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June 4, 2018

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUN 07 2018

S.C. SUPREME COURT

Re: Daniel J Jenkins 274033 v State, 20156CP-10-1700

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Charleston County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:

Megan Jameson

Daniel J Jenkins 274033.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 07 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Maite Murphy, Circuit Judge

Case No.: 2016-CP-10-01700

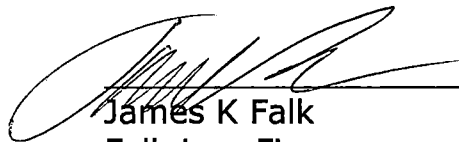
Daniel Jenkins 274033.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James L. Moore appeals the Honorable Maite Murphy's May 7, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on May 17, 2018. A copy of the order on appeal is attached hereto.



James K Falk
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PO Box 1058
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June 4, 2018

Megan Harrigan Jameson, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JUN 07 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Honorable Maite Murphy., Circuit Judge

Case No.: 2016-CP-10-1700

Daniel L Jenkins 274033.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Megan Harrigan Jameson Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this June 4, 2018.



James K Falk
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Daniel J. Jenkins, #274033,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2016-CP-10-1700

ORDER OF DISMISSAL

FILED
2018 MAY 15 PM 2:28
JULIE J. HARRIGAN
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed on April 4, 2016, by Daniel J. Jenkins (Applicant). The State (Respondent) filed a return on June 24, 2016, and an amended return on November 8, 2017, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened February 1, 2018, at the Charleston County Courthouse. Applicant was present at the hearing and represented by James K. Falk, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

The records before this Court establish Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. In April of 2006, Applicant was arrested following an investigation into a sexual assault. In September of 2006, the Charleston County Grand Jury indicted Applicant for one count of first-degree criminal sexual conduct. Assistant Public Defender Jason T. King

represented Applicant. The case was prosecuted by Assistant Solicitor Chad Simpson. On December 8, 2009, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Deadra L. Jefferson, circuit court judge, presiding. At the conclusion of trial, the jury convicted Applicant as indicted. Following the verdict, the trial judge sentenced Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45 based on Applicant's two prior convictions for "most serious" offenses.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense—Office of Appellate Defense. The State was represented by Assistant Attorney General Mark R. Farthing. Subsequently, following briefing and oral argument, the South Carolina Court of Appeals reversed the trial judge's ruling on the validity of a search warrant issued in Jenkins' case and remanded the matter to the trial court for an evidentiary hearing on the applicability of the inevitable discovery doctrine. State v. Jenkins, Op. No. 4958 (S.C. Ct. App. filed Mar. 28, 2012) (Shearouse Adv. Sh. No. 11 at 48). Thereafter, the State petitioned the Court of Appeals for rehearing, and the Court of Appeals granted the State's petition, withdrew its previous opinion, filed a substituted opinion that contained an additional footnote but was otherwise consistent with its previous opinion, and dispensed with further argument and briefing. State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (Ct. App. 2012).

In reaching that decision, the Court of Appeals determined the search warrant affidavit was deficient because it did not demonstrate the police had probable cause to believe Applicant raped Victim or Applicant's DNA was relevant to the investigation. (App'x pp. 264-268).

Furthermore, the Court of Appeals determined any error in the admission of the DNA evidence was not harmless, stating:

Without the DNA in this case, . . . the State would have been forced to rely heavily on the credibility of the victim. Applicant' fingerprint in the victim's home proved he was there, the presence of fluids in her body proved someone had sex with her, and the facial injuries proved someone violently assaulted her. However, removing the DNA leaves only the victim's credibility to prove two key facts necessary for a conviction: that Applicant was the person who had sex with her, and that the sex was not consensual. We cannot find beyond a reasonable doubt that the DNA comparison results in this case, which the DNA analyst testified had a one-in-8.6 quintillion likelihood of error, did not contribute to or affect the verdict.

(App'x pp. 269-270) (citations and footnotes omitted). Finally, the Court of Appeals concluded there was insufficient evidence in the "blank" appellate record to establish Applicant' DNA would inevitably have been discovered and remanded the matter for an evidentiary hearing on that issue. (App'x pp. 270-274).

The State then filed a petition for a writ of certiorari in the South Carolina Supreme Court, and the petition was granted on September 24, 2014. Following briefing and oral argument, the Supreme Court reversed the Court of Appeals and reinstated Applicant's conviction, finding the trial judge's error in admitting DNA evidence that was collected pursuant to an invalid warrant was harmless. State v. Jenkins, 412 S.C. 643, 773 S.E.2d 906 (2015). The Remittitur was returned to the circuit court on July 17, 2015.

SUMMARY OF FACTS ADDUCED AT TRIAL

In April of 2006, thirty-one-year-old Heather Mayer ("Victim") lived alone in downtown Charleston, South Carolina, and worked at a local bakery five days a week. (App'x pp. 3-5). Frequently, when Victim headed to work or went to a grocery store near her home, she would

encounter Applicant, who regularly hung around outside of the entrance to the grocery store. (App'x pp. 5-6). When she did so, Victim would greet Applicant, who she knew as "Black," and sometimes exchange pleasantries with him. (App'x pp. 5-7; pp. 27-28). However, other than briefly addressing Applicant when she passed him, Victim did not have a relationship with Applicant, did not know Applicant well, did not consider Applicant to be a friend, and was not even aware of Applicant's real name. (App'x pp. 6-7; pp. 27-28).

On the morning of April 5, 2006, Victim reported to her job at the bakery at approximately 8:00 a.m. and worked throughout the day. (App'x pp. 3-4; p. 7). At around 3:00 p.m. to 4:00 p.m., Victim finished working for the day and returned to her home. (App'x p. 7). After she did so, one of her friends came over to visit, and the two drank several beers together while they socialized. (App'x pp. 7-8). Then, Victim's friend left for the evening, Victim ordered a pizza for dinner, and Victim fell asleep on her couch around 8:00 p.m. while she waited for her pizza to arrive. (App'x pp. 7-8).

Subsequently, at around 10:00 p.m., Victim was awakened by the sound of someone knocking on her door and went to open the door in response. (App'x p. 8). When she opened her door, Victim found Applicant standing on her doorstep, and he asked her if she wanted to go get a beer with him. (App'x p. 9). However, Victim declined Applicant's invitation. (App'x p. 9). Applicant then asked Victim for money so he could go get a beer for himself, and Victim again declined. (App'x p. 9). After that, Applicant abruptly entered Victim's home "somewhat aggressively," and Victim responded by backing away into her living room and sitting down on her couch. (App'x pp. 10-11).

Thereafter, Applicant followed Victim to her couch, immediately began making lewd

sexual demands, and threatened to kill her if she did not comply with his demands. (App'x p. 11; p. 35). In response, Victim pleaded with Applicant not to do anything, warned him of the potential consequences of his actions, and did everything she could to dissuade him from doing anything further. (App'x p. 11). However, Applicant was undeterred by Victim's pleas and started touching her. (App'x p. 12). Then, Applicant grabbed a glass candle holder from Victim's coffee table and began repeatedly striking Victim in her head, face, nose, forehead, ears, and mouth. (App'x pp. 11-13). Stunned, Victim tried to physically resist Applicant while also trying to hold onto her pants and reach her portable house phone to call for help. (App'x pp. 12-13). However, Applicant grabbed the phone away from Victim and forcibly ripped off her pants and underwear. (App'x p. 14). After that, Victim repeatedly begged Applicant to stop, warned Applicant her boyfriend was on the way in an effort to frighten him into stopping, and attempted to scream. (App'x p. 14; p. 38). However, Applicant was not dissuaded, and he told Victim she was going to die, covered her mouth with his hand, and forced himself inside of her while continuing to make sexual remarks. (App'x p. 15; p. 38). Applicant then continued to sexually assault Victim until he ejaculated. (App'x p. 15; p. 132).

Once Applicant was finished, he climbed off of Victim, threatened to kill her if she told anyone about the assault, and quickly fled from her home. (App'x p. 15). Injured, frightened, and in disbelief of what had occurred, Victim put on a sweatshirt to cover her blood-soaked clothes and began looking for her phone inside of her house. (App'x p. 16). When she could not find it, Victim ran into the street looking for help, but several passing cars would not stop for her. (App'x p. 16). Victim then ran towards the grocery store near her home, and a woman approached her to find out what had happened. (App'x pp. 16-18). However, before Victim

could tell the woman, Applicant approached them and inquired about what had occurred. (App'x p. 18). Terrified, Victim began to cry and asked to use a phone, and Applicant responded by grabbing her by the arm, leading her across the street, and offering to let her use her phone if she would wash the blood off of her face. (App'x pp. 18-19). Applicant then helped Victim wash her face with water from a nearby spigot before returning Victim's own phone to her. (App'x pp. 19-20). After that, Victim took the phone and immediately ran to her house. (App'x p. 20). However, fearing Applicant would return, she ran back outside and hid under a tarp on the side of her home before calling 911 to report the sexual assault. (App'x p. 20).

Shortly thereafter, law enforcement officers from the Charleston Police Department arrived at Victim's house and spoke with Victim, who was shaking, crying, bleeding, and appeared to have been "roughed up pretty good." (App'x p. 21; pp. 23-24; pp. 49-51; p. 100). At that time, Victim advised the officers she had been sexually assaulted by a man she knew as "Black," and, based on his familiarity with "Black," Officer Jake Grill immediately headed to an abandoned building across from the grocery store located near Victim's house. (App'x p. 24; p. 51; pp. 53-54). Inside, he found Applicant, who was completely naked and appeared to be sleeping. (App'x p. 24; pp. 53-54). Officer Grill then woke Applicant up, allowed him to get dressed, and escorted him to the parking lot of the grocery store while Detective Jennie Antonio quickly brought Victim to that location to see if Applicant was the person who had sexually assaulted her. (App'x pp. 24-25; p. 52; p. 54; pp. 99-101). Upon seeing Applicant, Victim quickly identified him as her assailant. (App'x p. 25; p. 54). Applicant was then arrested, and Victim was transported to a clinic for a sexual assault examination. (App'x p. 26; p. 79; p. 111).

At the clinic, Faye Lebeof, a certified nurse midwife and an expert in sexual assaults,

interviewed Victim and performed a sexual assault examination on her. (App'x pp. 108-111). During the examination, Lebeof discovered Victim's face, eyes, and mouth were bruised and injured, Victim had abrasions and lacerations in her vagina, and Victim's hymen had signs of redness, and Lebeof located fluids inside of Victim's vagina, which were collected as evidence. (App'x pp. 112-114). Based on her examination, Lebeof concluded Victim's injuries were consistent with Victim's report of a sexual assault. (App'x pp. 113-114).

Meanwhile, officers processed the crime scene, located blood stains on Victim's sofa, collected Victim's ripped underwear and a glass candle holder from the floor, and recovered several fingerprints from the candle holder, which were subsequently determined to belong to Applicant. (App'x p. 55; pp. 59-61; p. 63; pp. 72-73). Additionally, as part of the investigation, Detective Antonio prepared a search warrant affidavit for the recovery of Applicant' D.N.A. based on the information Victim reported to her about the assault. (App'x pp. 78-79; p. 83; p. 86; p. 148). The probable cause section of the warrant affidavit stated:

On 4-5-06 at approximately 2230 hrs while at [Victim's address], the subject, Daniel Jerome Jenkins . . . did enter the victim's residence and threatened to kill her if she did not comply with his demand to perform oral sex on her. The victim attempted to fight the subject, however he overpowered her by striking her in and about her face using a glass candle holder. The subject then penetrated the victim's vagina with his tongue and penis. The DNA samples of blood, head hair and pubic hair will be retrieved from the suspect by a trained medical personnel in a medical facility. The collection of these sample will be conducted in a noninvasive manner.

(App'x pp. 80-81; p. 147). After preparing the warrant affidavit, Detective Antonio presented the affidavit to a magistrate judge, and the magistrate judge issued a search warrant without taking any supporting oral testimony. (App'x pp. 81-82; p. 102). Subsequently, pursuant to the search warrant, Lebeof collected a DNA sample from Applicant. (App'x p. 116). Thereafter,

Applicant's DNA sample was compared to the semen located in the rectal and vaginal swabs collected from Victim after the sexual assault, and an expert in forensic DNA analysis determined Applicant's DNA profile conclusively matched the DNA profile developed from the evidence collected during Victim's sexual assault examination. (App'x p. 129; pp. 131-132).

Subsequently, Applicant was indicted for first-degree criminal sexual conduct, and he proceeded to trial. (App'x pp. 143-144). During trial, Victim recounted the details of the sexual assault and identified Applicant in the courtroom as her attacker. (App'x pp. 11-21; p. 25). Additionally, the officers and other personnel who were involved in investigating the sexual assault testified about the results of their investigation. (App'x pp. 50-51; p. 57; pp. 72-73; pp. 78-79; p. 100; pp. 111-112; p. 131). Then, prior to the introduction of the evidence establishing Applicant's DNA profile matched the DNA profile of Victim's assailant, defense counsel moved to suppress the DNA evidence, arguing the search warrant used to gather the evidence was insufficient because the accompanying affidavit did not establish probable cause and contained no indication relevant information would have been found through the search. (App'x p. 87; pp. 90-91; p. 93). However, the trial judge denied the suppression motion. (App'x p. 94-97).

Thereafter, as the trial continued, Adrienne Riley, a forensic DNA analyst and expert in forensic DNA analysis, testified Applicant's DNA profile matched the DNA profile developed from the semen collected from Victim's body. (App'x p. 127; p. 129; pp. 131-132). Riley further explained the odds of randomly finding an individual with a matching DNA profile were one in 8,600,000,000,000,000,000. (App'x p. 132). Defense counsel then renewed his objection to the admission of the DNA evidence, and the trial judge again overruled the objection. (App'x pp. 132-133).

Subsequently, at the conclusion of trial, Applicant was convicted as indicted. (App'x p. 137). During the ensuing sentencing proceedings, the solicitor informed the trial judge of Applicant's prior criminal record, which consisted of convictions for first-degree criminal sexual conduct in 1978, carjacking in 1993, failure to register as a sex offender in 1998, strong-arm robbery and assault and battery of a high and aggravated nature in 2001, and failure to register as a sex offender in 2005. (App'x pp. 140-141). Based on Applicant's prior "most serious" convictions for first-degree criminal sexual conduct and carjacking, the trial judge sentenced Applicant to life imprisonment without the possibility of parole pursuant to S.C. Code Ann. § 17-25-45. (App'x pp. 140-142).

ALLEGATIONS RAISED

In his application and amended application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. "Notice of life without parole, was and still today, invalid and void (sic)."
 - a. "Illegal sentence and conviction."
2. "Prior Conviction- Not Most Serious Offense. 93-GS-10-6617. (sic)"
 - a. "Illegal use of prior conviction of 7-06-1978- was not most serious offense in 1978 (sic)."
3. "Prior Conviction- Not Most Serious Offense. 7-06-1978. (sic)."
 - a. "Carjacking- no notice of life without parole- left court without jurisdiction to proceed to trial."
4. "There is not a carjacking conviction"
 - a. "There's no carjacking indictment, sentence, or conviction."
5. "17-25-45 of January 1, 1996 is "prospective" (sic)"
 - a. "Offense before June 1986 was not classified as violent."

While he did not formally amend his application, Applicant proceeded forward on the following grounds at the evidentiary hearing without objection from the State:

1. Counsel should have moved for a mistrial when the State asked the victim to make an in-court identification of Applicant prior to a ruling on the admissibility of the identification
2. Counsel should have moved for a mistrial following his objection to the officer's testimony that he was familiar with Applicant
3. Counsel should have sought a curative instruction after State sought to bolster the victim's prior testimony
4. Counsel should have challenged Faye Leboef's credentials to testify as an expert in sexual assault examination

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 hearings. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441,

334 S.E.2d 813. The applicant must overcome this presumption 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. 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, 385 S.E.2d at 625 (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, 386 S.E.2d at 625.

After careful review of the entire record, including the testimony presented at the evidentiary hearing, based on the standard discussed above, this Court finds Applicant has failed to carry his burden of proof and had not established any ineffectiveness of counsel. Below are the findings in regards to each specific allegation of ineffective assistance of counsel raised by Applicant:

Allegation: Ineffective assistance of counsel for failing move for a mistrial when the State asked the victim to make in court identification of Applicant prior to a ruling on the admissibility of the victim's identification

Applicant asserts counsel was ineffective for failing to move for a mistrial when the victim made an in-court identification of Applicant prior to a ruling on the admissibility of the victim's identification. This Court finds Applicant has failed to establish any ineffectiveness of counsel as to this allegation.

The record reflects the trial court decided to conduct a Neil v. Biggers hearing on the admissibility of the victim's identification of Applicant prior to the introduction of the

identification during the victim's testimony rather than before trial. See Tr. 1-3. The court instructed counsel not mention the identification in opening statements. See Tr. 3. However, during the State's examination of the victim, the prosecutor asked the victim if the person she knew was Black was present in the courtroom today, to which the victim answered affirmatively. See Tr. 60. Counsel immediately objected, and following a bench conference, the trial court instructed the jury to disregard this testimony and "to give it absolutely no consideration in [their] deliberations." See Tr. 60-62.

Regarding this allegation, counsel testified the victim had identified Applicant by his street name, "Black" and had also identified him to law enforcement shortly after reporting her assault to law enforcement. He testified Applicant was found in an abandoned house nearby the victim's home and victim was brought to identify him in person. He testified law enforcement did not present a photographic lineup to the victim, but instead, brought the victim to view Applicant for a show-up lineup. He testified he moved to suppress the victim's lineup prior to trial. Counsel testified he moved to suppress the identification because of the show-up procedure, but conceded he did not have any valid ground on which to argue the identification should be suppressed. Moreover, counsel testified Applicant's identify was not at issue because Applicant's DNA and fingerprints already conclusively linked him the victim and her apartment. Moreover, he testified his defense was that the victim and Applicant had consensual sex, and therefore, the victim's identification was not prejudicial to his defense theory. He testified that rather than holding a suppression hearing before the trial began, the trial court decided to start the trial and break for a motions hearing on the identification's admissibility immediately before the intended introduction of the identification. He testified the trial court advised the State not to

mention the identification during its opening statement or otherwise mention the identification until a ruling on the admissibility. He testified that despite this warning from the court, the State elicited an identification from the victim prior to the motions hearing or ruling from the court. Counsel testified he immediately objected, and after a brief discussion at the bench, the trial court instructed the jury to disregard the last question and response. He testified the trial court later ruled the identification was admissible following an in-camera hearing on his motion to suppress.

This Court finds trial counsel was not defective in regards to this allegation, as he timely objected to the premature identification from the victim and he did not think a mistrial was necessary following the trial court's curative instruction to the jury based on the likelihood the identification would ultimately be admissible. This Court finds counsel performed reasonably and his decision not to move for a mistrial was reasonable based on the circumstances presented in this case.

Moreover, this Court finds Applicant cannot show any requisite prejudice as to this allegation, as the trial court sustained this objection, instructed the jury to not consider this testimony at all during its deliberations, and later ruled the identification was admissible. Additionally, Applicant's identification was not at issue, as his DNA and fingerprints linked him to the victim and her apartment. Therefore, this allegation must be denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to move for a mistrial following his objection to the officer's testimony that he was familiar with Applicant

Applicant asserts counsel was ineffective for failing to move for a mistrial following counsel's objection to Officer Cone's testimony that he was familiar with Applicant. This Court finds Applicant has failed to establish any ineffectiveness of counsel as to this allegation.

The record reflects that during the State's examination, Officer Cone testified that he and a fellow officer were familiar with Applicant. See Tr. 155. While Officer Cone was still answering a question, counsel objected and asked to approach for a bench conference. See Tr. 155-156. Thereafter, this trial court instructed the jury to disregard the last question and last answer and "to give it absolutely no consideration in [their] deliberations." See Tr. 156.

Regarding this allegation, counsel testified one of the law enforcement officers testified he was familiar with Applicant based on his prior experience with Applicant. He testified he immediately objected, and following a bench conference, the court instructed the jury to disregard the officer's statement. Counsel testified he clarified this cross-examination by eliciting testimony that this officer knew Applicant because he was a fixture in this community, not based on any prior criminal acts or encounters. Counsel testified he did not consider asking the trial court for a mistrial because Applicant's identification was not at issue, this testimony was not prejudicial to Applicant, and he was able to clarify this comment on cross-examination.

This Court finds trial counsel was not defective in regards to this allegation, as he timely objected to Officer Cone's testimony that he knew the Applicant and thereafter, the trial court sustained the objection and gave a curative instruction.

“Generally, a curative instruction is deemed to have cured any alleged error.” State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (quoting State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct.App.2005)); see also 75B Am.Jur.2d Trial § 1284 (1992) (“By striking the evidence and instructing the jury to ignore it, the court may often cure its error in admitting the evidence, or render such error harmless, even in criminal cases.”). “A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.” State v. Walker, 366 S.C. at 658, 623 S.E.2d at 130; see also Kelsey, 331 S.C. at 70, 502 S.E.2d at 73 (instruction to disregard inadmissible evidence is usually viewed as having corrected the error in its admission). If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction. State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996).

This Court finds counsel’s his decision not to move for a mistrial was reasonable based on the proper curative instruction given by the trial court that cured any possible error. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to request a curative instruction following bolstering testimony

Applicant asserts counsel was ineffective for failing to request a curative instruction following the re-direct examination of State’s witness Detective Antonio based on bolstering. This Court finds Applicant has failed to establish any ineffectiveness of counsel as to this allegation.

The record reflects that during the State's re-direct examination of Detective Antonio, the State asked, "Fair to say that what [the victim] told you about the crime is what would --." See Tr. 211. Before the State could finish asking its question, counsel objected on the basis of bolstering. See Tr. 211. The court asked counsel to approach, and thereafter, the State ended its examination without asking any additional questions. See Tr. 211.

Counsel testified he objected during the State's re-direct examination of its witness Detective Antonio based on bolstering. He testified the State was still in the middle of asking its question when he objected, and the trial court immediately asked counsel to approach for a bench conference. Thereafter, the State abruptly ended its questioning of this witness. He testified that he objected out of an abundance of caution, but is not sure if the State was attempting to elicit testimony to bolster the victim's account of events.

This Court finds counsel properly and timely objected before any testimony that could have potentially bolstered the victim's testimony could be elicited. Therefore, as counsel timely objected and no testimony was given, Applicant can establish neither deficiency of counsel nor prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing to object to the expert qualifications of the SANE nurse who examined the victim

Applicant asserts counsel was ineffective for failing to object to the qualifications of admission of Faye Lebeof, the SANE nurse who examined the victim, as an expert in sexual assault examinations. This Court finds Applicant has failed to establish any ineffectiveness of counsel as to this allegation.

The record reflects the State moved for the admission of Lebeof as an expert in female health with a specialty in sexual assault examination. See Tr. 233. Lebeof was a certified nurse midwife, had completed a course and passed an examination to become as a Sexual Assault Nurse Examiner (SANE), had done a thousand sexual assault examinations, and had been qualified as an expert 10 times. See Tr. 231-33. Counsel did not voir dire Lebeof or object to her qualifications as an expert witness and Lebeof was admitted as an expert. See Tr. 233. Lebeof testified the vaginal injuries were consistent with a sexual assault, but also testified during cross that the injuries were consistent with consensual sex. See Tr. 248-49.

Counsel testified he did not object to the admission of Faye Lebeof, the SANE nurse who evaluated the victim, as an expert in female health with a specialty in sexual assault. He testified he had experience with Lebeof in a prior case and noted she had performed over a thousand sexual assault examinations and had testified as an expert ten times prior. He testified he thought she was qualified in the area of expertise in which the State sought to introduce her, and therefore, did not question her about her qualifications or object to her admission as an expert. He testified he had received a copy of Lebeof's report prior to trial and had retained his own expert, Dr. Betsy Gibbs, to review Lebeof's report. He testified Dr. Gibbs reviewed Lebeof's report and thought it was fair and supported her conclusions. Counsel testified he also did not object to Lebeof's testimony because she was unable to conclusively state that a sexual assault had occurred and admitted the victim's examination was also consistent with consensual sex.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co.,

389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” *Id.* at 445-46, 699 S.E.2d at 175. “The qualification of a witness as an expert falls largely within the discretion of the trial judge.” State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert’s testimony is admissible where “it is relevant and based on some factual predicate in the record”). Before admitting expert testimony, the trial court must find (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) (“Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.”).

A witness can properly be qualified as an expert where “the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness’s knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) (“The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.”). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-86, 457 S.E.2d 344, 346 (1995).

This Court finds Lebeof was properly admitted as an expert and therefore, counsel was not ineffective for failing to object to her qualifications. Moreover, this Court finds Applicant cannot establish any requisite prejudice from the admission of Lebeof as an expert witness, as her testimony was ultimately neutral and never went beyond the scope of her expertise. Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Ineffective assistance of counsel for failing challenge the State's notice of intent to seek life without parole

Applicant asserts counsel was ineffective for failing to challenge the State's notice of intent to seek life without parole based on his prior convictions. Applicant argued there is no evidence that he was convicted of carjacking in 1993, and therefore, the State's notice was improper. This Court finds Applicant has failed to establish any ineffectiveness of counsel as to this allegation.

Counsel testified and the record reveals that Applicant was convicted of first-degree criminal sexual conduct in 1979 and carjacking in 1993. Counsel testified he believes the State's notice of its intent to seek life without parole based on those convictions and his investigation into those convictions was proper. Therefore, this Court finds Applicant has failed to establish any ineffectiveness of counsel. Therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

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

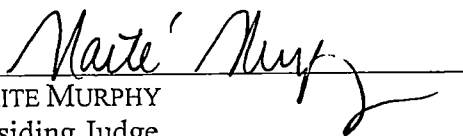
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief

counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State.

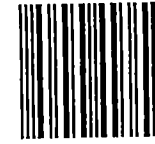
AND IT IS SO ORDERED this 7 day of May, 2018.


MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit

J. Gray, South Carolina



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