties of a nurse. Although the victim testified she was the head nurse at trial and her duties were not consistent with that of a regular nurse, she also testified she had been a nurse for thirty years. Counsel did not feel that the fact she had worked as a nurse for the past thirty years was a fact in controversy. Counsel also believed the arguments made by the

Solicitor as to a nurse's duties was a matter of common knowledge, as opposed to assuming facts not in evidence.

Counsel did not recall hearing the Solicitor say in closing that he did not have to prove the case beyond any reasonable doubt and believes the transcript does not reflect with the Solicitor actually said. Counsel stated that if the Solicitor had misstated the burden of proof as the transcript indicated, he would have objected. Counsel had tried cases against the Solicitor previously and had never heard him misstate the burden of proof.

Counsel testified Applicant never told him that another man, for whom Applicant had been often mistaken, had a scar on his hand. Applicant had only told Counsel that he had been mistaken for the other man. Counsel was aware that the victim had described her attacker as having bad teeth which went to his argument of mistaken identity. Counsel advised Applicant against testifying in his trial because he had a criminal history that could be used against him and because Counsel did not believe Applicant would withstand the pressures of a tough cross-examination. Regardless, it was Applicant's decision not to testify.

Counsel explained he did not object to the Solicitor's cross examination of the defense expert witness when he asked about a nurse's duties, because he found the questioning to be proper. It is proper to inquire into what facts and knowledge about the case the expert used in coming to her opinion and sometime experts consider evidence not presented to the jury. Counsel disagreed with Applicant's assertion that the Solicitor's description of a nurse's duties contradicted the victim's job duties to which she testified she had at the time of the crime. Counsel believed through common sense everyone understood that the victim had served as a nurse in some capacity for thirty years and that her duties throughout her career would have been consistent with that which is common knowledge of what nurse's do. Although she was a head

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nurse at the time and served in a more managerial role, he assumed her duties were typical nurse duties throughout her career.

Counsel explained that although defense witness, Faron Cox, admitted on cross examination that he was aware everyone else at the scene heard the victim say a white male had attacked her, he believed it was still an appropriate call by the Solicitor to call rebuttal witnesses to testify that is what they heard. Mr. Cox's testimony made the race of the attacker an issue and although he testified he was aware other people said the attacker was white, he felt the Solicitor had a right to show the jury who those other witnesses were and to present their live testimony as to what they heard the victim say. Counsel understood that Eubanks and Rudicill could have testified as to the race of the attacker in the State's case in chief, but recalls objecting during Rudicill's testimony in the State's case in chief and the judge sustaining the hearsay objection and requesting the witness not testify as to what the victim said. (Tr. vol. I, p. 189).

Counsel testified he did not request Applicant take an independent lie detector test because the tests are not reliable or accurate and the results could not be used at trial. Essentially, another polygraph test would be useless. With regard to Applicant's allegation that the Solicitor bolstered the State's witnesses' during the cross examination of the defense expert witness and during the State's closing, Counsel felt all of the Solicitor's arguments were fair game. Counsel testified it is proper to argue for or against credibility.

IV. Appellate Counsel testified to the following:

Tiffany Butler worked for the South Carolina Commission on Indigent Defense in the Office of Appellate Defense at the time of Applicant's appeal. Appellate Counsel filed a brief in Applicant's appeal of his criminal conviction, challenging the court's ruling on Applicant motion

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for directed verdict of acquittal on the attempted armed robbery charges. Appellate Counsel testified she believed the issue briefed was the most meritorious issue presented.

Appellate Counsel explained she did not brief the court's overruling Applicant's objection to Solicitor bolstering his witness with facts contrary to evidence because there was no objection to that effect. The objection was made based on relevance. Appellate Counsel could not brief an issue arising from a relevance objection based on an argument that the question actually bolstered the State's witness with facts contrary to evidence. Additionally, Appellate Counsel did not believe the Solicitor was bolstering his witness with facts contrary to the evidence.

Appellate Counsel explained she did not brief the issue of a denial of due process where the court allowed Applicant's defense counsel to release an alibi witness from her subpoena. First, Appellate Counsel testified that in general, there needs to be a contemporaneous objection in order to preserve an issue for appeal. However, where there's been an egregious denial of due process, an objection may not be necessary to consider the issue on appeal. But, Appellate Counsel did not believe in this instance, Counsel releasing a witness from a subpoena a denial of due process. In fact, Appellate Counsel believed Counsel made a strategic decision to release the witness and the issue was not proper for direct appeal.

Regarding Applicant's allegation that Appellate Counsel was ineffective for failing to brief the issue of the court allowing reply testimony from two State's witnesses, Appellate Counsel believed the reply testimony was proper to rebut testimony presented during the defense's case. Additionally, Appellate Counsel testified Counsel did not make an objection to the reply witnesses and therefore the issue was not preserved for appellate review.

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On cross examination, Appellate Counsel admitted to the practice of using key word searches for the term, "objection," but clarified that appellate defenders always read every word of the transcript in addition to word searches. Therefore, she would not have missed a meritorious issue by only searching for objections in the record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, [the burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SERCP). Where ineffective assistance of counsel is alleged 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (citing Strickland). 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.

A. Failure to object

Applicant has made a number of allegations revolving around Counsel failing to object at various times during the trial. Counsel's failure to make any conceivable objection is not deficient *per se*. Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the whole, reasonably calculated his objections to achieve the stated end. In any trial, decisions of Counsel can be, and will be, questioned. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was more than adequate and clearly within the standards of professional conduct. The Court will specifically address all the "failure to object" claims in this section:

1. Failure to object to the Solicitor's closing arguments.

This Court finds that Applicant has failed to meet his burden of proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by

presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to the Solicitor's closing remarks that the State did not have to prove the case beyond any reasonable doubt. (Tr. p. 105, ll. 16-21). Both Counsel and the Solicitor testified that is not what was actually said during the Solicitor's closing argument. This Court finds Counsel and the Solicitor's testimony on the issue credible. The Solicitor has been prosecuting criminal cases for many years and obviously fully understands the State's burden of proof. This Court finds it very likely that this was a transcription error and the Solicitor most likely said the State was not required to prove the case by *any doubt*. On the other hand, if the Solicitor did actually say what appears in the transcript, this Court finds it very difficult to believe the mistake was not inadvertent. Additionally, Counsel testified that had he heard what was written in the transcript, he would have objected. Regardless, Applicant has failed to prove any prejudice from the alleged failure to object. The record is littered with the correct burden of proof, including the trial judge who mentions reasonable doubt twenty-six times during his jury instructions. Therefore, there is no reasonable possibility that had Counsel objected to any alleged misstatement by the Solicitor, it would have affected the outcome.

Applicant also complains Counsel did not object to the Solicitor's statement in closing, "imagine someone in your face," to argue the idea that the victim would remember her attacker's face. This was in reply to the defense's theory set forth that this was a case of mistaken identity. To the extent Applicant alleges this statement was a Golden Rule Argument, this Court finds that contention meritless. The Solicitor was not asking the victim's to put themselves in the shoes of the victim in an effort to garner pity for the victim and have the jury render a guilty verdict on that basis. This Court finds the argument fair game in the case of mistaken identity.

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Furthermore, Applicant cannot prove there is a reasonable probability that had Counsel objected, it would have affected the outcome of the trial.

Applicant also complains Counsel did not object to the Solicitor mentioning the general duties of a nurse to imply the victim was observant and therefore paid attention to the face of her attacker. This Court finds these closing remarks appropriate and unobjectionable. The Solicitor was drawing reasonable inferences from the victim's own testimony that she was the head nurse and had worked for the doctor's office for thirty years. Furthermore, any objection from Counsel on this point was not reasonably likely to affect the outcome of the trial.

Lastly, Applicant alleged Counsel was ineffective for failing to object when the Solicitor, in closing, asked the jury not to let Applicant get away with the crime because women need to be able to go to work and not face the horror the victim did. (Tr. vol. II, p. 108). Once again, this Court can find nothing objectionable about the Solicitor's call upon the jury to punish Applicant for his criminal conduct. The Solicitor's argument was fair. The State and the defense are both allowed to play on both the reason and the emotion of a jury. After all, a jury is made up of humans, none of whom are immune to emotion. However, an appeal to the emotion of a jury becomes improper when it is to an extreme or outweighs the appeal to reason. That was simply not the case here. The evidence presented damning facts against Applicant. The jury's verdict was obviously not a result of emotion, but rather a result of the evidence put forth before them. Applicant failed to prove his burden that he was prejudiced by the alleged deficiency on this issue.

Having failed to meet his burden of proof, these allegations against Counsel for failing to object to the Solicitor's closing arguments is denied and dismissed with prejudice.

2. Failure to object improper rebuttal testimony.

This Court finds that Applicant has failed to meet his burden in proving Counsel was deficient or that he was prejudiced by the alleged failure to object to rebuttal testimony offered by the State. This Court finds nothing improper with regard to the rebuttal testimony from Dr. Eubanks or Ms. Rudicill. During the defense's case, Applicant offered a witness, Mr. Cox, who testified the victim stated her attacker was a black male. The State called two employees of the doctor's office to testify as to how they heard the victim describe her attacker as a white male. This was proper rebuttal testimony to which Applicant opened the door. To the extent Applicant claims Counsel should have objected to hearsay, the testimony was admissible as an excited utterance. Therefore, Applicant has failed to prove Counsel was deficient or that he was prejudiced by any deficiency. This allegation is denied and dismissed with prejudice.

3. Failure to object to the State bolstering their witness with untrue facts contrary to prior testimony.

Applicant argues Counsel was ineffective for failing to object when the State elicited testimony regarding a nurse's general duties because the victim testified she had worked at that doctor's office for thirty years, was the head nurse, and performed managerial duties. Essentially, Applicant's contention is that because the victim testified she was the nurse supervisor, the general duties of nurses was not applicable to her and therefore was bolstering the witness's ability to identify her attacker based on job duties that were not hers at the time of the attack. However, it is worth noting, the victim did not become the head nurse supervisor over the course of thirty years of employment with that office without first having served as a nurse. Furthermore, the duties of a nurse were not a fact in dispute or controversy and therefore were not objectionable under the theory that the State was assuming facts not in evidence. Phillips v. State, 728 So.2d 681 (1998). This Court also believes a nurse's duties are general common knowledge. Applicant also cannot prove there is a reasonable probability an objection to this

testimony would have had any effect on the outcome of his trial. Therefore, this allegation is denied and dismissed with prejudice.

B. Failure to pursue mistaken identity

Applicant alleged Counsel failed to pursue an issue of mistaken identity. However, the record reflects the entire defense was centered around mistaken identity. Counsel offered an expert witness to testify regarding the phenomenon of mistaken identity. Counsel also called Mr. Cox to the stand to testify the victim said her attacker was a black male. Additionally, Counsel successfully suppressed evidence of a second victim who identified Applicant as her attacker. Part of that pre-trial motion included Counsel calling attention to the second victim's description of a scar on the hand of her attacker and pointing out Applicant had no such scar. Applicant fails to present evidence of how Counsel could have better pursued the issue of mistaken identity. Therefore this Court finds Applicant has failed to meet his burden to prove Counsel was deficient or that he was prejudiced by any alleged deficiency. This allegation is denied and dismissed with prejudice.

C. Failure to effectively impeach rebuttal witnesses

Applicant alleged Counsel could have more adequately impeached rebuttal witnesses, however he's failed to demonstrate exactly how Counsel could have more effectively impeached the State's rebuttal witnesses. In light of the testimony offered by the rebuttal witnesses and the facts of the case, this Court finds Counsel's performance reasonable with regard to his cross-examination of the State's rebuttal witnesses. This allegation is meritless and therefore, it is denied and dismissed with prejudice.

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D. Alibi witness allegations

Applicant alleged Counsel was ineffective for failing to request a delay in order to present testimony from an alleged alibi witness and for releasing his alleged alibi witness from her subpoena the day of trial. It is undisputed the alleged alibi witness was intoxicated during Applicant's trial. This Court finds Counsel provided credible testimony on the issue. Counsel testified he and his investigator had previously met with the alleged alibi witness in jail. She told Counsel she could testify Applicant was with her the day of the crime, but she could not provide any details of where they were or what they were doing, like Applicant could do. Counsel believed her alibi testimony was weak, but provided an alibi nonetheless and would be helpful to Applicant's defense. Counsel subpoenaed the alleged alibi witness for trial, but found the address she gave him was to an abandoned church. She failed to appear at trial to testify on Applicant's behalf. Counsel requested a recess in order to attempt to locate her and bring her to court to testify. The trial court granted his request and Counsel and his investigator were able to find her in a soup kitchen with her paramour. Counsel testified it was obvious she was under the influence of something – drugs or alcohol or a combination thereof. Counsel decided to excuse her from her subpoena and move forward with Applicant's defense without the alleged alibi witness's testimony. The record also reflects a colloquy regarding this issue between Counsel, Applicant and the trial judge before proceeding without the alleged alibi witness.

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This Court finds that Applicant has failed to show that Counsel was ineffective for either not requesting a delay in order for the alleged alibi witness to sober up and testify or excusing her from her subpoena. First, this Court notes any claims surrounding the failure to present testimony from an alleged alibi witness assumes the testimony from the alleged alibi witness would have been favorable to the defense and therefore affected the outcome of the trial.

However, this contention is based on pure conjecture and speculation. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post-conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Here, while Applicant's claims are not directly claims that Counsel failed to call the witness at all, they are essentially of the same nature. Because Applicant failed to produce the testimony of the alleged alibi witness, any prejudiced derived from any of Counsel's actions leading to her not testifying is purely speculative.

Secondly, this Court finds Counsel provided credible testimony that he investigated and interviewed the alleged alibi witness. The record proves he physically searched for her and found her at a soup kitchen intoxicated. After this discovery, he considered the potential problems with having her arrested and forcing her to be held in the "drunk tank" to sober up to testify. Having weighed his options and the relatively lackluster and vague testimony she seemed to be able to offer, he ultimately made the strategic decision to refrain from calling the witness. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546,

419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel's strategic decision was based on sound professional judgment which will not be disturbed by this Court in hindsight of Applicant's conviction. Therefore the allegations are denied and dismissed with prejudice.

II. Ineffective Assistance of Appellate Counsel

Applicant also alleges ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that she was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly

stronger than those actually raised on appeal. *Id.*

A. Failure to brief error in Judge's overruling objection to Solicitor bolstering his witness with facts contrary to evidence

Applicant alleged Appellate Counsel was ineffective for failing to brief the overruled objection Counsel made to the Solicitor bolstering his witness with facts contrary to evidence. (Tr. vol. II, p. 35; pp. 142 -143). This Court finds Appellate Counsel testified credibly that she did not brief this issue because there was no objection to that effect. The objection was made based on relevance. As such, Appellate Counsel could not brief an issue arising from a relevance objection based on an argument that the question actually bolstered the State's witness with facts contrary to evidence. Additionally, Appellate Counsel did not believe the Solicitor was bolstering his witness with facts contrary to the evidence. This Court agrees. As discussed above, the Solicitor's questions and comments regarding general nurse duties was not objectionable. Regardless, Applicant has failed to show how briefing this issue would be reasonably likely to affect the outcome of his appeal. This Court finds Appellate Counsel's decision to brief the directed verdict issue was based on sound professional judgment. Applicant has failed to prove otherwise. This allegation is therefore denied and dismissed with prejudice.

B. Failure to brief denial of due process when Judge allowed trial attorney to release alibi witness from subpoena

Applicant alleged Appellate Counsel was ineffective for failing to brief a denial of due process when the trial judge allowed Counsel to release the alleged alibi witness. (Tr. vol. II, p. 79). Appellate Counsel credibly testified that in general, there needs to be a contemporaneous objection in order to preserve an issue for appeal. However, where there's been an egregious denial of due process, an objection may not be necessary to consider the issue on appeal. But, Appellate Counsel did not believe in this instance, Counsel releasing a witness from a subpoena

rose to a denial of due process. In fact, Appellate Counsel believed Counsel made a strategic decision to release the witness and the issue was not proper for direct appeal. This Court agrees. Applicant has failed to meet his burden of proving Appellate Counsel was deficient in her decision not to brief this issue or that he was prejudiced by such a decision. There is no reasonable probability the briefing a denial of due process when Counsel excused the alleged alibi witness from her subpoena would have changed the outcome of Applicant's case on appeal. Therefore this allegation is denied and dismissed with prejudice.

C. Failure to brief judge error of allowing the reply testimony of Stephanie Eubanks and Kelly

Rudicill

Applicant also alleged ineffective assistance of appellate counsel for failing to brief the trial court allowing the State to call rebuttal witnesses Stephanie Eubanks and Kelly Rudicill. Appellate Counsel credibly testified she believed the reply testimony from the State was proper to rebut testimony presented during the defense's case. Additionally, Appellate Counsel testified Counsel did not make an objection to the reply witnesses and therefore the issue was not preserved for appellate review. This Court finds Appellate Counsel's decision not to brief this issue reasonable and based on sound professional judgment. Applicant has failed to prove Appellate Counsel was deficient in this regard or that he was prejudiced by the alleged deficiency. Ultimately, Appellate Counsel opined she selected the most meritorious issue to brief in Applicant's appeal. As such, Appellate Counsel fulfilled her duty. Jones, supra. Furthermore, this Court finds none of the issues raised by Applicant were more meritorious than the issue actually briefed by Appellate Counsel. Therefore, this allegation is denied and dismissed with prejudice.

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CONCLUSION

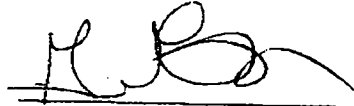
Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
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 31st day of October, 2017.



GRACE GILCHRIST KNIE
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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