

LAW OFFICE OF
Kristy Grafton Goldberg, LLC
ATTORNEY AT LAW

March 19, 2018

RECEIVED

MAR 21 2018

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

S.C. SUPREME COURT

RE: Michael D. Watson, SCDC # 342010, vs. State of South Carolina
Appeal of Case No. 2014-CP-41-00144


Dear Mr. Shearouse,

Enclosed for filing is a Notice of Appeal in the above referenced case. Also enclosed are a certificate of service and a copy of the original court order which is to be challenged on appeal. I would appreciate it if you could file the Notice of Appeal and mail a date-stamped copy back to me in the enclosed pre-stamped envelope.

By copy of this letter I am informing the Office of Appellate Defense of this Appeal. I was **appointed** to represent Mr. Watson on his PCR.

Please let me know if you have any questions or concerns regarding this matter.

Respectfully,



Kristy Goldberg

CC: Melody Brown
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549

Michael Watson, SCDC # 342010
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

The Honorable Sheri Coleman
Clerk of Court
100 East Church Street
Saluda, South Carolina 29138

Office of Appellate Defense
Chief Appellate Defender – Robert Dudek
PO Box 11433
Columbia, SC 29211-1433

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 21 2018

S.C. SUPREME COURT

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2014-CP-41-00144

Michael D. Watson, SCDC # 342010, Appellant

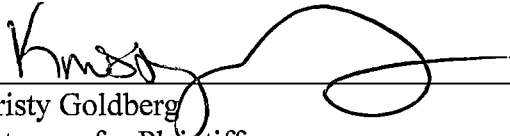
v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Applicant Michael D. Watson hereby appeals from the Order of the Honorable R. Keith Kelly presiding Judge for the 11th Judicial Circuit, filed March 3, 2018 and received by counsel for the Applicant on March 15, 2018 in the matter of Michael D. Watson v. State of South Carolina, Case No. 2014-CP-41-00144.

March 19, 2018



Kristy Goldberg
Attorney for Plaintiff

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

MAR 21 2018

R. Keith Kelly, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2014-CP-41-00144

Michael D. Watson, SCDC # 342010, Appellant

v.

State of South Carolina, Respondent.

PROOF OF SERVICE

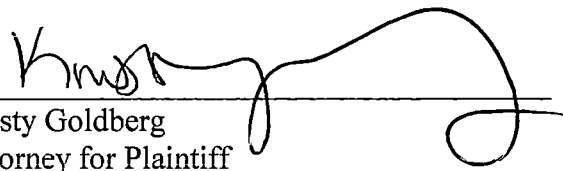
Personally appeared before me, Kristy Goldberg, Esquire, who being duly sworn, deposes
and states:

She is the counsel of record for Applicant;

Service by mail is proper in this instance; and

She has served the NOTICE OF APPEAL on the following party on March 19, 2018 by
depositing one copy in the U.S. Mail, postage prepaid:

Assistant Attorney General, Melody Brown
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Columbia, South Carolina 29211



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Attorney for Plaintiff

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Other Counsel of Record:
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STATE OF SOUTH CAROLINA
COUNTY OF SALUDA

IN THE COURT OF COMMON PLEAS
IN THE ELEVENTH JUDICIAL CIRCUIT

Michael D. Watson, #342010,

Case No. 2014-CP-41-00144

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes to the Court by way of an application for post-conviction relief (PCR) filed July 8, 2014. Respondent made its return dated May 1, 2015. An evidentiary hearing was held on November 8, 2016. Applicant was present and represented by Kristy Goldberg, Esq. Senior Assistant Deputy Attorney General Johanna C. Valenzuela of the South Carolina Attorney General's Office represented respondent. Applicant and trial counsel P. Andrew Anderson, Esq., testified. The Court had before it records from the Saluda County Clerk of Court and South Carolina Department of Corrections (SCDC), trial transcript, and relevant direct appeal documents.

Following review of testimony presented at the hearing and all other evidence, this Court finds applicant received constitutionally effective assistance of counsel at all stages of the trial, and relief must be denied.

Procedural History

Applicant is presently confined in SCDC pursuant to orders of commitment of the Saluda County Clerk of Court. During the October 2007 term, a Saluda County grand jury indicted Applicant for murder, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm. (2007-GS-41-0551, -0552, -0553). Applicant proceeded to a

1
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jury trial on July 26, 2009, and was represented by P. Andrew Anderson, Esq. The jury convicted Applicant of the lesser included offense of voluntary manslaughter and both weapons charges. The Honorable William P. Keesley sentenced Applicant to thirty years imprisonment for voluntary manslaughter and a concurrent five years for each weapons charge. Applicant served and filed a timely notice of appeal.

Assistant Appellate Defender Kathrine H. Hudgins represented Applicant on appeal. Counsel raised two issues on Applicant's behalf:

1. ... whether the trial court erred in denying Watson's motion to reconsider his sentence for voluntary manslaughter...
2. ... whether the trial court erred in refusing to suppress Watson's statement to Officer Cockrell...

State v. Watson, No. 2013-UP-276, 2013 WL 8538719, at *1 (S.C. Ct. App. June 26, 2013).

The South Carolina Court of Appeals affirmed in an unpublished opinion filed June 26, 2013. *Id.* The court issued its remittitur on July 15, 2013.

In his original *pro se* PCR application filed July 8, 2014, Applicant alleged the following claims of error:

Ineffective assistance of trial counsel:

- i. Failure to prepare and argue a viable self-defense argument

Prosecutor misconduct, specifically:

- i. Prosecutor repeatedly mentioned the term sawed-off in referring to the weapon used when there was no supporting evidence

In the amended application filed by PCR counsel on October 13, 2016, Applicant raised the additional claims for relief:

Ineffective assistance of trial counsel:

- i. Counsel told the jury in his opening statement he did not know if they would put up a defense or not and that "nobody's going to win this case"
- ii. Failure to object when witnesses testified applicant was in possession of a sawed-off shotgun
- iii. Questioning Octavious Thomas about a prior unrelated incident where Thomas testified applicant pulled a sawed-off shotgun on Thomas's cousin the week before
- iv. Failure to object and request a mistrial when Dr. Ross testified differently than the information originally provided during discovery
- v. Failure to sufficiently argue and present testimony providing a basis for a self-defense argument
- vi. Allowing the jury to see and know about shackles on applicant

At the hearing, Applicant proceeded on the grounds of ineffective assistance of counsel raised in the amended application.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record, and further had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court finds trial counsel's testimony is credible and should be afforded great weight, while also finding Applicant's testimony lacks credibility on the critical facts and allegations. Set forth below are the relevant findings of fact and conclusions of law pursuant to S.C. Code Ann. § 17-27-80.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in his application and establishing he is entitled to relief. *Goins v. State*, 397 S.C. 573, 726 S.E.2d 1, 3 (2012). Where ineffective assistance of counsel is alleged 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." *Strickland v.*

Washington, 466 U.S. 668, 686 (1984).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, counsel's performance is measured by its reasonableness under professional norms. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 446 U.S. at 688). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Moreover, where counsel articulates valid reasons for choosing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992); *see also Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding where counsel articulates a valid strategy, it is measured under an objective standard of reasonableness).

Second, the applicant must demonstrate prejudice and show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Ard*, 372 S.C. at 331, 642 S.E.2d at 596. A reasonable probability is one sufficient to undermine confidence in the outcome of the trial. *Id.* at 331, 642 S.E.2d at 596. When a conviction is challenged, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Importantly, overwhelming evidence of guilt negates any claim counsel's deficient performance could have reasonably affected the result of applicant's trial to the level of required prejudice. *Harris v. State*, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

After careful review of the record and testimony presented at the evidentiary hearing, and based on the standard above, this Court denies and dismisses with prejudice the application for relief. The Court finds, as to all claims of ineffective assistance of counsel raised by Applicant, counsel had adequate and proper strategic grounds upon which to base his decisions. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding courts presume counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case). Counsel's performance was not deficient, there was no resulting prejudice to Applicant, and Applicant failed to carry his burden. Below are the findings related to each of the allegations raised in the PCR application:

Comments Made During Opening Statement

Applicant first alleged trial counsel was ineffective for telling the jury during his opening statement he was not sure if they would put up a defense, and further stating he felt "nobody's going to win this case." (Trial Tr. pp. 148-49; p. 152). At PCR, Applicant testified his family retained counsel, they met several times, and they frequently discussed his claim of self-defense. (PCR Tr. pp. 7-9). Applicant stated he always wanted to testify at trial. (PCR Tr. p. 11).

Trial counsel testified his strategy was to present self-defense and let Applicant testify. (PCR Tr. p. 23). However, counsel stated he believed the case for self-defense was weak because the victim did not have a gun, so he wanted to see how the trial progressed and keep his options open, and he did not "want to make a promise to the jury and then renege on the promise." (PCR Tr. pp. 23-24). Counsel testified he also argued for the lesser-included offense of voluntary manslaughter. (PCR Tr. p. 45). Finally, counsel stated his comments regarding there being no winners in the case should not be taken out of context because, while Applicant could have received a not guilty verdict, both his family and the victim's family were emotional and upset,

Applicant had been in jail awaiting trial for three years, and counsel “was trying to say that no matter how this thing plays out it’s a tragedy.” (PCR Tr. pp. 30-31).

This Court finds this claim of ineffective assistance of counsel is without merit. First, the Court finds trial counsel’s performance was not deficient where counsel credibly testified, while he said in his opening he was not sure what defense he would put up, his strategy was to present both self-defense and the lesser-included offense of voluntary manslaughter, which counsel ably argued throughout trial. Such a strategy was valid and objectively reasonable under professional standards. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding there is a strong presumption counsel exercised reasonable professional judgment in making decisions in the case); *see also Ingle*, 348 S.C. at 470, 560 S.E.2d at 402 (holding where counsel articulates a valid strategy, it is measured under an objective standard of reasonableness). The Court further finds the statement that “there’s no winner” was not improper given the context in which it was made, and counsel’s PCR testimony regarding the emotions surrounding the trial.

Regardless, Applicant cannot demonstrate prejudice where trial counsel, in fact, presented two defenses—self-defense and voluntary manslaughter—and the jury heard Applicant’s version of the deadly incident when he testified at trial. (Trial Tr. pp. 454-504). Counsel testified at PCR he believed self-defense was the weaker theory, so his strategy was to present the jury with a third alternative to murder. Counsel’s strategy was successful as the jury convicted Applicant of the lesser-included offense, rather than murder. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding to establish prejudice, an applicant must demonstrate the result of the proceeding would have been different but for counsel’s errors). Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

Failure to Object to Mention of Sawed-Off Shotgun

Applicant next alleged trial counsel was ineffective in failing to object when multiple witnesses referred to the gun Applicant used to shoot the victim as a sawed-off shotgun. (Trial Tr. p. 164; p. 226; see also p. 283 “short shotgun”). At the PCR hearing, Applicant testified it “paint[ed] a very evil picture” and was inherently prejudicial when witnesses testified he used such a weapon. (PCR Tr. p. 14). Applicant stated further he and counsel discussed trying to keep out any mention of the type of weapon used. (PCR Tr. p. 14). Counsel agreed upon questioning in the PCR hearing that during the original pretrial motions “the solicitor conceded that he did not think the State should be able to present evidence of a sawed-off shotgun because that would likely be prejudicial as possession of such would be a crime” responding, “Yes, I think so. That sounds right.” (PCR Tr. p. 26). (See Also Trial Tr. pp. 72-77). Counsel testified he did not recall considering a request to limit the testimony specifically because the witnesses were inconsistent and he did not consider the testimony particularly harmful. (PCR Tr. pp. 26-27). Counsel recalled some witnesses simply called it a shotgun, while others said it was a sawed-off shotgun. (PCR Tr. p. 27). When asked if he should have sought to “limit any such references to possibly just a shorter gun,” counsel testified: “I think it probably would have been smarter. I honestly don’t know why - - like right there where you pointed out, I don’t know. I mean, I think in hindsight it wouldn’t have probably hurt anything.” (PCR Tr. p. 27).

This Court finds this claim of ineffective assistance of counsel is without merit. While trial counsel did not object when “sawed-off” was used in reference to the weapon, the record demonstrates he vigorously cross-examined each witness about their recollection of the events, including their interactions with Applicant prior to the night of the shooting and with police, to bolster the claim of self-defense. Further, he asked the investigator about the failure to previously

7
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identify the gun as a “sawed-off shotgun” to further impeach the testimony. (See PCR Tr. p.48, defense counsel had investigator admit at trial that witnesses had not “said anything about a sawed-off shotgun” in previous interviews; see also Tr. p. 318, lines 5-12). The Court is convinced counsel’s performance was reasonable under professional standards and was not deficient. Further, *Strickland* specifically instructs courts to be highly deferential in reviewing counsel’s actions because a “fair assessment” of performance requires “every effort be made to eliminate the distorting effects of hindsight.” See *Strickland*, 466 U.S. at 689 (noting “it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful,” to conclude a particular act or omission was unreasonable); see also *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) (“Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel.”). Because Applicant cannot demonstrate deficiency, he also cannot show counsel’s performance prejudiced him under *Strickland*. Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

Cross-Examination of Witness Regarding Unrelated Incident

Third, Applicant alleged trial counsel was ineffective in eliciting information on cross-examination of Octavious Thomas (Thomas) about an unrelated incident where Thomas testified Applicant pointed a sawed-off shotgun at Thomas’s cousin the week before the deadly shooting. (Trial Tr. p. 217). Prior to trial, counsel made a successful motion to exclude testimony about the prior incident in which Applicant pointed the weapon at Thomas’s cousin and another teenager. (Trial Tr. pp. 71-77). However, during cross-examination, as counsel asked Thomas about a different incident in which words were exchanged, Thomas began to answer with details about the incident involving his cousin. (Trial Tr. p. 217). Counsel immediately interrupted

Thomas, and then moved on with his examination. (Trial Tr. p. 218).

At the evidentiary hearing, trial counsel testified Thomas “blurted that out” about the incident involving his cousin and that was not the information he intended to elicit from the witness. (PCR Tr. pp. 27-29). Counsel stated his strategy was to move on as quickly as possible once Thomas made the reference to the sawed-off shotgun rather than bring additional attention to it. (PCR Tr. p. 29; pp. 47-48).

This Court finds this claim of ineffective assistance of counsel is without merit. The record shows trial counsel made a successful pre-trial motion to suppress testimony about the earlier incident. Through no fault of counsel, Thomas made a single reference to the prior matter and counsel immediately stopped Thomas from going into greater detail. Counsel credibly testified he did not intentionally elicit the information and he quickly moved on with his cross-examination to avoid drawing unnecessary attention to the testimony, which he was within his discretion to do. This Court finds counsel articulated a valid strategy regarding his treatment of Thomas’s cross-examination and counsel was not deficient. *See Stokes*, 308 S.C. at 548, 419 S.E.2d at 779 (holding it will not be deemed ineffective assistance of counsel where counsel articulates valid reasons for choosing a certain strategy). Applicant also cannot establish prejudice where the single reference to the incident involving Thomas’s cousin could not have impacted the jury’s verdict. This is particularly so where Applicant testified that he was involved in a prior event at a ballpark approximately two weeks before the shooting that caused him to carry a shotgun; (Trial Tr. pp. 463-465), and also admitted on cross-examination that “[p]eople have seen me with it...,” (Trial Tr. p. 495; pp. 499-500). Therefore, this Court finds Applicant failed to meet his burden of proof pursuant to *Strickland* and this allegation must be denied and dismissed.

Failure to Object and Request Mistrial During Pathologist's Testimony

Applicant next alleged trial counsel was ineffective in failing to object and request a mistrial when the pathologist's testimony differed from the information received in discovery. (Trial Tr. pp. 279-80). During cross-examination at trial, the pathologist testified there was no gunshot residue (GSR) found on the victim's body. (Trial Tr. p. 279). Under questioning by defense counsel, the pathologist admitted the original report contained a typographical error and the word "no" was left out, and she provided the amended report to counsel prior to trial. (Trial Tr. pp. 279-80). The pathologist continued to testify she could not determine from the victim's wounds how far away the shooter was standing, but it was likely three or four feet given the spread of wounds and that a shotgun was used. (Trial Tr. p. 280).

At PCR, trial counsel noted there were two issues involving GSR evidence – one on discovery (a page was omitted but supplied before trial), and another regarding a typographical error in the report. (PCR Tr. pp. 31-33; pp. 49-50). Counsel testified his strategy involving the second¹ was to impeach the doctor's credibility by bringing to the jury's attention the fact that the report he received initially was incorrect and had to be amended later. (PCR Tr. pp. 49-52).

The Court finds this claim of ineffective assistance of counsel is without merit especially where Applicant cannot demonstrate the required deficiency. The mistake in the report was not critical to the theory of self-defense as it was not unreasonable that the pathologist would not find any GSR under the victim's clothes and on his body. This Court finds counsel's stated strategy of impeaching the pathologist about the mistake rather than taking the extreme measure of requesting a mistrial was valid given the circumstances. *See Stokes*, 308 S.C. at 548, 419

¹ Counsel made a pre-trial motion to exclude evidence of GSR found on the passenger side of Applicant's vehicle due to a problem with the investigator's report. (Trial Tr. pp. 62-66). The trial court found the State complied with discovery, and denied the motion. (Trial Tr. pp. 66-71). That GSR finding is not at issue in this action.

S.E.2d at 779 (holding it will not be deemed ineffective assistance of counsel where counsel articulates valid reasons for choosing a certain strategy).

Applicant also failed to demonstrate the required prejudice where he cannot show any mistrial motion would have been granted and his trial would have ended. *See State v. Beckham*, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (holding the granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way). Applicant never denied shooting the victim, so any GSR found on the victim would not have been surprising. Conversely, the lack of GSR did not prevent an assertion of self-defense. Of note, the weak link in self-defense, in defense counsel view, was that “nobody saw the Chandler boy with a gun....” (PCR Tr. p. 24). The mistake in the pathologist’s report was clearly not so prejudicial to warrant a mistrial. Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

Failure to Sufficiently Argue and Present Theory of Self-Defense

Next, Applicant alleged trial counsel failed to sufficiently present self-defense to the jury. At the evidentiary hearing, Applicant testified he never denied shooting the victim, but claimed he stopped to ask a group of young men for directions at an apartment complex, heard “shoot now,” so he fired his gun first, hitting the victim. (PCR Tr. pp. 9-10). (See also Trial Tr. pp. 465-469). Applicant further explained he knew the group and had been involved in at least one incident with some of them the week prior to the deadly shooting when one of the young men shot toward him. (PCR Tr. pp. 11-13). Applicant testified counsel did not ask the proper questions or get him to “go into detail” so that “it didn’t come out in trial” that someone from the group shot at him prior to the deadly incident. (PCR Tr. pp. 13-14; pp. 17-18).

As previously noted, trial counsel testified his strategy was to present self-defense and let Applicant testify. (PCR Tr. p. 23). Counsel stated he thought Applicant's testimony went well because the jury heard from Applicant about the prior incident. (PCR Tr. pp. 34-35). (See also Trial Tr. pp. 461-462). Further, counsel presented evidence of self-defense through other witnesses, including Applicant's cousin who told the jury about previous incidents in which the young men tried to intimidate Applicant and testimony from State's witnesses who also heard someone in their group say "shoot now." (PCR Tr. pp. 37-40). Counsel also testified he got witnesses to admit how dark it was at the time of the shooting, the victim's pocket was turned inside out like he pulled something out, and pictures of the victim's hand looked "like a gun had been in it and been taken away," all of which supported self-defense. (PCR Tr. pp. 54-55). However, counsel admitted there was also evidence of Applicant's guilt, including other witnesses who never heard anyone say "shoot now," no one ever saw the victim with a gun, and Applicant admitted he shot the victim, so counsel also made the strategic decision to argue for the lesser-included offense of voluntary manslaughter. (PCR Tr. p. 24; pp. 40-41; p. 45).

This Court finds this claim of ineffective assistance of counsel is without merit. First, the Court finds trial counsel's performance was not deficient where counsel thoroughly and ably presented the theory of self-defense. Not only did Applicant testify, but counsel examined witnesses to present information to the jury to support the theory that the group of young men that included the victim antagonized Applicant to point that he felt he was in danger. Further, because counsel was concerned about the fact the victim was never seen with a weapon, counsel testified his strategy was to also argue for a lesser-included offense. The Court finds such a strategy was valid and objectively reasonable. *See Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (holding there is a strong presumption counsel exercised reasonable professional judgment in

making decisions in the case); *see also Ingle*, 348 S.C. at 470, 560 S.E.2d at 402 (holding where counsel articulates a valid strategy, it is measured under an objective standard of reasonableness).

Applicant also cannot demonstrate prejudice where the State presented overwhelming evidence of Applicant's guilt, including testimony from eyewitnesses, GSR on Applicant's vehicle, Applicant's statements to investigators in which he admitted shooting the victim, and details that included the fact that the victim never had a gun. *See Harris*, 377 S.C. at 79-80, 659 S.E.2d at 147 (holding overwhelming evidence of guilt negates claims that counsel's deficient performance could have reasonably affected the result of trial). The jury heard Applicant's version of events, was charged on self-defense and voluntary manslaughter, and ultimately did not believe Applicant was without fault as it found him guilty of the lesser-included offense, beyond a reasonable doubt. Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

Telling Jury About Applicant's Shackles

Finally, Applicant alleged counsel was ineffective for telling the jury he wore shackles at trial. (Trial Tr. pp. 452-54; p. 461). Before trial, counsel asked the court if the shackles could be removed because they were uncomfortable, though not noticeable. (Trial Tr. pp. 60-62). The court denied the motion. (Trial Tr. p. 62). Prior to Applicant's testimony, he demonstrated for the court how he walked in the shackles, and the court asked if Applicant should be seated on the stand when the jury returned "so the jury won't be exposed to the fact that he's got some sort of restrictive device on his legs." (Trial Tr. pp. 452-53). Counsel rejected the offer. (Trial Tr. pp. 453-54). When Applicant got to the stand, counsel asked him about the shackles in front of the jury. (Trial Tr. p. 460). Applicant admitted they were a security measure and said they were the

reason he was “walking funny.” (Trial Tr. p. 461).

Before this Court, Applicant testified the shackles fit under his pants, but they locked up and affected the way he walked. (PCR Tr. pp. 15-16). Trial counsel testified he was surprised the trial judge did not allow the bailiffs to remove the shackles. (PCR Tr. pp. 35-36). Counsel stated he made a conscious decision not to take the judge up on his offer to put Applicant on the stand prior to the jury’s return because counsel thought it might help their case and arouse the jury’s sympathy to bring the shackles to its attention as they looked uncomfortable. (PCR Tr. pp. 36-37).

The Court finds this claim of ineffective assistance of counsel is without merit. This Court makes careful note the shackles were knee braces that could be fully concealed by Applicant’s pants, rather than a more conventional set of shackles connected by a chain. Knowing this, trial counsel still elected to draw the jury’s attention to the shackles in an attempt to invoke the sympathy of the jury. This decision was a strategic one, and counsel was well within his discretion to make that choice. *See Humbert v. State*, 345 S.C. 332, 337 n.4, 548 S.E.2d 862, 865 n.4 (2001) (“The defendant’s appearance at trial dressed in jail clothing is not automatically reversible error. There may be situations where, as a matter of trial strategy, counsel decides jail attire benefits the defense.”); *see also Strickland*, 466 U.S. at 700 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”). Because Applicant cannot demonstrate deficiency, he also cannot show counsel’s performance prejudiced him under *Strickland*. Therefore, this Court finds Applicant failed to meet his burden of proof and this allegation must be denied and dismissed.

All Other Allegations

As to any and all allegations raised in the application or at the hearing in this action 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.

Conclusion

Based on the foregoing, this 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.

This Court notes Applicant must file and serve a notice of appeal within thirty days from receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his PCR attorney must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal. Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. *Austin v. State*, 305 S.C. 453, 454-55, 409 S.E.2d 395, 396 (1991).

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant is remanded to the custody of the Department of Corrections to complete service of his sentence.

IT IS SO ORDERED this 7th day of March, 2018.

R. Keith Kelly
R. Keith Kelly, Presiding Judge
Eleventh Judicial Circuit

Spartanburg, South Carolina.

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The Honorable Daniel E. Shearouse
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