

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

December 6, 2018

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

RECEIVED

DEC 10 2018

S.C. SUPREME COURT

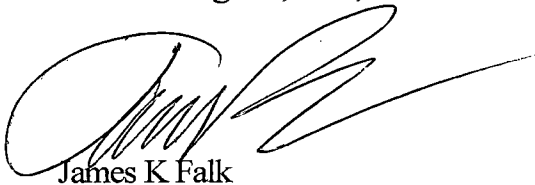
Re: Keenan Coakley 358058 v State, 2015-CP-10-5906

Dear Clerk Shearouse:

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

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

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc:

Kelly Oppenheimer, Esq
Keenan Coakley 358058
Charleston County Circuit Court Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 10 2018

S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable Michael G. Nettles, Circuit Judge

Case No.: 2015-CP-10-5906

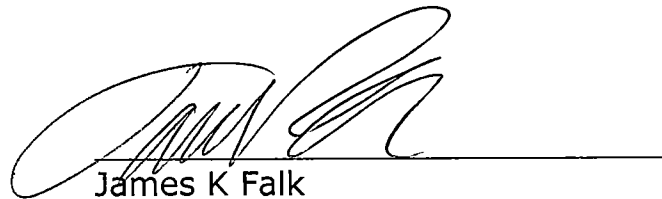
Keenan Coakley 358058.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner Keenan Coakley 358058 appeals the Honorable Michael G Nettles' November 19, 2018 Order of Dismissal. Undersigned counsel received notice of entry of the order on December 3, 2018. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

December 6, 2018

Kelly Oppenheimer, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

Clerk of Court- Charleston CP
100 Broad Street
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

DEC 10 2018

APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT
Court of Common Pleas
Honorable Michael G Nettles, Circuit Judge

Case No.: 2015-CP-10-5906

Keenan Coakley 358058.....PETITIONER

V.

State of South Carolina.....RESPONDENT

CERTIFICATE OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Kelly Oppenheimer Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this December 6, 2018.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

cc
AG
AT
GS
SDC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
)
Keenan Coakley, #358058,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2015-CP-10-5906

ORDER OF DISMISSAL

FILED
2018 NOV 27 PM 3:39
JULIE HARRIS
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed November 2, 2015, by Keenan Coakley (Applicant). The State (Respondent) made its Return on June 9, 2016, requesting an evidentiary hearing be held. Thereafter, through his counsel, Applicant filed an amendment to the application for post-conviction relief on July 18, 2018. An evidentiary hearing was convened on October 2, 2018, at the Charleston County Courthouse before the Honorable Michael G. Nettles. Applicant was present at the hearing and represented by James K. Falk, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. During its April 2011 term, the Charleston County Grand Jury indicted Applicant for armed robbery (2011-GS-10-02078). William L. Runyon, Jr., Esquire (Counsel),

represented Applicant on this charge. Assistant Solicitors Jennifer Shealy and Emmanuel Ferguson, both of the Ninth Circuit Solicitor's Office, prosecuted the case. On December 2-6, 2013, Applicant proceeded to a jury trial with his two co-defendants, Jarret Graddick and Kevin Smalls, before the Honorable R. Markley Dennis, Jr. Following deliberations, the jury convicted Applicant and Graddick as indicted.¹ Judge Dennis sentenced Applicant to a term of imprisonment of sixteen years.

Applicant filed a timely notice of appeal, and Counsel perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issue:

1. It was reversible error to allow the alleged statement as it introduced other alleges [sic] acts in violation of Rule 404B of the South Carolina Rules of Evidence.

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence by unpublished opinion. *State v. Coakley*, Op. No. 2015-UP-412 (S.C. Ct. App. Filed August 12, 2015). The Remittitur was issued on August 28, 2015.

CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel:
 - a. "Trial counsel was ineffective for failing to request an insubstantial circumstantial evidence jury charge be given to the jury in Applicant's criminal trial."

In his amendment to the application for post-conviction relief, Applicant raises the following additional grounds for relief:

1. Ineffective Assistance of Counsel:
 - a. "Failing to move that Applicant be tried separately from his co-defendants;"

¹ At the time the jury reached a verdict for Applicant and Graddick, it had not reached a verdict for co-defendant Smalls. Tr. 905.

- b. "Failing to object to the Court's use of the phrase 'seeking the truth' in its charge on reasonable doubt. (TR. 862 l.8);"
- c. "Failing to object to the Court's circumstantial evidence charge. (TR 867 l. 25 – 868 l. 10);"
- d. "Failing to request Jury Charges on the lesser included offense of Strong Armed Robbery;" and
- e. "Filing [sic] to request an adequate charge regarding multiple defendants similar to the following: *There are [two, three, etc.] defendants in this case. Each is charged with Armed Robbery or its lesser included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your review of the testimony and evidence, which you alone are to pass upon. See South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr. § 1-27.*" (emphasis in original)

At the hearing, Applicant proceeded forward on the claims in his amendment to the application for post-conviction relief.

STATEMENT OF FACTS ADDUCED AT TRIAL

Two men, wearing cloths over their faces and ball caps, entered a cell phone store on September 15, 2010, and stole the cashbox containing approximately \$1,000. At least one of the men had a gun. The men entered and exited through a back door, and the store owner saw them run into a field behind the store. The owner testified there was a uniquely marked \$100 bill in the cashbox. Tr. 147-69.

The store employees ran out of the store when the men entered, and yelled for someone to call 911 because they were being robbed. A woman in the parking lot called 911, and noticed a man "looking very nervous" standing next to a red and black car. After the employees ran out,

the man got into the car and drove off. As the car backed up, the woman got the license tag number and gave it to police. Tr. 226-31.

A man ("Davis") who lived on a dead end road (Sam Edwards Road) near the shopping mall testified he saw a red and black car drive down the road twice on the day of the robbery. The first time there were four people in the car, but when the car drove out, two of the passengers were on foot. About half an hour later, the car came back, and the two men who left on foot earlier ran out on the road. One of the men was carrying something under his coat, and Davis saw him throw it in a ditch as he ran. The men got into the red and black car, which left very fast. When police arrived a short time later, Davis showed them where the man threw the item, which was subsequently identified as the cashbox from the cell phone store, in the ditch. Tr. 294-308, 349-50.

Officer Joseph Zeitner of the Mount Pleasant Police Department testified he heard the dispatch regarding an armed robbery, with a description and license tag number of the red and black car. He almost immediately saw the car cross an intersection in front of him and initiated a traffic stop after he was able to verify the license tag number. There were four men in the car, and he ordered them to put their hands up. Tr. 362-66.

After a back-up officer arrived, Zeitner started getting the occupants out of the vehicle, beginning with the driver (Kevin Smalls). While he was getting Smalls out, the two males in the back seat, subsequently identified as Applicant and co-defendant Graddick were moving around. Graddick, who was seated behind the driver, dropped down out of Zeitner's sight three times, and Applicant, seated behind the front passenger seat, tried to get into the front seat of the car. The officers ordered Graddick out of the car, and had Applicant slide across the backseat and

exit on the driver's side. They then got the front seat passenger (Brian Mazyck) out of the car. Tr. 366-75.

A police supervisor who assisted in the traffic stop testified that after the occupants were removed from the car, officers moved it out of the roadway into a parking lot to secure it and wait on the crime scene technicians. When she looked into the car, she saw a Glock handgun on the passenger side, and money in the back seat arm rest. Tr. 386-97.

The crime scene/evidence technician testified he recovered some shirts turned inside-out, a black pair of pants, a belt, and gloves from inside the car. He also recovered cash (\$1,095) from the backseat's center console, and a forty-five caliber Glock handgun from under the back of the front passenger seat. Tr. 426-45, 449-55. The cash included the uniquely marked bill described by the store owner. He then responded to the location where the cashbox was found, photographed the location, and retrieved the cashbox as evidence. Tr. 454-59.

Mazyck testified for the State, and recounted the events on September 15, 2010, leading up to the traffic stop. He stated he was in the car with Smalls in the shopping mall parking lot when the store owner yelled the store had been robbed, but Smalls told him not to "get involved." Smalls then drove out of the parking lot at "a nice little speed," went to Sam Edwards Road, went to the end of Sam Edwards Road and turned around. Mazyck saw Applicant and Graddick come out of a path and wave Smalls down. They were wearing gloves and had something covering the lower part of their faces, and one of them threw the cashbox down before they got in the car. Applicant got in the backseat behind Mazyck, and Graddick got in the backseat behind Smalls. Tr. 485-510.

Mazyck testified Applicant and Graddick started taking off the clothes they had on when they got in the car, and putting on clothes laying on the backseat, and he saw a gun under the

backseat armrest. After Zeitner stopped the car and ordered them to get out, Applicant said: "Go! I'm not going back to jail." Tr. 518-21.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Counsel. This Court also had before it a copy of Applicant's trial transcript, the records of the Charleston County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

Counsel testified he was not directly retained by Applicant to represent him, but he was brought on by Applicant's first attorney as associate counsel. He explained at some point in time, there was a difference of opinion between Applicant and his first attorney, and Applicant wanted to proceed with just Counsel. Counsel further testified he tried the case and handled the case on appeal; but after the appeal, he was asked to turn over Applicant's file to Applicant's father, who signed a receipt indicating he had gotten the file.

He testified he met with Applicant several times, both with Applicant's first attorney and individually. He further testified he reviewed the elements of the charges for each case. He explained at the time, Applicant was charged with four counts of armed robbery. Counsel also testified he reviewed the discovery materials with Applicant.

Counsel further testified this armed robbery was the strongest case the State had of the other armed robbery charges. He testified Applicant was apprehended shortly after the robbery took place. He explained all four co-defendants were caught in the car in the surrounding area. He further explained at the time of his capture, Applicant stated: "I'm not going back to jail." He testified there was both forensic evidence and physical evidence found in the car. He explained at least one gun was found, and there was DNA from the clothing in the car. He

further explained the DNA connected Applicant to the clothing in the car, and the car was not Applicant's.

He also testified this was a case involving multiple co-defendants, and three of the four co-defendants had different levels of responsibility in this crime. He testified three of the co-defendants were tried jointly. He further testified although he considered moving for a severance, he ultimately did not. He explained he made the decision not to move to sever the cases after speaking with Applicant and explaining he did not think he could get the cases severed. He further explained the primary problem with Applicant's case was the statement Applicant made when law enforcement officers started following their car. He testified this was an incriminating statement that raised the issue of other crimes and might have been handled through a severance.

Counsel also testified he does not make "every motion in the book." He testified the State had a witness who saw three people get out of the car through an undeveloped area leading to the crime scene. He further testified this witness could recognize Applicant, but he did not identify Applicant as one of the three people. Counsel explained if Applicant were tried alone, the jury could not view Applicant's physical characteristics in comparison to the other co-defendants. He testified this was part of his trial strategy. Counsel explained if Applicant were tried separately, he risked the witness who knew him pointing to Applicant as the person he saw. He further testified he made a conscious decision not to move for a severance. He also testified on the day of trial, one of the co-defendants decided to testify against the other co-defendants, which was information he did not have when he decided not to move for a severance. He explained the co-defendant's testimony altered his strategy.

He further testified at least one of the store clerks testified there was a weapon, so Applicant could have been liable under the theory of the hand of one, hand of all. He explained

there was testimony at least one gun was used, if not two. He further explained the victims believed the robbers were using a firearm. He did not recall whether there was a specific description of Applicant having a gun at the time of the crime. He testified he did not ask for a charge of a lesser-included offense. He explained he made this decision based on the facts, testimony, and arguments made to the jury. He further testified there was no need for a charge on strong arm robbery, as an argument there was no gun involved when there was testimony indicating a gun was involved might not be beneficial.

Counsel also testified the trial court prepared the charge in advance and provided a copy to counsel. He testified he did not believe the court's "seeking the truth" language in its charge on reasonable doubt shifted the burden, so he did not object. He also testified the trial court indicated it was the State's burden to prove to the jury beyond a reasonable doubt multiple times in its charge. He explained it was very clear the State had the burden as to each defendant. He further testified the charged from the trial court made it clear to the jury Applicant and his co-defendants were individual defendants. He also testified the trial court altered his charge to reflect multiple defendants. He testified the trial court did not give the King charge, nor did he request it be charged. Counsel also testified he did not raise that issue on appeal. He testified it was apparent the jury considered each defendant separately, as they reached verdicts for Applicant and one of his co-defendants before reaching a verdict for the third co-defendant. Counsel also testified he did not have any reason to object to the circumstantial evidence charge under these circumstances. He explained the circumstantial evidence charge given was not error and was, in fact, a correct charge on the law. He further explained part of his strategy was considered when to tactfully make objections, indicating if he wanted the trial court to consider a crucial motion, he needed to consider whether the trial court would have listened.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony accordingly. This Court finds Counsel's testimony is very credible, whereas Applicant's testimony is not credible. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant's allegations of ineffective assistance of counsel are as follows: (1) failing to move for a severance; (2) failing to object to the trial court's use of the phrase "searching for the truth" in its charge on reasonable doubt; (3) failing to object to the trial court's circumstantial evidence charge; (4) failing to request a charge on the lesser-included offense of strong arm robbery; and (5) failing to request an adequate charge regarding multiple defendants.

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to move for severance

Applicant alleges Counsel was ineffective for failing to argue for severance of his trial from that of his co-defendants, Jarret Graddick and Kevin Smalls. Criminal defendants who are jointly tried are not entitled to separate trials. *State v. Kelsey*, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (citing *State v. Holland*, 261 S.C. 488, 201 S.E.2d 118 (1973); *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972)). Motions for severance are within the discretion of the trial court. *Id.* "A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant's guilt." *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing *State v. Dennis*, 337 S.C. 275, 523 S.E.2d 173 (1999)) (emphasis in original). In order to reverse a conviction on the basis of an allegation that a defendant was improperly

tried jointly, a defendant must show prejudice. *Dennis*, 337 S.C. at 281, 523 S.E.2d at 176 (citing *Crowe*, 258 S.C. 258, 188 S.E.2d 379). Such prejudice is established by a showing the defendant would have obtained a more favorable result at a separate trial. *Hughes*, 346 S.C. at 559, 552 S.E.2d at 317. In order to ensure no prejudice results from a joint trial, a cautionary instruction may help protect the individual right of each defendant. *Id.* (citing *State v. Holland*, 261 S.C. 488, 494, 201 S.E.2d 118, 121 (1973)).

Moreover, “counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). *See also Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. United States*, 564 F.2d 1071 (4th Cir. 1977)).

Here, Counsel testified with Applicant being tried with two of his co-defendants, it would be difficult for the eyewitness, who was familiar with Applicant, to specifically identify Applicant as being one of the individuals he saw. He explained it would be to Applicant's benefit having other defendants at the defense table with him, so that he could be physically compared to those co-defendants and to shift some of the focus to Applicant's co-defendants. He further explained had Applicant been tried alone, he risked having all of the focus on him. Therefore, this Court finds Counsel's performance was reasonable under the circumstances, as he articulated a valid trial strategy in not moving for a severance. This Court further finds Applicant has wholly failed to establish any deficiency on the part of Counsel.

Moreover, Applicant has failed to establish any resulting prejudice from this alleged deficiency. Counsel specifically testified he did not think he would be successful on a motion for a severance. As aforementioned, the State's witness who was familiar with Applicant testified at trial he did not see Applicant, or any members of Applicant's family, go towards the crime scene or return from the crime scene. *See* Tr. 315. Moreover, no statements from Graddick or Smalls to law enforcement implicating themselves or Applicant were ever introduced at trial. *Compare Bruton v. United States*, 391 U.S. 123 (1968) (finding the introduction of a co-defendant's confession, which implicated not only the co-defendant but also the appellant, "added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination.") *with State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012) (finding a co-defendant's statement, which was introduced at trial, containing "the neutral phrase 'another person'" in place of the other co-defendants' names did not violate *Bruton*). Consequently, Applicant cannot establish any prejudice from this alleged deficiency. Based on the foregoing, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to "searching for the truth" language during the trial court's charge on reasonable doubt

Applicant alleges Counsel was ineffective for failing to object to the trial court's use of "searching for the truth" in its charge on reasonable doubt. Applicant contends such language shifted the burden of proof from the State to Applicant.

When analyzing the propriety of jury instructions for error on appeal or on collateral review to determine whether counsel should have objected to a purportedly impermissible charge, the reviewing court must view the jury charge as a whole and in light of the evidence and issues from trial. *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); *see Todd v. State*, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."); *see also Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."). The appropriate test for reviewing a jury charge involves determining whether there is a reasonable likelihood the jury applied the charge in an unconstitutional manner. *Estelle v. McGuire*, 502 U.S. 62, 71 (1991). "In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *Todd*, 355 S.C. at 399, 585 S.E.2d at 306).

One of the fundamental functions of the trial process in both criminal and civil cases is to discover the truth. *See State v. Wren*, 322 S.C. 103, 105, 470 S.E.2d 111, 112 (Ct. App. 1996) ("A trial is a search for the truth[.]"); *see also Portuondo v. Agard*, 529 U.S. 61, 73 (2000)

(stating “the central function of [a] trial . . . is to discover the truth”); *see generally Carella v. California*, 491 U.S. 263, 265 (1989) (explaining burden-relieving jury instructions “subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned solely to juries in criminal cases”); *Gardner v. Florida*, 403 U.S. 349, 360 (1977) (“[T]he debate between adversaries is often essential to the truth-seeking function of trials[.]”).

As part of this truth-seeking process, the State is constitutionally required to prove a criminal defendant’s guilt for every element of a criminal offense beyond a reasonable doubt while a defendant is ordinarily not required to prove anything at all. *In re Winship*, 397 U.S. 358, 364 (1970); *see Burr v. Florida*, 474 U.S. 879, 880 (1985) (“[T]he beacon of the truth-seeking process in criminal cases is not absolute certainty, but the ‘reasonable doubt’ standard[.]”); *see also State v. Brewer*, 411 S.C. 401, 408, 768 S.E.2d 656, 659 (2015) (reiterating a criminal defendant has no duty to prove his or her own innocence); *see generally State v. Attardo*, 263 S.C. 546, 552, 211 S.E.2d 868, 871 (1975) (recognizing the burden may be on the defendant to establish a defense to a criminal charge only in limited circumstances). In *State v. Daniels*, however, the Supreme Court instructed trial courts “to remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties” when the trial court charged the jury “it was his ‘confirmed opinion’ that the verdict would represent ‘truth and justice for all parties.’” 401 S.C. 255-56, 737 S.E.2d 473, 475 (2012). The Supreme Court further cautioned “such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilty beyond a reasonable doubt.” *Id.* at 256, 737 S.E.2d at 475.

Here, unlike in *Daniels*, the trial court never indicated to the jury they had an obligation to seek the truth. Indeed, the trial court never instructed the jury Applicant had to prove anything. Rather, the trial court merely stated: “A reasonable doubt is a doubt that would make an honest, sincere, conscientious juror, who’s searching for the truth in the case to hesitate to act or to take some action.” Tr. 862. Such an instruction does not indicate there is an obligation to seek the truth. Accordingly, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. Although, the Supreme Court has repeatedly cautioned trial courts to avoid using language that instructs the jury to “seek the truth” due to the risk such language could **potentially** shift the burden of proof to the defendant in an unconstitutional manner,¹ it has specifically declined to hold any mention of “the truth” to a jury automatically constitutes reversible error or is *per se* unconstitutional. See *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (citing *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998) (“Trial courts should avoid using ‘seek’ language in instructing the jury because such language is unnecessary and runs the risk of unconstitutionally shifting the burden of proof.”); *State v. Aleksey*, 343 S.C. 20, 27-28, 538 S.E.2d 248, 251 (2000) (quotations omitted) (noting jury instructions on reasonable doubt that charge the jury to “seek the truth” are disfavored because

¹ Recently, in *State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), decided nearly five years **after** Applicant’s trial, the Supreme Court again stated “trial judge[s] should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict” because “[t]hese phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice.” The Supreme Court further stated, “We instruct trial judges to avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant’s guilt beyond a reasonable doubt.” *Id.* Notably, although finding the trial court’s instruction was improper, this Court found the error harmless, “Although there was error here, our review of the entirety of the judge’s opening comments and the entire trial record convinces us that Appellant has not shown prejudice from this error sufficient to warrant reversal.” *Id.*

they the risk of unconstitutionally shifting the burden of proof to a defendant.); *State v. Hoffman*, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994) (holding a reasonable doubt jury charge that included “seeking the truth” language constituted a correct definition of reasonable doubt when read as a whole and did not shift the burden of proof to the defendant). Indeed, in *Aleksey*, the Court noted: “Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of ‘the truth’ in jury charges is unconstitutional.” 343 S.C. at 28, n. 2, 538 S.E.2d at 252. Furthermore, the Court has declined to hold such language was reversible error when the trial court instructs the jury numerous times throughout its charge that the State has the burden of proving a defendant guilty beyond a reasonable doubt. *See Needs*, 333 S.C. at 154, 508 S.E.2d at 867 (finding the trial court’s use of the “seeking the truth” language constituted harmless error when the trial court instructed the jury twenty-six times that the State had the burden of proving a defendant guilty beyond a reasonable doubt).

Here, the trial court instructed the jury thirteen times that the State had the burden of proving Applicant guilty beyond a reasonable doubt. *See* Tr. 860, l. 5-6; 861, l. 24-25; 869, l. 3; 872, l. 17-20; 873, l. 2-3; 873, l. 15-17; 875, l. 8-11; 876, l. 1-4; 876, l. 18-20; 877, l. 8-11; 877, l. 13-14; 879, l. 21-22; 880, l. 6-7. Moreover, Mazyck testified shortly after leaving the cellphone store parking lot and proceeding down Sam Edwards Road, Applicant and Graddick were coming out of the path that led to the cellphone store shopping center, wearing gloves, sunglasses, hats, and something to cover their faces. Tr. 505-08. Mazyck also testified either Applicant or Graddick had a black gun. Tr. 508. Applicant was also apprehended shortly after the armed robbery took place and near the crime scene. Tr. 364-65, 369, 375. Additionally, while being pulled over by law enforcement, Applicant stated: “Go! I’m not going back to jail.

Go!” Tr. 520. Still further, Applicant’s DNA was found on gloves and clothing in the car, which Applicant and his co-defendants were in when apprehended. *See* Tr. 680-94. Based on the foregoing, it is unlikely the result of the proceeding would have been different had Counsel objected to the “search for the truth” language. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel’s alleged failure to object to the circumstantial evidence charge

Applicant alleges Counsel was ineffective for failing to object to the trial court’s charge on circumstantial evidence. “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (2003) (internal citations omitted). In *State v. Grippon*, the Supreme Court recommended the following jury instruction on circumstantial evidence be given once a proper reasonable doubt instruction is given:

There are two types of evidence which are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find [the defendant] not guilty.

327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997). Thereafter, the Court held the aforementioned recommended language “is the sole and exclusive charge to be given in circumstantial evidence cases in this state.” *State v. Cherry*, 361 S.C. 588, 601, 606 S.E.2d 475, 482 (2004). Recently,

however, the Court recommended language differing from that prescribed in *Grippon*. See *State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). In *Logan*, the Court explicitly found its “holding does not prevent the trial court from issuing the circumstantial evidence charge provided in *Grippon* and *Cherry*. However, trial courts may not exclusively rely on that charge over a defendant’s objection.” *Id.* at 100, 747 S.E.2d at 452-53.

Here, the trial court gave the following charge on circumstantial evidence:

Now, evidence in a case such as this, there are two types of evidence, which you generally consider. Quite frequently, they consist of both types. Sometimes one more than the other, but it really doesn’t matter because it’s customary to use both types of evidence.

One would be direct evidence. And direct evidence is typically testimony regarding a sensory perception. I saw something, I heard something, I felt something or the like. And if you are firmly convinced as to the truthfulness of that testimony, then it would establish that particular fact and circumstance.

The other would be circumstantial evidence. And that, unlike direct evidence, is when a person testifies of a number of facts. And if you’re firmly convinced as to the reliability and the truthfulness of each of those facts and you link them, then either through deductively, deductive reasoning, you reach another conclusion, you reach another conclusion, that, likewise, if you’re firmly convinced of that conclusion, it would establish that particular fact or conclusion.

I will tell you that it is quite common to use both and the law makes no distinction between the value or the weight to be given either to direct or circumstantial evidence. Nor is there any greater degree of certainty required of circumstantial evidence and direct evidence. Rather, you should weigh all of the evidence and decide what you find to be credible and believable.

Tr. 867-68. The language given by the trial court contains the correct definition and adequately covers the law as outlined in *Grippon*. Furthermore, Counsel testified he had no reason to object to the circumstantial evidence charge as given. Given the fact the *Grippon* language is still good

law and Counsel believed he had no reason to request the language in *Logan*, this Court finds Applicant has wholly failed to meet his burden. Accordingly, this allegation is denied and dismissed with prejudice.

Counsel's alleged failure to request a charge on strong arm robbery

Applicant further alleges Counsel was ineffective for failing to request a charge on the lesser-included offense of strong arm robbery. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. *Gentry*, 540 U.S. at 8 (quoting *Massaro*, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith*, 386 S.C. at 567, 689 S.E.2d at 632. *See also Ingle*, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead*, 308 S.C. at 122, 417 S.E.2d at 531. When counsel articulates a valid, strategic reason for failing to request a jury instruction on a lesser-included offense, trial counsel cannot have been ineffective for failing to do so. *Abney v. State*, 408 S.C. 41, 46-47, 757 S.E.2d 544, 547 (Ct. App. 2014).

Here, Counsel testified at least one of the store clerks testified a weapon was involved during this robbery, although there was no specific description of the gun by the clerk. Counsel further testified he did not request a lesser-included offense, and his decision was based upon the

facts, testimony presented at trial, and the arguments made to the jury. Based on the foregoing, this Court finds Counsel employed a valid strategic reason in failing to request a charge on the lesser-included offense of strong arm robbery. This Court further finds Applicant has wholly failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. A trial court is required to charge a jury on the lesser-included offense “if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed.” *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (emphasis added). If, however, there is no evidence the defendant committed the lesser rather than the greater offense, the trial court should refuse to charge the lesser-included offense. *State v. Smith*, 315 S.C. 547, 549, 446 S.E.2d 411, 413 (1994).

Armed robbery is defined as the commission of a: “robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon.” S.C. Code Ann. § 16-11-330 (2003). Strong arm robbery, however, is defined “as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.” *State v. Rosemond*, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003).

Here, the owner of the cellphone store testified he turned and saw two men wearing hats and masks come into the store, waving a gun. Tr. 154. Mazyck also testified when he and Smalls picked up Applicant and Graddick on Sam Edwards Road, one of them had a gun. Tr. 508. Furthermore, a gun was found in the car in which Applicant and his co-defendants were

apprehended. Tr. 392. Based on the foregoing, it is apparent a gun was used during this robbery and there was no evidence to support a charge of strong arm robbery. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to request an adequate charge on multiple defendants

Applicant further contends Counsel was ineffective for failing to request an adequate charge on multiple defendants. Specifically, Applicant contends the following charge should have been given:

There are [two, three, etc.] defendants in this case. Each is charged with armed robbery or its lesser-included offense. Whatever verdict you find, it does not have to be the same as to [both] [all] defendants. You take each defendant, consider the evidence as to him, and write your verdict in accordance and in conformity with the evidence in the case and the instructions that I have given you and will hereafter give you. Where more than one person is charged with a crime, if the evidence warrants it, you may convict one and acquit the other, or you may acquit both, or you may convict both. It will depend upon your view of the testimony and evidence, which you alone are to pass upon.

Amendment to PCR Application (citing South Carolina Request to Charge-Criminal, Ralph King Anderson, Jr. § 1-27).

A jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law.” *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464. A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Furthermore, “the substance of the law is what must be charged to the jury, not any particular verbiage.” *Adkins*, 353 S.C. at 318-19, 577 S.E.2d at 464 (emphasis added).

Here, the trial court charged the jury: “[I]t’s important to realize that there are three separate indictments, three separate defendants and three separate determinations that you will

have to make. And each party is entitled to a fair and impartial determination based on your assessment of the evidence.” Tr. 859. The trial court further charged the jury: “To assist you . . . in recording the verdict, I’ve prepared three verdict forms. That is necessary because there are three separate cases, as we have discussed.” Tr. 878. The trial court made the jury very aware there were three separate indictments and three separate defendants, and the jury was to render verdicts for each defendant individually. As no particular verbiage is required, this Court finds the charge given adequately covered the law. Moreover, Counsel testified he did not request the particular language laid out in the King charge, as the trial court’s charge made it very clear these were three individual defendants. Based on the foregoing, this Court finds Applicant has wholly failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Following deliberations, the jury came back with verdicts for two defendants—Applicant and Graddick. Tr. 899-901, 905-06. The jury, however, had not rendered a verdict as to the third defendant, Smalls, so they returned to their deliberations. Tr. 910, 651. Based on the mere fact the jury reached verdicts on Applicant and Graddick prior to reaching a verdict on Smalls, the jury was aware they were to consider each case separately. Accordingly, this allegation must be denied and dismissed with prejudice.

CONCLUSION

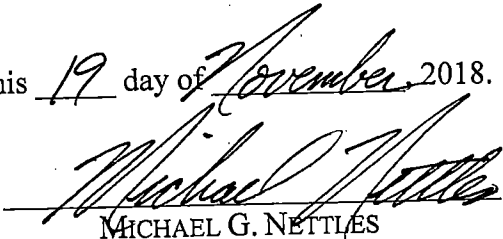
Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel 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 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRPC, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

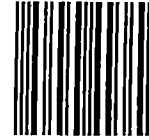
AND IT IS SO ORDERED this 19 day of November, 2018.


MICHAEL G. NETTLES
Presiding Judge
Ninth Judicial Circuit

J. J. J. J., South Carolina



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FALK LAW FIRM

PO Box 1058

Charleston, SC 29402

Clerk of Court

Supreme Court of South Carolina

P.O. Box 11330

Columbia, SC 29211