VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Hampton County

Honorable Thomas A. Russo, Circuit Court Judge

BRANDON GREENE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-000557

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

CHRISTIAN SAVILLE
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street
Columbia, SC 292101

ATTORNEYS FOR RESPONDENT

PAGES 501-545

INDEX

there was an inventory taken there was no fishing tackle in the car; is that correct?

A That's correct.

Q And I believe that it's -- it is my client's position is that the fishing tackle sort of explains why he was at the scene, he was there to go fishing as opposed to getting into a fight?

A Well, you are kind of starting in the middle. He actually went to the house to get a chain for his son's four wheeler. And evidently Mr. Badget, who is deceased, the two of them saw one another at some prior occasion and they talked about four wheelers and he mentioned, he meaning Mr. Badget deceased, had a chain that he could use for his son's four wheeler, or his child's four wheeler.

So, Mr. Greene, my client, explained to me he had gone -- you know, he had come home from work and was going to go fishing, passed by, he saw them. He went and bought a couple of pints of liquor from the liquor store and went back before he -- went back by the Badget's residence before going fishing to get the chain. And somehow a conversation started and a lot of people were hanging out around a burn barrel in the backyard, and subsequently he ended up staying our there talking and having a couple of drinks with them rather than going fishing. But I may have not answered your question, you may have to ask it again. I

am just trying to lay the groundwork.

Q No, I appreciate that. My client's concern is that you made him seem like he was not being accurate because there was no fishing gear in the car and saying that is why he was in the area was because he ultimately was planning on going fishing?

A Well, so, you are asking -- tell me what you are asking.

Q So, why didn't you call the grandfather to the stand to say that he took the fishing gear out of the car?

A Because I had a concern that the Solicitor's office -- first of all, Mr. Greene, Brandon, could testify to those things. And he did. And, you know, Mr. Murdaugh who has tried probably a thousand cases used the strategy of, well, you know, it was not in there so it must not have happened. And, you know, we questioned the officers' veracity because they didn't write the things down in their notes and they are just popping up and testifying to things that were never memorialized in writing like they should be.

But I think the ultimate question was I thought that they were trying to bait Mr. Greene, Mr. Samuel Greene, his grandfather, into getting into a position where there could be some character things brought in. And that was my concern in not calling him, you know, directly is if he got on the stand and questions were asked, you know, or

eluded to that he may say a little too much and open the door for some things to come in that we didn't want to come in.

Q What was that that you didn't want to come in?

A The Solicitor's office prior dealings with him, some prior issues or questions about guns that assistant solicitor Legette brought to my attention on numerous occasions and during bond hearings that we had with Judge Mullen and Judge, I believe, Buckner may have been a part of some of those bond hearings as well early in the process. They were very against Mr. Greene receiving a bond and every time that there was an opportunity for us to go to Court the decedent's family was there they went into this history of gun play, if you will. And that was something that I feared could seriously muddy the waters and hurt him at trial if it came in.

Q If you were just asking the grandfather about the fishing gear, how could that come in?

A There is a thing called cross examination, and during cross examination if you say too much you could open the door and there is a fear that that could happen and I felt like the veracity of Mr. Greene my client, and also the other things that he talked about where he fished, how often he fished, and what you saw when you went fishing out in those particular areas of that preserve. I felt like his

credibility could carry those things.

Now, would I have loved surrebuttal to bring in Mr. Greene to speak on that specific matter, sure I would have loved to do that, but Judge Dennis said it was -- he was not going to allow it, so that was the ruling of the Court.

Q Now, during Mr. Murdaugh's opening statement he had said -- not to take it too much out of context, but Pages 66, Lines 2 through 5 where he said, Not only that, even though he is not charged with it, there's a law in South Carolina that he can't possess a gun. It is right there. Brandon Greene is breaking the law by possessing a gun. What law do you think Mr. Murdaugh is referring to?

A I don't want to speculate, but he wasn't charged with that in this particular incident. First of all, I don't know. Maybe he is saying unlawful carrying of a pistol. You know, maybe he's suggesting if you have a gun on you and it is not in a specific place in the car maybe you could be found guilty of unlawful possession, but he wasn't charged with it.

But again -- not again, but I'm a believer, I think of old school, well, the way that I was taught by Levi Johnson and others is in an opening I believe in under-promising and over-delivering. So, if you have a solicitor that is bold enough to say that all of these

things are out there and exist, please say them because I am going to hold you accountable for everything that you have promised to a jury during closing. And that didn't become an issue.

Q Did you consider making an objection to the opening argument?

A I didn't make an objection. I can't say if I considered it or not. But I am not a big objectionor in opening and closings unless something is just so far out of bounds and so prejudicial that I think that a curative instruction is warranted, and this I did not see that. I mean, I have seen and heard a lot worse from a lot of other solicitors.

Q Do you think that it was fair that the jury could have drawn conclusions during the opening argument that Mr. Greene had a prior record and that is why it was unlawful for him to be carrying a handgun?

A I think that the Judge is very clear during the pre instructions that they give the jury that openings and closings are not evidence and they are not to be construed as such.

Q But my question is, do you think that a jury could have inferred from that argument, from the statement in the opening argument, that Mr. Greene was a convicted felon?

A Could they have inferred? I mean, they could

infer many things from that, but they could also infer in closing that the solicitor lied to them because he was never charged with those things. So I think those things balance out.

Q At the time of the opening, no decision was made whether or not Brandon Greene would ultimately testify at trial?

A I think that that decision had been made by us. Our position was self defense and we are not getting into the elements of the self defense without Mr. Greene testifying, so we knew that it was going to happen and he was quite prepared to testify prior to that. We spent a good bit of time. So, yeah, no, I think we knew that he was going to testify. They may not have known that, but he knew that, we knew that.

MR. FALK: Excuse me, Your Honor.

(Pause.)

BY MR. FALK:

Q Now, you heard concerns that Mr. Greene has about the testimony of Keith King?

A I heard concerns that he voiced, yes.

Q Were they not a statement in the discovery that were conflicting with the statements that were made on the stand?

A I cross-examined him on the information that we

had.

Q Did you have prior statements from Mr. King?

A Any statements that I had were provided in discovery. I provided them to Brandon. I had them. I suspect that I did. I can go through my file and look specifically if you would like me to. But any information that was given to me I used if it was pertinent to cross-examine. And I think that we cross-examined each one of these witnesses.

Q Do you have a copy of the transcript?

A I do.

Q If you could look, sir, around Page 334. And that is cross-examination by Mr. Murdaugh, around Line 17 through the end.

A I see it.

Q I am sorry, did you get a chance?

A Yes, I did.

Q Is Mr. Murdaugh not pitting the veracity of one witness against another right there?

A Tell me how you -- what you define as "pitting."

Q That they lied about that.

A You mean Brandon's answer that the State's witness had lied about it?

Q Answer, "No, sir, I never had the question. It didn't happen. Answer: It never happened. Question: They

lied about that? Answer: That was -- that was a total lie. So he is saying Mr. King is lying or you are lying?

A I think that's cross-examination. I didn't view that as unfairly pitting a witness against one another. You have a situation where you have somebody who is saying that, or eluding to -- let me rephrase that. You have a witness from the State who is eluding to Mr. Greene doing something illegal and shooting people, and so Mr. -- he obviously is saying that Mr. Greene is not telling the truth and Mr. Greene is saying that he wasn't telling the truth. That is what cross-examination is about, it is up to the jury to determine a witness' credibility and believability and they did that.

In one of the cases I fully agree on, the one he was found not guilty on. And I don't necessarily agree with the jury's decision on the other.

Q During the charge conference, what charges did you ask for as far as any lesser included offenses?

A In our discussion I didn't ask for lesser includeds because sometimes you get into a position where sometimes you split the baby. And I think the Judge actually -- I don't have the page number, but it is in the transcript where he specifically goes through -- Judge Dennis goes through and explains that he didn't really see any grounds for manslaughter to be asked for, for voluntary,

so he didn't see a need to charge that.

I know that I had a conversation with Mr. Greene and explained to him, this is the situation, you have murder, you have manslaughter, there is involuntary manslaughter, and then there is not guilty. Those are the only options that you have when it comes to murder. And so if you charge, and in my experience, if you charge voluntary manslaughter or involuntary, if there's a factual basis for it, the jury will try to come back -- they will try to split the baby and try to come back with something else.

And I'm sure that we had the conversation to say, all right, if we ask for this charge the Judge will give us this charge more than likely, and if we get that charge there's a chance that the jury will come back with something in the voluntary range. And I said, It's either all up or all down if we don't do that. And with me not asking for it in the charge conference, we are going all in and we are going to ask for murder or not guilty, we are not asking for any lesser includeds.

Q And not guilty based on self defense?

A Correct.

Q Prior to going to trial, did you discuss the possible sentencing ranges that he would face if he were convicted?

A Absolutely.

Q What did you explain to him those would be?

A Murder is 30 years to life. Day for day. Thirty years. And ABWIK, at that point, I think was up to 20 years. I will have to look at the statute, but I believe it was up to 20. And if convicted he could receive a life sentence, or anything in between 30 to life if he is convicted of murder. And if with ABWIK it can be up to 20 years and a Judge could determine that he -- well, in this case, he could run a sentence concurrently or consecutively. So, absolutely we discussed those things.

MR. FALK: One moment please.

(Pause.)

MR. FALK: We have no further questions.

CROSS EXAMINATION

BY MR. NEELY:

Q After they called reply witnesses, with regard to the questions about the fishing tackle, at that point did you consider Mr. Samuel Greene's testimony more important?

A I did, at that point.

Q At that point?

A Yes.

Q At that point, you asked for surrebuttal?

A That's correct.

Q So you planned on calling Mr. Samuel Greene as a witness in reply to the State if the Court allowed you to?

A That's correct.

Q At that point, it was more important than it had been prior?

A That's correct.

Q But the Court didn't allow that?

A That's correct.

Q Over your asking for surrebuttal?

A That's correct.

Q And there was actually a plea to voluntary offered to him; is that correct?

A At some point there was a plea offer out there.

Q Was it voluntary, do you recall?

A I think that it was for voluntary, but it would have been for the max is what they were asking for I'm sure.

Q You had that conversation with Mr. Greene as well?

A Yes, yes.

Q During the middle of the trial, it came to the attention of the Court that one of the jurors had been speaking to one of the witnesses; is that right?

A Yes, I would say, had spoken to. I don't want to say, had been speaking, because I don't know about any had been speaking, but there was a juror seen speaking to one of the witnesses. So, yes, that did take place. I think that that was Mr. Youmans.

Q After that came to the Court's attention, you

asked the Court to dismiss that jury and place in the alternate, correct?

A Absolutely.

Q This was before any jury deliberations?

A That's correct. And as the Court knows, the warning that is given to jurors every time they exit the building at any point in time you do not discuss the case with anybody, you have not received all of the evidence, to do that would be improper. And they are given the warning if somebody is found discussing the case amongst themselves in the jury room, that the jury should -- or the foreman should let the Judge know that the case has been prematurely discussed and the Court will at that point do what it needs to do to cure it if it can be cured, or whatever the Court needs to take place.

Q So, for you, you didn't see any prejudice because the jury hadn't deliberated the case and he was removed from the jury?

A Correct, it was brought to the Court's attention. There was an in-camera hearing, and he was removed. And another juror took his place who ended up being another black male on our jury, which is ultimately what we truly wanted.

Q So, in that case it was actually beneficial for you and there was no reason for a mistrial; is that correct?

A That's correct.

MR. NEELY: No further questions.

THE COURT: Anything further?

MR. FALK: No, Your Honor. I would like to recall my client to the stand.

THE COURT: All right. Thank you, Mr. Gipson, you may step down, please sir. You may come back to the stand and keep in mind you are still under oath.

Thereupon,

BRANDON GREENE

was called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FALK:

Q Mr. Greene --

A Yes, sir.

Q -- you heard Mr. Gipson about plea negotiations or plea discussions; is that correct?

A Yes, sir.

Q What is your recollection of those conversations?

A Well, when I was still at the County he told me that they put a deal on the table for 30 years and I told him that I didn't want to take that deal. And then once trial started he came with another deal that they said that they would allow me to plead guilty to both charges for

manslaughter, manslaughter for both charges, to run concurrent I guess and it was to be zero to 30. And I said, That means they are going to give me the original 30 that they offered me from the beginning. And he said, Not necessarily. He told me, Not necessarily. But I already -- I kind of felt like they wanted to give me the 30, so that is why I continued on with the trial.

MR. FALK: No further questions.

MR. NEELY: No cross, Your Honor.

THE COURT: All right. Thank you, sir. You may step down.

MR. FALK: At this point we rest.

THE COURT: All right. Mr. Neely, anything further from the State?

MR. NEELY: Your Honor, the State doesn't have any witnesses to call. I would like to ask for summary judgment on two of the allegations.

THE COURT: OKay.

MR. NEELY: The allegation that Mr. Gipson didn't file a Brady motion. I don't believe that there's any evidence that that didn't happen. Mr. Gipson testified in the case as to his client. There's no allegation that he failed in discovery in any way shape or form. And as well as the allegation that appellate counsel was in error, I don't believe that I heard anything

about appellate counsel brought up in the issues.

THE COURT: All right. Mr. Falk, do you want to be heard on either one of those?

MR. FALK: Those are not our strongest issues.

THE COURT: I'll grant your motion as it relates to those issues.

MR. NEELY: Thank you, Your Honor.

THE COURT: We will proceed with Mr. Falk. I'll be happy to hear from you.

MR. NEELY: May I ask that Mr. Gipson be excused at this point in time?

THE COURT: Any objection?

MR. FALK: No objection.

THE COURT: Thank you very much, sir, you are free to go.

All right. Mr. Falk.

MR. FALK: Your Honor, I think that the issues that I think are strongest for my client, and I certainly have concerns when we have a jury and the State strikes three people off of a jury and my client is black and he takes three of the four blacks off of the jury. I'm not sure if he provided race neutral responses to his reasons for why he struck those people. But certainly, under these circumstances, there's no way to do parts two and three of a Batson

challenge, so I certainly have concerns just on its face it looks as though there was a Batson issue here as far as the makeup of the jury panel.

And there was a discussion about whether or not my client had an opportunity to say, I don't like this panel, this is -- the panel looks all white to me. Again, I'm concerned that the State took the three of its five strikes against taking three of the blacks off of the jury panel leaving only one at that time.

And the other -- I also have a concern about the statement about, in the opening argument where he said that -- again, I am going back to Page 66 where he said that Brandon Greene is breaking the law by possessing a gun. I think that, certainly, that is an improper argument to be making in opening argument. He wasn't indicted for anything related to why that gun would be unlawful.

And I think that it's very easy to assume that the jury can draw the conclusion that the reason that it's unlawful to have a gun is because he has a prior record. And that would, again, be a concern that the jury -- that the solicitor is sort of tipping the hand that my client had a prior record at the time. And certainly he is charging -- he is indicating that we even have more stuff that we can charge him with. This

is like 404(b) evidence. More stuff that we can charge him with.

And I think it is clearly prejudicial to my client. I think that, at the end of the day, he's pitting his witnesses together. He has got Keith King and my client. And there might be a difference in the testimony, but I certainly think that it's improper to challenge my client saying, I know why would Mr. King be lying. I think that it is clearly pitting the witnesses, and I think that it is prejudicial to my client's representation in this case.

We have concerns about the seating of the juror number 55. And I think that that's been addressed by both my client and trial counsel in the fact that Mr. Gipson could have called Samuel Greene to the stand to sort of clear out this issue about the fishing tackle in the car. That would have calmed the issue if it came; he could have put that fire out.

He would have had a witness who could have come up and said that the fishing tackle -- an explanation for why the fishing tackle was not in the car. The State certainly used the absence of the fishing tackle from the car in some way to try to impeach his testimony. And again, I think that Mr. Gipson should have called Mister -- he knew about Mr. Greene Senior, his

grandfather, he had had conversations with him. And had he called him to the stand we believe that there is a reasonable possibility that the jury would have reached a different verdict.

THE COURT: All right. Thank you, sir. Mr. Neely.

MR. NEELY: Thank you, Your Honor. Concerning the opening remarks by the solicitor, you are not allowed to have a gun on you unless you have a concealed weapons permit no matter where you are or what you are doing, unless you are in your home or have it in the glove compartment or center console of your vehicle. I think that's what he was talking about. There was testimony elicited by assistant Murdaugh that the officers have concealed permits. And even on cross examination of Mr. Greene, Mr. Greene admitted that he shouldn't have had the gun on him and didn't have a right to have that gun on him.

And again, even if, even if that was the case, it goes to the prejudice. And there's absolutely no prejudice where you heard Mr. Gipson testify that the plan was always to have Mr. Greene testify. So, his prior record was always going to come out. So, there was no prejudice even if the jury could have inferred that he had a prior record because that came out

because he did testify.

And Mr. Gipson testified that he was scared to bring Samuel Greene, the grandfather in the case, because he didn't know what he was going to say. He didn't want to get into a character evidence type situation where the State could introduce character evidence against Mr. Greene because there was character evidence they could have brought against him, had that been the case.

And then the State called reply witnesses and made a big deal about the fishing tackle and about his absence from the truck, and he actually planned at that point on calling Mr. Samuel Greene because at that point it had become an issue in dispute we thought that it was important to call him and asked to call him and the Judge denied his request for a surrebuttal.

So, in the end it wasn't even that he decided not to call Samuel Greene, it was the Judge decided not to allow him to. So I don't think that Mr. Gipson would disagree that they wanted to call Mr. Samuel Greene to testify about the fishing tackle and just couldn't.

He asked for a mistrial. The motion was very clear. It actually benefited him, or potentially benefited him for getting another black male juror on the jury, and there was no prejudice at all because

nothing was discussed amongst the jury. So any potential prejudice from one of the witnesses speaking to one of the jurors was nullified by the fact that he was dismissed from the jury before they deliberated.

And the instruction for the voluntary manslaughter, I think that Mr. Gipson, again, covered that very well. He discussed with his client and made an informed decision to go for all or nothing. That was discussed at length. That was his decision.

Mr. Greene testified that he had a potential plea deal to voluntary. Although he was scared he would get 30, he could still plea to voluntary. Asking for a voluntary instruction would, as Mr. Gipson elucidated, brought the potential for the jury to split the baby and come back with voluntary if they were not sure whether it was murder or not. And I think that was a result that they were trying to avoid. The pitting of the witnesses, I think that there could have been an objection there, but I don't think that by any stretch of the imagination insufficient for him not to object at that point. Certainly he's putting up Mr. Greene to testify to the things that other witnesses said that were not accurate and Mr. Greene's version of events were accurate. That was the entire basis of the case, self defense. And to some extent, maybe to a large

extent, the jury agreed with him.

The initial aggressor on Mr. Greene was Anthony Badger and that is where the ABWIK charge came from. And the jury found Mr. Greene not guilty of the ABWIK charge against the initial aggressor. And then the decedent was, according to the testimony of others, I think attempted to stop the fight and Mr. Greene was part of the fight. And the jury obviously believed that Mr. Greene was not justified in the killing of the third party who became involved after he shot Anthony Badger.

It was a very reasonable result to come to, that he was justified for one shooting of an individual that he was scared of that was charging him, according to Mr. Greene's testimony as well as others, but was not justified shooting a third party that was attempting to stop the fight.

Again, with the Juror Gill, it seems like it was a very informed decision on all sides. They talked about the pros and cons and weighed them together and they both decided that you have a unique situation where you have a juror who has been charged with -- and it was a little unclear as to whether it was expunged or whether it was dismissed. If it was expunged, I think that it even goes further to Mr. Gipson's point that you have a

man that was charged with ABWIK and he knows the confusion and fear that that can cause, and then the relief of getting that expunged from your record and moving on with his life, that is a very unique situation, as Mr. Gipson put it, and I agree. Normally in most cases it is the solicitors that are going to be striking those jurors.

And regarding the Batson motion, I was actually fairly surprised at how well Mr. Murdaugh remembered each of the jurors, and I think that he actually gave a race neutral reason for each of the jurors that he struck. Which I thought that he would testify, I don't know. But he testified for each one of the individual reasons for why he struck them.

For Juror number 44 he testified that he's from Brunson and he had a problem with the Dobsons from Brunson and that he wouldn't take anybody from that family. That is certainly a race neutral reason.

Juror number 105, he testified that he prosecuted his brother for assault and battery. Certainly that is a race neutral reason.

And Juror 146, he testified that he was from Estill and that he had known from law enforcement that he was in the drug business and that he wouldn't want anyone on the jury who was in the drug business.

Again, certainly that is a race neutral reason.

So, we have three race neutral reasons for three struck jurors. And he had two more strikes left over and he didn't strike either of the other two black jurors that ended up on the jury. And we see no reason for the Batson motion as the evidence illustrated there was no problem with the reasoning of Mr. Murdaugh. And he would have certainly made a Batson motion if he believed that there was a problem or it was not a race neutral reason for any of the jurors that were picked and struck.

MR. FALK: If I could follow-up. I don't think that the explanation -- I think that it is just a pretext. I think that the explanation, I do not like that guy's family is really a race neutral explanation.

THE COURT: It absolutely is.

MR. FALK: I think that he's in the drug business, when he obviously doesn't have a drug conviction otherwise he's not on the jury panel.

THE COURT: I can tell you on numerous occasions when I was a defense lawyer, when I was a public defender and then I was a solicitor, I knew people who were in the drug business who never got charged for it and they were deeply in the drug business. That is just the information that I would have. It doesn't

mean that they are guilty of it because they are not -- I'm not being asked to prove their guilt beyond a reasonable doubt, but I have that knowledge and I know about it.

And so that, you know, clearly you are not bound by only people that have prior records or convictions of charges. I'm just -- I don't mean to interrupt your argument, but I will tell you that the three reasons that he gave -- and I'm equally amazed that he could remember those folks -- that those, barring other evidence that may have come in from defense at that point, which I don't think that there was any because Mr. Gipson testified to that.

Those reasons given I think passed Muster, or at least would have with me. I don't have any concerns about the facts and issues based on what both Mr. Gipson and Murdaugh testified to.

MR. FALK: Thank you, Your Honor.

THE COURT: So, having said that, I don't find that issue is compelling at all.

The other matters, and this is something that is always hindsight. It is always something that if it doesn't work the way that you want it to work can be criticized. And that is a trial strategy where counsel is faced with a situation where you feel that the

State's evidence on the greater offense is somewhat weak and you take the risk if the evidence doesn't support the lesser included charge, you run the risk that if you ask for that, if the evidence would support a lesser included and you ask for it.

We always hope that when we impanel a jury of 12 that they would very strictly adhere to the law and that if there is -- the State must prove to the satisfaction of all 12, beyond a reasonable doubt, that a person is guilty of an offense. You want to believe that the juries don't compromise verdicts, but there's that concern. You may have someone on the jury that does not believe that the State has proven murder but that they feel that there may be something that the State has been able to at least show, the lesser included offense of voluntary manslaughter. So, there may have been those that felt that it was murder and believed in that verdict but would be willing to compromise because they also believe that there's evidence that supports the voluntary, so in order to reach a unanimous decision they make that compromise.

Your hope, when you don't ask for that lesser included, that that one juror, or if it's one, two, however many it is, if they don't believe that the State has proven the murder charge, then you are -- you

may not get those jurors to turn the other group to not guilty, but you certainly have a greater shot at getting that jury to give you another day in court by ending up being in a mistrial. And when that works, you are a hero. And when it doesn't work, it was the worst decision ever.

But, again, it is trial strategy that, from what I heard from the testimony, was discussed. And at the time Mr. Greene understood it and was on board with it. And it didn't turn out the way that he had hoped and so now, of course, that sparks the question. But I don't think that that rises to the level of ineffective assistance of counsel. I think that it is -- I think that it is effective trial strategy if it works. It can be looked at the other way if it doesn't work. But I don't believe that it rises to the level of ineffective assistance and that it -- that it changes this matter.

The issue regarding the statement in the opening, it just seems that that's any fear of that is just moot by the fact that he did take the stand and his record was revealed to the jury. So, the concern that, you know, he made a comment early on that would cause the jury to believe that my client has a prior record that he didn't have or whatever, well that wasn't the case.

He had a prior record and it came out during the trial.

As Mr. Gipson indicated, there was never any question in their minds that Mr. Greene would take the stand. That was part of their -- that was their defense even though the State was unaware of it. So, that is rather harmless in light of the fact that he did testify and that instruction was given.

Based on everything that I have heard, I'm going to respectfully deny the application. And I don't think that there's anything in the record that rises to the level that Mr. Gipson performed below the level of competency of a defense counsel. I don't think that there's anything in here.

As I said, hindsight is always 20/20 and we can regret certain decisions made, but the jury challenge, challenges, the Batson, the seating of Juror 55 I think it was, that was all discussed and that was all part of the strategy in putting together the case. I mean, at the time it appeared that Mr. Greene understood the thought process and agreed with it. And again, like I said, obviously hindsight causes us to view things differently when they don't turn out.

The jury appears that the jury did, in fact, consider the evidence and they found -- they found Mr. Greene not guilty of the assault and battery with

intent to kill, which is obviously also a very serious offense. And so I just don't think that there's any evidence to support the fact that Mr. Gipson's representation was deficient in any fashion to the extent of granting the request, so I am going to respectfully deny it.

MR. NEELY: Thank you, Your Honor.

(Whereupon, the hearing was concluded.)

CERTIFICATE PAGE

CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF BEAUFORT:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 11th day of June, 2018.

Mona L. Manley /s/
MONA L. MANLEY
Official South Carolina Court Reporter
Circuit Reporter for the 14th Circuit
(850) 893-6662
mmanley@sccourts.org

STATE OF SOUTH CAROLINA COUNTY OF HAMPTON	)	IN THE COURT OF COMMON PLEAS THE FOURTEENTH JUDICIAL CIRCUIT
Brandon Greene, #289919 Applicant,	)	Case no. 2015-CP-25-0090
v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

The above-captioned matter comes before the court via an application for post-conviction relief (PCR) filed by Brandon Greene on March 4, 2015. This Court convened an evidentiary hearing into the matter on October 9, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Byron E. Gipson (Counsel), Esquire, and Applicant were both present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Hampton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

Applicant was indicted at the December 2009 term of the Hampton County Grand Jury for murder (2009-GS-25-0515) and at the July 2010[1] term for assault and battery with intent to kill (ABWIK) (2009-GS-25-0567.) On September 5, 2012, Applicant proceeded to trial before the Honorable R. Markley Dennis, Jr. Applicant was found guilty of murder and not guilty of

[1] The Applicant had previously been indicted for ABWIK at the December 2009 term; July 2010 reflects the term of re-indictment.

ABWIK by a jury of his peers. Judge Dennis sentenced Applicant to confinement for forty years for murder.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf. On Appeal, Kathrine Hudgins, Esquire, represented the Applicant. The South Carolina Court of Appeals dismissed the appeal. State v. Greene, Op. No. 2014-UP-140 (S.C. Ct. App. filed April 2, 2014). The Remittitur was issued on April 18, 2014.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

I. Ineffective Assistance of Counsel
   a. Failure to call witnesses to rebut the State's reply witness.
   b. Failure to request a *Batson* hearing.
   c. Failure to strike juror 55.
   d. Failure to move for a mistrial when juror 172 was removed from the jury panel.
   e. Failure to object to the Solicitor's remarks regarding Applicant's unlawful possession of a firearm, during the State's opening statement.
   f. Trial counsel failed to make a specific Brady request.
   g. Failure to object to the State pitting Applicant against other witnesses.
   h. Failure to request the lesser-included charge of voluntary manslaughter.
   i. Appellate counsel failed to raise the properly preserved and meritorious issue regarding the introduction of an inconsistent statement.
   j. Trial counsel failed to object to the sentence pronounced.

After the presentation of the defense's case, the State moved for summary judgment based on Applicant's failure to present any evidence supporting the following allegations:

   f. Trial counsel failed to make a specific Brady request

i. Appellate counsel failed to raise the properly preserved and meritorious issue regarding the introduction of an inconsistent statement

This Court granted summary judgment and finds these allegations abandoned based on Applicant's failure to present any evidence supporting these allegations.

III. SUMMARY OF FACTS

At trial, Applicant testified he shot both Dominick Badger (Dominick) and his brother Anthony Badger ("Tony") in self-defense. (R. pp. 291-292). The jury found Greene not guilty of the AWBIK involving Tony. On October 2, 2009, Applicant left work at 5:00 PM, purchased two half-pints of brandy, and went to the home he shared with his grandparents. At the house, he retrieved a pistol, which he had taken from his girlfriend without her knowledge. (R. pp. 296-299). Applicant then stopped at Dominick's house. (R. pp. 299-300). Applicant had previously spoken with Dominick about borrowing a chain for Applicant's son's four-wheeler. (R. p. 297, ll. 2-22). Dominick told Applicant he did not have the chain for the four-wheeler. (R. p. 300, ll. 1-6). Applicant stayed in the yard at Dominick's house and began drinking. (R. pp. 300-301). Applicant testified as the evening went on Tony became more aggressive. (R. pp. 311-314). Dominick and Dexter Bozeman tried to separate Applicant and Tony by putting Tony in their car. (R. pp. 314-315). Tony got out of the car and moved toward Applicant. (R. pp. 315-316). Applicant testified he pulled the gun from his waistband and shot Tony. (R. pp. 316-317). After Applicant shot Tony, Dominick tried to stop him. Applicant shot and killed Dominick. (R. p. 318-319). Applicant got in his car, and fled the scene. (R. p. 320, ll. 1-5). Applicant testified he went home and changed his shirt and then drove to his cousin's house. (R. p. 320, ll. 11-25). Applicant received phone calls from his family telling him the police were looking for him so he

returned home. (R. p. 322, ll. 3-7). Applicant testified on the way home he threw the gun away. (R. p. 322, ll. 8-22).

IV. SUMMARY OF TESTIMONY

Former Solicitor Randolph Murdaugh, III, Esquire, (the Solicitor) testified he was responsible for jury selection and he was looking for fair and impartial jurors. He testified juror 44 was struck because the Solicitor knew the Dobson family and didn't think highly of anyone in that family. Juror 105 was struck because he prosecuted his brother for assault and battery. Juror 146 was struck because the Solicitor had knowledge 146 was involved in the drug business.

Counsel testified he and Applicant discussed the pros and cons of letting Juror Gill on the jury and decided to let him on as a matter of trial strategy. Counsel discussed the fishing tackle with Samuel Greene prior to trial. Counsel was worried Samuel Greene, if called as a witness, would be led into presenting positive character evidence for Applicant. Counsel was concerned this could allow the State to call witnesses in response and attack his prior bad acts and reputation. For this reason, Counsel testified he wasn't going to call Samuel Greene as a witness during the defense's case. However, Counsel testified, after the State called witnesses in reply, he believed Samuel Greene's testimony was worth the risk. Counsel requested a surrebuttal, which the trial court denied. Counsel did not believe the Solicitor's statement, regarding the gun, was damaging to his client's case. Counsel testified he and Applicant discussed the case multiple times before hand and Applicant was going to testify on his own behalf. Counsel did not believe the Solicitor's question asking Applicant if the other witnesses were lying was prejudicial. Counsel explained to Applicant the sentencing ranges of all the charges he was facing, as well as for voluntary manslaughter. Counsel testified he and Applicant discussed whether to request a voluntary manslaughter instruction and Applicant did not want an instruction on voluntary

manslaughter. Counsel testified he did not ask for a mistrial when the juror was caught speaking to a witness because it was before deliberations and the juror was replaced with an alternate. Further, Counsel testified he preferred the alternate and thought the substitution was favorable to Applicant's case.

Applicant testified he and Counsel spoke about Juror Gill and decided, after weighing the pros and cons, to seat him as a juror. Applicant testified Counsel never spoke to him concerning the lesser-included charge of voluntary manslaughter. During the trial, the State offered Applicant the ability to plea to voluntary manslaughter, but he refused the offer because he believed he would receive 30 years' incarceration.

Samuel Greene, Applicant's grandfather, testified he took the fishing tackle out of the vehicle before law enforcement impounded it. He also testified Applicant had been in trouble involving guns before, but Applicant was still a good hard-working person.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds Applicant has failed to satisfy his burden to prove Counsel's actions were deficient. Applicant also failed to prove he was prejudiced by Counsel's alleged deficiencies. This Court finds the Solicitor's testimony was credible. Likewise, this Court finds Counsel's testimony was credible. This Court finds Counsel properly prepared for Applicant's trial. This Court finds Counsel elucidated valid trial strategies in defending Applicant and preparing for trial. This Court finds Counsel rendered adequate assistance and exercised professional judgment in his decisions at trial. This Court finds the Solicitor provided sufficient race-neutral reasons for the preemptory strikes he used at trial. This Court dismisses Applicant's application for the reasons set out below:

A. Ineffective Assistance of Counsel

In evaluating allegations of ineffective assistance of counsel, the court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668, 669 (1984). First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). "The proper measure of counsel's performance remains whether he has provided representation within the range of competence required of attorneys in criminal cases." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, Counsels' deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

1. Failure to call witnesses to rebut the State's reply witness.

Counsel requested a surrebuttal and the trial court denied Counsel's request. Tr. 355. This Court finds Applicant failed to prove Counsel was deficient. Further, Counsel testified the surrebuttal witness was also a liability to Applicant's case. At the evidentiary hearing, Applicant called Samuel Greene to as a witness. Samuel Greene testified he took the fishing tackle out of Applicant's car after Applicant murdered one victim and wounded the other. This Court finds the

prejudicial value of the excluded testimony was miniscule and Counsel's performance in requesting a surrebuttal was not deficient. Therefore, this Court finds Applicant failed to prove he was prejudiced by the surrebuttal witness's failure to testify.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not calling Samuel Greene as a witness. This Court also finds Applicant failed to prove Counsel's actions prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different. Accordingly, this Court denies and dismisses this allegation.

2. Failure to request a *Batson* hearing.

At the evidentiary hearing, the Solicitor testified and provided sufficient race-neutral reasons for his jury strikes. He testified Juror 44 was struck because the Solicitor knew the Dobson family and didn't think highly of anyone in that family. Juror 105 was struck because the Solicitor prosecuted his brother for assault and battery. Juror 146 was struck because the Solicitor had independent knowledge Juror 146 was involved in the drug business. Therefore, there was no potential prejudice from Counsel's failure to request a *Batson* hearing. Further, this Court finds Counsel's decision not to request a *Batson* hearing where he believed the State had race-neutral reasons for their jury strikes was not deficient. Counsel should not make motions he believes are frivolous. As shown by the Solicitor's testimony, any *Batson* motion would have been easily defeated by the State.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for deciding not to request a *Batson* motion. This Court also finds Applicant failed to prove Counsel's decision not to request a *Batson* motion prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

3. Failure to strike Juror 55.

This Court finds Counsel and Applicant discussed the pros and cons of striking Juror 55 and made a trial strategy decision not to strike Juror 55 because he had previously been charged with an assault charge. Counsel testified it is rare to be able to seat a juror who had previously gone through the process of being charged with the crime for which the defendant was being tried. Counsel testified he and Applicant wanted Juror 55 on the jury because Juror 55 might better understand how Applicant felt. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Here, Counsel gave competent advice to Applicant and a knowing and intelligent decision was made. This Court cannot and will not use the advantage of hindsight to criticize Counsel's reasonable trial strategy decisions.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for deciding not to strike Juror 55. This Court also finds Applicant failed to prove Counsel's decision not to strike Juror 55 prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

4. Failure to move for a mistrial when juror 172 was removed from the jury panel.

Juror 172 was dismissed from the jury at Counsel's request before the jury began deliberations. Juror 172 caused no potential prejudice to Applicant's case because deliberations had not yet begun when he was removed. "To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion." Earley v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016). "The granting of the 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." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999). This Court finds any mistrial motion would have been properly denied. This Court finds Applicant's case was not prejudiced by a juror who was never part of deliberations. Further, Counsel testified the alternate who replaced juror 172 was a juror who he wanted seated. This Court finds Applicant failed to prove Counsel's decision not to move for a mistrial prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not moving for a mistrial. This Court also finds Applicant failed to prove Counsel's decision not to move for a mistrial prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

5. Failure to object to the Solicitor's remarks regarding Applicant's unlawful possession of a firearm, during the State's opening statement.

Applicant alleges the jury could have inferred Applicant had a criminal history from the Solicitor's statement and he was prejudiced by the potential inference. During his opening statement, the Solicitor stated, "Not only that, even though he's not charged with it, there's a law in South Carolina that you can't possess a gun. So right there, Brandon Greene is breaking the law by possessing that gun." Tr. 66, ll. 2-5. Counsel testified Applicant's defense relied on Applicant's testimony. Therefore, Applicant's applicable criminal history was going to come into evidence for the purpose of impeaching his testimony. Further, Counsel testified he did not believe the statement was prejudicial.

This Court also finds Applicant failed to prove he was prejudiced by the statement. In South Carolina, it is illegal to carry a gun on your person without a concealed weapons permit. S.C. Code Ann. §16-23-20. This is common knowledge. At trial, no evidence was presented that

Applicant had a concealed weapon permit. This Court believes it unreasonable to assume the jury would infer Applicant had a criminal history from the Solicitor's comment. Further, Applicant's criminal history was before the jury because Applicant testified. Thus, any potential prejudicial value of the statement was removed.

This Court finds Counsel's decision not to object to the Solicitor's statement did not fall below the standard of professional norms. This Court also finds Applicant failed to prove Counsel's decision not to object to the Solicitor's statement prejudiced Applicant under Strickland. Accordingly, this Court denies and dismisses this allegation.

6. Failure to object to the State pitting Applicant against other witnesses.

The Solicitor's question during cross-examination prompted Applicant to call the witnesses testifying against him liars.

Q: "It didn't happen?"
A: "It never happened."
Q: "They lied about that?"
A: "That was – that was a total lie."
Tr. 334, ll. 21-25.

Counsel testified the question and the response were not harmful to Applicant's case. Applicant's version of events was in direct contradiction to the witnesses. This Court agrees with Counsel. The Solicitor's question, while potentially objectionable, had negligible prejudicial value. Applicant's version of events was obviously in direct contradiction with other witnesses' accounts. The Solicitor's question merely permitted Applicant to directly contradict the witnesses testifying against him. Therefore, this Court finds Counsel's decision not to object was not deficient nor was it prejudicial to Applicant's case.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the Solicitor's question. This Court also finds Applicant failed to prove Counsel's

decision not to object prejudiced Applicant such that there was a reasonable probability the result of the trial would have been different if Counsel had objected. Accordingly, this Court denies and dismisses this allegation.

7. Failure to request the lesser-included charge of voluntary manslaughter.

Counsel testified Applicant turned down a plea offer of voluntary manslaughter and wanted to proceed forward with an all or nothing strategy. Applicant's current allegation is merely the result of hindsight. This Court finds Counsel and Applicant discussed the pros and cons of requesting a voluntary manslaughter charge and made the strategic decision not to request voluntary manslaughter. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes, 308 S.C. at 419 S.E.2d at 778. This Court finds Applicant made the knowing and intelligent decision not to request an instruction on voluntary manslaughter based on competent advice from Counsel.

Accordingly, this Court finds Applicant failed to prove Counsel was deficient for not objecting to the Solicitor's question. Accordingly, this Court denies and dismisses this allegation.

8. Failure to object to the pronounced sentence.

The trial court's sentence was lawful and any objection would have been rightfully overruled. The sentencing range for murder is thirty years to life imprisonment. S.C. Code Ann. §16-3-20(A). Judge Dennis appropriately sentenced Applicant to forty years. Tr. 432.

Accordingly, this Court finds Applicant failed to prove Counsel deficient for not objecting to the sentence nor was Applicant prejudiced by his failure to do so. Accordingly, this Court denies and dismisses this allegation.

VI. 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 30 days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief 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.

IT IS THEREFORE ORDERED:

1. The Application for post-conviction relief is denied and dismissed with prejudice; and

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

AND IT IS SO ORDERED this 7th day of November, 2017.

THOMAS A. RUSSO
Presiding Judge
14th Judicial Circuit

Florence, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

INDICTMENT

2009-GS25-00567

At a Court of General Sessions, convened on July 8, 2010, the Grand Jurors of Hampton County present upon their oath:

Assault / Assault and battery with Intent to Kill (ABWIK)

That in Hampton County, South Carolina, on or about October 2, 2009, the Defendant, Brandon Greene, with malice aforethought, did commit an unlawful act of a violent nature upon the victim, Anthony Antonio Badger, to wit: the Defendant did shoot Anthony Antonio Badger in the abdomen or stomach area with a handgun; all in violation of the Common Law of South Carolina and Section 16-03-620 of the Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

Solomon

Rv SC 11

ARREST WARRANT NUMBER

N100339
Date of Arrest: October 27, 2009

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: DEC 15 2009

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2009GS25-00567

The State of South Carolina

County of Hampton

COURT OF GENERAL SESSIONS

December, Term 2009

THE STATE

vs.

Brandon Greene

Indictment for

Assault / Assault and battery with Intent to Kill (ABWIK)

SC Code: 16-03-0620
CDR Code:0014

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

INDICTMENT

2009GS25-00515

At a Court of General Sessions, convened on December 15, 2009, the Grand Jurors of Hampton County present upon their oath:

Murder / Murder

That in Hampton County on or about October 2, 2009, with malice aforethought, Brandon Greene did kill and murder Dominick Badger by means of shooting him twice with a .45 caliber handgun, and that Dominick Badger did die in Hampton County as a proximate result thereof on October 2, 2009; in violation of Section 16-3-10 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Isaac M. Stone, III
Solicitor, 14th Judicial Circuit

WITNESSES

Russell

ARREST WARRANT NUMBER

N105018

Date of Arrest: October 4, 2009

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: DEC 15 2009

VERDICT

Foreperson of Petit Jury
Date:

INDICT

DOCKET NO. 2009GS25-00515

The State of South Carolina

County of Hampton

COURT OF GENERAL SESSIONS

December, Term 2009

THE STATE

vs.

Brandon Greene

Indictment for

Murder / Murder

SC Code: 16-03-0010; 16-03-0020
CDR Code:0116