LAW OFFICE OF
JEREMY A. THOMPSON
LLC

March 22, 2019

VIA HAND-DELIVERY

RECEIVED
MAR 22 2019
S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211-1330

RE: Fred Halcomb, Jr., #311070 v. State of South Carolina; 2010-CP-33-00852

Dear Mr. Shearouse:

Enclosed please find the original and two copies of my Notice of Appeal in the above-captioned action. I would appreciate your filing the original, clocking the copies, and returning the two clocked copies to me. I would note that Judge Brown issued a written Order of Dismissal in this case which was filed with the Marion County Clerk of Court's Office on February 14, 2019. A copy of that Order is also enclosed. I have been retained to represent Mr. Halcomb on this appeal. His attorney at the circuit court level, Joshua A. Bailey, Esquire, will be continuing my representation of Mr. Halcomb on appeal to this Court. I have also already received the PCR hearing transcript in this matter. I would request that my time to file the certiorari petition and Appendix be calendared from today's date. With my thanks for your assistance in this matter and my best regards, I am,

Yours sincerely,

Jeremy A. Thompson
Attorney and Counselor at Law

JAT/
Enclosures
cc: David Spencer, Senior Assistant Attorney General (w/ notice of appeal)
Joshua A. Bailey, Esquire (w/ notice of appeal)
Fred Halcomb, Jr., #311070 (w/ notice of appeal)
Michael Petrocine (w/ notice of appeal)

: 803-779-2555
: 803-753-9732
: jeremyatlaw@yahoo.com

Mailing Address:
P.O. Box 1834, Irmo, SC 29063
Physical Address:
1201 Main Street, Suite 1980, Columbia, SC 29201

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

D. Craig Brown, Presiding Judge

2010-CP-33-00852

RECEIVED

MAR 22 2019

S.C. SUPREME COURT

FRED HALCOMB, JR., #311091,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Fred Halcomb, Jr., #311091, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed February 14, 2019, and received by counsel on February 22, 2019, issued by the Honorable D. Craig Brown, presiding judge.

Jeremy A. Thompson
Attorney and Counselor at Law

Law Office of Jeremy A. Thompson, LLC
P.O. Box 1834
Irmo, SC 29063
803-779-2555 Phone
803-753-9732 Fax
jeremyatlaw@yahoo.com E-mail

ATTORNEY FOR PETITIONER

This 22nd day of March, 2019.

Other Counsel of Record:
David Spencer, Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent
(803) 734-3737

Joshua A. Bailey, Esquire
P.O. Box 1317
Florence, SC 29503
Attorney for Petitioner
(843) 317-4900

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

D. Craig Brown, Presiding Judge

2010-CP-33-00852

FRED HALCOMB, JR., #311091,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petitioner's Notice of Appeal in the above-entitled case has been served upon opposing counsel, David Spencer, Senior Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by mailing in an envelope properly addressed with postage prepaid on this 22nd day of March, 2019.

Jeremy A. Thompson
Attorney and Counselor at Law

SWORN TO BEFORE me this 22nd day of March, 2019.

Emily N. Caraway (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/27/2022

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF MARION	)	TWELFTH JUDICIAL CIRCUIT
	)	
	)	
Fred R. Halcomb, #311070	)	**Civil Action No.: 10-CP-33-852**
	)	
Applicant,	)	**ORDER OF DISMISSAL**
	)	
-vs-	)	
	)	
	)	
State of South Carolina	)	
	)	
Respondent.	)	
	)	

This matter is before this Court by way of an application for post-conviction relief (PCR) filed October 12, 2010, and received by the Office of the Attorney General on January 4, 2011. The State filed its return on March 2, 2011. A hearing on the matter was convened at the Marion County Courthouse on May 29 and May 30, 2018. Applicant was present and represented by Joshua A. Bailey, Esquire. The State was represented by Senior Assistant Attorney General David Spencer of the South Carolina Office of the Attorney General.

Applicant testified on his own behalf and called Sheriff Phillip Thompson, Amber Counts, the Honorable Sherry Rhodes, Sheriff Mark Richardson, and the Honorable Magistrate Danny Barker. The State called Fran Humphries, Esquire, Senator Greg Hembree, and Applicant's trial counsel, Scott Bellamy, Esquire.

This Court had before it the trial transcript, the pleadings of both parties, the Clerk of Court's records regarding the subject convictions, the appellate records from Applicant's appeal, and the Applicant's records from the South Carolina Department of Corrections.

DCR
p. 1792

PROCEDURAL HISTORY

Applicant is currently serving a life sentence for the murder of Jonathon "Jon-Jon" Love. Applicant was committed to the South Carolina Department of Corrections to serve a life sentence. Applicant is currently serving his sentence under the Interstate Compact with the Illinois Department of Corrections following an interstate transfer.

Applicant was indicted during the November 2004 term of the Marion County Grand Jury for murder. Scott Bellamy, Esquire, represented Applicant. Then Fifteenth Circuit Solicitor Greg Hembree and Fran Humphries, Esquires represented the State.

Applicant was jointly tried with his co-defendant, Luzenski "Allen" Cottrell. Following a jury trial, Applicant was convicted as charged on September 1, 2005. The Honorable J. Michael Baxley sentenced Applicant to life imprisonment.

Humphries explained prior to this trial, Humphries and Senator Hembree prosecuted Cottrell's death penalty case in Horry County, and as a result, they were familiar with the facts of this case. Humphries explained that from a logistical stand point, it made sense for the Fifteenth Circuit to prosecute the case instead of the Twelfth Circuit Solicitor's Office. PCR Tr. p. 142.

Applicant appealed the conviction and sentence. The appeal was perfected by Robert Dudek, Esquire and the Court of Appeals affirmed the conviction by opinion dated March 11, 2009. State v. Halcomb, 382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009). The Supreme Court denied Applicant's petition for writ of certiorari on April 8, 2010.

FACTS AT TRIAL

The State's theory of the case was in December 2002, the victim, Jonathan Love, dug his own grave and was shot in the back, the arm, and in the head. He was buried in the grave he dug in

DEE 2092

the woods of an isolated plot of land in rural Marion County. Love and Applicant's co-defendant, Luzenski "Allen" Cottrell, dug the grave. Applicant, along with Diane Lawson, joined them. Applicant provided a revolver to Cottrell. Cottrell then shot Love at the gravesite while Applicant and Diane Lawson waited back at Applicant's car. See Tr. 149.

The State's theory for motive was that on December 14, 2002, working at Applicant's behest, Love and Cottrell unsuccessfully attempted to burn Brett Smalls' house down, but were unsuccessful. The Solicitor argued that in their world, when you fail, you don't get fired, but become a liability and have to be eliminated. Tr. p. 149. Because of the failed arson attempt, Applicant directed Cottrell to murder Love.

Trial Testimony

Lawson testified she was Applicant's girlfriend in 2002. Tr. p. 213. She testified about her knowledge of the intended arson. Tr. pp. 218-19. She was in the living room of the Cherry Grove house with Applicant and Cottrell and "[Applicant] asked that Allen [Cottrell] go take Donnie [Morgan] with him to burn their house down, to kill them." Tr. p. 220, ll. 2-4. She said the person whose house they wanted to burn down was "Brett" and she had been to his house before. Tr. p. 220. She later overheard in a telephone call by Applicant that Jon-Jon [Love] would commit the arson and Donnie would get a gas can from Wal-Mart. Tr. p. 222. She saw Cottrell and Donnie leave the house. Tr. p. 223. After they left, she was in the bedroom when Applicant received a call from a person he referred to as "Black" (Cottrell's nickname). In the first call, she heard Applicant instructing Cottrell that Jon-Jon should take the gas can and pour it around the house, then fill the bottle and put a piece of cloth in it and throw it in the window so it would blow from inside out. Tr. p. 225.

DCK 3/9/12

Lawson recalled a second conversation in which Applicant talked about the same thing. Tr. p. 225, lines 14-15. In the third conversation, Applicant was upset because he didn't know if it was done right. Tr. p. 226. Applicant told her to get dressed and they drove by the house to see if the arson was successful. She said there were fire trucks but no smoke "like nothing happened." Tr. pp. 226-28. Applicant was upset and complained "Allen couldn't do anything without him" and "that Jon-Jon was a liability." Tr. p. 228, lines 3-4.

They returned to the Cherry Grove house and later Cottrell and Morgan returned. Applicant was still angry. She heard Cottrell tell Applicant "it had blown up," but Applicant didn't think the arson was done right. Tr. 229.

Subsequently, she learned Applicant "wanted for Allen to take Jon-Jon to Highway 9 and get rid of him because he was a liability to him." Tr. p. 230, lines 5-7. Lawson explained she later learned about their efforts to carry it out when she heard Applicant on a telephone call with Cottrell the next day and Applicant was upset "because Allen couldn't do anything without him." Tr. 231. Applicant told her he had second thoughts about Cottrell and told her he might have to get rid of Cottrell also. Tr. p. 231, lines 16-20.

She testified a few days later, she went with Applicant to a property in Marion County that Applicant previously discussed buying. She testified that one time Applicant invited her former boyfriend to the property to target shoot with him. She had never been there before. Tr. pp. 231-33. It took a long time to get there and she was not familiar with the area. She said they pulled up a dirt road and saw Donnie Morgan's car there and made a U-turn and pulled in behind it. They got out and walked into the woods. Tr. pp. 233-34. She heard Cottrell's voice talking to Love and saw Cottrell and Love digging a hole. Applicant then went over and looked at it and said they

DCB
P. 40742

needed to corner it off. He took the shovel and showed them. Tr. p. 235. Cottrell climbed out of the hole and greeted them. Tr. p. 235.

Applicant was upset because they were supposed to dig the hole near the swamp, but Cottrell explained they hit water there and the phone was dropped in the water. She saw the phone actually belonged to Morgan and was wet and muddy. Tr. 235-36.

Love and Cottrell grabbed the shovels and continued digging. After some time, Lawson and Applicant walked further into the woods rather than back to the car. Tr. p. 237. Applicant pulled his gun out and said he could never be too careful. Lawson said for him to take her back to the car, and she promised she would never say anything. They then went back to the car. Tr. pp. 237-38.

While there, Applicant wiped his gun down. Later, she saw Cottrell and Love return to Morgan's car to take a smoke break. Tr. 240. On re-direct, Lawson clarified she initially saw Cottrell with a gun and give it to Applicant while they were initially at the hole digging. Tr. pp. 296-97. She described the eventual return to the car with Applicant who wiped off the gun with a red cloth. Tr. p. 298. Then, Cottrell came by the car and took the gun and went back to the hole with Jon-Jon. Tr. p. 298.

She said she saw Cottrell and Love walk back to the hole while she was in the car. Applicant opened the door and asked her to tell him if she heard anything. Tr. p. 240. She then heard several gunshots. Applicant opened the door again and asked her if she heard anything and she told him yes. Applicant closed the door and walked back into the woods. He was gone for an hour. She was by herself. Applicant returned with Cottrell, Love did not return. Tr. pp. 240-41.

D CK
p. 5 of 42

Applicant told her to watch for cars while he was gone, and if she saw anyone to turn on the headlights. Tr. p. 241. When Applicant and Cottrell returned, she saw them carry two shovels and put them in Morgan's car. Tr. p. 242. She said Cottrell left first and they followed. Applicant told her she was not allowed to talk to anyone about it, including Cottrell. Tr. p. 242.

After they returned to the house, Applicant told her "he had to go get rid of the evidence" and left with Cottrell for a while. After they returned, she recalled them making fun of what they did and Cottrell said she should have seen it with smoke coming from Love's head like a mushroom cloud and Applicant describing him still gurgling like he was still breathing when they covered him up. Tr. 243-44.

Lawson cooperated with police when she was arrested and she drew a map for law enforcement to try and help find Love, but she did not even know what county the property was in. Tr. pp. 244-45. She traveled with law enforcement twice to try to locate the body, but was unsuccessful finding her way to the plot of land. Tr. pp. 246-48.

Dr. Allen Bennett, an expert in forensic pathology, testified about Jonathan Love's autopsy performed on May 9, 2003. The autopsy was complicated by the body's decomposition. Love received four gun-shot wounds and two of the wounds – to the lung and the head – would be fatal. A projectile was recovered from the chest. Dr. Bennett declared that the cause of death was multiple gun-shot wounds to the chest and head. Tr. pp. 302-313.

Horry County Fire Chief Kenny Todd testified he was called to a fire on December 14, 2002, at a house in Socastee near the Air Force Base. There was suspected arson due to the smell of gasoline. Tr. pp. 338-39. They used a combustible gas meter to confirm their suspicion and

DCK
p. 6 of 42

received a positive indication. Tr. pp. 339-341. He opined the fire was caused by an intentional arson. Tr. p. 343, line 21 - p. 344, line 6.

Brett Small testified that in December 2002, he lived on Shelette Lane. He identified the house with burn damage as his house. Tr. pp. 252-53. He testified he was acquainted with Applicant and Cottrell prior to the arson attempt. Tr. 353.

Lindsay Bolton testified she met Cottrell in 2001 and was his live-in girlfriend. She recalled a conversation with Applicant when he showed her two new blue-handled shovels in the garage area in December 2002 at Applicant's house. Tr. p. 358. Bolton said the next time she saw the shovels, she was with Halcomb's fiancee, Alison, who took the shovels to the Socastee dumpster and threw them away. Tr. p. 358. This happened after Christmas in 2002. Tr. p. 359.

Earlier, in mid-December 2002, she received a telephone call from Cottrell late one night. He asked her to ride past the airport and see if there were any lights. Tr. 359. She said he did not explain why, but told her to just to do it. Tr. pp. 359-60. She described that she saw nothing. Tr. p. 360. Bolton said she called Cottrell and told him. Later, she also received a call and told Applicant and Cottrell again that she saw nothing and they both got angry. Tr. pp. 60-61. She said she was sent back out after the second call and that time saw an ambulance and fire truck. Tr. p. 362.

During this time period, she testified Cottrell would return home late at night, muddy and dirty. Cottrell complained the ground was not settling. Tr. p. 363; p. 375. After Cottrell's arrest, Bolton visited him at the Detention Center. During a visit, Cottrell told her "when he killed Jonathan that he was disgusted because he had used the bathroom on himself and he laughed about it." Tr. p. 364.

DLS
P 7/7/92

Bolton played a significant role in solving the case. When asked by law enforcement about a property, she was able to provide the first name of the owner – Doug – and Doug's address. Tr. p. 367. This turned out to be Douglas Newman, and it was on his rural property in Marion County where the grave and Love's body was found. Newman confirmed he took Applicant, Cottrell, and Alison Nelson to the property one time. He gave them permission to visit the property whenever they wanted. He took law enforcement to the property. Tr. pp. 397-401.

Detective Nathan Johnson testified about going out to Douglas Newman's property after prior failed attempts to locate Love. Based upon information received they located Love's body in May 2003. Tr. pp. 413-14. He testified about the three earlier trips that Diane Lawson took, they were unable to locate the body. Tr. pp. 418-22.

Lieutenant Scott Norton, however, testified that Lawson's previous drawing of the scene of the crime was accurate. He said that the only significant discrepancy involved a fork in the road. Tr. pp. 427-33.

Additional evidence was presented about the seizure of a .357 revolver during Cottrell's arrest. Tr. pp. 474-77, 484-85. Testimony by SLED Agent Vello Paavel established that a bullet recovered from Love's body was fired from .357 seized during Cottrell's arrest. Tr. pp. 488-93.

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 presented 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 (2003).

Def P. 8 of 92

I. Ineffective Assistance of Counsel

Applicant makes various allegations of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court will now address each allegation of ineffective assistance of trial counsel below:

Evidence as to whether Applicant had any phone conversations with co-defendant the night of the arson.

At trial, the State presented evidence through Diane Lawson's testimony that Applicant and Cottrell had phone conversations with each other the night of the arson. Applicant alleges

PCR 9.97 92

counsel was ineffective for failing to subpoena phone records that he believes would refute the State's evidence.

Applicant contends the phone conversations testified to by Lawson did not occur. Applicant further contends that he was not with Lawson that night, as she testified, but was at his home with his fiancé, Alison Nelson. PCR Tr. pp. 14-15. Applicant's claim he was with his fiancé was later impeached by his own witness, Amber Counts, who testified at the PCR hearing that he and Lawson were at the Cherry Grove house when she returned with the other participants from the attempted arson. PCR Tr. p. 223, lines 10-14.

Applicant did not present any phone records to this Court. Therefore, this Court would need to speculate that any phone records would have been useful to the defense. Therefore, he failed to meet his burden of proving prejudice from the alleged deficiency of counsel. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (finding mere speculation is insufficient to establish prejudice); Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (holding, where there was nothing in the record to indicate that interviewing the victims would have led to any different result, trial counsel's failure to conduct an independent investigation did not constitute ineffective assistance of counsel, as the allegation was supported only by mere speculation as to the result). Further, this Court would note that counsel did not begin representation for the murder charge until many months after the attempted arson since the murder victim was not found until roughly five months later. Applicant failed to present any evidence counsel would have been able to attain phone records at that point in time if he

PCR p. 107 92

attempted to do so. Further, Counsel argued the State failed to attain the phone records to corroborate the witnesses' testimony during closing argument. Tr. p. 585, lines 17-20. Therefore, he used the lack of phone records to Applicant's advantage. Under these circumstances, this Court finds Applicant did not meet his burden of proving counsel was ineffective.

Arson victim was subject to other independent acts of violence.

In his application, Applicant alleged trial counsel was ineffective for not investigating that other acts of violence were committed at the residence where the arson occurred. Applicant withdrew this allegation at the hearing. PCR Tr. p. 20, lines 17-23.

Solicitor's oral proffer.

Applicant alleges counsel was ineffective for failing to object to the prosecutor making an oral proffer about the arson, instead of taking testimony, when the prosecutor moved to admit evidence of the arson as a prior bad act.

Prior to trial, Solicitor Hembree proffered two events in lieu of taking tetimony: (1) what is referred to in the hearing as a drug rippoff from Brett Smalls' residence, and (2) the attempted arson. The prosecution moved to admit these items to prove motive and intent under Rule 404(b), SCRE, and as res gestae evidence. Tr. p. 87.

The Solicitor proffered that Brett Smalls, a small time drug dealer in Horry County with a house in Socastee, knew Applicant and Cottrell. In early December, Applicant and Cottrell visited his house to purchase marijuana from Smalls, but stole it instead. They left in two separate cars. Smalls' cousin and a friend pursued them at speeds of up to 85 m.p.h. Afterwards, Smalls and his cousin made calls to the defendants demanding payment for the marijuana. Smalls was staying elsewhere on December 14, but received a phone call that the outside of his house was burned.

DCR p. 1109 42

Batallion Chief Kenny Todd would testify there was the presence of accelerants and in his opinion the fire was caused by an arson. Tr. pp. 87-89.

Solicitor Hembree also proffered that Amber Counts would testify she was staying in the Cherry Grove home with Diane Lawson. She would admit she was present for the ripoff at Smalls' home. She drove the vehicle Cottrell rode in and as they were pursued, Cottrell fired his gun at the pursuers, ending the chase. Tr. pp 89-90.

According to the proffer, Counts would testify several days later Cottrell, Love, Morgan, and her drove to a Wal-Mart where Morgan purchased a gas can, and then a Texaco where Morgan or Love purchased gasoline. They parked near Smalls' house and Love was directed by Cottrell to go to the house and set it on fire. Cottrell gave specific directions on how to do this. She would testify that Cottrell had several phone calls at this time, but she did not know who was on the other end of the conversation. They waited for a significant amount of time and became concerned, but then they saw a fireball go up and Love ran back to the car. They returned to the Cherry Grove house. She recalled Applicant and Lawson were at the Cherry Grove house when they arrived. Tr. pp. 90-92.

The prosecution proffered Lawson's testimony. She would testify she drove Applicant in the second car involved in the drug ripoff. She would confirm the other facts of the drug ripoff and testify that when Applicant received phone calls demanding money, he became mad and decided to have Smalls' house burned down. The Solicitor proffered her testimony regarding the arson, which was substantially the same as to what she testified at trial. Then he proffered her testimony in regards to Applicant's plans for Love to be killed for his failed arson attempt. Tr. pp. 92-95. Bolton's testimony was also proffered. Tr. pp. 96-97.

DCK
p. 12-7-92

Solicitor Hembree then explained to the trial court, "You have the drug rip off which is the motive for the arson which is the motive for the murder. There all three of these events are linked together." Tr. p. 97, lines 5-9. Solicitor Hembree then advised the judge that out of an abundance of caution, and to eliminate a potential appellate issue, the State was only seeking to introduce evidence of the arson and not the drug rip off. Tr. pp. 98-99.

Applicant called Amber Counts as a witness at the PCR hearing. She testified she was at the Cherry Grove house when Cottrell told her to go with him for a task. She drove Cottrell, Donnie Morgran, and Love to Wal-Mart where they purchased a gas can. They drove to the side of the road and Love got out of the car and walked off with the gas can. Cottrell gave Love directions on how to commit the arson, although Counts did not recall the specifics. She also testified that Cottrell was on the phone with someone, but she did not know who. Cottrell became agitated because Love was gone for so long. But all of a sudden he came running back and they all went back to the Cherry Grove house where Halcomb and Lawson were. PCR Tr. pp. 221-23.

This Court would note Applicant told this Court he was with his fiancé at home and not at the Cherry Grove house with Dianne Lawson the night of the arson. Yet Applicant presented a witness at the PCR hearing who impeached this claim – Counts testified Lawson and Applicant were at the Cherry Grove house when they returned from the attempted arson. Tr. p. 223.

This Court notes that Counts' PCR testimony is substantially consistent with the prosecution's proffer concerning the arson and finds Applicant was not prejudiced by the prosecution's oral proffer in lieu of live in camera testimony. This Court finds that Applicant has not proven counsel's performance was deficient in this regard or that Applicant was prejudiced by the alleged deficiency. This allegation is denied.

DCL p. 1307 42

Failure to preserve prior bad acts objection

Applicant complains trial counsel failed to renew his in limine objection to the arson evidence. Codefendant's counsel did renew the objection and also moved for a mistrial after the State rested its case, arguing the State misrepresented the evidence they would present by failing to call Amber Counts as a witness. These issues were addressed by the Court of Appeals when it affirmed Cottrell's conviction. State v. Cottrell, 2009-UP-010 (filed Jan. 8, 2009) (2009 WL 9524547). The Court of Appeals held as follows: "Specifically, Cottrell argues the State misrepresented the evidence it would present that would connect Cottrell to the arson and the subsequent murder, and as a result of the misrepresentation, the trial court erred in failing to grant Cottrell's motion for a mistrial." Id. The Court of Appeals found the arson evidence met the clear and convincing standard and was admissible evidence proving motive under Rule 404(b) SCRE.

It is clear to this Court that testimony at trial, even without Counts' testimony, established an arson was attempted and Love's failure to carry out the arson was the motive for the murder. The arson evidence was properly admitted as motive under Rule 404(b), SCRE, and as res gestae. Therefore, Halcomb was not prejudiced by counsel's failure to renew his objection to the arson evidence as it would have been affirmed if raised on appeal and the evidence was properly admissible as explained by the Court of Appeals. Accordingly, this claim is denied.

Failure to object to Lawson's "outburst."

Applicant alleges counsel was ineffective in regards to a point in testimony in which Dianne Lawson hyperventilated or had difficulty breathing and needed assistance to leave the witness stand and calm down in the hall. The jury saw this occur before the jury could be removed from the courtroom. Tr. pp. 264-65. This occurred in connection with co-defendant's

DCE p. 1407 42

cross-examination of Lawson. Codefendant's counsel, Hoffmeyer, asked Lawson about a visit at Christmas to her family in North Carolina. She was brought to the house and dropped off by Halcomb and Cottrell. After she spent the day with the family, Cottrell and Halcomb came and picked her up from the house. Hoffmeyer asked if she contacted law enforcement when she was with the family. She replied she told her sister. Hoffmeyer asked "Did [sister] ever contact law enforcement when you told her?" Lawson replied, "I was scared, no, why. I mean he would come after my family. He said he knew people in law enforcement. He manipulated me ---" Tr. p. 261, line 9 – p. 262, line 5. Hoffmeyer objected, arguing the answer was unresponsive and highly prejudicial. The trial court admonished Lawson to "please only answer rather than speak like that" and told the jury to disregard the response. Tr. p. 262, lines 6-12.

Following Hoffmeyer's mistrial motion, which trial counsel joined, the trial court explained for the record what occurred. After the trial court struck Lawson's last response, the trial court asked trial counsel to approach to find out how long his cross-examination would be. At that point, the trial court explained, "[T]he witness appeared to hyperventilate and have some sort of breathing disorder where she could not catch her breath and was very loudly wheezing in the courtroom and had to have some assistance in leaving the witness chair and going outside the courtroom where she now has calmed down. All this did occur in the immediate presence of the jury . . . ." Tr. p. 264, line 9 – p. 265, line 5.

The jury was sent out after Lawson started having difficulty breathing and after a recess and out of the presence of the jury, Hoffmeyer moved for a mistrial. Tr. pp. 262-63. Trial counsel also moved for a mistrial, arguing the abstract fear Lawson had was directed at Applicant and he asked for a curative instruction in the alternative to his mistrial motion. Tr. pp. 263-64.

 DCB 1-15-17 42

The trial court denied the mistrial motion and advised the parties he would tell the jury again to disregard Lawson's last answer and advise the jury the witness was calm and ready to go forward. Tr. p. 265. When asked about the procedure, trial counsel indicated he had no objection to the trial court's plan to cure the error. Tr. p. 265, line 17 – p. 266, line 1.

The trial court then brought the jury back in the courtroom and gave the following instruction to the jury:

> . . . Again, I want to instruct you to disregard the last two comments that were made by Ms. Lawson prior to our taking a break. Those comments were not in response to any question are not appropriate evidence. And again, I instruct you to disregard that. Now, as you know, and just as many witnesses are individuals and jurors are often in the courtroom for the first time are not commonly in the courtroom. And it can be a stressful situation.

Tr. p. 266, line 22 – p. 267, line 6. After directing an inquiry to Lawson as to whether she was ready to continue, the trial court allowed trial counsel to begin his cross-examination. Tr. p. 267.

Applicant complains counsel failed to object, but counsel did join the mistrial motion. Arguably, counsel needed to object after the curative instruction to preserve the issue for appeal. The issue was not raised in Applicant's appeal to the Court of Appeals.

This court finds that even if the issue was not preserved for appeal, Applicant was not prejudiced as this Court believes a reviewing court was unlikely to find that the trial court erred in denying the mistrial motion. A reviewing court would also find the instruction cured the error. An appropriate curative instruction is generally considered to cure any error. State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989). On appeal, a denial of a motion for mistrial will not be reversed absent a showing that the trial court abused its discretion. Id. "A mistrial should not be granted except in cases of manifest necessity and ought to be granted with the greatest caution for very

PCR p. 169 42

plain and obvious reasons." State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989) *cited in* State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999) (noting trial judge should exhaust other methods to cure possible prejudice before aborting a trial).

For instance, in State v. Anderson, 322 S.C. 89, 470 S.E.2d 103 (1996), during a murder trial, the victim's sister testified as to the identity of the defendant. She then addressed the defendant, saying, "Why Shawn? Why did you do it? . . . He didn't have to take her life." The jury was sent out of the courtroom, but Victim screamed and bawled for three to five minutes at the top of her voice. Defense counsel noted the jury room was adjacent to the area where this occurred. The Supreme Court found no error in the denial of the mistrial motion.

This Court believes that a reviewing court would find the trial court did not abuse its discretion in denying the motion for mistrial even if preserved and raised on appeal. Therefore, this Court finds Applicant was not prejudiced by the alleged deficiency.

The State's closing argument

Applicant alleges counsel was ineffective for not objecting to different portions of the prosecutor's closing arguments regarding the demeanor of Diane Lawson. Speaking as to Lawson's testimony, Humphries noted "And you may hear in later arguments can you believe the State relied on such a witness. They may suggest to you she didn't say that before. She didn't say that particular thing in that particular statement, but folks, in addition to weighing what she says compared to things you know to be true or things that other people support by virtue of their examinations, their observations, the demeanor of the witness is critical, absolutely critical in this case." Tr. p. 546, line 25 - p. 547, line 8.

DCR p. 17 of 42

Applicant complains this comment was improper, but this Court disagrees. Trial courts routinely instruct the jury to consider a witness's demeanor in assessing credibility. Applicant also complains about a comment following shortly afterwards:

> The question becomes this, Dianne Lawson testified from this stand did you believe her. Was the manner in which she provided you those horrific facts was it believable. Did she appear truthful. What was her demeanor. What was her state at the time she testified. You recall it. She was tortured. She was suffering. Now does one do that and you tell a lie. Is a lie ever that hard you think about it. Is the telling of a lie ever that hard combined with emotion that real.

Tr. p. 547 lines 9-17. Applicant complains that this is a reference to Lawson's hyperventilation. However, Humphries explained it was a reference to Lawson's demeanor throughout her testimony. PCR Tr. pp. 146-48. Senator Hembree explained Lawson was fearful throughout her testimony even on direct examination. PCR Tr. pp. 267-69.

Trial counsel testified his general practice is to avoid objections during closing argument. For one thing, counsel testified, it runs the risk of drawing the jury's attention to the item objected to and further, having talked with jurors in the past, counsel found that jurors assume it is hurting his client and the jury assumes counsel does not want the jury to hear it and jurors want to hear all of it. PCR Tr. p. 368, lines 7-20.

This Court finds Humphries' closing reference to Lawson's demeanor was not improper. The jury is required to make its own determination as to a witness's credibility and a witness's demeanor is a proper consideration. It is evident from the trial record and testimony presented that the reference to Lawson's demeanor was a reference to her demeanor thru out her trial testimony and not just the end of Hoffmeyer's cross-examination when Lawson suffered some breathing

DCB
P 18 of 42

difficulties. Accordingly, this Court finds counsel was not deficient for not objecting to this portion of closing argument and Applicant was not prejudiced by the alleged deficiency.

Applicant also alleges trial counsel should have objected to the following argument:

> As I said before, I submit to you that if all we had put up on this stand in this case based on narrowed [sic] in which she testified based on her truthful demeanor, that this case with that evidence alone would have warranted verdicts of guilty for murder for both these defendants. What kind of person, what kind of people could inspire such fear in one individual? What kind of people could cause a witness in a protected courtroom with armed deputies all around, what kind of people could inspire such fear.

Tr. p. 556, lines 16-25. Codefendant's counsel, Hoffmeyer, objected and the trial court struck the comment, commanding the jury to disregard the comment. Tr. p. 556, line 25 – p. 557, line 5.

Trial counsel noted that demeanor is something a judge typically tells a jury they should consider, but thought at some point Humphries might have got over the line. However, trial counsel noted Hoffmeyer objected and the trial court issued a curative instruction. Counsel explained, "I didn't think the judge would do anything different for me other than what he had done with the curative instruction." PCR Tr. p. 318, lines 16-25. He did not see any additional benefit from making his own objection. PCR Tr. p. 319, lines 3-10.

This Court finds it was unnecessary for trial counsel to object unless counsel sought a mistrial. This Court does not believe a mistrial would have been warranted or likely based on the struck comments. See State v. Dawkins, 297 S.C. 386, 377 S.E.2d 298 (1989) (finding an appropriate curative instruction is generally considered to cure any error). This Court finds counsel's trial strategy reasonable and finds his performance was not deficient. This Court finds Applicant failed to prove either prong of Strickland and denies this allegation.

DCR
P 19 of 42

Applicant complains about Humphries' immediate comment when he continued his argument, "Her demeanor you will judge." Tr. p. 557, lines 8-9. That comment is not improper. The jury is allowed and should consider a witness's demeanor in judging their credibility. The comment is not improper and counsel was not deficient for not objecting to the comment. Further, Applicant was not prejudiced by the alleged deficiency as it was not reasonably likely to affect the outcome of the trial.

Failure to move to quash jury venire

Applicant claimed he arrived at the Courthouse from the county jail in a caravan of three vans and maybe two sheriff's cars. He claimed law enforcement was on all four corners of the courthouse directing traffic. He claimed to see one officer with an assault rifle at the back door to the courthouse. He further claimed some officers were in fatigues or tactical gear. He claimed the officer got out of the van with rifles where the jury was gathered. Applicant complains he was led, wearing a jumpsuit and shackles, into the courthouse in the presence of the jury venire that was gathered outside by the back entrance to the courthouse. PCR Tr. pp. 66-67. Applicant claims he told this to trial counsel. PCR Tr. p. 69, lines 8-16. Trial counsel testified he did not recall Applicant telling him Applicant was led through the jury panel. He testified if something of that nature occurred that seemed prejudicial, he would have objected, although he admitted he did not have any recollection on that point. PCR Tr. pp. 332-33.

To the extent Applicant might have been seen by any members of the jury panel in shackles and a jumpsuit, this would not automatically warrant a mistrial or reversal on direct appeal even if counsel made an objection. In State v. Moore, 257 S.C. 147, 184 S.E.2d 546 (1971), the defendants were seen by jurors in shackles as they were being prepared to return to the county jail.

DCB p. 20 of 42

The trial court denied the defendants' objection, noting jurors know some defendants are in custody during trial and would need to be transported back and forth from the county jail to the courthouse. The Supreme Court upheld the trial court's ruling, observing, "It is within the sound discretion of an officer charged with the custody of a prisoner to place handcuffs or shackles on him while being taken back and forth between the courthouse and jail." Id.

Moore was cited favorably in State v. Johnson, 422 S.C. 439, 458, 812 S.E.2d 739, 749 (Ct. App. 2018). In Johnson, the appellant complained he was brought into the courtroom in shackles and surrounded by law enforcement. The Court of Appeals found the trial judge did not err in denying the mistrial motion because the appellant failed to show any jurors saw him or were prejudiced, and therefore, mistrial was not warranted.

This Court finds Applicant's testimony on this claim is not credible and gives his testimony no weight at all. This Court notes he offered no evidence corroborating this claim, including any eyewitnesses that saw this occur. Applicant did not call any jurors to testify they saw Applicant in shackles. Applicant did not call any of the deputies who transported Applicant. This Court further believes counsel, if advised that Applicant was led through the jury venire panel in a manner that was unduly prejudicial, would have objected. This Court does not believe such information was conveyed to counsel. This Court finds Applicant has not met his burden of proof on this claim and denies this allegation.

Counsel should have objected to allowing the trial court to submit the indictment to the jury.

Applicant alleges counsel was ineffective for not objecting to the indictment being submitted to the jury when it deliberated. At trial, codefendant's counsel objected to the

DCA p 217 42

indictment being sent back to the jury and the trial court overruled the objection, noting it was the trial court's practice since taking the bench. Tr. pp. 530-31.

During its instructions to the jury, the trial court advised the jury the indictments were merely accusations by the Solicitor and not evidence. Tr. p. 600, lines 7-24. The trial court then proceeded to discuss the presumption of innocence and burden of proof. Tr. p. 600, line 25 – p. 601, line 8.

Applicant cites two cases in his application that purports to support his position. State v. Rudd, 355 S.C. 543, 586 S.E.2d 183 (Ct. App. 2003) and State v. Thomas, 287 S.C. 411 (1986). However, neither case stand for the proposition that it is improper for the jury to receive a copy of the indictment during deliberations. Instead, both cases found the prosecution's closing argument improper. In Rudd, it was for suggesting that Rudd had many protections, such as the issuance of a warrant and the issuing of a true-bill indictment by the grand jury. In Thomas, it was the suggestion that Thomas already had a preliminary hearing and the case was submitted to the grand jury, and that in the event of conviction, Thomas would be able to appeal the verdict. Neither case purports that a trial court errs in submitting the indictment to the jury. See generally, United States v. Coward, 669 F.2d 180 n. 6 (4th Cir. 1982) (referencing the local rule regarding sending an unedited copy of an indictment to the jury).

In the cases relied upon by Applicant, the concern was the jury's sense of responsibility would be lessened by an argument that Rudd was already offered protections or that Thomas would be able to seek redress on appeal. In the instant case, the trial courts actions do not suggest this and the trial court made sure the jury understood the indictment was merely an accusation the jury must necessarily find was proven by the State beyond a reasonable doubt.

DCR p. 22 of 42

Trial counsel testified that it was the practice in most cases he has tried for the jury to have the indictment and he did not think there was any reason to object. He noted the trial court's general practice to give an instruction that indictments are not evidence, merely the manner that cases are brought to trial. PCR Tr. p. 370.

This Court finds counsel exercised reasonable professional judgment in forgoing any objection to the indictment and his decision to decline objecting did not fall below professional norms. Further, in light of the trial court's instructions, this Court finds that Applicant was not prejudiced by the alleged deficiency of counsel and denies this allegation.

Presence of law enforcement inside and outside the courthouse

Applicant complains counsel should have objected to what he described as the heavy presence of law enforcement both inside and outside the courtroom.

Accounts of the presence of courtroom security differs among several witnesses. Applicant called Magistrate Barker, at the time of trial a probation agent, who estimated as many as twenty officers were present in the courtroom. Senator Hembree, during his testimony, commented that the number sounded high to him, that perhaps there were a dozen officers. Several reasons for heightened security were presented at the hearing. Applicant was transported from the J. Rueben Long detention center and was accompanied by Horry County personnel. Sheriff Thompson explained it was standard practice in such a situation to use three vehicles for transportation in case there was difficulty. Co-defendant Cottrell was in the custody of the Department of Corrections after being sentenced to death for the McGarry murder. Therefore, he was accompanied by Department of Corrections personnel. Sheriff Richardson explained he started as Sheriff in January 2005 and was responsible as Sheriff for courtroom security. PCR Tr.

DCR p. 23 of 42

p. 239. It was the first murder trial of his tenure and a high profile case. He would have had about eight to ten deputies available for courtroom security at the time of trial. He requested Horry County to provide assistance with security during the trial and recalled five officers from Horry County escorted Applicant to the courthouse. PCR Tr. p. 240. He explained two officers would have been positioned at the entrance where the metal detector was. PCR Tr. p. 242.

Several witnesses provided testimony about Cottrell's status on death row. Further, Applicant and Cottell were not only defendants in Love's murder, but also a separate murder in Horry County. Senator Hembree testified that prior to the trial in this case and Cottrell's death penalty trial, he requested the Department of Corrections to take Cottrell in pre-trial protective custody because of his conduct at the J. Reuben Long detention center. PCR Tr. pp. 255-56. Cottrell was discovered with a homemade rope fashioned from prison clothes, which Humphries explained could be used as a ligature. PCR Tr. pp. 143-44. Further, he also fashioned a wire to use for picking the lock on handcuffs. He used it to slip out of belly chains and physically attack another inmate. PCR Tr. p. 255. Cottrell was also recorded in jail phone conversation threatening officers. Senator Hembree identified and explained the affidavit he executed and provided to the Department of Corrections when he made the request for Cottrell to be transferred to the Department of Corrections. One of the assertions made in the affidavit was the concern that Cottrell had contacts with criminal elements in Horry County that could conspire to assist Cottrell to escape. Senator Hembree confirmed that Cottrell and Applicant were closely associated with each other and Applicant would have the same contacts with criminal elements in Horry County. He testified that within the Solicitor's office they discussed the possibility of an outside escape attempt. He described Halcomb as an intelligent long-term thinker who could make plans and

DCB
p. 247 42

recruit people to carry out plans, making him unusually dangerous in comparison with most criminal defendants. PCR Tr. pp. 257-60.

Applicant claimed he did not have any disciplinary record at the Long detention center that would warrant heightened security, but then acknowledge he had a possession of contraband charge while there. PCR Tr. p. 125. Further, he confirmed a knife was found in his cell, but testified there were two other inmates in his cell and the charge was dismissed. He claimed it was confiscated from one of the other two mattresses, not his. PCR Tr. p. 125.

Senator Hembree commented on the nature of the courthouse, noting it was a small, older courthouse that was not designed for modern security needs. Senator Hembree indicated they were concerned about security prior to trial due to Cottrell's actions. While both prosecutors noted the heightened security at the courthouse, both felt it was appropriate under the circumstances of the case. PCR Tr. p. 178; pp. 252-55.

Trial counsel likewise noted there was heightened security although he did not believe it was inappropriate in the instant case. He testified he would not have objected unless he felt his client was prejudiced. He noted none of the officers were in riot gear. He noted Cottrell was on death row. He also testified about the courtroom being a historic, smaller courtroom that was not designed for modern security concerns. Counsel testified he tried several cases in the courthouse and first visited it as a law clerk in 1991. He noted inmates did not come through a secure entrance, but were brought to the courtroom through the public entrance. PCR Tr. pp. 328-29. Counsel testified that one of the officers from Horry County told him they felt one of the defendants might try to escape, although counsel did not know the basis for that belief. PCR Tr. p. 337, line 19 – p. 338, line 2.

DCR p 25742

This Court notes some discrepancies between the many witnesses on this subject. However, this Court notes the prosecutors and trial counsel, all who have a duty to ensure Applicant received a fair trial, provided credible testimony that shows enhanced security was necessary under the circumstances, but it was not of the nature that impeded Applicant's right to a fair trial. This Court finds their testimony credible and gives it great weight. In contrast, this Court finds Applicant's testimony is at best, exaggerated, and does not find it credible on this matter.

This Court notes the co-defendant was on death row and a significant escape risk, Applicant and co-defendant collectively were accused of three murders and an attempted arson that seemed to be an attempted murder, they both had contacts with the criminal elements of their county and, as Senator Hembree points out, Applicant had the ability to recruit people for his criminal plans. The court room, the same one which this PCR hearing was held in, is a small courtroom that was not designed with modern security concerns in mind. Under these circumstances, heightened security was warranted. However, based on the evidence presented, this Court does not believe it impacted Applicant's ability to receive a fair trial; this Court finds Applicant has not met his burden of proving so. This Court finds the security provided during trial was not inherently prejudicial. Holbrook v. Flynn, 475 U.S. 560 (1986). This Court finds Applicant has not established that counsel's performance was deficient in this regard and further that Applicant was not prejudiced by the alleged deficiency. This allegation is denied.

Stun belt

Applicant alleges counsel was ineffective for failing to object to Applicant being required to wear a stun belt. Relying on Deck v. Missouri, 544 U.S. 622 (2005), Applicant alleges the trial court was required to make a finding of a special need for Applicant to be required to wear a stun

DCH p. 26 of 42

belt throughout trial. Applicant complains that it impeded his ability to assist his attorney and caused him to decline testifying at trial although he really did want to testify at trial. Applicant claims that if he testified at trial, he would have admitted he was convicted in federal court after he was stopped in Texas transporting marijuana. Applicant claims this would have helped him because it shows he took responsibility for that crime because he was guilty but was now asserting his innocence for Love's murder.

Applicant testified he was told by Cottrell that the stun belt went off in a court proceeding in Horry County. Cottrell did wear a stun belt during an Horry County proceeding and the stun belt did go off accidently due to a mechanical issue per Sheriff Thompson's testimony. Because of this, Applicant worried the stun belt would go off by accident. He was also concerned that it would go off if he did something the deputies watching over him did not like, and he felt he did not know under what circumstances they would cause him to be shocked.

Both prosecutors noted Applicant did not appear to be inhibited in his ability to assist his attorney. They noted he spoke with his counsel incessantly during trial and took plenty of notes. He did not appear fearful as Applicant claimed during the PCR hearing. PCR Tr. p. 146; p. 261. Counsel testified he was aware of the stun belt and noted it was not visible to the jury. He testified he would have objected if the stun belt was visible to the jury. Counsel verified Applicant took notes during the trial and spoke to counsel during the trial. The stun belt did not appear to impede his ability to assist counsel. PCR Tr. pp. 335-37.

This Court notes that Deck prohibits the routine use of **visible** shackles without specific findings of a special need, and does not speak as to restraints that are not visible to the jury. This Court finds that case law at the time of trial did not required the trial court to make a finding of a

PCR p. 27 9/12

special need for non-visible restraints such as a stun belt. Indeed, neither our state court nor the Fourth Circuit has established such a rule as of time of the PCR hearing. See also Earhart v. Konteh, 589 F.3d 337, 347-48 (6th Cir. 2009) (finding no error in requiring the defendant to wear a stun belt during trial where the stun belt was not visible to the jury); Mungo v. United States, 987 A.2d 1145, 1150 (D.C. Ct. App. 2010) (finding the trial court did not err in holding a hearing on the propriety of making the appellant wear a stun belt; all authorities relied upon to establish a due process violation came from different jurisdictions and were issued after appellants 2000 trial; the appellate court noted, "[C]ritical to our analysis, neither the United States Supreme Court nor this court has ever held that a stun belt qualifies as a type of physical restraint whose use is subject to the strictures that the Supreme Court set out in Deck); Commonwealth v. Lopez, 854 A.2d 465, 469-70 (Pa. 2004) (rejecting the claim the defendant's rights were violated because he was forced to wear a stun belt, noting evidence supporting concerns he would attempt to escape. The belt was not visible to the jury. The defendant claimed the belt constricted his breathing and movement and interfered with his Sixth Amendment right to assist counsel. The court rejected the claim because the defendant failed to show that but for the belt, the result of the trial would have been different. The court held, "It is difficult to ascertain what prejudice allegedly resulted from appellant's wearing the belt, beyond the prejudice of not being able to escape.").

This Court finds that the stun belt was not visible to the jury. This Court also rejects Applicant's claims that he was impeded in any manner from assisting his attorneys and is concerned about the lack of candor in Applicant's testimony on the subject. This Court finds credible the testimony of the prosecutors and trial counsel on this matter and finds Applicant was able to assist his trial counsel. This Court also rejects Applicant's claim that the stun belt

DCR p. 28 of 42

contributed to Applicant's decision to not testify. This Court notes the trial court's colloquy with Applicant and the absence of any concerns raised by Applicant about his ability to testify due to the stun belt. Tr. pp. 505-512. This Court finds Applicant's testimony on the subject is simply not credible.

This Court finds counsel's performance was not deficient for failing to object to the stun belt. Further, this Court finds Applicant was not prejudiced by the alleged deficiency as under the circumstances, requiring Applicant to wear the stun belt was not unreasonable and did not have any effect on Applicant's ability to receive a fair trial. This allegation is denied.

Lindsey Bolton

Applicant makes several allegations regarding a State's witness, Lindsey Bolton. Bolton was staying with Applicant's fiancé, Alison Nelson. Bolton was one of Cottrell's girlfriends. Bolton was cross-examined by Hoffmeyer about how she stayed with Applicant's fiancé and continued to see Cottrell in jail despite him discussing killing Love. He referenced her prior testimony that she had a disagreement with the fiancé and left to live with her mother in North Carolina in April, several months after Cottrell was arrested. Bolton responded she moved out after "Alison started threatening me, that's when I left and went to stay with my mother." Tr. p. 379, lines 12-13.

Trial counsel testified that he did not object because he did not want the jury to think that testimony hurt him or call attention to the testimony. He noted the testimony was brief and not specific. PCR Tr. p. 347, lines 13-25. He agreed it appeared responsive to Hoffmeyer's questions. Tr. p. 348.

DCB
f. 29 of 42

This Court notes that the testimony concerning Applicant's fiancé threatening Bolton is vague – it does not specify the type of threat. Also, the testimony was responsive to the questioning. Further, earlier during cross-examination, Hoffmeyer suggested Bolton went to law enforcement because she was worried she would be charged for taking a vehicle from the fiancé, she was scared because there was a dispute over the car. Tr. pp. 370-71. The jury could conclude the threat was the threat of prosecution over the car, there was no indication of a violent threat.

Further, an objection would likely call the jury's attention to the testimony and unduly emphasize something that was otherwise oblique. This Court finds the testimony was responsive and proper. Further this Court finds Applicant was not prejudiced by the lack of an objection. Therefore, this Court finds counsel was not ineffective as to this allegation.

Applicant alleges counsel was ineffective for failing to move to introduce evidence that Bolton and Cottrell were in an argument about another woman. Tr. p. 176, lines 12-16. Apparently, this testimony should have been utilized to establish bias on Bolton's part. This Court finds this testimony would not have affected the outcome of trial if trial counsel elected to elicit the testimony. Further, the testimony would establish Bolton's bias against Cottrell, not Applicant, so the benefit from eliciting such testimony was more tenuous as to Applicant. This Court finds Applicant has not established his burden of proving either prong of Strickland in this regard.

Applicant also complains that counsel should have cross-examined Bolton about evidence of a physical assault on Bolton by Cottrell that Applicant alleges he witnessed. Counsel acknowledged this could be considered an inadmissible prior bad act against Cottrell and the trial court might not admit it. Tr. pp. 345-46. This Court finds it is unlikely the trial court would have admitted this kind of testimony due to the prejudicial nature it would have to co-defendant Cottrell.

DCH p. 30 of 42

Further, this Court does not believe it would have affected the outcome of the trial if counsel were somehow permitted to elicit this testimony. It was just as likely to have prejudicial effect on Applicant that he was associated with a violent person like Cottrell, and its helpful impact on Applicant's behalf is limited at best. This Court finds counsel was not ineffective for not seeking to admit testimony of this extrinsic act. This allegation is denied.

Applicant also alleges counsel should have personally interviewed Bolton or have a private investigator interview Bolton. This Court finds Applicant has failed to show any benefit that would accrue from counsel interviewing Bolton or having a private investigator interview Bolton. Therefore, this Court finds Applicant failed to establish prejudice from these claims. Further, Applicant failed to show counsel could reasonably expect to gain any benefit from interviewing or having an investigator interview Bolton. This Court finds Applicant failed to meet his burden of proving counsel was ineffective and denies this claim.

Applicant complains counsel should have objected to Lawson's direct examination testimony that there was another woman, Applicant's fiancé, in the picture. Tr. p. 216. This Court finds that the testimony was not improper. Applicant's fiancé, Alison Nelson, was one of the people involved in this case. Bolton would testify that she and the Nelson threw out two nearly brand new shovels shortly after Love disappeared. It was also relevant as to Lawson's relationship with Applicant. She testified that she was limited in her ability to contact Applicant or move freely about, and this aspect of the relationship helps explain a possible reason for Applicant's controlling behavior. Therefore, the limited danger of unfair prejudice did not substantially outweigh the probative value of the testimony. This Court finds that Applicant failed to establish either prong of Strickland for this allegation., and denies the allegation.

DCR 3/17/92

Kenny Todd's testimony

During his testimony, Kenny Todd made short reference, unsolicited, to testifying in a "previous trial." Tr. p. 347, lines 1-7; p. 350, lines 1-8. Trial counsel noted the problem was each time, the nature of the question posed did not suggest an answer that would reference another trial. Counsel noted that preferably an objection will prevent the testimony from being elicited, but once the testimony is solicited, an objection would have only called attention to the testimony. PCR Tr. p. 349, lines 8-16. Trial counsel addressed the possibility of the trial court providing a curative instruction after the fact, and the trial court was open to the suggestion. Tr. p. 527, line 20 – p. 528, line 6. However, no curative instruction was provided. Trial counsel testified at the PCR hearing that such an instruction would have only called attention to the matter and therefore, he chose to forgo an instruction. PCR Tr. pp. 350-51.

Interestingly enough, at one point, counsel was attempting to question Lawson about her testimony in a previous trial, although the trial court did not allow it. Tr. pp. 282-91.

This Court finds the oblique reference to another trial, without further specification, was not prejudicial to Applicant. Further, objection or an instruction would have only called attention to the oblique reference, and therefore was probably not advisable. Therefore, this Court finds counsel's strategy was reasonable, his performance was not deficient, and Applicant was not prejudiced by the alleged deficiency of counsel. This allegation is denied.

Failure to cross-examine Brett Small about extrinsic acts

Applicant alleges trial counsel was ineffective for failing to investigate prior crimes that occurred at Brett Smalls' residence and to cross-examine Brett Small about robberies committed by other parties at Smalls' residence. Counsel expressed skepticism that the trial court would have

D GS
p. 32 of 42

allowed this kind of third party guilt evidence. Counsel acknowledged that cross-examination about these acts could run the risk of admitting other extrinsic acts involving Applicant and Cottrell. PCR Tr. pp. 351-52. As part of its proffer, the State alleged that the difficulties leading to the arson attempt at Smalls' residence began when Cottrell and Applicant stole marijuana from Smalls' residence and they were pursued in a car chase, which concluded when Cottrell discharged his gun from his vehicle at the pursuers, while Counts drove. Smalls subsequently called Applicant and Cottrell demanding money for the marijuana. PCR Tr. pp. 87-93. This conflict created the motive to commit the arson at Smalls' residence, which led to Love's murder. The prosecution elected not to present testimony on what has been termed the drug rip-off and limited its motion to admit prior bad acts to just the arson. At the PCR hearing, the prosecutors acknowledged that they may have moved to admit evidence of the drug rip off if counsel sought to admit this evidence. Counsel, for his part, argued during closing argument that the State failed to show any evidence of what motive Applicant and Cottrell might have held to commit the arson. Tr. p. 590.

This Court finds that counsel's performance was not deficient in this regard. Such testimony along the lines of evidence of third party guilt for the arson was not probative or useful. However, if admitted, it likely would have opened the door to Applicant's role in the drug rip off, which would show a motive for the arson and also not paint Applicant in a very good light. This Court finds Applicant failed to establish either prong of Strickland in this regard.

II. Brady allegations

Applicant makes several Brady allegations. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to

DCB
p. 33 of 42

guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

Brady is based on the requirement of due process. To succeed on a Brady claim, the defendant must show: 1) the evidence was favorable to the accused, 2) it was in possession of or known to the prosecution, 3) it was suppressed by the prosecution, and 4) was material to the guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). The prosecution has the duty to disclose Brady evidence even in the absence of a request by the accused. United States. v. Agurs, 427 U.S. 97, 107 (1976).

"Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006). "[T]he materiality element of a Brady claim requires a collective assessment of whether introduction of the exculpatory evidence might have affected the outcome of the trial." See Winston v. Kelly, 592 F.3d 535, 556 (4th Cir. 2010). The mere possibility that an item of undisclosed information may be helpful to the defense in its own investigation is insufficient to establish constitutional materiality under Brady. United States. v. Agurs, 427 U.S. 97, 109-10 (1976).

Evidence is exculpatory and favorable if it "may make the difference between conviction and acquittal" had it been "disclosed and used effectively." United States v. Bagley, 473 U.S. 667 (1985). "Evidence is material if it is likely to have changed the verdict." United States v. Wilson, 624 F.3d 640, 661 (4th Cir. 2010) (citation and internal quotation marks omitted).

The United States Supreme Court explained:

> This special status explains both the basis for the prosecution's broad duty of disclosure and our conclusion that not every violation

DCR p. 349 of 42

> of that duty necessarily establishes that the outcome was unjust. Thus the term "Brady violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence – that is, to any suppression of so called "Brady material" – although strictly speaking, there is never a real "Brady violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Strickler v. Greene, 527 U.S. 263, 281 (1999).

Failure to disclose interview with Vander McCray

Applicant claims the State committed a Brady violation that warrants a new trial because the State failed to disclose notes of an interview by the Solicitor's investigator, Dale Long, of Vander McCray. The report, dated March 25, 2004, attempts to memorialize an interview from March 11, 2004. It was accompanied by a cover or transmittal memorandum from Investigator Long. The memorandum indicates Long interviewed McCray at the J. Reuben Long detention center. Long notes in the memorandum, "MCCRAY stated he has been in Maximum Security with COTTRELL for several months, and that COTTRELL has confided a great deal in him, yet he was very thin with details."

The report indicates the interview took place in the presence of McCray's attorney, Candace Lively, Esquire. McCray claims to have befriended Cottrell, and Cottrell talked about the two murders he was charged with. He claims Cottrell told him Cottrell gave Jonathon Love an ounce of marijuana he never paid for, so Cottrell acted friendly towards Love. He then lured Love to an area in Marion County and had him dig a grave he thought was for someone else. The statement then reads: "MCCRAY reported that LUZENSKI admitted he shot LOVE in the head and chest once LOVE had dug the grave. MCCRAY stated LUZENSKI admitted that only he and LOVE were present when LOVE was murdered."

DCB
p. 350 of 82

The interview also discusses the shooting of Officer Joe McGarry in Horry County. The report indicates McCray said the shooting occurred during a traffic stop in front of a Dunkin Donuts. The statement claims Cottrell said he was holding a gun by his leg when McGarry approached the vehicle and Cottrell shot McGarry in the face when he was at the vehicle.

Both Humphries and Senator Hembree testified that while the document was something they normally would turn over, both adamantly believed the statement was not exculpatory. They stressed the State's theory of the case was not that Halcomb was present at the gravesite when Cottrell murdered Love, but he was back at the car parked on the road and out of eyesight from the gravesite. Applicant argues a different interpretation, that the statement could mean Halcomb was not present in Marion County at all and was not a participant in the murder. Trial counsel testified that in his view, the statement was open to both interpretations and believed the document should have been turned over, although he noted he never had any discovery issues before with either of the prosecutors. PCR Tr. p. 320.

Counsel testified he would have liked the opportunity to investigate the statement, but noted, "Now, as to could I have used it, would I have used it, I can't really say. There would certainly have been problems with Mr. McCray on some credibility issues because of his history and some other things." PCR Tr. p. 320, lines 2-17. Counsel admitted without knowing what McCray might actually say, he was unable to determine if he could use the statement or call McCray to testify. Counsel explained, "[C]learly he was in a position of looking for some sort of assistance from the government, which I obviously could not give him." PCR Tr. p. 322, lines 5-11. Counsel expounded on that point further, "[A]s the solicitor Mr. Humphries indicated, you know, you get these letters, hey, I've got information, you know, you get these letters, he, I've got

DR 36742

information, I've got information and I want to go home, you know. I didn't get a letter from him saying, hey, I want to help Mr. Halcomb. So I don't know if he would have any willingness to help me or not." PCR Tr. p. 322.

Testimony from both prosecutors highlighted factual inaccuracies in regards to the McGarry murder. They testified that the murder did not occur during a traffic stop. Instead, McGarry was entering the Dunkin Donuts as Cottrell and Applicant were leaving the store. McGarry then approached Cottrell and asked for identification. Cottrell retrieved his gun from his waistband, not by his leg. Solicitor Hembree indicated that no other evidence corroborated the claim about a dispute over Love failing to pay for marijuana. PCR Tr. p. 161, line 20 – p. 162, line 4. There was also no evidence that McGarry was following Cottrell and taking photographs, as claimed in the interview.

The State moved to admit a letter into evidence at the PCR hearing addressed to Solicitor Hembree from McCray, dated after the interview with Dale Long. This letter is dated April 31, 2004. The letter starts out by informing Hembree, "Well I have some more info on the Joe McGary [sic] case plus I have more info about these two guys, Mr. Contrell [sic], Mr. Fred. I talk to Mr. Fred and he told me the hole [sic] story about what had happen that night he stated that."

The letter gives a different set of facts describing the McGarry murder. The letter further reads, "the reason that [I] told that guy what I told him is because I was scared these guys have pull with some big people . . . ." The letter concludes on the second page, and under what appears to be McCray's signature, the letter reads, "There is a lot to these guys and I'm willing to put you down and I will take your little test."

PCR p. 37 of 42

Counsel observed McCray appears to back up in the letter on the statement he previously gave. He is continuing to ask for help. Counsel also expressed concern over a statement in the letter that McCray claimed to have been talking with Halcomb. Counsel explained, "Because potentially the concern is he's got – he's looking to give information on maybe Mr. Halcomb as well. Probably his main thought is, you got a guy who's killed a police officer, but I've also got this other guy with two murders, maybe I can give information on both of them. And that would be a concern." PCR Tr. p. 323, line 24 – p. 324, line 5.

Applicant assured the State at the hearing that he did not have contact with McCray before the trial. Yet the letter purports that McCray spoke with Applicant, and the tone suggests that McCray held incriminating, rather than exculpatory, information about Applicant.

Asked on cross-examination if it was possible the outcome of the trial could have been different if the notes of the McCray interview was disclosed, counsel commented, "The word possible is such a big word. I mean, it's possible, you know, that we have an earthquake tonight or today or a tsunami, but it's not – it's too speculative for me to give a definitive answer. I guess anything is possible, but without knowing the specifics of Vander McCray's full statement and those sort of things, it's just – it's very speculative." PCR Tr. p. 357, lines 17-24.

This Court finds Investigator Long's report of his interview with McCray was not disclosed. This Court feels certain the non-disclosure was not intentional, but of course, this does not change the analysis. See Agurs. This Court agrees with the prosecutors that the statement was not inconsistent with the State's evidence at trial, although it certainly would be preferable such a document would have been turned over, as the prosecutors acknowledge.

DCR 38 742

This Court notes trial counsel's closing argument, recognizing the State's theory of the case as follows: "In fact, the evidence is that at the time of the killing the only evidence produced by the State is that my client was in another location out of eyesight, could not see where the murder happened with the only witness who was there." Tr. p. 523, lines 4-8. Counsel went on to argue that Lawson did no more than establish mere presence and argued the evidence only showed Applicant led her away from the scene while "Cottrell went back into the woods and some shots were fired." Tr. p. 523, lines 14-25.

However, the Applicant's claim must ultimately fail on the lack of showing the statement was material in that there is any reasonable probability it would lead to useful evidence or affect the outcome of trial. The statement itself represents an out of court statement by Investigator Long as to an out of court statement by McCray, as to alleged admissions by Cottrell. McCray did not testify at this hearing, so this Court would need to speculate on whether McCray would have truly provided testimony that was exculpatory to Applicant and that such testimony would be credible. This Court could not possibly know on the evidence presented if McCray was indicating Applicant was alone because the others were back at the car, or if Cottrell, as filtered through McCray, was claiming to be truly all alone in Marion County. This Court notes McCray's reputation for seeking a deal from prosecutors, the letter in the prosecution's file seemingly recanting some of his previous statement, and inconsistencies in the statement itself about the McGarry murder, that are all additional factors that weigh even further against the likelihood McCray would offer helpful information for Applicant's benefit if he testified at trial. This Court finds Applicant failed to meet his burden to establish the interview report constituted material exculpatory information under Brady and denies this allegation.

Counts statement

Applicant also complains about the late disclosure of a statement by Amber Counts to Investigator Long in which she claimed she received a letter from Cottrell that said Jon-Jon was killed because he raped women. The letter itself was destroyed. This was disclosed at trial and counsel moved in limine for the trial court to allow Counts to testify about the letter. The State did not object to the testimony, but Cottrell's counsel, Hoffmeyer, did raise an objection and the trial court excluded the letter on the basis of the best evidence rule. The Court of Appeals subsequently found the trial court erred in not allowing Counts to testify about the letter but also found any error was harmless. PCR Tr. pp. 183-187; p. 208.

Ultimately, due to trial court error, counsel was unable to utilize the information in the statement: that Cottrell purported Love was killed because he raped women. However, the State did not stand in the way of Applicant's counsel utilizing the information in the statement. Counsel attempted by an in limine motion, to elicit testimony about the letter and the in limine motion was denied after Hoffmeyer's objection. Further, Counts never testified, and counsel indicated he would not have wanted to call Counts as a witness and lose last closing argument. PCR Tr. p. 317, lines 1-9. Counsel also noted that if Counts testified, she would have confirmed the arson did occur and there was the possibility if he challenged the motive for the arson, she would start testifying about the drug rip off. Tr. pp. 339-41. Of course, the Court of Appeals already has determined that error in exclusion of the letter was harmless.

This Court finds that no Brady violation occurred, since late disclosure did not prevent the information in Counts' statement to be utilized. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998) ("In a Brady analysis, information is not deemed 'material' if the defense

 DCR p. 40742

discovers the information in time to adequately use it at trial."). Further, this Court finds the statement does not rise to the level of materiality. The purported letter merely provides an additional reason for Cottrell to want to murder Love, and is not inconsistent with the State's case in that regard. Further, similar information was elicited from Lindsey Bolton. Tr. p. 387, lines 22-25.

Applicant also raised a claim in his final amended application that the State committed a discovery violation because it did not disclose a statement by Kenny Todd with the Horry County Fire Department. However, Applicant announced at the hearing he was withdrawing that allegation. (11(d)(2).

Applicant alleged the prosecution misled the trial court by its proffer of Counts testimony. However, at the PCR hearing, Counts testified consistently with the prosecution's proffer of what she would have testified to at trial. This allegation is denied as Applicant has failed to prove this allegation.

CONCLUSION

Based on the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations that would require this court to grant her application. Therefore, this Application for Post-Conviction Relief must be denied and dismissed with prejudice.

This Court advises the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek

DCR p. 41 of 42

appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (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 an applicant's behalf.

IT IS THEREFORE ORDERED:

1. That this post-conviction relief matter shall be denied, and

2. Applicant remain in custody to continue to serve his sentence.

AND IT IS SO ORDERED this 8th day of February, 2018

D. Craig Brown
Presiding Judge
12th Judicial Circuit

FILED
2019 FEB 14 AM 10:14
MARLBORO COUNTY, SC
CHRIS T. McCRAY
CLERK OF COURT

D 42
P 42 of 42