State of South Carolina
The Circuit Court of the Fifth Judicial Circuit

Jocelyn Newman
Judge

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November 19, 2018

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

Re: *Robin Gray Reese v. State of South Carolina*
Civil Action No.: 2014-CP-40-05657
Appellate Case No.: 2017-001110

Dear Mr. Shearouse:

Enclosed please find a copy of the Amended Order of Dismissal which was filed in the Circuit Court today. Pursuant to Order dated October 18, 2018, I am hereby notifying the Supreme Court of my timely compliance with its directive to enter a new PCR order in this matter.

Should you have questions or concerns, please do not hesitate to contact me.

Sincerely,

Jocelyn Newman

JN/
Enclosure

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014- CP-40-05657

ROBIN GRAY REESE (SCDC #350020)
PLAINTIFF(S)

STATE OF SOUTH CAROLINA
DEFENDANT(S)

Submitted by: NEWMAN, J.	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Jocelyn Newman
Circuit Court Judge

2757
Judge Code

Nov. 19, 2018
Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Robin Gray Reese (SCDC #350020), Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No. 2014-CP-40-05657 **AMENDED ORDER OF DISMISSAL**

This matter came before the Court upon Application for Post-Conviction Relief filed by Robin Gray Reese ("Applicant") on September 14, 2014. An evidentiary hearing was convened at the Richland County Judicial Center on August 30, 2016. Applicant appeared along with her counsel, Jonathan Waller, Esquire. The State of South Carolina ("the State") was represented by then-Assistant Attorney General Jessica Kinard, Esquire.

For the reasons set forth below, the Application for Post-Conviction Relief is DENIED.

BACKGROUND

Applicant is currently confined at the South Carolina Department of Corrections. She was indicted at the March 2010 term of the Richland County Grand Jury for Lynching – 1st Degree[1] (indictment 2010-GS-40-00040). She was subsequently indicted for Murder[2] (indictment 2011-GS-40-04916) during the October 2011 term of the Richland County Grand Jury. Applicant pled not guilty to both charges and proceeded to trial.

Beginning on February 27, 2012, Applicant was tried by a jury on both charges (along with her brother and co-defendant, Henry Gray). At trial, Applicant was represented by Andrew

[1] S.C. CODE ANN. §16-3-210
[2] S.C. CODE ANN. §16-3-10

Farley, Esquire ("Trial Counsel"). On March 2, 2012, the jury returned verdicts of guilty as to both of Applicant's charges. Thereafter, the Honorable G. Thomas Cooper, Jr., sentenced her to thirty years' imprisonment on each charge, with both sentences to be served concurrently. The Richland County Clerk of Court issued corresponding orders of commitment, pursuant to which Applicant remains incarcerated.

Following her conviction, Applicant filed a notice of appeal with the South Carolina Court of Appeals. The appeal was perfected by Katherine Haggard Hudgins, Esquire. The Court of Appeals affirmed Applicant's conviction and sentence. *State v. Reese*, No. 2014-UP-300 (S.C. Ct. App. July 30, 2014). The Remittitur was issued on August 15, 2014.

Applicant then filed the instant Application for Post-Conviction Relief ("PCR Application") in which she alleges "ineffective assistance of counsel" and that she is being unlawfully incarcerated for three reasons –

(a) Counsel was ineffective resulting in the *State v. Batson*
(b) Counsel was ineffective, failed to ask for lesser charge on record
(c) Counsel was ineffective, failed to elicit testimony from prosecutor

At the commencement of the evidentiary hearing, Applicant amended her PCR Application to include the following additional alleged deficiencies in Trial Counsel's representation – failure to request suppression of her statement as not voluntarily made; failure to object to impermissible comments made during the State's closing argument; failure to object to the jury's view of Applicant's ankle and wrist shackles; failure to properly advise Applicant regarding her decision whether to testify at trial; failure to obtain Applicant's phone records; failure to properly prepare for trial; failure to investigate and speak to the State's witnesses; and failure to object to the testimony of witnesses Campbell Streeter and William Pegram. In addition, although not one of

her requested amendments, Applicant argued at the evidentiary hearing that Trial Counsel should have objected to portions of her co-defendant's opening statement.

During the hearing, both Applicant and Trial Counsel testified. The Court found the testimony of Trial Counsel to be more credible than that of Applicant. In addition to the PCR Application, the Court reviewed and considered the State's Return (dated March 11, 2015 and filed on March 13, 2015), the transcript of the jury trial, records of the Richland County Clerk of Court, and Applicant's records from the South Carolina Department of Corrections. The Court denied the PCR Application and entered its Order of Dismissal on November 14, 2016. A "Motion Pursuant to Rule 59(e), SCRCP, to Amend," filed by Applicant on December 1, 2016, was also denied.

Applicant appealed the denial of her PCR Application to the Supreme Court of South Carolina ("the Supreme Court"). On October 18, 2018, the Supreme Court found that this Court's Order of Dismissal "did not address each of [Applicant's] claims, and did not include specific findings of fact or conclusions of law on any of [Applicant's] claims," and, therefore, vacated the Order. The matter was remanded to this Court "for the entry of a new PCR order that complies with the law," specifically, South Carolina Code §17-27-80 and Rule 52(a) of the South Carolina Rules of Civil Procedure.

The Court now, more specifically, addresses each of Applicant's claims as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Trial Testimony

The five-day jury trial of Applicant and her co-defendant began on February 27, 2012. After the initial selection of a jury panel, the State challenged the use of peremptory strikes by Applicant and her co-defendant, contending that of the twenty-two strikes used by the parties,

twenty-one removed white people from the jury. After the trial court conducted a hearing on the issue pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), the State's motion was granted. Jury selection was done a second time, and the trial jury was empaneled on the morning of February 28 without issue.

Prior to the commencement of the trial, the State expressed its intention not to introduce the statements of any witnesses into evidence. In response, Trial Counsel asked that if the State's position should change in the course of the trial, that the trial court conduct a hearing pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), to determine the admissibility of the statements.

Witnesses at trial testified that on the afternoon of February 13, 2010, two officers from the Columbia Police Department ("CPD") were dispatched to a fight involving several people in the Gonzales Gardens neighborhood. They were told that one person involved in the fight was "wearing a red hoodie or hat" and that another was "wearing a black sweat shirt or something like that." However, when the officers arrived they couldn't find anyone "actively fighting."

The CPD officers began patrolling the area and located a man – later identified as Kenneth Mack ("Victim") – lying on the ground, unresponsive. Medical personnel were called to transport Victim to the hospital, where he was determined to be brain dead. He was kept on life support until his organs could be harvested, at which time Victim died.

Several witnesses testified regarding the events leading up to Victim's death. Angelo Boyd, Jr. ("Boyd"), who lived in the area, testified that he and Marcellius Brooks[3] ("Brooks") were walking to a nearby store when they saw Victim grab Melquanna, Applicant's minor daughter.[4] Melquanna yelled "Stop!" and the man "threw her to the ground." Boyd and Brooks

[3] Marcellius Brooks is sometimes referred to as "Bloom" at trial.
[4] Melquanna is also referred to as "Lucy" throughout the trial.

intervened, knocking the man to the ground. Boyd kicked Victim, and Melquanna hit him a couple of times. Boyd testified that Victim was still able to speak and that Victim got up from the ground and walked away after the attack.

Eyewitness Amber Hardy testified that she saw "the fight" and described it was lasting "maybe five minutes[, but] it seemed like forever." In addition, Brooks admitted in his trial testimony that he and Boyd attacked Victim. He explained that afterwards, Victim got up from the ground and ran away.

Brooks and Boyd then walked with Melquanna to a nearby store so that she could find Applicant and tell her that Victim had been harassing Melquanna. Applicant seemed upset but also appeared to be finishing her video poker game when Brooks and Boyd left the store to return to Gonzales Gardens. The store's owner witnessed the conversation but described the conversation with Applicant as "quiet fussing." The interaction was recorded on the store's video surveillance cameras, which also showed Applicant leaving the store while talking on her phone. Brooks testified that when he saw Applicant she was upset and called someone on her phone as she was leaving the store.

Donetta Perry ("Perry"), another resident of Gonzales Gardens, testified that she saw "Six" (Applicant's brother and co-defendant) speaking to Victim outside the apartments. At that time, Victim looked like he had been in a fight, and Six was asking him what had happened to him. Six received a phone call and, soon after, Applicant arrived. Perry saw Six knock Victim to the ground, causing Victim to hit his head. She heard Applicant say to Six, "Yeah, that's him," and they both began kicking Victim and hitting him with a chair. Perry also testified that she heard them yell things at Victim such as "What did you do to my niece?" and "I'm going to

teach you for messing with my daughter." Applicant and Six left the area, and Perry saw Victim bleeding but never saw him get up from the ground.

Another witness, Mary Anderson ("Anderson"), testified that she was at Gonzales Gardens on the day of the incident and saw Applicant and Six "kicking and stomping and doing everything" to Victim. Anderson also saw either Applicant or Six "beating [Victim] with an iron chair." She said that Victim, who was unarmed, couldn't move and that she never saw him get up from the ground. In addition, during the attack, she heard Applicant say, "Motherfucker, why did you approach my 13-year-old?" Afterwards, Anderson saw the pair leave the scene, enter an apartment, and leave Victim lying on the ground injured. Much of Anderson's recount was corroborated by eyewitness Kara Chase ("Chase"). Chase recalls Applicant hitting Victim and Victim hitting his head on the ground, but she remembers Applicant walking away once Victim hit the ground. Chase also testified that she didn't remember Applicant hitting Victim with the chair but that during the attack, Victim "did not have the chance to fight back or flee."

Witness Sanovia Thompson ("Thompson") was outside her apartment at Gonzales Gardens on the day of the incident "being nosey" when she saw Victim "walking down the street with his hand over his head," obviously bleeding. Thompson testified that she also saw Six outside, who asked Victim what had happened to him. Victim responded, "[S]omething about some young b-i-t-c-h up the street." According to Thompson, Six then went inside his father's apartment to answer a phone call and when he returned outside, he said to Victim, "You put your hand on my niece. We're going to talk to my sister."

Thompson testified that she then walked around the apartment building to change her vantage point. When she could see them again, she saw Victim on the ground and saw Applicant walking down the sidewalk. Thompson stated that Applicant appeared upset and said to victim,

"Why did you put your hand on my baby?" She saw Applicant kick Victim once or twice before walking away. Thompson also testified that Victim never got up from the ground and, while she didn't see Applicant hit Victim with the chair, she did notice that the chair was "out of place" in the grass, not where it was normally located.

Dr. Bradley Marcus ("Dr. Marcus"), a pathologist and medical examiner for Richland County, testified about the autopsy performed on Victim. After being accepted by the trial court as an expert in forensic pathology, Dr. Marcus testified that the Victim's cause of death was a closed head injury due to blunt force trauma to his head. According to Dr. Marcus, Victim sustained significant trauma, including cerebral contusions which caused his death. He also opined that "[t]he second assault certainly contributed to [the victim's] death in this case," but he could not distinguish which injuries were sustained in the first attack from those injuries sustained in the second attack. This was corroborated by Dr. Clay Nichols, who testified that but for the second assault, Victim would not have died.

The State also offered the testimony of Sergeant William Pegram ("Sgt. Pegram"), the lead police investigator for this case, and Katie Ukra ("Ukra"), a forensic DNA analyst at the South Carolina Law Enforcement Division. Among other things, Sgt. Pegram discussed Applicant's cell phone records and, specifically, a phone call from Applicant to her father around the time of the incident. Ukra testified about the DNA testing conducted on swabs taken from a black metal chair from the incident location. She indicated that the swabs contained Victim's DNA.

After a standard colloquy with the trial court, Applicant testified in her own defense. She admitted being at the store and being upset when Brooks entered with Melquanna and said that he had just pulled a man off of her. Applicant admitted having called Six and giving him a

description of the man. She went to look for the man when she encountered Victim, who was already lying on the ground with his hands covering his face. She testified that she asked Victim why he was with her daughter, that he tried to kick him but slipped and fell, and that she slapped Victim across the face. Applicant also testified that she took a chair and "slung it," but it didn't hit Victim. She said, "I promise to God, I put my hand on that Bible when I say the chair did not touch that man at all."

Having considered the testimony and evidence, the jury found Applicant (and her co-defendant) guilty of both lynching and murder. She was sentenced to thirty years' imprisonment.

II. Applicant's Allegations: Ineffective Assistance of Counsel

Applicant bears the burden of proving the allegations contained in her PCR Application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing *Griffin v. Martin*, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where, as here, the PCR Application alleges ineffective assistance of Trial Counsel as a ground for relief, Applicant must prove that Trial 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." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether Trial Counsel provided representation within the range of competence required in criminal cases. *Id.* (citations omitted). The Court strongly presumes that Trial Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* (citing *Strickland*, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of Trial Counsel. *Id.* at 117, 386 S.E.2d at 625. First, Applicant must prove that Trial Counsel's performance was deficient. *Id.* Under this prong, the Court measures Trial Counsel's performance by its "reasonableness under prevailing professional norms." *Id.* (citing *Strickland*, 466 U.S. at 688). Second, Trial Counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 117-18, 386 S.E.2d at 625.

A. *Batson*

First, Applicant argues that Trial Counsel was ineffective for failing to give her any explanation for his use of peremptory strikes during jury selection at trial. She complains that Trial Counsel did not makes notes for the reasons why each strike was used and that, had his reasons been properly noted, the State wouldn't have been successful in its *Batson* motion.

When the first potential jury was selected, counsel for Applicant's co-defendant struck Juror #11 (and twelve other potential jurors) from the panel. Trial Counsel struck an additional ten potential jurors. The trial court then granted the State's challenge to the jury selection process, finding that defense counsel was unable to give satisfactory, race-neutral reasons for the use of their peremptory strikes. When jury selection was done a second time, Juror #11 – who Applicant says had been smiling and winking at one of the prosecutors – was selected and named foreperson.

Several things are clear from the record: (1) that defense counsel used twenty-one of its twenty-two strikes for white people; (2) that Trial Counsel offered justifications for each of his strikes to the trial court; and (3) the trial court was not persuaded that counsels' justifications were satisfactory. However, no evidence was offered during the evidentiary hearing about the

alleged conduct of Juror #11, how Trial Counsel was deficient in this regard, or how Applicant was prejudiced by the purported deficiency. Applicant is unable to sustain her burden of proof as to this allegation; therefore, this portion of the PCR Application is denied.

B. Lesser Included Offense and Testimony of Prosecutor

Applicant also alleges (without offering evidence[5]) that Trial Counsel was deficient for failing "to put into evidence a valid argument for the lesser included charge" of involuntary manslaughter. However, the record is clear that the trial court's determination on the issue was largely based on Applicant's own testimony and any reasonable inferences which the jury could draw from that testimony. *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003) (the facts must support a jury instruction for it to be proper). She also complains that Trial Counsel should have elicited testimony from the prosecutor in her case after the State made "a baseless allegation" that Applicant called Six. Applicant believes that Trial Counsel's performance was deficient for "allowing it into evidence."

No testimony, exhibits, or other evidence were offered by Applicant on these issues during the evidentiary hearing. Further, the transcript of the trial contradicts Applicant's contentions. Specifically, it is clear that Trial Counsel requested and advocated for a jury charge on involuntary manslaughter. It's also evident that the State's position regarding Applicant's phone calls was based on witness testimony. Again, Applicant is unable to sustain her burden of proof as to these allegations;[6] therefore, these portions of the PCR Application are denied.

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[5] No witness testimony, exhibits or other evidence were presented on this issue at the evidentiary hearing.

[6] There is no basis upon which this Court can conclude that the trial court would have taken the extraordinary measure of allowing Trial Counsel to interrogate the prosecutor. *See, e.g., State v. Inman*, 395 S.C. 539 (2011) (discussing the disfavor of South Carolina courts and courts from other jurisdictions in calling a prosecuting attorney to testify in a case in which he is participating as an advocate); *see also Bennett v. Commonwealth*, 236 Va. 448, 374 S.E.2d 303, 313 (1988) ("The circumstances are rare indeed where any lawyer may properly testify in a case in which he is participating as an advocate.").

C. Suppression of Statement

Applicant also alleges that Trial Counsel was ineffective for failing to request suppression of the statement which Applicant gave to CPD. Specifically, at the evidentiary hearing Applicant testified that she was taken by police officers to CPD in their vehicle. She stated that although she owned a car at the time, she was not given the option to drive herself there. Applicant testified that she rode in the front passenger's seat of the unmarked police car and was neither handcuffed nor arrested. When asked at the evidentiary hearing whether she was free to leave, she stated that she was unsure; however, she later said that she believed that she was in custody at the time and had to do what officers told her. After she gave a written statement to CPD officers, they drove her home.

At trial, Sgt. Pegram testified that at the time she was interviewed by CPD, Applicant was a not yet suspect in the case, was not treated as a suspect, and was not under arrest; therefore, no one explained *Miranda*[7] warnings to her. He explained that Applicant provided information only about the first assault on Victim but not the second, fatal assault. CPD had received an anonymous tip about a chair having been used in the assault, and they were unable to locate the chair; however, Applicant did not provide additional information in that regard.

Trial Counsel testified at the evidentiary hearing, stating that he didn't recall the State having made much use of Applicant's statement, and he did not remember why he failed to renew his motion that the statement be suppressed. Trial Counsel contended that he discussed Applicant's statement with her and told her he was unsure whether the State would use it against her. In his opinion, the statement was of no particular importance at trial and wasn't focused on by the State. Although Applicant's trial testimony included conversations about what she

[7] *Miranda v. Arizona*, 384 U.S. 436 (1966)

discussed with police prior to her arrest, Applicant's written statement was never introduced into evidence.

The Court finds that even if counsel's performance was deficient with respect to the statement, Applicant has failed to prove that she was prejudiced by this alleged deficiency. First, Applicant cannot demonstrate that she as in custody when the statement was given and, therefore, cannot show that a custodial interrogation occurred. *See, e.g., State v. Williams*, 405 S.C. 263, 272, 747 S.E.2d 194, 199 (Ct. App. 2013) ("Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."). According to Sgt. Pegram, Applicant was interviewed in an effort to gather critical information about the crime but was not a suspect at that time. Therefore, the Court finds that Applicant had no reasonable likelihood of success in the suppression of her statement; and, even if the statement were suppressed, there is no evidence that the outcome of the trial would have been any different without the statement. Therefore, this portion of the PCR Application is denied.

D. The State's Closing Argument

Next, Applicant contends that Trial Counsel was ineffective for failing to object to improper comments made by the State during its closing argument. She argues that the State inappropriately commented on her constitutional right to remain silent and that Trial Counsel, therefore, should have lodged an objection.

In closing arguments at trial, the State referred to Applicant's trial testimony the previous day regarding her recollection of the incident, stating, "Nobody saw that. Nobody even heard that until yesterday." Trial Counsel testified that he didn't believe that the comment was

objectionable and that "it's usually pretty unorthodoxed (sic) to object in an opening statement or closing argument."

The evidence is clear that Applicant never invoked her constitutional right to remain silent; rather, she provided oral and written statements to law enforcement and testified at trial. As to her pre-arrest statements, Applicant was not given *Miranda* warnings but was neither a suspect nor in custody at the time. "The State may point out a defendant's silence prior to arrest, or his silence after arrest but prior to the giving of *Miranda* warnings, in order to impeach the defendant's testimony at trial." *State v. McIntosh*, 358 S.C. 432, 443, 595 S.E.2d 484, 490 (2004). Therefore, the State's comment was not objectionable, and there is no evidence that any objection made by Trial Counsel would have been reasonably likely to affect the outcome of the trial. Therefore, this portion of the PCR Application is denied.

E. Jury View of Applicant's Shackles

Applicant testified that her ankles and wrists were shackled for the duration of the trial. She contends – and Trial Counsel confirmed – that the jury was able to see the shackles when she walked to the witness stand to testify; however, there is no evidence that the shackles were visible to jurors at any other time.[8] Nevertheless, she argues that Trial Counsel was ineffective for failing to object to Applicant being required to wear them.

The routine use of visible shackles during the guilt phase of a jury trial, absent some special need, violates the due process rights of the accused. *See, e.g., Deck v. Missouri*, 544 U.S. 622 (2005) (trial court must make a case-specific determination that visible shackles may be used, taking into account special security needs and risk of escape of the accused). The accused need not show prejudice to establish a due process violation where visible restraints are used.

[8] Based on common practice in General Sessions Court and the absence of any evidence to the contrary, the Court has no reason to believe that the shackles were visible to the jury at any other time.

Id., but see, e.g., Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010) (no due process violation where the accused did not wear visible restraints). However, even where such a due process violation occurs, the court may find such an error to be harmless.

For example, in *People v. Clyde*, 961 N.E.2d 634 (N.Y. Ct. App. 2011), the appellant appeared in leg irons which were visible to the jury. The court found that the use of visible restraints violated due process but considered whether the error was harmless, explaining:

> Because we find that the trial court committed error as a matter of federal constitutional law, we apply Supreme Court precedent in deciding whether the error is of a type that may be harmless . . . In *Deck*, the Supreme Court declared that the burden is on the State to prove beyond a reasonable doubt that a shackling error "did not contribute to the verdict obtained" (544 U.S. 622, 635, 125 S.Ct. 2007 [internal quotation marks omitted], quoting *Chapman*, 386 U.S. at 24, 87 S.Ct. 824). By quoting language from Chapman, a case that holds, as a matter of federal law, that federal "constitutional errors can be harmless" . . . the *Deck* Court made it clear that harmless error analysis applies to shackling errors.

Clyde, 961 N.E.2d at 639. Noting the overwhelming evidence against the accused, the court stated, "A jury, faced with a defendant accused of assaulting and/or attempting to reap a civilian while incarcerated, is more likely to conclude that the defendant was shackled as a precaution, because of the nature of the crimes charged, than to conclude that the defendant was shackled because he was independently known to be dangerous." *Id.*

In this case, any prejudice to Applicant was minimal because the jury's view of her restraints was extremely limited. Applicant was in the courtroom with jurors and potential jurors for five days. Even in the largest of courtrooms in the Richland County Judicial Center, the distance between a defendant's chair and the witness stand takes mere seconds to travel. There is no evidence that the jury's quick view of the shackles resulted in prejudice. Further, any potential prejudice was limited by Trial Counsel's depiction of Applicant and was outweighed by

the abundance of evidence against her (eyewitness testimony, Applicant's statement, etc.). While Trial Counsel erred in his failure to object, an objection was unlikely to affect the outcome of the trial; and the error was harmless beyond a reasonable doubt. Therefore, this portion of the PCR Application is denied.

F. Applicant's Right to Testify

Applicant, who was one of three defense witnesses at trial, complains that she was not properly advised about her right to testify. Specifically, she alleges that although they briefly discussed whether she would testify, Trial Counsel did not explain to Applicant that if she testified, her prior written statement could be used to impeach her. Applicant also testified that Trial Counsel opined that "it would be a good idea" if she testified and that she trusted him because she doesn't know the law.

During the evidentiary hearing, Trial Counsel testified that he discussed with Applicant the "pros and cons" of her testifying at trial. During the pre-trial hearings, he requested that the Court conduct a *Denno* hearing if the State intended to introduce Applicant's statement (a determination that the State had not yet made). Despite his warning about potential impeachment of Applicant using her statement, she told Trial Counsel that she wanted to testify "because she wanted to tell her side of the story," and he didn't think that it was a bad idea. Trial Counsel also testified that Applicant's statement, which wasn't introduced into evidence at trial,[9] was a significant part of the State's case.

Finally, the trial court explained to Applicant her constitutional rights and the possibility that she could be "examined or cross-examined on any relevant issue in this case." Applicant expressed understanding of the court's warning, asked no questions of the court, and attested that

[9] At the evidentiary hearing, an argument was made that Sgt. Pegram discussed Applicant's written statement during his testimony. However, a review of the trial transcript reveals that the "statement" mentioned was, in fact, Applicant's cell phone billing statement.

she had discussed her decision with Trial Counsel. Following the court's colloquy, Applicant was given additional time to consider whether to testify before ultimately deciding that she would.

The Court finds that Trial Counsel was not deficient in this regard. Even assuming that there was some deficiency in the representation, Applicant has not shown any resulting prejudice. Trial Counsel offered credible testimony regarding his warnings to and discussions with Applicant about the "pros and cons" of testifying. The only credible evidence demonstrates that Applicant knowingly, voluntarily and intelligently waived her right to remain silent, with knowledge of the potential consequences of that decision. Applicant presented no evidence that any additional discussion would have changed her decision to testify at trial. Further, the minimal testimony about the statement, coupled with the overwhelming evidence against her, underscores the lack of prejudice suffered by Applicant. Therefore, this portion of the PCR Application is denied.

G. Trial Counsel's Lack of Preparation, Applicant's Phone Records, and Interviewing the State's Witnesses

Applicant next complains that Trial Counsel was ill-prepared for trial and, more specifically, that he failed to obtain her phone records or to speak to the State's witnesses. Although Applicant did not offer testimony during the evidentiary hearing specific some of these allegations, she did testify that she didn't recall discussing any defenses with Trial Counsel or giving him the names of any potential witnesses. She also testified that, of the two known potential witnesses, Trial Counsel wasn't able to contact either. Instead, he asked Applicant to contact Anderson and Perry herself despite her concerns about her safety if she did. She admits, however, that Trial Counsel hired a private investigator to assist in her defense and that he met with Applicant on at least five occasions to discuss her version of the events. In addition,

Applicant's cell phone records were introduced at trial, and her testimony implies that Trial Counsel did, in fact, have those records, as he asked her about at least one name (or phone number) that was contained in them.

Trial Counsel stated that although the discovery materials in this case were voluminous, he believes that he had sufficient time – approximately three or four months – to review it and to prepare for trial. He testified about his recollection of reviewing discovery with Applicant in her apartment and expressed his belief at the time that she understood what they discussed. Trial Counsel also retained a forensic pathologist to serve as an expert witness for Applicant.

Simply put, Applicant has offered no evidence from which the Court can find that Trial Counsel's performance fell below the standard of reasonableness "under prevailing professional norms." Additionally, in order to demonstrate that counsel was inadequately prepared for trial, Applicant must present evidence showing how additional preparation would have had an effect on the result at trial. *See, e.g., Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997). Applicant has not done that.

No testimony was offered regarding the phone records in question; and the Court was given no definitive evidence as to whether Trial Counsel or his investigator met with potential witnesses. Even assuming that no one interviewed potential witnesses on Applicant's behalf, there is no evidence that the outcome of the trial would have been different if these interviews had occurred. Trial Counsel indicated that he requested and reviewed discovery, met with Applicant several times, employed the services of both a private investigator and an expert witness. Given the nature of the charges against Applicant, Trial Counsel's actions were reasonable. While Applicant may contend that Trial Counsel was ill-prepared, there is no

evidence of the same. Therefore, Applicant cannot meet her burden of showing deficiency or prejudice; and this portion of the PCR Application is denied.

H. Testimony of Campbell Streeter

Applicant alleges that Trial Counsel was ineffective for not objecting to the testimony that he elicited from Campbell Streeter ("Streeter") during re-cross-examination. At the time, Streeter was employed as an investigator for the State. He testified that prior to trial he interviewed Chase, who confirmed the accuracy of the prior statements which she had given about the incident. Specifically, Trial Counsel question Streeter about his interview of Chase, asking, "[D]id she appear nervous to you?" Streeter responded that she wasn't nervous and, "I felt like she was being forthcoming." When asked whether Streeter sensed that Chase was uncomfortable, he testified, "I didn't sense it at all, no."

Applicant argues that Trial Counsel should have objected to Streeter's testimony as unresponsive and bolstering. On the contrary, it appears that Streeter's responses were responsive to the questions asked of him. Viewed in the context of Trial Counsel's insinuation that Chase may have been hesitant to confirm the content of her written statement, it is clear that Streeter's use of the word "forthcoming" was intended to indicate that Chase had been cooperative with him. There is no evidence that this testimony was intended to bolster Chase's testimony. In addition, any potential deficiency in eliciting this testimony was harmless in light of the volume of evidence of Applicant's guilt. Because Applicant cannot meet her burden of showing deficiency or prejudice, this portion of the PCR Application is denied.

I. Testimony of Sgt. William Pegram

Applicant complains that the testimony of Sgt. Pegram included improper bolstering and opinion testimony. Specifically, Sgt. Pegram testified about why Boyd was not initially arrested,

stating, "[i]n [his] opinion of the law, everybody involved in this case was guilty but I had to determine the principal parties in this case." In addition, during its re-direct examination of Sgt. Pegram, the State asked him certain questions about gang affiliations and elicited testimony that Applicant and Six were "affiliated with" Brooks, a known gang member. Applicant contends that Trial Counsel should have objected to all of this testimony.

Trial Counsel admits that he probably should have objected to Sgt. Pegram offering his opinion of the law. However, as to the testimony about gang affiliations, Trial Counsel explained his trial strategy. He testified that he knew that Brooks, who was criminally charged in the first assault of Victim, was a gang member and he wanted to enable Applicant to talk about Brooks' defense of her daughter.

Viewed in context, it is clear that the legal opinion given by Sgt. Pegram was purely in describing his interactions with Boyd and to explain why he didn't arrest Boyd at that time; it was not a direct commentary on Applicant's guilt and was not improper. *See, e.g., State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) ("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially."). Additionally, it is axiomatic that police officers believe in the guilt of persons who they arrest. Therefore, Trial Counsel was not deficient in his failure to object to Sgt. Pegram's testimony, and any resulting effect was harmless beyond a reasonable doubt.

Similarly, the Court takes no issue with Sgt. Pegram's testimony about gang affiliations. The testimony was permitted in order to explain why Boyd and Brooks (who were not charged with Victim's murder) would so vigorously defend Applicant's daughter, to pave the way for Applicant's testimony on that issue, and not for purposes of disparaging Applicant. Trial

Counsel articulated a valid, reasonable trial strategy for choosing not to object to the introduction of the testimony and was not ineffective. *See, e.g., Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding that counsel must articulate an objectively reasonable, valid reason for employing a certain strategy to avoid a finding of ineffectiveness). Further, Applicant has not demonstrated any prejudice resulting from Trial Counsel's failure to object, particularly in light of the weight of evidence inculpatory evidence offered by the State. *See, e.g., Payne v. State*, 355 S.C. 642, 586 S.E.2d 758 (2004) (although counsel was deficient by failing to object, no prejudice shown because of overwhelming evidence of guilt). Therefore, this portion of the PCR Application is denied.

J. Co-defendant's Opening Statement

Finally, Applicant contends that Trial Counsel was ineffective for failing to object to a comment made by Six's attorney in his opening statement. During the statement, counsel rhetorically asked the jury, "Do you have any idea what the end of the world sounds like?" He said, "If you were to ask my client that question, he would tell you it sounds like .... being forced to sit in a courtroom, shackled." Trial Counsel did not object to this statement, explaining that he was "more focused on [his] own opening statement in defending [Applicant], and that may have gone by and [he] didn't pay that much attention to it..."

The Court finds that Trial Counsel was not deficient in his failure to object. The comment was not only about Six (not Applicant), but it appears designed to engender sympathy for Six and, by extension, for Applicant. This is similar to Trial Counsel's strategy "to point out the fact that all of this happened because the victim assaulted [Applicant's] child..." and to present Applicant as a concerned mother rather than a cold murderer.

Although Trial Counsel believes that the comment was objectionable, there is no evidence that Applicant was prejudiced by it. Even if accidentally so, the comment complemented Applicant's own strategy. Further, to the extent that the comment referenced Applicant, it was harmless particularly because it ultimately became apparent to the jury that she was shackled when she walked to the witness stand to testify. Applicant cannot sustain her burden of proving Trial Counsel's deficiency or resulting prejudice on this issue; therefore, this portion of the PCR Application is denied.

K. Other Allegations

As to any and all allegations that were raised in the PCR Application or at the evidentiary hearing but are not specifically addressed in this order, the same are denied. The Court finds that Applicant failed to present any evidence regarding any such allegations and has, therefore, abandoned them.

CONCLUSION

Based on the foregoing, the Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant the requested relief. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

The Court notes that 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 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, her post-conviction relief attorney must serve and file a notice of appeal on Applicant's

behalf. Applicant and her attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS, THEREFORE, ORDERED that the Application for Post-Conviction Relief is DENIED, and this matter is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Applicant be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED.

JOCELYN T. NEWMAN
Presiding Judge

November 19, 2018
Columbia, South Carolina.

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