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MAY 17 2019

S.C. SUPREME COURT

May 15, 2019

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

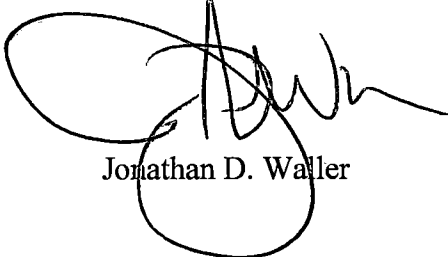
Re: David G. Johnson vs. State of South Carolina
C/A No: 2016-CP-21-2545

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. Johnson 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: Samuel Key, South Carolina Office of Attorney General

Enclosures

Waller Law Group
1116 Blanding Street, Suite 2B
Columbia, SC 29201

803-520-7278
www.wallerlawgroup.com
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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 17 2019

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge

S.C. SUPREME COURT

2016-CP-21-2545

David G. Johnson, # 312138,

Appellant,

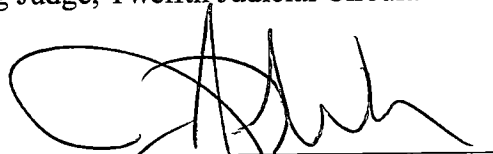
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

David G. Johnson, # 312138, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 13, 2019, issued by the Honorable George M. McFaddin, Jr., Presiding Judge, Twelfth Judicial Circuit.



Jonathan D. Waller
Waller Law Group
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ATTORNEY FOR PETITIONER

May 15, 2019

Other Counsel of Record:
Samuel Key, Assistant Attorney General
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Columbia, SC 29211
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STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 17 2019

APPEAL FROM FLORENCE COUNTY
George M. McFaddin, Jr., Circuit Court Judge S.C. SUPREME COURT

2016-CP-21-2545

David G. Johnson, # 312138,

Appellant,

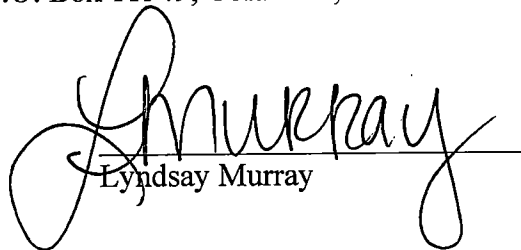
v.

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, Samuel Key, 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

May 15, 2019

FILED FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2102545

2019 MAY 13 AM 10:19

David Gerrard Johnson South Carolina State Of

PLAINTIFF(S) DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC DEFENDANT(S)
Attorney for: Plaintiff Defendant
 Self-Represented Litigant

Submitted by:

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge Judge Code Date 5/13/2019

For Clerk of Court Office Use Only

This judgment was entered on May 13, 2019, and a copy mailed first class or placed in the appropriate attorney's box on May 13, 2019, to attorneys of record or to parties (when appearing pro se) as follows:

CERTIFIED: A TRUE COPY
Doris Poulos O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

Jonathan D Waller 1116 Blanding Street Suite 2B
Columbia, SC 29201

Samuel Leonard Key Rembert C. Dennis Building 1000
Assembly Street Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Doris P. O'Hara

Court Reporter

Doris Poulos O'Hara - Clerk of Court

Court Reporter:

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

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

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)
)
 David G. Johnson, #312138,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2016-CP-21-2545

ORDER OF DISMISSAL

2019 MAY 13 AM 10:05
 DONALD FORBES CHAMBERLAIN
 CLERK OF COURT
 FLORENCE COUNTY, SC

FILED

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed October 19, 2016. An evidentiary hearing into the matter was convened on April 3, 2018, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Applicant. Lindsey McCallister, Esquire, of the South Carolina Attorney General’s Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. W. James Hoffmeyer, Esquire, Applicant’s trial counsel, testified for the State. At the close of all the evidence, the Court requested post-trial memoranda on the issue of whether trial counsel failed to object to improper comments in the Solicitor’s closing argument. After reviewing the evidence and testimony from the hearing along with the arguments of counsel, this Court now denies and dismisses the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. Applicant was indicted at the September 2009 term of the Florence County Grand Jury for murder, first-degree burglary, armed robbery, possession of weapon during the commission of a violent crime, and conspiracy



CERTIFIED: A TRUE COPY
 Donald Forbes Chamberlain
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

(2009-GS-21-1564). W. James Hoffmeyer (Counsel), Esquire, represented Applicant. Solicitor E. L. Cléments, III, Esquire, and Deputy Solicitor John C. Jepertinger, Esquire, prosecuted the case. On February 13, 2012, Applicant proceeded to trial before the Honorable Thomas A. Russo and a jury. On February 17, 2012, the jury found Applicant guilty as indicted on all five counts. Judge Russo sentenced Applicant to imprisonment for consecutive terms of life without the possibility of parole for murder and first-degree burglary. Judge Russo also sentenced Applicant to thirty years for armed robbery and five years for conspiracy to run concurrent with the murder and first-degree burglary sentences. Judge Russo did not impose a sentence for possession of a weapon during the commission of a violent crime because Applicant had been sentenced to life without the possibility of parole.

Applicant filed a timely notice of appeal. Susan B. Hackett, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division perfected the appeal. The South Carolina Court of Appeals affirmed Applicant’s conviction on April 9, 2014. State v. Johnson, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014). Applicant filed a petition for rehearing with the South Carolina Court of Appeals on April 24, 2014. The Court of Appeals denied the petition by order filed on June 13, 2014.

Applicant then filed a petition for writ of certiorari to the South Carolina Supreme Court on July 17, 2014. By order dated February 20, 2015, the Supreme Court partially granted certiorari. The Supreme Court dismissed the writ as improvidently granted on December 2, 2015. State v. Johnson, Op. No. 2015-MO-067 (S.C. Sup. Ct. filed December 2, 2015). The remittitur was returned to the circuit court on December 2, 2015.

Applicant filed a petition for writ of certiorari to the United States Supreme Court on March 1, 2016. The United States Supreme Court denied the petition on April 18, 2016.

ALLEGATIONS

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

1. "Ineffective Assistance of Counsel," regarding:
 - a. "Failure to subject the case to a meaningful adversarial testing;"
 - b. "Failure at sentencing stage;
 - c. "Burden shifting;"
 - d. "Violations of Constitutional Rights;"
 - e. "Malicious prosecution;"
 - f. The defendant "suffered prejudice;"
 - g. "Suppression of evidence."

At the call of the case, counsel for Applicant clarified his allegations as follows:

1. Ineffective Assistance of Trial Counsel, in that:
 - a. Counsel was ineffective for failing to object to members of the jury pool who knew Applicant;
 - b. Counsel was ineffective for failing to object to the solicitor's improper closing argument;
 - c. Counsel was ineffective for failing to object to testimony regarding the DNA and fingerprint evidence, rendering those issues unpreserved for appeal;
 - d. Counsel was ineffective for failing to renew his objections at the close of the evidence;
 - e. Counsel was ineffective for failing to introduce evidence of Applicant's intellectual disability;
 - f. Counsel was ineffective for failing to move for a mistrial based on the solicitor's improper questions.

Therefore, this Court finds Applicant has abandoned his original allegations to the extent the allegations in the original application can be construed as separate issues from those contained in the amendment. Those allegations are waived and are hereby denied and dismissed with prejudice.



SUMMARY OF FACTS ADDUCED AT TRIAL

The victim in this case was sixty-nine-year-old Willie Mae Hayes. On August 25, 2008, family members received a call notifying them Ms. Hayes had not shown up for work, which was very unusual. Worried, her family went to her home to check on her, but Ms. Hayes was not there. Upon inspection of the home, her brother found the back door unlocked and unsecured by the reinforced bar she usually placed on the door for added security. Tr. pp. 134-35. Ms. Hayes's daughter also noticed a broken vase, then saw a television was missing. Tr. pp. 139-40. Her son noticed a screen had been removed from a window and saw other evidence of disarray, specifically twisted bed linens in Ms. Hayes's bedroom. Tr. pp. 143-44. At first, the family thought perhaps Ms. Hayes had an accident but after calling the hospital, their concern increased, and they called the police. Tr. pp. 140, 144.

Upon arrival, officers found a point of entry in the kitchen and blood in the bedroom on the mattress and surrounding areas. Tr. pp. 205, 214-18, 363-64. Upon further investigation, officers located Ms. Hayes's car parked in the general area near the home. Tr. pp. 269-70. They also found a bag of pillows close to the home which tested presumptively positive for blood. Tr. pp. 214, 377-78. Additional investigation in the area led police to request Applicant come by and speak with the officers. Officers left messages at Applicant's home, with his father, and put the "word on the street." Tr. pp. 535-37, 654-60.

Applicant voluntarily went to the station to speak with investigating officers. Officers Drayton and Godwin were the lead investigators; however, they were busy interviewing another individual when Applicant arrived. Officer Compton therefore sat with Applicant in the meantime. Applicant chatted with Compton, had a snack and drink, and even took a nap while waiting. Compton testified the conversation was cordial, pleasant, and intelligent. Tr. pp. 37-40,

60-61, 444-49. Several hours (perhaps as many as eight hours) passed before Compton became "curious" and asked Applicant if, given that the other detectives were still busy, Applicant would talk to him instead. Tr. pp. 40-41, 54-55. Applicant agreed to talk, and Compton read Applicant his Miranda rights. Tr. p. 41. Compton testified he read each one, "one at a time," and advised Applicant to "listen up carefully." Tr. pp. 41-42. Compton asked if Applicant understood his rights, and Applicant indicated he did. Compton testified he had no indication Applicant did not or could not understand. Compton further explained he had experience with individuals who could not understand and did not see any "red flags" or cause to stop the interview. Tr. pp. 45-46, 452-54.

During his conversation with Compton, Applicant initially denied involvement, then admitted he was in the home. He also agreed to show investigators where the body was dumped. He indicated Anthony Wilson, known to Applicant as "Amp," told him where the body was located. Tr. pp. 47-50, 84, 455-59, 497-501. Another officer, Officer Raines, came in to Compton's office during the questioning. Raines also testified in pre-trial that he "heard nothing that would lead [him] to think that [Applicant] was not understanding what was being said." Tr. p. 67.

After leading officers to Ms. Hayes's body and returning to the station, Applicant gave another statement, which was recorded. He was re-read his Miranda rights, again appeared to understand his rights, and no threats were made or coercive tactics used. Tr. pp. 77 -83, 547-50, 673, 681-85. In this second statement, Applicant again admitted to being in the home but blamed Wilson for the murder. However, Applicant admitted taking part in driving the car afterwards and dumping the body. Tr. pp. 686. Applicant also took officers to his father's home and showed them the hidden electronics taken from Ms. Hayes's home. Tr. pp. 79-80, 83-84, 556-60, 673-75.



Forensic testing determined the blood on the mattress, the bed rail, the bedroom curtains, and the pillows belonged to Ms. Hayes. Tr. pp. 312-13. Additional forensic testing matched samples from the steering wheel in the car to Applicant with “[t]he probability of randomly selecting an unrelated individual having a [matching] DNA profile” as one in five point one quadrillion. Tr. p. 303. Applicant’s fingerprints were also found on the driver’s side area of Ms. Hayes’s car. Tr. pp. 417.

Applicant’s co-defendants Anthony Wilson and Gregory Montgomery testified at trial. Wilson testified he was fourteen-years old in August 2008. He testified on August 25, 2008, he was sitting in a swing in Rashawn Bailey’s yard next to Ms. Hayes’s home when Applicant asked him to “walk with him,” and they went next door to Ms. Hayes’s house. Applicant asked Wilson, who was small, to climb through a window to gain entry to the house. Wilson opened the door for Applicant and Bailey. Tr. pp. 584, 589-94.

According to Wilson, at one point, he looked in the bedroom and saw Applicant sitting on top of Ms. Hayes in her bed. Applicant had a pillow over Ms. Hayes, and Applicant instructed Wilson to enter the room. Applicant then pulled a pocketknife open and gave it to Wilson, telling him to stab Ms. Hayes. Wilson, at Applicant’s repeated urging, stabbed Ms. Hayes once and ran outside. Tr. pp. 596-98. Applicant came out and asked for Wilson’s help in disposing of the body. Wilson and Applicant carried the body out of the house, wrapped in a sheet, and transported it in Ms. Hayes’s car out into the country. Tr. pp. 600-01. Wilson and Applicant eventually placed the body in a ditch by the side of the road. Applicant was concerned the body could be seen, and Wilson attempted to cover the body with twigs and leaves. They then returned to Ms. Hayes’s home and met up with Montgomery, who reentered the home with Wilson and Applicant. Tr. pp. 602-03.



Montgomery testified similarly in that he saw Applicant and Wilson in Ms. Hayes's car as they returned. He asked Applicant, who was driving, where he had gotten the car. Applicant replied "he had pulled a lick, which means he had committed a robbery." Montgomery also testified he asked for additional details, but Applicant said Montgomery would be scared if Applicant told him, so Montgomery determined he did not want to know and did not press Applicant further. Tr. pp. 631-33. Montgomery then took a ride around the block with Applicant and Wilson in Ms. Hayes's car. After they returned, Applicant asked Montgomery if he would like to "pull a lick." The group exited the car and went into Ms. Hayes's home. Montgomery testified he entered the home with Applicant and Wilson. He noted the back door was already open. Tr. pp. 633-34. Montgomery could not find anything he "wanted like a TV, VCR, and stuff like that," so he went to the kitchen and took a pack of chicken and Kool-Aid. Tr. p. 635.

Ms. Hayes was stabbed seven times along the front of her neck, with the deepest wound measuring 3.8 inches. Her cause of death was determined to be "stab wounds to her neck with the disruption of the jugular vein." Tr. pp. 388-89. Defense counsel argued at trial, consistent with Applicant's final statement, that Applicant was at Ms. Hayes's home, but did not stab Ms. Hayes. Tr. pp. 765-72. Nonetheless, the jury convicted Applicant as indicted on all charges. Tr. pp. 804-05.

SUMMARY OF TESTIMONY AT EVIDENTIARY HEARING

Applicant testified he was in the Florence County Detention Center for four years prior to trial, and he had two different attorneys before Counsel was appointed to his case. According to Applicant, he and Counsel did not talk about the statements given by his codefendants, the DNA testing/evidence, or the fingerprint evidence. Applicant testified he and Counsel also did not discuss the statements he gave to law enforcement himself, and he claimed he did not understand

the waiver of rights form he signed. Further, Applicant testified he was sent for an evaluation at the Department of Mental Health, and he told Counsel he was in special education classes. However, Applicant testified he and Counsel did not discuss the results of the evaluation.

Applicant also testified Counsel told him Counsel would talk to the victim's family and the Solicitor to see if they could negotiate a plea agreement for a thirty-year sentence, but the State was only willing to offer life. Applicant testified the State originally gave notice of intent to seek the death penalty, which he discussed briefly with Counsel, but he did not fully understand the information Counsel conveyed. Applicant testified he was unable to provide any useful information to Counsel about his case. Finally, Applicant testified he knew several members of the jury pool who were selected for his case, which he told Counsel, but Counsel did not take any action.

Counsel testified he was originally appointed to the case because he is certified as "first chair" counsel in death penalty cases, and the State had, at one time, given notice of intent to seek the death penalty in Applicant's case. Counsel testified he had tried four or five death penalty cases, some as first chair and some as second chair. Counsel testified he actively prepared the case in expectation of the State seeking the death penalty, including retaining a mitigation expert on mental health. Counsel also testified he made a motion to require the State to withdraw the death penalty notice after Applicant was evaluated and found to have an intellectual disability, and the State thereafter conceded he was not eligible on that basis. However, Counsel could not convince the State to offer a better plea agreement than life without parole.

Counsel testified he discussed both of Applicant's statements with Applicant and challenged the propriety of their admission in a pre-trial Jackson v. Denno hearing. Counsel



testified he retained an expert who testified regarding Applicant's ability, or lack thereof, to give a voluntary statement. Counsel further testified he made similar motions regarding whether Applicant could understand what he was consenting to in order to voluntarily give his fingerprints and a DNA samples, but he felt those motions would be harder to win, and the State would be able to use the DNA and fingerprints even if Applicant's statements were suppressed. Counsel testified, in the end, his motions were all denied. Counsel also testified he investigated the circumstances of the search of Applicant's father's home and went to view the crawl space where the stolen items were recovered. According to Counsel, Applicant's father (the homeowner) consented to the search, and the items were found in an area where Applicant did not have a reasonable expectation of privacy.

Counsel testified he objected to the admission of all of this evidence at trial and renewed his motions at the appropriate times. For example, Counsel pointed out where he objected to the admission of the reports of the DNA and fingerprint analyses. See Tr. p. 240. Counsel also explained he moved for a direct verdict and renewed all of his previous motions at the close of the State's case, and because he did not introduce any further evidence, he did not believe he needed to object or renew those motions again when the defense rested. Counsel testified he objected throughout the State's examination of witnesses, but he did not consider making a motion for a mistrial based on the cumulative effect of the State's allegedly improper questioning because he did not believe it rose to that level and because some objections were overruled. Finally, Counsel testified he did not object to the Solicitor's comment during closing arguments that there was no way to know which stab wound actually killed the victim because he did not believe that statements was objectionable as a mischaracterization of the pathologist's testimony. Counsel explained he interpreted the comment as the Solicitor merely pointing out that there was



no way to determine which of the seven wounds was the fatal wound, chronologically, and the State's theory was that Wilson inflicted the first wound, but Applicant inflicted the remaining six. Counsel indicated this information was presented to the jury through Wilson's trial testimony and previous statement to police. Counsel further explained he does not always object during closing because it can call more attention to an issue and because it is often difficult to remember exactly what is said throughout a long trial.

Counsel further testified it was difficult to come up with a viable defense in this case, and his primary focus was on preventing Applicant from receiving the death penalty. Counsel testified once that was off the table, he focused on trying to create reasonable doubt by arguing the codefendants were biased, and Applicant was merely present at the scene but did not stab the victim. Counsel further explained he decided not to call the expert who testified during the Denno hearing in front of the jury because he did not think the jury would find Applicant's statement involuntary, and, because he had so little else to work with, he felt it was important to retain the last argument to the jury.

Finally, Counsel testified Applicant never indicated he knew any of the members of the larger jury pool or the individual members of Applicant's jury. Counsel explained his practice is to discuss with his clients whether or not to strike each juror as the jurors stand because he wants his clients' input. According to Counsel, he and Applicant would have decided together whether to accept or strike each juror, and Applicant never told him he had an objection to any of the jurors.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record and has heard the testimony at the PCR hearing. 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).

Applicant alleges he received ineffective assistance of counsel. In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, 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. at 443, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, the court measures an attorney’s performance by its “reasonableness under professional norms.” Id. (quoting Strickland, 466 U.S. at 688 (1984)). 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.” Id. at 117-18, 386 S.E.2d at 625.



Further, the standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 668.

1. Failure to object to members of the jury pool who allegedly knew Applicant

As noted above, where an applicant alleges ineffective assistance of counsel as a ground for relief, he must prove his trial counsel was deficient, and "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." Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

As to the issue of whether Counsel was ineffective for failing to object to members of the jury pool who knew Applicant, this Court finds Counsel was not deficient nor was Applicant prejudiced by Counsel's representation. This Court finds Counsel's testimony on this issue to be credible, while also finding Applicant's testimony not credible. Counsel explained his practice is to discuss with his client whether or not to strike each juror as the jurors stand because he wants his clients' input, and he and Applicant would have made the decision whether to accept or strike each juror together. Counsel testified Applicant never informed him he knew any of the members of the larger jury pool or the individual members of Applicant's jury, and therefore, the Court finds Counsel was not deficient because he was not put on notice of the need to take any action. Additionally, Applicant testified only that he knew some of the jurors, but he failed to offer any evidence whatsoever of how that fact prejudiced him. Accordingly, this Court finds Applicant has wholly failed to establish prejudice.



Because Applicant has not met his burden as to either prong of the Strickland test, this allegation shall be denied and dismissed with prejudice.

2. Failure to object to the Solicitor's closing argument

Applicant alleges the Solicitor's statement in closing argument that Ms. Hayes "just died from the all the stab wounds" was a misstatement of the evidence to which Counsel should have objected. However, this Court finds, when viewed in context of the entire argument on the matter, it is clear Solicitor Clements was referring to testimony in the record in which the pathologist testified she could not say for certain which stab wound was the fatal wound, chronologically, and therefore, the jury could reasonably conclude it was one of the seven wounds the State asserted Applicant was responsible for inflicting, either personally or by instructing Wilson to stab her.

In closing, the Solicitor argued, Dr. Presnell "said she was stabbed seven times. And she told Mr. Jupertinger, 'I can't say which stab wound actually killed her.' You know, because there's no way to say this stab wound was first, this was second, this was third. She just died from all the stab wounds." Tr. p. 739, line 23 – p. 740, line 3. The Solicitor continued, "Well, the only other person that we know of that was in that room was David Johnson, so if Anthony was telling the truth [that] he stabbed her one time. . . either David Johnson had to get somebody else to come in the room and finish stabbing her or David Johnson had to finish stabbing her himself. And that's the main fact I think you can infer from the circumstantial evidence. . . ." Tr. p. 340, lines 3-6, 17-22.

As mentioned above, during her direct examination, Dr. Presnell testified Ms. Hayes sustained "seven stab wounds across the front of her neck," one of which "disrupted the jugular vein." Tr. p. 338-39. Presnell also testified, after considering all the injuries, she "determined

[Ms. Hayes'] cause of death was due to the stab wound, the stab wounds to her neck with disruption of the jugular vein." Tr. p. 339. In a follow up question, Dr. Presnell stated more specifically the stab wound to the jugular vein was the fatal injury. However, she also explicitly testified she could not determine "*chronologically* which wound occurred first." Tr. p. 339 (emphasis added).

It is well settled that "the solicitor must confine his arguments to the evidence in the record and its reasonable inferences." State v. Tucker, 324 S.C. 155, 169, 478 S.E.2d 260, 267 (1996). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

In the context of the full argument made by Solicitor Clements, his statement, "she just died from all the stab wounds" is clearly referring to the uncertainty regarding the order in which the wounds were inflicted. Given Presnell's testimony that Ms. Hayes died from "the stab wounds to her neck," in conjunction with the testimony that she could not identify whether the wound to the jugular was the first inflicted or the last or any of those in between, the Solicitor's comment in closing was supported by the record and the reasonable inferences to be drawn from



it. Therefore, this Court finds the Solicitor's comment was unobjectionable, as Counsel determined, and Counsel cannot be deficient for failing to object to it.

In addition, the Court finds even if the comment was objectionable, Applicant suffered no prejudice. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. The burden of proof is on [Applicant] to show prejudice." Tucker, 324 S.C. at 169, 478 S.E.2d at 267-68 (internal citations omitted). "In evaluating prejudice, a number of factors should be considered: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." United States v. Mason, 344 F. App'x 851, 854 (4th Cir. 2009). When making this determination, courts "review the 'alleged impropriety of argument in the context of the entire record.'" State v. Liberte, 336 S.C. 648, 521 S.E.2d 744 (1999) (quoting Brown v. State, 383 S.C. 506 (2009)).

As discussed above, this Court finds Solicitor Clements' comment was not misleading when considered in the context of the entire record and within the closing argument itself, as it referred to the uncertainty with regard to the order of the wounds, and Dr. Presnell's statement Ms. Hayes died from the stab wounds, in the plural. Additionally, this is the only portion of the Solicitor's closing Applicant alleges is improper. The entirety of the Solicitor's closing, however, covers approximately thirty pages of the trial transcript. Tr. pp. 728-58. The comment



at issue is an isolated statement within the context of a lengthy, and generally unobjectionable, closing argument. Further, immediately prior to beginning closing arguments, the trial judge instructed the jury, as he did before to opening statements, that “what the lawyers tell you in their closing arguments is. . . not in evidence,” and the evidence in the case for their consideration was limited to “the testimony of witnesses that [the jury] heard from during the course of the week and then any exhibits which came in during the course of the trial.” Tr. pp. 727-28.

Both of Applicant’s statements to police officers placed him at the home as a participant in the robbery and in the room when the stabbing occurred. In his first, unrecorded statement to police, Applicant admitted “he cut her throat.” Tr. p. 459. In his recorded statement, Applicant admitted he entered the house knowing Ms. Hayes was there and the group planned to rob her, though he denied stabbing Ms. Hayes and claimed he merely watched as Anthony did so. However, Applicant’s second version of events was contested by the State, and Wilson testified at trial Applicant actually gave him the knife and encouraged him to stab Ms. Hayes. Tr. p. 596-98.

At a minimum, by Applicant’s own admission, he knowingly burglarized Ms. Hayes’s home, at night, and witnessed the stabbing. Additionally, Applicant’s fingerprints were found in the driver’s compartment of her car and items missing from her home were recovered at Applicant’s home. Tr. pp. 417, 556-58. There was also compelling testimony by a codefendant from which the jury could reasonably infer Applicant inflicted at least some of the stab wounds himself and find him guilty as a principal. See State v. Zeigler, 364 S.C. 94, 103, 107, 610 S.E.2d 859, 864, 866 (Ct. App. 2005) (“To be guilty as an aider or abettor, the participant must have knowledge of the principal’s criminal conduct. . . . Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the



killing.”). See also State v. MacFarlane, 188 Conn. 542, 450 A.2d 374 (1982) (finding trial court properly instructed jury it could find defendant guilty of felony murder even if they found the other participant in the burglary actually caused the victim’s death).

The State presented alternate theories of Applicant’s liability as both a principal and as an accomplice under the hand of one, hand of all theory. Under “the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” State v. Harry, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017) (internal quotations omitted). This Court finds there was overwhelming evidence of Applicant’s guilt at least as an accomplice, if not a principal. Accordingly, this Court also finds any error in the Solicitor’s closing argument was harmless, and Applicant was not prejudiced by Counsel’s alleged deficiency. See State v. Collins, 409 S.C. 524, 538, 763 S.E.2d 22, 29–30 (2014) (“Error ‘is harmless where a defendant’s guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.’” (quoting State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006)); Edmond v. State, 341 S.C. 340, 348, 534 S.E.2d 682, 686 (2000) (noting the relevant factors in a prejudice analysis “are the same ones analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt.”)).

Therefore, because Applicant has failed to prove either deficiency or prejudice, this allegation shall be denied and dismissed with prejudice.

3. Failure to object to testimony regarding the DNA and fingerprint evidence; failure to renew objections at the close of the evidence

Applicant contends Counsel was ineffective because he failed to properly object to the admission of DNA and fingerprint evidence, rendering those issues unpreserved for appeal.

Applicant also claims Counsel failed to properly renew his pre-trial and trial objections and motions at the close of all evidence. The Court finds these allegations are without merit and should be dismissed.

The Court has reviewed the appellate documents from Applicant's direct appeal. On appeal, Applicant raised several issues, including whether the trial court erred when it found his statement to be voluntary and whether the trial court erred in admitting the DNA and fingerprint evidence. The Court of Appeals opinion in this case addresses both issues on the merits and makes no mention of doing so despite the issues being unpreserved. By implication then, the Court of Appeals found the issues preserved, and this Court finds Counsel was therefore not deficient. Additionally, the Court of Appeals fully reviewed the trial court's decision to admit this evidence and affirmed its decision to do so. Applicant therefore received his "full bite at the apple" as to these issues, and Applicant was not prejudiced by any alleged deficiency. See State v. Johnson, Op. No. 2014-UP-167 (S.C. Ct. App. filed April 9, 2014) (finding even with the acknowledgment Johnson may have had cognitive deficits, there was evidence to support the admission of his statement as well as the DNA and fingerprint evidence).

Because Applicant has failed to meet his burden as to either prong of the Strickland test, these allegations shall be denied and dismissed with prejudice.

4. Failure to introduce evidence of Applicant's intellectual disability

Applicant contends Counsel was ineffective for failing to introduce evidence of Applicant's intellectual disability during the defense case. For the reason articulated below, the Court finds this allegation is without merit and should be dismissed.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made

all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include ‘which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.’ What motions to file and ‘whether to put on evidence so as to preserve the final word in closing argument’ are also strategic and tactical decisions to be made by trial counsel.” Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted).

Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). Here, Counsel credibly testified he chose not to call expert witness to testify as to Applicant’s intellectual disability before the jury, even though he did offer such testimony during the pre-trial Jackson v. Denno hearing on the voluntariness of Applicant’s statement. Counsel explained he did not believe the



jury was likely to find Applicant's statement had been given involuntarily and putting up the witness would have caused the defense to lose the last argument to the jury. Counsel explained because of the difficulty in formulating a viable defense other than arguing reasonable doubt, he felt it was particularly important to retain the last argument in this case. This Court finds this is a reasonable trial strategy clearly based on Counsel's professional assessment of the case, and therefore, this Court finds Counsel was not deficient in declining to call the expert witness.

Further, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Applicant did not call any witnesses or present any evidence to substantiate the very defense he alleges he was unable to present at trial due to Counsel's deficiency. Accordingly, Applicant has failed to meet his burden of proving he was prejudiced by Counsel's performance at trial. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."). This Court will not second guess Counsel's trial tactics, especially in light of the Court's finding Applicant has not met his burden of proving he was prejudiced by such tactics.

Accordingly, because Applicant has failed to prove either deficiency or prejudice, this allegation shall be denied and dismissed with prejudice.

5. Failure to move for a mistrial based on the solicitor's improper questions

Applicant next alleges Counsel was ineffective for failing to move for a mistrial based on the cumulative effect of improper questions from the Solicitor. Applicant contends Counsel objected throughout trial to the State's questioning on the basis of leading and hearsay, but Counsel should have also moved for a mistrial based on the cumulative prejudicial effect of the objectionable questioning.

Here, Applicant concedes Counsel made appropriate objections throughout the trial. His only contention is that because Counsel repeatedly made the same two objections – to elicitation of hearsay and leading questioning – Counsel should have also made a mistrial based on the prejudicial effect of the State's allegedly improper questions. Had the motion for a mistrial been made, the trial court's decision would have been reviewed under an abuse of discretion standard on appeal. "The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amount to an error of law. . . . In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-28 (2000) (internal citations omitted). This Court finds Applicant has failed to meet this high standard. This Court has reviewed the trial record and notes several of Counsel's objections were overruled or were sustained before any answer was given by the witness, thus no prejudice resulted to Applicant. See, e.g., Tr. pp. 210-11, 331-32, 465, 499, 578, 635, 640. Further, because "[t]he power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes," this Court finds it is not reasonably likely Applicant would have prevailed on this on appeal had such a motion been made. State v. Kirby, 269 S.C. 25, 28-29, 236 S.E.2d 33, 34-35 (1977).



Because Counsel was not deficient, nor was Applicant prejudiced by Counsel's decision to move for a mistrial in this situation, this allegation shall 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. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

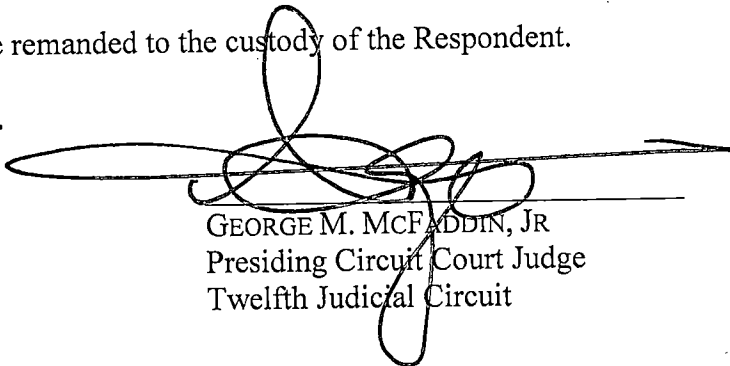
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR 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. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



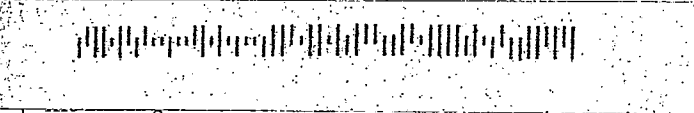
GEORGE M. MCFADDIN, JR
Presiding Circuit Court Judge
Twelfth Judicial Circuit

May 8, 2019

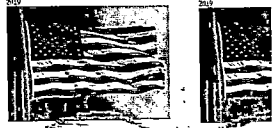
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DONIS PAUL OS O'HARA
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FLORENCE COUNTY, SC

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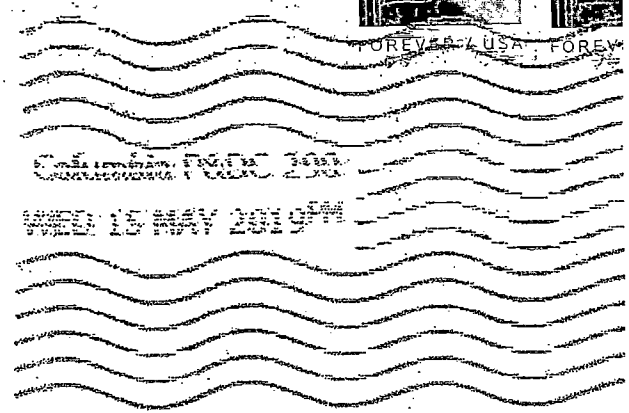
CERTIFIED: A TRUE COPY
Don Paul O'Hara
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.



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