WALLER
LAW GROUP

February 25, 2019

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

Re: Jeff Chestnut v The State of South Carolina
C/A No: 2014-CP-40-05179

Dear Mr. Shearouse:

Please find enclosed one (1) original and one (1) copy each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

I was appointed to represent Mr. Chestnut in this matter and am also enclosing a copy of the Order of Dismissal. If you have any questions, please do not hesitate to ask. My telephone number is 803-520-7278.

Sincerely,

Jonathan D. Waller

Cc: J. Clayton Mitchell, III, South Carolina Office of Attorney General

Enclosures

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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
J. Derham Cole, Circuit Court Judge

2014-CP-40-05179

Jeff Chestnut, # 304420,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Jeff Chestnut, # 304420, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 19, 2019, issued by the Honorable J. Derham Cole, Presiding Judge, Fifth Judicial Circuit.

Jonathan D. Waller
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ATTORNEY FOR PETITIONER

February 27, 2019

Other Counsel of Record:
J. Clayton Mitchell, III, Assistant Attorney General
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
J. Derham Cole, Circuit Court Judge

2014-CP-40-05179

RECEIVED
MAR 05 2019
S.C. SUPREME COURT

Jeff Chestnut, # 304420,

Appellant,

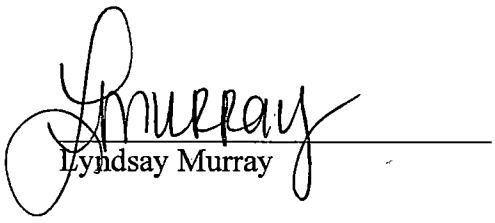
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, J. Clayton Mitchell, III, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this day, to his office located at P.O. Box 11549, Columbia, SC 29211.



Lyndsay Murray

February 27, 2019

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. **2014-CP-40-05179**

Jeff CHESTNUT, SCDCID# 304420
Applicant

The **STATE** of South Carolina,
Respondent

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.

☐ **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 .

2019 FEB 19 PM 4:01
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

IT IS ORDERED AND ADJUDGED: ☒ Formal order is attached; ☒ Statement of Judgment by the Court:

This matter came before this court on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-10 et.seq.*.

Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of counsel, and consideration of the applicable statutory and case law, this court finds that the applicant's request for **post-conviction** relief should be and **is** therefore **denied** and the **application** is **dismissed** with prejudice for failure of the applicant to establish deficient performance of counsel and/or prejudice resulting from counsel's performance.

Dated at Spartanburg, South Carolina, this **12th** day of **February, 2019.**

PRESIDING JUDGE, J. Derham Cole

This judgment was entered on the day of **February, 2019**, and a copy mailed first class this 19th day of **February, 2019** to attorneys of record or to parties (~~when appearing~~ pro se) as follows:

Jonathan D Waller, *Esq.*
1116 Blanding Street, Suite 2B
Columbia, South Carolina 29201

ATTORNEY(S) FOR THE APPLICANT

J. Clayton Mitchell, *Esq.*
Post Office Box 11549
Columbia, South Carolina 29211-1549
Kelly Oppenheimer, *Esq.*
Post Office Box 11549
Columbia, South Carolina 29211-1549
ATTORNEY(S) FOR THE RESPONDENT

CLERK OF COURT, Jeanette W. McBride

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Jeff Chestnut, #304420, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2014-CP-40-05179 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief filed August 22, 2014. Respondent made its Return on March 11, 2015, requesting an evidentiary hearing be held. Thereafter, through counsel, Applicant filed an amended application for post-conviction relief on January 26, 2016. An evidentiary hearing into the matter was convened on February 3, 2016, at the Richland County Courthouse before the Honorable J. Derham Cole. Applicant was present at the hearing and was represented by Jonathan D. Waller, Esquire. Assistant Attorney General J. Clayton Mitchell, III of the South Carolina Attorney General's Office represented Respondent.

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 denied 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 Richland County Clerk of Court. During its July 2012 term, the Richland County Grand Jury indicted Applicant for three

counts of kidnapping (2012-GS-40-04241; -04243; -04244) and for three counts of armed robbery (2012-GS-40-04242; -04245; -04246). The Grand Jury also indicted Applicant for an additional charge of armed robbery in 2010 (2010-GS-40-02641). Mathias G. Chaplin, Esquire represented Applicant on these charges. On September 17-20, 2012, Applicant proceeded to a jury trial before the Honorable G. Thomas Cooper, Jr., where he was convicted as indicted on all charges. Judge Cooper sentenced Applicant to concurrent terms of imprisonment of thirty years for each charge.

Applicant filed a timely notice of appeal in the South Carolina Court of Appeals. Appellate Defender David Alexander of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected an *Anders*[1] brief on Applicant's behalf. Thereafter, the South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's request to withdraw. *State v. Chestnut*, 2014-UP-237 (Ct. App. Filed June 25, 2014). The Remittitur was issued on July 18, 2014.

CURRENT ACTION

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

1. Ineffective Assistance of Counsel;
    a. "Failure to properly research and investigate the facts and laws surrounding my whole case."

In his amended application, filed January 26, 2016, Applicant also raised the following allegations:

1. Counsel was ineffective for failing to retain the services or investigate the potential effectiveness of an eyewitness identification expert;
2. Counsel was ineffective for failing to procure telephone records of Defendant as a potential defense;
3. Counsel was ineffective for failing to object to the lack of notice of State's expert witness and for failing to object to the witness' written report from an expert witness;

[1] *Anders v. California*, 386 U.S. 738 (1967).

4. Counsel was ineffective for failing to properly argue factors regarding the reliability of a witness' identification during the suppression hearing;
5. Counsel was ineffective for failing to object to Judge Cooper's preliminary remarks to the jury as they improperly shifted the burden to the Defendant;
6. Counsel was ineffective for failing to object to several instances of impermissible hearsay during the testimony of Drenita Ore;
7. Counsel was ineffective for failing to object to impermissible hearsay during the testimony of Timothy Bell;
8. Counsel was ineffective for failing to contemporaneously object to State's Exhibit #3 (lineup) being offered into evidence;
9. Counsel was ineffective for failing to contemporaneously object to Angela Diaz-Garcia's in-court identification of Defendant;
10. Counsel was ineffective for failing to object to several leading questions during the testimony of Investigator Kevin Eisenhoward;
11. Counsel was ineffective for failing to object to State's Exhibit #1 (advisement of rights) thereby not preserving the issue for appeal;
12. Counsel was ineffective for failing to allow Defendant to view surveillance video prior to trial;
13. Counsel was ineffective for failing to renew motion for Directed Verdict at the close of Defendant's case and the close of all evidence;
14. Counsel was ineffective for failing to request a jury charge of "withdrawal;"
15. Counsel was ineffective for failing to request a jury charge of "mere presence" after the State's closing argument; [and]
16. Counsel was ineffective for failing to object to Judge Cooper's charge to the jury.

At the evidentiary hearing, Applicant proceeded forward on the allegations raised in his amended application.

STATEMENTS OF FACTS ADDUCED AT TRIAL

On May 23, 2010, the Carolina Gold Bingo was robbed. A few days prior to the robbery, Applicant and his co-defendant went to the bingo parlor to visit Applicant's girlfriend, Teidra Dennis, who worked there. Tr. 182, 185. The following Sunday, two men, wearing bandanas and carrying guns entered the bingo parlor. Tr. 174. The men announced to the bingo parlor they were robbing the place. Tr. 174. One man remained on the floor while the other went into the cage area of the parlor where the money was kept. Tr. 175, 207, 209, 210.

The man entered the cage and asked Angela Diaz-Garcia, who was working in the cage that day, where the money was kept. Tr. 279, 281. She pointed to the counter, which had money sitting on top of it, but the man opened the drawer[2] and took the money out. Tr. 279-80. He also took money out of the till. Tr. 279. He then took the money that was on top of the counter. Tr. 280. After taking the money, the man and his co-defendant left. Tr. 284.

After the robbery, Ms. Garcia told law enforcement she believed she could identify the robber who held her gunpoint. Tr. 281. Ms. Garcia described the robber as wearing a baseball cap, black shirt, black pants, and a black bandana. Tr. 280. She could also see his eyes, which she testified: "I'll never forget his eyes as long as I live." Tr. 280, 282.

Some weeks later, Sergeant Kevin Isenhoward, of the Richland County Sheriff's Department, showed Ms. Garcia a six-person photo lineup. Tr. 281. When Sergeant Isenhoward showed her the lineup, she immediately felt sick and picked out picture number two. Tr. 282-83. She was one hundred percent sure of the man she identified. Tr. 283. Ms. Garcia identified the robber as Applicant. Tr. 282-83.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented testimony from trial counsel, Mathias Chaplin, Esquire. This Court also had before it a copy of the Applicant's trial transcript, the records of the Richland County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant first presented the testimony of trial counsel, Mathias Chaplin, Esquire (hereinafter "Counsel"). Counsel testified he is a criminal defense

[2] Only employees were aware that money was kept in the drawer. Tr. 280.

attorney with his own practice. He testified he has handled many serious crimes before at both the State and Federal levels. He testified he was appointed to represent Applicant on his numerous arrests and charges, including his probation violation. He testified he met with Applicant in excess of twenty times, both in his office and at court. He further testified he got ODC to hire an investigator for him, who also met with Applicant a number of times, both with and without Counsel. He elaborated they went through the file ad nauseam, including discovery, Applicant's rights, possible defenses, and Applicant's options. He testified he and Applicant discussed a plea offer for between ten and fifteen years imprisonment, but the plea offer did not encompass all of the potential charges. He testified Applicant rejected this plea offer. Counsel further testified he was well prepared for trial. Counsel also testified he told Applicant he was going to give him his best, which is what he did. He elaborated despite Applicant's damaging statement, he believes he "gave one hell of a trial."

He testified Applicant was adamant he wanted to go to trial and wanted to testify. He elaborated Applicant was sure that no one was going to be able to identify him at trial. He testified it was their strategy at trial to have Applicant take the stand to tell the truth—that he did not go inside the bingo parlor and did not rob anyone. He further testified he and Applicant discussed Applicant testifying at trial; and from the very beginning, Applicant was adamant he was wrongfully accused and wanted to go to court to straighten everything out. He elaborated Applicant knew if he ultimately chose not to testify, that fact could not be used against him at trial. Counsel also testified it is his standard practice to advise everyone of this right. He further testified it is his standard practice to advise everyone that their prior criminal record could be used against them for impeachment purposes if they decide to testify. He testified he and Applicant discussed

his testimony, as well as his prior record. He elaborated he explained to Applicant his prior record may cause the jury to not believe him. He further testified he explained to Applicant that because he was on probation, he was taking a risk. Counsel also testified he advised Applicant as to the risks he was exposing himself to by testifying.

Counsel testified the State alleged Applicant was dating a woman who worked at the bingo parlor, Teidra Dennis, and came to bingo on hot dog night, which was prior to the night of the robbery, to case the place. He further testified Applicant denied that he was there to case the place but rather went to the bingo parlor that night to see Dennis. He elaborated the State alleged Applicant was involved in the robbery that occurred a few nights after hot dog night because several individuals tied him to the bingo parlor and there were phone calls around that time between Applicant, Dennis, and another person. Counsel also testified the State alleged Dennis told law enforcement the night before the robbery that they would not need security. Counsel further testified someone identified Applicant from the surveillance video at the bingo parlor.

Counsel testified as to Applicant's version of the facts: Applicant was outside hiding while the robbery took place. He further testified Applicant asserted he got into the car with the co-defendant, and the co-defendant mentioned the robbery. He elaborated Applicant initially said he would participate in the robbery but later decided he did not want to go through with it, so he gave his shirt and hat to Quantas and hid during the robbery. He also testified Applicant saw Quantas run by, and then Applicant left the area.

Counsel testified his main defense strategy was that the identifications were faulty. He elaborated law enforcement arrested Applicant and posted his mug shots, then Applicant was identified the next day. He testified Applicant's appearance in the news contaminated the

witnesses. He further testified the employees at the bingo parlor were a close-knit group and would talk about the robbery leading up to their interviews with law enforcement and were able to watch the surveillance video together. He testified he was able to use this to his advantage and argue this point to the jury. He elaborated these employees may have been able to put together a suspect and may have identified someone from something that was not their own personal recollection of the robbery. He also testified Applicant knew a couple of the employees from the bingo parlor because he sold them marijuana in the past.

Counsel testified Dennis was never arrested and did not testify at trial. Counsel further testified law enforcement was never able to apprehend Dennis.

Counsel also testified Applicant gave a statement right after the robbery. He elaborated in this statement, Applicant stated he was going to participate in the robbery, but then he decided against it. He further testified in this statement, Applicant claimed he let someone by the name of Quantas borrow his clothes. He elaborated Quantas was the same height and body shape as Applicant, but he was never found. Counsel testified it was their theory that law enforcement misinterpreted Applicant's statement. He elaborated the State's theory surrounding Applicant's statement was that in helping law enforcement, Applicant was actually trying to minimize his guilt and put the blame on an imaginary person. He also testified because of this statement, it needed to be addressed, which he and Applicant discussed. He testified Applicant would have to testify, and Applicant was concerned neither with his statement nor with testifying.

Counsel testified Applicant was identified from a six-person photo lineup about two-and-a-half weeks after the robbery, which occurred prior to his appointment on the case. He testified the woman who identified Applicant, Angela Diaz Garcia, stated that she would "never forget

those eyes." He further testified he and Applicant discussed Ms. Garcia's identification briefly. Counsel testified he made a motion to suppress the lineup, but the trial court denied that motion. He testified he did not object to the State's introduction of the lineup, but, in hindsight, he should have objected to preserve the record. He elaborated he did not object at the time because he believed he would have heard the same issue, which was raised during the suppression motion. He further testified there was a slim chance the trial court would not have allowed the identification into evidence. He also testified it was likely they would have introduced the lineup themselves in order to show it was impossible to make an identification from the surveillance video. He elaborated he wanted to demonstrate to the jury how far the State was reaching with this identification. Counsel further testified the trial court ruled the lineup was admissible in the *Biggers*[3] hearing, which he anticipated because the lineup was a key piece of evidence.

He testified he and Applicant did not discuss hiring an expert in witness identification because he "caught hell" just getting ODC to approve the investigator they had. He further testified he had some concern that an expert would come back with a report identifying Applicant as the robber, which he would have had to turn over to the State. He testified in his experience, the jury looks at an expert witness as a hired gun who will say whatever you pay them to say. He testified instead of hiring an expert, he cross-examined Ms. Garcia on poor vision, bad lighting, and other factors that might have tainted her identification.

He testified his theory surrounding Ms. Garcia was to indicate to the jury that her identification of Applicant was highly suspect and, therefore, they could not rely on it. He elaborated he presented this through direct examination and cross-examination and believes his

[3] *Neil v. Biggers*, 409 U.S. 188 (1972).

cross-examination of Ms. Garcia was compelling. He further testified all of the witnesses, including Ms. Garcia, testified that both robbers had bandanas across their faces, and the robber who was supposed to be Applicant had a hat on as well. He also testified he pointed out and emphasized at trial that Ms. Garcia's identification of Applicant from only his eyes was pretty incredible. He testified he was able to bring out during cross-examination the fact that Ms. Garcia was only able to see the robber's eyes. He expounded, however, that Ms. Garcia's testimony that she would never forget Applicant's eyes went a long way. He elaborated he was also able to highlight that Ms. Garcia was busy trying to take care of her daughter during the robbery. He testified he was trying to impress on the jury that it was very likely the witnesses might have been looking at a lot of different things and, therefore, could not have had enough time to look at the robber. He testified he hammered on the fact that Ms. Garcia wore glasses and was immobilized with fear. He also testified he was able to argue to the jury that simply because Ms. Garcia identified Applicant does not conclusively mean that Applicant was the individual who robbed her. He ultimately testified he did a good job discrediting the identification and challenged what he thought he could.

He also testified even though Ms. Garcia identified Applicant in court, Applicant's testimony would refute that identification. He further testified he did not object to this in-court identification because he was concerned with protesting too much. He elaborated he argued extensively about the unreliability of Ms. Garcia's identification, so he did not object to her in-court identification. He testified the State did not produce any other witnesses who identified Applicant, except for Ms. Garcia.

Counsel testified he saw the surveillance video will in advance of trial and had plenty of time to review it. He testified he does not recall specifically when he and Applicant reviewed the video. He further testified he knew going into court the image in the video was a far cry from the photo lineup, which explained why he made the motion to suppress. He testified he wanted to watch the video again in court because he wanted to ensure the projector was not high definition. He further testified after his and Applicant's review of the video on the projector, it was still blurry and had not been altered in any way.

Counsel testified the State used the phone calls and records between Applicant and Dennis as circumstantial evidence that they were connected to the robbery. He elaborated the State used these phone calls to support its theory Dennis and Applicant conspired to commit this robbery. He further testified the State tried to connect Dennis and Applicant through the phone calls by saying Dennis did not want to reveal her identity, so she called Applicant from other people's phones. He testified it was his theory that the phone calls between them did not necessarily mean Applicant did something wrong, and he did not deny those phone calls were, in fact, made. He further testified Applicant testified it was not uncommon for Dennis to call him from different numbers. Counsel also testified he and Applicant reviewed the phone records; and during that review, Applicant identified various phone numbers and specific calls. He elaborated, for example, that in one of the phone calls from Dennis, Dennis called Applicant because she wanted him to purchase some cigarettes for her. He testified the phone records were from a specific time frame, and records from further back might have been helpful. He elaborated he was unaware, however, if records from one month prior would have refuted the State's theory surrounding the phone calls. He further testified he did not attempt to subpoena T-Mobile for more phone records because he

believed what the State provided were adequate. He testified he does not recall if he and Applicant discussed whether or not older records would have been helpful, but he was unaware as to how older records would have supported his case. He elaborated the testimony elicited at trial, from both the State and Applicant, indicated Dennis was having problems with her phone, so she used other people's phones to call Applicant.

He testified he was aware the State was going to introduce the testimony of an individual regarding the phone records, but he was unaware that person was going to be introduced as an expert. He testified he was not provided with this expert's PowerPoint presentation in advance but was told the presentation was the method in which the State wanted to present the phone records. He elaborated the records in the presentation were already received through Rule 5, and the presentation was just a different form of presenting those records. He further testified the State provided him with the basis of this expert's testimony. He testified although he could have been a bit more aggressive with trying to keep out the presentation, the proper foundation was laid to have it admitted. He elaborated he and Applicant wanted that information to come in, as it was their position that Applicant made calls to these other individuals because Dennis's phone was dead, which would have shown there was more than one reason those phone calls were made. He testified Applicant addressed these phone calls in his testimony. He further testified this expert's testimony was because there were no calls made during the time of the robbery that was evidence Applicant was committing the crime. Counsel testified he did not object to this testimony as speculative, but he addressed it on cross-examination. He elaborated it was their theory Applicant was hiding during the time of the robbery, which would explain why he did not make any phone calls during that time.

Counsel testified he had no problem with the trial court's statement that the defense would be making an opening because it reflected what happened. He elaborated it was very unlikely he was going to object while the court was speaking because he does not want to hurt the jury's opinion of him or his client. He further testified he did not think the trial court's statements were objectionable.

Counsel also testified he did not object to Drenita Ore's testimony regarding Dennis's asserting that she did not see anyone run out of the door. Counsel elaborated Ms. Ore had personal knowledge of what Dennis said and she was testifying to it. He further testified it was their position that Applicant did not run out of the door either. Counsel also testified he did not object to Ms. Ore's testimony that Dennis said she was not going anywhere because he felt this statement showed that Dennis and the co-defendant were in cahoots and because it put the blame on Dennis. He elaborated at the time, he did not believe these statements were hearsay and also did not believe they were harmful. He expounded this was consistent with Applicant's assertion that he had nothing to do with the robbery. He further testified the testimony regarding Dennis, he hoped, allowed the jury to ask where she was and why she was not being held accountable for this crime. He testified the more the State talked about Dennis and the more Dennis was disparaged, the better it was for Applicant. Counsel also testified Ms. Ore's recitation of a phone call she had with an unidentified male because the man was not saying that Applicant was involved in this crime, but rather there were other co-defendants. He elaborated from this phone call the suggestion was that Dennis and the co-defendant got together after the robbery. He also testified he does not recall if this was Applicant's phone number that Ms. Ore called.

Counsel testified he objected to as many leading questions surrounding Sergeant Isenhoward's testimony as he could, but he did not think there was a strategy behind not objection. He also testified Applicant's statement was introduced through Investigator Isenhoward, but he did not object. He testified he made a motion to suppress the statement prior to trial because it was their theory that the statement was inaccurate, and the advisement of rights and statement were signed together at the end of the interview, rather than what was proper procedure—first advising the suspect of his rights, then taking the statement. He further testified there was no strategy behind him not objecting to the advisement of rights at trial, but he felt he covered his objections to the advisement of rights in pre-trial.

Counsel testified he generally believes he made appropriate objections. He also testified some of the evidence that came in, he used in argument. He elaborated if he was going to cross-examine a witness on the admitted evidence, he was probably not going to object to it. He further testified constantly objecting makes an attorney look worse in the eyes of the jury. Counsel testified he made a motion for a directed verdict and renewed all of his motions and objections at the close of the State's case.

Counsel also testified he did not see any evidence of withdrawal on the part of Applicant, so he did not request a jury charge on that. He testified he did request a charge on mere presence, but the trial court refused to charge mere presence. He further testified he did not re-request a charge of mere presence after the State's closing argument because he believed it would be futile.

Following Counsel's testimony, Applicant testified. Applicant testified Counsel was appointed to represent him on his probation violation and began working on his other charges from there. He further testified Counsel was appointed about two years before his trial. He testified he

was initially charged with one count of robbery, but then more charges were presented to the Grand Jury in July 2012.

Applicant also testified he and Counsel met about six or seven times, and he understood most of their conversations. He testified he and Counsel discussed the elements of armed robbery and of kidnapping. He also testified they discussed his constitutional rights, and Counsel explained to him he waived his right to remain silent when he talked to law enforcement. He further testified they discussed Applicant testifying at trial after he rejected the State's plea offer. He elaborated Counsel told him he did not have to testify. He testified Counsel's advice was that he should testify because it would help explain his statement to law enforcement, but he did not know what he should do. He further testified he and Counsel went over some of the questions Counsel would ask him at trial, but they did not go over any potential questions the State may have asked. He testified the State made a big deal about his statement at trial and went through it line-by-line, asking him what was accurate and what was inaccurate.

Applicant testified Dennis used other people's phones to call him because hers was turned off. He further testified this was not uncommon. He also testified he and Counsel did not discuss getting the phone records to show that Dennis would call him from different numbers. He testified rather, they discussed the phone records the State provided about one week before trial. He elaborated he did not see the phone records, and Counsel did not talk about the records but discussed other evidence to prepare for trial, i.e. the statements.

Applicant also testified he and Counsel discussed the lineup but did not discuss hiring an expert. He further testified Counsel told him Ms. Garcia identified him in the lineup and the State was going to use her as a witness.

He testified he and Counsel did not discuss the surveillance video. He further testified the only time he saw the video was when it was played in court during the trial. He also testified Counsel did not tell him whether or not they were provided the video.

Applicant testified the defense strategy was on the identification. He elaborated Counsel talked to him about witnesses and certain things in the motion, but did not talk a lot about strategy.

He also testified at trial he testified that he initially agreed to go along with the robbery but then decided he did not want to participate, so he gave his shirt and his hat to someone else. He testified he and Counsel discussed that he tried to withdraw from the robbery, but Counsel did not really say anything about it.

Applicant testified he was not able to communicate with Counsel during the trial after he was taken into custody. He did testify, however, he had pencil and paper in order for him to take notes during the trial.

He testified he had been to the bingo parlor prior to hot dog night and knew some of the employees. He elaborated he had previously sold some of the employees at the bingo parlor marijuana, which he discussed with Counsel prior to trial. He further testified Counsel was aware that none of those individuals had given statements to law enforcement or identified him.

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. 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).

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), SCRCP; *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 "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

After careful review based on the standard discussed above, this Court finds that 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 retain the services of an eyewitness identification expert

Applicant alleges that Counsel was ineffective for failing to retain the services or investigate the potential effectiveness of an eyewitness identification expert. This Court finds Applicant has failed to establish any deficiency of Counsel and this allegation must be denied and dismissed with prejudice. A competent attorney may elect a trial strategy which does not require the use of an expert. *Harrington v. Richter*, 562 U.S. 86, 88 (2011). Moreover, "counsel is entitled to balance limited resources in accord with effective trial tactics and strategies. *Id.* To do otherwise would fail to "'reconstruct the circumstances of counsel's challenged conduct' and 'evaluate the conduct from counsel's perspective at the time.'" *Id.* (quoting *Strickland*, 466 U.S. at 689). The uncontroverted testimony reveals Counsel had a difficult time in obtaining funding for an investigator, much less an expert witness. Moreover, Counsel testified he chose to raise the question of Ms. Garcia's identification as suspect through cross-examination. In fact, Counsel testified he emphasized how incredible her identification of Applicant was given that she could only see the perpetrator's eyes and given that she has poor vision and was focused on a number of things at the time of the robbery, not just the perpetrator. Thus, Counsel employed an effective trial tactic and strategy given his resources. This Court finds that Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Additionally, this Court finds that Applicant cannot prove any resulting prejudice from this alleged deficiency, as Applicant wholly failed to provide any testimony from an identification expert and further failed to identify how the testimony from such an expert would have been helpful. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where

the witnesses do not testify at the post-conviction relief hearing. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991). Applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the post-conviction relief hearing in order to establish prejudice from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Therefore, as Applicant provided neither the testimony of any identification expert witness nor the reasoning behind why such testimony would have been helpful, Applicant has failed to establish any resulting prejudice. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to procure telephone records

Applicant alleges that Counsel was ineffective for failing to procure telephone records of Applicant as a potential defense. This Court finds Applicant has failed to establish any deficiency of Counsel and this allegation must be denied and dismissed with prejudice. At the evidentiary hearing, Counsel testified that while phone records from a period prior to the timeframe the State provided could have been helpful, he is unaware that such records would refute the State's theory of the case: that Dennis used other people's phones to call Applicant in order to conceal her identity. Moreover, Counsel testified Applicant was able to explain the phone records through his testimony at trial, by testifying that it was not uncommon for Dennis to call him from other people's phones. As Counsel testified he was unaware of any benefit additional records would have had to Applicant and because Applicant was able to address the reasoning behind Dennis

calling him from various phones, Counsel cannot be said to have been deficient. This Court finds that Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Additionally, this Court finds that Applicant cannot prove any resulting prejudice from this alleged deficiency, as Applicant failed to present any concrete evidence of these alleged phone records at the evidentiary hearing. Applicant's bare assertions as to what these phone records would have shown, without more, do not give rise to the level of proof required for Applicant to meet his burden. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the lack of notice of the State's expert witness

Applicant alleges Counsel was ineffective for failing to object to the lack of notice of the State's expert witness and for failing to object to the witness's written report being admitted into evidence, as it was not produced in discovery as a report from an expert witness. The uncontroverted testimony reveals Counsel was aware the State would produce a witness to address the phone records, as he was provided with the basis of this individual's testimony, but was unaware this person would be testifying as an expert. Furthermore, Counsel testified although he was not provided with the exact PowerPoint presentation, which was introduced through this witness, the presentation contained information the State provided in discovery, just in a different form. By Counsel's own testimony, he was aware of not only this witness but also the basis of this witness's testimony. Therefore, Counsel cannot be found deficient for failing to object to the lack of notice, as he, in fact, did have notice of this witness. Moreover, upon the request of a defendant, the State must make available for inspection and copying any results or reports of

scientific tests or experiments. Rule 5(a)(1)(D), SCRCrimP. Here, however, the PowerPoint presentation introduced at trial did not include the results of any scientific test or experiment. Much less, the State's expert surrounding the phone records did not conduct any scientific experiments or tests. The PowerPoint presentation was merely another method in which the State chose to present those records provided to Applicant through discovery. Consequently, Counsel cannot be found to be deficient for failing to object to material introduced into evidence which did not include any results from any scientific tests or experiments and which was provided by the State through discovery. This Court finds Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Additionally, this Court finds Applicant can establish no resulting prejudice from the alleged deficiencies. Even if Counsel had objected to the lack of notice to this expert witness, it is unlikely the trial court would have excluded this witness's testimony, as Counsel was both aware of this witness and the basis of this witness's testimony prior to trial. Similarly, it is unlikely the trial court would have excluded this presentation from being introduced into evidence. Counsel testified the State laid a proper foundation for the presentation to be admitted. Moreover, where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *See Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996) ("[C]ounsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness."); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective."); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (finding counsel was not ineffective when he articulated a valid reason for not calling certain witnesses at trial). By

Counsel's own admission, he and Applicant wanted the phone records admitted into evidence, as it was their position that Dennis made those calls to Applicant from various phones because her phone was dead. Counsel elaborated part of their defense was to show there was more than one reason those phone calls could have been made, which would have only been supported by the introduction of the records. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Therefore, Applicant can establish no resulting prejudice. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to properly argue factors regarding the reliability of a witness's identification during the suppression hearing

Applicant alleges Counsel was ineffective for failing to properly argue factors regarding the reliability of a witness's identification during the suppression hearing. This Court finds Applicant has failed to establish any deficiency on the part of Counsel. The factors to be considered when evaluating the reliability of an identification include: (1) the opportunity of the witness to view the perpetrator at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972).

The evidence presented at the suppression hearing revealed Ms. Garcia was working at the bingo parlor in the back office, behind the counter when the robbery took place. Tr. 111. The lights were on. Tr. 114. While she was working, she saw a man coming behind the counter. Tr. 113. The man was wearing a bandana over his face, which covered the tip of his nose, and a hat,

but she was able to clearly see his eyes. Tr. 113, 119. She would never be able to forget the man's eyes, particularly in light of the shape of his eyes, which were very slanted and wide. Tr. 117, 119. He was also holding a gun, which she believed to be real, and a bag. Tr. 115. She was approximately three feet away from the robber and had an opportunity to clearly observe the portion of his face that was uncovered. Tr. 114. Although she was scared, she was trying to get any kind of description in her mind, so that she might be able to point out any identifying mark. Tr. 115. She was with this individual for about one to three minutes, but she cannot be sure as to the exact time. Tr. 114, 120. About two weeks after the robbery, she contacted the sheriff's department and told them she might be able to identify the man who came behind the counter. Tr. 115. When she met with Investigator Isenhoward, she immediately felt sick when she saw the six-photo lineup, and she immediately picked out Applicant. Tr. 116-17. At the suppression hearing, Ms. Garcia testified she had not spoken with anyone from the sheriff's department or the solicitor's office concerning her testimony prior to court, but she had spoken with other employees, particularly her daughter Kayla, during the two weeks between the robbery and her identification. Tr. 119, 122. She also testified she has prescription glasses, but she did not have them the night of the robbery. Tr. 123. She elaborated, however, that she has no problem seeing up close. Tr. 123.

In arguing Ms. Garcia's identification was not reliable, Counsel highlighted that Ms. Garcia's attention was not necessarily on the perpetrator's eyes. He also emphasized that Ms. Garcia was only in front of the perpetrator for two to three minutes, and her identification was at least two weeks after the robbery, at which time she indicated that she could not be sure if she could identify anyone, but she would try. Additionally, Counsel was able to stress during cross-

examination that Ms. Garcia did wear prescription eyeglasses and did not have them at the time of the robbery. Furthermore, by Ms. Garcia's own admission, she was very scared at the time of the robbery, and Counsel was also able to elicit testimony from her that she was frantic as well, thereby alluding to the fact that her full attention might not have been on the perpetrator. Given the fact Counsel was able to address each factor laid out in *Biggers*, either through argument or cross-examination, this Court finds Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Furthermore, Applicant cannot show any resulting prejudice from this alleged deficiency. Following the testimony of Ms. Garcia and argument from both Counsel and the State, the trial court made specific findings as to each factor identified in *Biggers*. Specifically, the trial court found that Ms. Garcia had an adequate opportunity to view the accused in well-lit, close quarters with a heightened degree of attention, based on the fact she was in a position to pick out identifying factors. Additionally, although the trial court was concerned with the length of time between the robbery and Ms. Garcia's identification, he indicated the length of time between the crime and the identification was not a disqualifying factor. Moreover, the trial court found Ms. Garcia demonstrated a high level of certainty when she was confronted with the photo lineup, given that she immediately identified Applicant and indicated she did not need any additional time. Given the trial court's specific findings as to each *Biggers* factor, it is unlikely had Counsel argued the factors more vociferously that the trial court would have not permitted Ms. Garcia's in-court identification. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the trial court's preliminary remarks

Applicant alleges counsel was ineffective for failing to object to the trial court's preliminary remarks to the jury, specifically that Applicant would make an opening statement, as they improperly shifted the burden to Applicant. The uncontroverted testimony reveals Counsel did not object to the trial court's statement that "[Applicant] will also make an opening statement" because it reflected what occurred. Tr. 143. In addition, Counsel was adamant he would make an opening statement, especially in light of the fact Applicant asserted his innocence. Therefore, this Court finds Counsel's performance was reasonable and effective under professional norms. *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625 (citing *Strickland*).

Moreover, Applicant cannot establish any resulting prejudice from this alleged deficiency. Had the trial court not made these remarks, Counsel would have still given an opening statement. Therefore, Applicant cannot show the result of the proceeding would have been different absent these remarks. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to hearsay statements during Drenita Ore's testimony

Applicant alleges counsel was ineffective for failing to object to several instances of impermissible hearsay during the testimony of Drenita Ore. At trial, Ms. Ore testified she was working as the caller at the bingo parlor on the night of the robbery. Tr. 168. On that night, Dennis was making phone calls from other people's cell phones constantly. Tr. 173. Dennis then went out the side door of the bingo parlor; and ten minutes later, two men wearing bandanas—one brown and one red—came into the bingo parlor. Tr. 174. While the man wearing the red bandana went into the cage area, the other man wearing the brown bandana stood to her right and took money from the other employees and the customers. Tr. 175. After the robbers exited through the side door, Ms. Ore ran to the side door to see if she could see what type of car the men were driving.

Tr. 176. Ms. Ore saw Dennis on the other side of the door, and Dennis responded she did not see anybody run out of that door. Tr. 176, 179. Later, Dennis took Scooter's, who was another employee at the bingo parlor, phone to make a call. Tr. 178. Ms. Ore told Dennis she could not leave because everyone had to stay to talk to law enforcement, to which Dennis replied she was not going anywhere. Tr. 178. Thereafter, Dennis disappeared without clocking out and without saying anything to anyone. Trial Tr. 178. After Dennis left, Ms. Ore, Scooter, and Kayla, another employee at the bingo parlor, compared the numbers on Scooter's and Kayla's phone because Dennis was using their phones on the night of the robbery. Tr. 179. As a result, Ms. Ore called a number on Kayla's phone. Tr. 180. She told the man who answered she was trying to get in touch with Dennis, to which the man replied he heard the bingo parlor had been robbed that night and to "tell the two young men know everything is alright now. They can breathe easy." Tr. 180.

At the evidentiary hearing, Counsel testified he did not object to the statements that repeated what Dennis told Ms. Ore because these statements were not harmful to Applicant. He further testified these statements tended to support Applicant's position that he had nothing to do with the robbery, but Dennis did. Counsel also testified he did not object to the statements made from the man who answered Ms. Ore's call as hearsay because there was no specific reference to Applicant in that call but rather the man was referring to what occurred during the robbery.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-89. Moreover, "representation is an art, and an act or omission that is unprofessional in one case may be sound

or even brilliant in another." *Id.* at 693. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Furthermore, "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). Here, Counsel articulated he did not object because he believed this testimony served to put the blame on Dennis, rather than Applicant, which supported their defense strategy. Furthermore, Counsel specified their position was that Applicant had no part in this robbery, and Dennis's behavior and comments shortly thereafter only served to show that she, not Applicant, was acting strangely and might have been involved in the robbery. Therefore, because Counsel employed a specific trial strategy in not objecting to these comments during Ms. Ore's testimony, this Court finds counsel's performance was not deficient.

Similarly, this Court finds Applicant suffered no resulting prejudice from Counsel's alleged deficiencies. As Counsel testified at the evidentiary hearing, none of these statements were harmful to Applicant. Counsel specified the more disparaging comments made about Dennis, the better it was for Applicant. Moreover, none of these statements implicated Applicant in the robbery in any way. As there is no indication whatsoever that the result of the proceeding would have been different had Counsel objected to these statements, Applicant has failed to show that he has suffered any prejudice from these alleged deficiencies and, therefore, has failed meet his burden. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to impermissible hearsay during Timothy Bell's testimony

Applicant alleges Counsel was ineffective for failing to object to hearsay statements made during Timothy Bell's testimony. At trial, Mr. Bell testified he was working at the bingo parlor on the night of the robbery. Tr. 202. He heard his sister, Ms. Ore, announce over the speaker not to move, but he thought she was joking around. Tr. 203. Then, one of the robbers, who was on the floor not in the cage area, walked up to him with a gun, made Mr. Bell get on his knees, and held the gun to his head. Tr. 203, 207, 208. As he was making Mr. Bell get on his knees, the robber told him he was a "bold one," and "if you want your life, you better get on your knees." Tr. 204. Mr. Bell could clearly hear this man's voice and recognized it from hot dog night the week before. Tr. 205, 212. However, he was never able to identify anyone and would only be able to identify the voice, although he was unsure exactly who it was. Tr. 211, 213. After the robber took money from him and the customers, he and the other man left. Tr. 204. Thereafter, Dennis proclaimed she needed to leave. Tr. 206.

This Court finds Counsel was not deficient, nor did Applicant suffer any resulting prejudice from this alleged deficiency. As aforementioned, these statements neither specifically allude to nor impliedly allude to Applicant's involvement in this crime. Furthermore, these statements serve to place blame on two other individuals—Dennis and the co-defendant—rather than Applicant. Because of the nature of these statements, they ultimately serve to support Applicant's theory of the case—Dennis and the co-defendant were in cahoots and planned this robbery together. This Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to contemporaneously object to State's Exhibit #3

Applicant alleges Counsel was ineffective for failing to contemporaneously object to the photo lineup from which Applicant was identified (State's Exhibit #3) when the State offered it into evidence. Even if Counsel had contemporaneously objected to the lineup in order to preserve the issue on appeal, this Court finds Applicant has failed to establish any resulting prejudice, as it is unlikely an appellate court would have reversed the trial court's decision. "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." *State v. Liverman*, 398 S.C. 130, 137-38, 727 S.E.2d 422, 425 (2012) (citing *State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000)). In reviewing such issues, "where the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Id.* at 138, 727 S.E.2d at 425. The decision to admit an eyewitness identification is within the trial court's discretion and will only be disturbed on appeal if there is an abuse of this discretion. *Id.* The factors to be considered when evaluating the reliability of an identification include: (1) the opportunity of the witness to view the perpetrator at the time; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time between the crime and the identification. *Biggers*, 409 U.S. at 199-200.

As the trial court found, Ms. Garcia had an adequate opportunity to view the accused in well-lit, close quarters with a heightened degree of attention, based on the fact she was in a position to pick out identifying factors of the robber. Additionally, although the trial court was concerned with the length of time between the robbery and Ms. Garcia's identification, he indicated the length of time between the crime and the identification was not a disqualifying factor. Moreover, the trial court found Ms. Garcia demonstrated a high level of certainty when she was confronted with the

photo lineup, given that she immediately identified Applicant and indicated she did not need any additional time. Based on the foregoing, there is no indication the trial court abused his discretion in admitting the eyewitness identification. Therefore, this Court finds it is unlikely Applicant would have been successful on appeal even if Counsel had contemporaneously objected to the photo lineup. Accordingly, Applicant has failed to establish any prejudice, and this allegation must be denied and dismissed.

Counsel's alleged failure to contemporaneously object to the in-court identification of Applicant

Applicant contends Counsel was ineffective for failing to contemporaneously object when Ms. Garcia identified him in court. For the reasons listed in the section immediately preceding this section, this Court finds Applicant has failed to establish any prejudice from this alleged deficiency. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to leading questions

Applicant contends Counsel was ineffective for failing to object to leading questions during the testimony of Investigator Isenhoward. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." Rule 611(c), SCRE. However, Applicant has wholly failed to establish any prejudice which would warrant a reversal. Indeed, it is extremely unlikely mere leading questions could garner the requisite prejudice to warrant a reversal here. Had Counsel objected to this line of questioning, the State simply would have rephrased its questions and still elicited the same testimony. Accordingly, this Court finds Applicant has failed to meet his burden. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to State's Exhibit #1

Applicant alleges Counsel was ineffective for failing to object to the advice of rights form administer to Applicant (State's Exhibit #1). Applicant further alleges Counsel's failure to object to the advice of rights did not preserve this issue for appeal. This Court finds Applicant has failed to establish he suffered any prejudice from this alleged deficiency. A defendant is entitled to an independent evidentiary hearing in order to determine the voluntariness of statements made by the defendant. *Jackson v. Denno*, 378 U.S. 368, 377 (1964). During this hearing to determine the voluntariness of the statement, the court must determine whether the defendant was in custody, whether the statements were incriminating, and whether the statements were made voluntarily. *State v. Silver*, 314 S.C. 483, 485, 431 S.E.2d 250, 251 (1993). The trial court determines the admissibility of the statement made "upon proof of its voluntariness by a preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); *State v. Smith*, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)). A trial court's determination as to the voluntariness of a statement "will not be reversed unless so erroneous as to show an abuse of discretion." *Id.* (citing *State v. Von Dohlen*, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996)). Furthermore, when reviewing the trial court's determination as to the voluntariness of a statement, the appellate court determines whether that determination is supported by any evidence. *Id.* at 378-79, 652 S.E.2d at 448.

Following a *Jackson v. Denno* hearing as to the voluntariness of Applicant's statement and after considering all of the evidence presented, the trial court found Applicant was fully advised of his constitutional rights under the Fifth and Sixth Amendments prior to giving a statement to law enforcement. Tr. 102-04. The trial court further found Applicant had knowingly and intelligently waived these rights and made the statement freely and voluntarily. Tr. 104. This

finding is supported by the testimony of Sergeant Isenhoward. Sergeant Isenhoward testified he reviewed the advice of rights form with Applicant on June 8, 2010, at 5:14 in the evening. Tr. 49. He further testified Applicant understood he had the right to remain silent, that anything he said could be used against him in court, he had the right to talk with an attorney prior to questioning and also had the right to have an attorney present at the time of questioning, that an attorney would be appointed to him if he could not afford one, he had the right to stop questioning at any time. Tr. 49. Sergeant Isenhoward elaborated Applicant appeared to understand each of his rights by acknowledging his understanding several times, including signing the advice of rights form. Tr. 50-51. In addition, Applicant never told Sergeant Isenhoward he did not understand. Tr. 51. He also never indicated he did not want to speak with Sergeant Isenhoward nor that he wanted to speak with an attorney. Tr. 51, 54. Applicant further indicated he wanted to waive his rights and speak with Sergeant Isenhoward. Tr. 51-52. Investigator Isenhoward did not threaten Applicant, coerce him, hold out any promise or hope of reward, nor withhold any comforts from Applicant. Tr. 52.

Based on the foregoing, this Court finds even if Counsel had preserved this issue for appellate review, it is unlikely Applicant would have been successful on appeal or that the trial court would change its previous ruling. *See Milledge v. State*, 422 S.C. 366, 382, 811 S.E.2d 796, 805 (2018) (to demonstrate prejudice from counsel's failure to preserve an issue for appeal, the applicant must show a probability either the appellate court would have reversed and remanded for a new trial if counsel contemporaneously objected or the trial court would have sustained a contemporaneous objection, which reasonably would have resulted in a not guilty verdict). Specifically, this Court finds there is no indication the trial court abused his discretion in finding

Applicant's statement was freely and voluntarily given. Therefore, Applicant has failed to establish he suffered any prejudice from Counsel's failure to contemporaneously object. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to allow Applicant to view the surveillance video prior to trial

Applicant alleges Counsel was ineffective for failing to allow Applicant to view the surveillance video of the incident prior to trial. At the hearing, Applicant testified he and Counsel did not discuss the surveillance video prior to trial. PCR Tr. 83. He elaborated: "The only time I saw the surveillance video was during the time I saw it here." PCR Tr. 83. He further elaborated he first saw this video during his trial. PCR Tr. 83. Counsel, however, testified he reviewed all of the discovery materials with Applicant prior to trial. PCR Tr. 20, 58. This Court finds Counsel's testimony with respect to this allegation very credible, whereas Applicant's testimony is not credible. Accordingly, this Court finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. In particular, this Court notes Applicant has wholly failed to testify as to what course of action he would have taken had he seen the video prior to trial. Additionally, Applicant has failed to provide this Court with any evidence as to what benefit could have been realized from viewing the surveillance video prior to trial. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to renew his motion for a directed verdict

Applicant further alleges Counsel was ineffective for failing to renew his motion for a directed verdict at the close of Applicant's case and at the close of all evidence. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of

evidence, not its weight. *State v. Larmand*, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing *Butler*, 407 S.C. at 381, 755 S.E.2d at 460). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. *State v. Hernandez*, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. *State v. Ladner*, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Here, an eyewitness identified Applicant as one of the individuals who robbed the bingo parlor. Indeed, all of the eyewitnesses indicated the robbers entered the bingo parlor with guns. Several eyewitnesses also indicated they recognized one of the robbers as having been at hot dog night the week prior.[4] In addition, Applicant gave a confession to law enforcement, indicating he was involved in this robbery. The trial court accurately assessed the evidence and determined it sufficient to allow Applicant's guilt to be fairly and logically deduced by the jury, when taken in a light most favorable to the State. Based on the foregoing, there is evidence from which the jury could have, and did, convict Applicant; and it is unlikely Applicant would have prevailed on this issue on appeal, even if Counsel had renewed his motion for a directed verdict. Accordingly, this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to request specific charges on the law

Applicant alleges Counsel was ineffective for failing to request specific jury charges. In particular, Applicant contends Counsel should have requested a jury charge on withdrawal. Applicant further contends Counsel was ineffective for failing to renew his request for a charge on mere presence after the State made its closing argument.

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[4] Evidence indicated Applicant attended hot dog night a couple of days prior with his girlfriend, who worked at the bingo parlor.

With respect to Applicant's allegation Counsel was ineffective for failing to request a charge on withdrawal, this Court finds Applicant has wholly failed to meet his burden. "'The law to be charged must be determined from the evidence presented at trial.'" *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (quoting *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394(2001)). In order to withdraw from the commission of a crime, a person must "withdraw entirely and unequivocally from the plan throughout the commission of the entire plan and . . . communicate his withdrawal to all of the associates involved in the plan." *State v. Vang*, 353 S.C. 78, 87, 577 S.E.2d 225, 229 (Ct. App. 2003) (citing *State v. Woods*, 189 S.C. 281, 288, 1 S.E.2d 190, 193-94 (1939)). There was no evidence Applicant withdrew from the commission of these offenses. Indeed, at the evidentiary hearing, Counsel testified he did not request a charge on withdrawal because he did not see any evidence Applicant withdrew. Therefore, this Court finds Applicant has failed to establish any deficiency on the part of Counsel and failed to establish any resulting prejudice therefrom. Accordingly, this allegation must be denied and dismissed with prejudice.

With respect to Applicant's allegation Counsel was ineffective for failing to renew his request for a charge on mere presence, this Court finds Applicant has failed to establish any deficiency on the part of Counsel. In instances where a defendant may be guilty under a theory of accomplice liability, "the trial court may be required to instruct the jury that 'a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act.'" *State v. Dennis*, 321 S.C. 413, 420, 4687 S.E.2d 674, 678 (Ct. App. 1996) (quoting *State v. Austin*, 299 S.C. 456, 385 S.E.2d 830 (1989)). In addition, "'mere presence at the scene is not sufficient

to establish guilt as an aider or abettor.'" *Mattison*, 388 S.C. at 480, 697 S.E.2d at 584 (quoting *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)). The eyewitness testified Applicant came into the cage of the bingo parlor with a gun and asked where the money was. Tr. 279, 281. After she pointed to the cash drawer, Applicant then opened the drawer and took the money out. Tr. 279-80. Based on the foregoing, this Court finds there was no evidence to support a charge on mere presence, as the eyewitness testimony indicated Applicant actively participated in the crime. Indeed, the trial court stated: "Mere presence is not an issue in this case." Tr. 562. This Court further finds Applicant has failed to establish Counsel was deficient.

Similarly, this Court finds Applicant has wholly failed to establish any resulting prejudice from this alleged deficiency. In reviewing jury charges for error, the charge must be taken as a whole in light of the evidence presented at trial. *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). Moreover, a jury charge is correct if, when it is read as a whole, it contains the correct definition and adequately covers the law." *Id.* 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: "Present – being present at the commission of a crime means to be sufficiently near to aid and abet and assist in the commission of the crime. However, mere presence at the scene of a crime is not sufficient to convict one as the principal on the theory of aiding and abetting." Tr. 645, 651. Taken as a whole, this Court finds the trial court's charge contained the correct definition and adequately covered the law. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to the jury charge

Applicant contends Counsel was ineffective for failing to object to the jury charge after it had been given. Applicant, however, wholly fails to articulate to what exactly Counsel should have objected. Indeed, at the hearing, Applicant merely indicated: "Following the judge charging the jury on the law, [Counsel] failed to object to the judge's jury charge despite him not charging some of the things you requested." PCR Tr. 46. Applicant wholly failed to identity the "things" which were requested but not charged. This Court finds this allegation is so vague that Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice therefrom. Therefore, 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), SCRCP, provides that 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 12 day of February, 2019.

J. DENHAM COLE
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

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