THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney C. Pope, Circuit Court Judge

Case No. 2015-CP-02-02458

William H. McCladdie #364614.....Applicant/Appellant

v.

State of South Carolina.....Respondent/Respondent

NOTICE OF APPEAL

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal entered in this case. Appellant received written notice of the entry of the Order of Dismissal on March 16, 2020. A copy of the Order of Dismissal appealed from is attached.

April 15, 2020

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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
William H. McCladdie, #364614, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-02-02458 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed on October 19, 2015, by William McCladdie (Applicant). An evidentiary hearing into the matter was convened on Tuesday, January 21, 2020, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Arthur Aiken, Esquire (PCR Counsel). Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Michael McMillian, former Assistant Public Defender of the Second Circuit Public Defender's Office (Trial Counsel), also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

FACTUAL BACKGROUND

Six weeks before the crime occurred, Margaret McDaniel (McDaniel) passed away. (Trial Tr. 165.) In her will, McDaniel passed the title to her home to her sister, Evelyn Clark (Clark) (Trial Tr. 195-196.) The water and electricity were transferred into Clark's name (Trial Tr.170) and remained on and running at the house, and the yard continued to be cut and maintained after Clark took possession of the home. (Trial Tr. 165-166.) Although Clark had not yet moved into

the home on at least one occasion before the crime, Clark stayed the night at the house. (Trial Tr. 166-167; 170; 196.)

On February 20, 2015 at 11:55 p.m., Officer James Michael Hess (Officer Hess) of the Jackson Police Department responded to a call about an unauthorized vehicle parked at Clark's house. (Trial Tr. 99.) Upon arrival to the residence, Officer Hess noticed a vehicle parked in the driveway of the home with a warm engine, as if it had been freshly parked. (Trial Tr. 100.) He checked around the house for signs of forced entry and noticed a window that had been forced open. (Trial Tr. 101.) After calling for backup, Officer Hess parked his patrol car across the driveway so that the vehicle could not leave. (Trial Tr. 101.) When backup arrived, another officer spotted Applicant, who was found hiding in the bushes in the backyard of the home. (Trial Tr. 103-104.) The officers handcuffed and stood Applicant up, and beneath his body they found a crowbar. (Trial Tr. 104.) Officer Hess testified the house had been burglarized and the crowbar or "pry bar" lined up to the markings of the door that had been pried open. (Trial Tr. 106.)

In the pat-down and search incident to arrest of Applicant, the officers found in his pockets a flashlight, a pocketknife, and a key to the vehicle that was parked in the driveway of the house. (Trial Tr. 106-107.)[1] Upon an inventory search of the vehicle, officers found a wallet containing Applicant's driver's license, Social Security card, and credit card, as well as a butcher knife taken from the kitchen of the home, mail sent to the address of the burglarized home, and a checkbook that came from inside the home with the same address. (Trial Tr. 113.)

At trial, the State presented testimony from the investigating officers, as well as Clark, the owner of the home, and her grandson who called and reported the burglary to law enforcement. At

[1] The evidence showed the vehicle parked in the driveway was stolen from another property. Applicant was convicted at the conclusion of this trial to possession of a stolen vehicle.

the close of the State's evidence, Applicant moved for a directed verdict, arguing that the State failed to prove all the elements of first degree burglary because Clark did not live in the house at the time of the crime, so it was not classified as a dwelling. (Trial Tr. 201-208.) The trial court denied the motion, ruling the State presented sufficient evidence to allow a jury to determine the house was a dwelling under the statute. (Trial Tr. 211). The trial court ruled:

> [T]he person who owned the house had died, she has left it to Ms. Clark in her will, so Ms. Clark is at least the de facto owner of the house. The testimony was uncontradicted that she had spent at least one night in the house subsequent to her sister's death, which had occurred about six months [sic] prior to the burglary. The testimony was that she is, quote, working on it, unquote, about planning to move into the house at [redacted] Foreman Street. She said it's a slow process, I know, and there's some hang-ups but I want to be there; keep thinking maybe I'll feel her presence.
>
> She's maintained at her own expense the electricity and water since her sister's death, she pays for those bills. She maintains the yard through the help of a neighbor who continues to cut it and keeps it maintained. She maintains and continues to get mail, she or her sister, there at that house, checks on the mail daily. She's stayed there one night since the sister's death. She maintains personal items of clothes at [redacted] Foreman Street. In response to cross-examination, she admitted that she had personal belongings in that house and she is still considering moving into the house.

(Trial Tr. 213.)

PROCEDURAL HISTORY AND ALLEGATIONS RAISED

Applicant was indicted during the July 2015 term of the Aiken County Grand Jury for first-degree burglary (2015-GS-02-01103), possession of tools capable of being used in crime (2015-GS-02-0104), and possession of a stolen vehicle (2015-GS-02-01105). Trial Counsel represented Applicant. Cassie Hall (Hall) and Jay Slocum (Slocum) of the Second Circuit Solicitors Office prosecuted the case. On July 8, 2015, Applicant proceeded to a jury trial before the Honorable Doyet A. Early, III, circuit court judge. The jury found Applicant guilty as indicted and Judge Early sentenced Applicant to a fifteen year term of imprisonment for first-degree burglary, a five

year term of imprisonment for possession of tools capable of being used in a crime, and a ten year term of imprisonment for possession of a stolen vehicle with all sentences to run concurrently.

Applicant subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015.

On October 19, 2015, Applicant filed an application for post-conviction relief alleging the following grounds:

1. Ineffective assistance of counsel
    a. Failed to file appeal in time.
2. Subject matter jurisdiction
    a. Sham indictments
3. Illegal sentence
    a. Sentence exceeds and or does not coincide with charge.

Respondent made its return on December 18, 2015, and requested that an evidentiary hearing be held.

Respondent subsequently consented to Applicant's request for a belated review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974), and an order granting Applicant a *White* review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, and filed on August 22, 2016. No hearing was held.

Applicant subsequently filed a notice of appeal. Applicant then filed a Brief of Applicant pursuant to *White* and a petition for writ of certiorari. Respondent made its return to the petition of writ of certiorari and a Brief of Respondent pursuant to *White* on July 26, 2017. The case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(j) SCACR. The South Carolina Court of Appeals granted certiorari on September 24, 2018, and Applicant timely filed a brief on October 5, 2018.

On January 17, 2019, Respondent, in lieu of filing a Brief of Respondent, filed a motion for remand requesting the matter be remanded back to the circuit court for a hearing to determine if Applicant knowingly, intelligently and voluntarily waived his other post-conviction relief claims. On March 21, 2019, the Court of Appeals issued an Order remanding Applicant's post-conviction relief case to the Aiken County circuit court in order to conduct a hearing to determine:

1) Whether [Applicant] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review, and

2) Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

On May 16, 2019, Applicant had a hearing before the Honorable J. Cordell Maddox, circuit court judge. During that hearing, Applicant testified he did not intend to waive his post-conviction relief allegations when he signed the consent order granting him belated appellate review. At the conclusion of that hearing, Judge Maddox granted Applicant a full evidentiary hearing on his previously filed post-conviction relief application.

On September 21, 2019, Applicant filed an amended PCR application asserting the following claims:

(1) Ineffective Assistance of Counsel

a. "In his preliminary jury instructions (Tr. P. 50) and in his final jury instructions (Tr. P. 250) the trial judge emphasized the truth-seeking function of the jury. Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review...."
b. "Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions."
c. "Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property."
d. "Trial Counsel actually elicited testimony concerning missing property.
e. "Trial Counsel failed to object to hearsay from a witness regarding what another witness told her."
f. "Trial counsel did not object to a police officer testifying that the pry marks found on a door were "lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony."

g. "Trial Counsel did not request an instruction on direct and circumstantial evidence and did not join in the state's request."

At the commencement of the trial, Applicant indicated they would also be going forward on an allegation of failing to object to "sham indictments."

SUMMARY OF PCR TESTIMONY

Applicant's Testimony

Applicant testified he understood that he would start his case over if he were to be granted PCR relief. Applicant testified he read his indictments and believed the indictments were not legitimate because one of the indictments was dated July 2, 2015, and there was not a term of court held on July 2, 2015. Applicant testified he had contacted Aiken County and he believed that no one was in court that day, and therefore, the Grand Jury could not have met that day.

Trial Counsel's Testimony

Trial Counsel testified he has been admitted to practice law since 2012 and has practiced exclusively in criminal law. Trial Counsel testified Applicant's charges arose out of a car theft and burglary. Trial Counsel testified Applicant was found in the bushes on the edge of the property line of a home that was burglarized, and Applicant was found laying on top of a crowbar. Trial Counsel also testified items that belonged to Applicant were found inside of a stolen car that was backed in to the home that was burglarized.

Trial Counsel testified he discussed elements and defenses with Applicant extensively. Trial Counsel testified he did not think going to trial was a good idea, but Applicant wanted to pursue a trial. Trial Counsel testified he negotiated with the solicitor's office to get Applicant a guilty plea offer, but Applicant still wanted to take his case to trial. Trial Counsel testified he thought the best trial strategy was to prevent the jury from viewing Applicant's house as a dwelling due to the fact that the house was vacant at the time of the crime.

Trial Counsel testified he reviewed Applicant's indictments and did not see anything wrong with them. Trial Counsel testified he looked at the calendar and the July 2, 2015, date on the indictments was consistent with the fact that the Grand Jury typically meets on the Thursday before the term of court and the next week was a term of court. Trial Counsel testified he discussed this with Applicant.

After reviewing pages 50 and 250 of the jury trial transcript. Trial Counsel testified he did not believe the comments were error because the mention of the truth does not follow the "truth seeking cases" exactly, as the judge merely made a mention of the truth during his initial and final jury instructions.

PCR counsel then showed Trial Counsel the following excerpt from the trial transcript: "he comes to me and says, Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there." (Trial Tr. 99). Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted, thus it was questionable as to whether the comment was hearsay. Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark (Doug), was going to testify at the hearing to the same facts.

PCR Counsel then showed Trial Counsel a portion of the trial transcript in which the State introduced State's Exhibit 43, a picture of a clock that belonged to the owner of the home; the same clock that was found in Applicant's vehicle on the night of the burglary. Regarding Exhibit 43, Officer Hess, testified, "This is the clock that [Doug] advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle." (Trial Tr. 129). Regarding this testimony, Trial Counsel testified he did not believe the statement was offered to prove the truth of the matter asserted, so it was also questionable as to whether this

statement was actually hearsay. Trial Counsel testified that, regardless of whether the statement was offered to prove the truth of the matter asserted, he made a strategic decision not to object to the testimony because Clark was on the State's witness list and was going to testify about the clock that was missing from her home. Trial Counsel also stated he did not object to keep the trial "moving along," so as to not exhaust the jury.

PCR Counsel then questioned Trial Counsel regarding the testimony of Officer Hess:

Trial Counsel: Did you notice the missing dishwasher?

Officer Hess: I didn't [know], sir, not until prior.

Trial Counsel: I'm sorry?

Officer Hess: Not until prior to.

Trial Counsel: Not until prior to....

Officer Hess: Ms. Clark coming and telling me other things that were missing.

Trial Counsel: Okay. So there was a missing washer and a missing dry[er]?

Officer Hess: According to Ms. Clark, yes, sir.

(Trial Tr. 146).

Regarding the above testimony, Trial Counsel testified he did not purposefully elicit this testimony, but that the testimony given was simply the answer to his question. Trial Counsel testified that, once again, Clark was going to testify at trial anyway so he did not object to that statement.

Next, PCR Counsel questioned Trial Counsel regarding the following testimony of Clark on direct examination:

> "I remember the phone rang and it was my grandson Doug. And he said, Grandma, you need to come down here, there's been a robbery at Nan's house. He called her Nan. I got dressed and started down there, and he was outside waiting for me in his truck."

(Trial Tri. 187). Regarding this testimony, Trial Counsel testified he did not object because of the way the question was phrased. Trial Counsel testified he was not expecting her to say what Doug Clark said as the question was not designed to elicit a hearsay response. Trial Counsel testified he theoretically could have objected and moved to strike the testimony, but he did not.

Next, PCR Counsel asked Trial Counsel regarding the following testimony of Officer Hess:

> Hall: Okay. State's 16?
>
> Officer Hess: This is the entrance where he – well, the pry marks itself were lining up I took the pry bar itself, went back to where the break-in was at, and lined the pry bar with it and took a picture.
>
> (Trial Tr. 122).

Trial Counsel testified he did not object because Officer Hess was describing a photo that was zoomed in so far that the tool marks and the tool clearly matched up.

Trial Counsel testified the State initially asked for a charge on direct versus circumstantial evidence, but it was missing from the jury charge. Trial Counsel testified he did not request the jury charge himself because he did not want to highlight the fact that circumstantial evidence can be just as valuable as direct evidence, as the evidence in Applicant's case was circumstantial. Trial Counsel testified he thought a direct versus circumstantial charge would make it easier for the jury to convict Applicant. On re-cross examination, Trial Counsel testified that he generally does not object each time a witness testifies to something objectionable because, among other things, frequent objecting does not look favorable to a jury.

APPLICABLE LAW

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 plea 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.

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. 668.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Aiken County Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the appellate records, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

1. *Failure to Object to "Truth" Comment in Jury Charges.*

Applicant alleges Trial Counsel was ineffective for failing to object to the following comments made during the preliminary and final jury charge:

> "As I told you earlier, you'll be the judges of the facts in this case. So it will be up to you to determine and judge the credibility or believability of the witnesses who testify in the case. You're all grown and mature and you've dealt, over you lives, with husbands, wives, children, husbands, employees, employers, friends; you know how to judge when someone is telling the truth. Please don't leave that common sense out here when you go into the room to deliberate..."

(Trial Tr. 50).

> "We're not here to punish any enemies or reward any friends. Your civic duty is to go back and consider the evidence, deliberate on the evidence, determine what testimony convinces you of its truth, apply those true facts to the law as I've given it to you to determine whether or not the State has proven their case to you beyond a reasonable doubt."

(Trial Tr. 250).

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d. 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant, but nonetheless found there was no reversible error in the charge given there because the "seek the truth" language was given in conjunction with the credibility charge, and not with either the reasonable doubt or circumstantial evidence charge.

Recently, the South Carolina Supreme Court again considered the use of "truth seeking" language by the trial court in *State v. Beaty*, 423 S.C. 26, 813 S.E.2d 502 (2018).[2] The *Beaty* Court concluded:

> [A] trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt. Although there was error here, our review of the entirety of the judge's opening comments and the entire trial record convinces us that appellant has not shown prejudice from this error sufficient to warrant reversal.

Id. The *Beaty* opinion signified the first time the Court issued a general and blanket admonishment to the bench and bar that such "truth-seeking" language should be avoided at any point during the trial, but nonetheless found a harmless error analysis applied if such charges or commentary was given by the trial court. Trial Counsel testified the judge made "a mention of the truth" during his

[2] Applicant's trial took place in 2015, well before this *Beaty* decision.

jury charges. Trial Counsel testified he did not believe the comments were error because the mention of the truth does not follow the "truth seeking" cases exactly. This Court finds Counsel's testimony as to this issue very credible.

In both *Aleksey* and *Beaty*, the South Carolina Supreme Court determined that while the trial court's use of "truth seeking" language was improper, the error was not significant enough to warrant reversal of the convictions. This Court finds the same holds true in Applicant's case. At the time of Applicant's trial in 2015, the trial court's opening charge included truth-seeking remarks that were widely-used by the bench and was similar to the approved charges as prepared by the Supreme Court and given to the bench for reference. Once again, Applicant's trial took place in 2015, well before the blanket admonishment in 2018 from *Beaty*. To find that trial counsel was constitutionally deficient for failing to object to something that was standard practice at the time of Applicant's trial and which the our appellate courts had not expressly advised the bench and bar not to use goes against the principles of *Strickland* and its progeny that counsel's actions be evaluated based on a standard of reasonableness at the time of an applicant's trial. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) ("This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law."); *see also Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . " (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

This Court finds Applicant's reliance on *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012), to argue that our Supreme Court had advised the bench to stop using truth-seeking language in 2012, is not dispositive, as the Court's admonition in *Daniels* focused on the trial court's use of language that the jury's duty was to return a verdict that is "just" or "fair", a fundamentally different scenario than Applicant's case. *See Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) ("Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim.").

Moreover, here, when "truth seeking" comments are viewed in conjunction with the record as a whole, the trial court properly advised the jury of the State's burden of proof and did not impermissibly shift the burden to Applicant. Because the jury instructions as a whole were proper, this Court finds Applicant cannot establish any resulting prejudice. *See Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001) ("In reviewing jury charges for error, we construe the court's charge as a whole in light of the evidence and issues presented at trial. If the instructions of the trial court, construed as a whole, correctly state the law, there is no reversible error. To entitle an appellant to reversal, the trial court's instructions must be not only erroneous, but also prejudicial, and the enumeration of hypercritical exceptions will not suffice to overthrow a jury's verdict." (internal citations omitted)). Moreover, the trial judge's comments were mentioned in the context of the jury's duty to evaluate the credibility of the testimony from the witnesses, not in

the context of the burden of proof, which is a key distinction emphasized in *Aleksy* and *Beaty*. *See Aleksy*, 343 at 27-29.

Additionally, Trial Counsel repeatedly and effectively reminded the jury in his closing argument that the State firmly held the burden of proof and must establish beyond a reasonable doubt that Applicant was guilty. (Trial Tr. 232-34). Based on this, in conjunction with the proper jury instructions on the State's duty to prove Applicant's guilt beyond a reasonable doubt, Applicant cannot establish deficiency of counsel or prejudice. Therefore, This Court denies and dismisses this allegation with prejudice.

2. *Failure to Object to Jury Charge/Request Circumstantial versus Direct Charge*

Applicant alleges Counsel was ineffective for failing to request a direct versus circumstantial jury charge.

The standard of review for appellate purposes is to consider jury instructions as a whole, and "if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Counsel testified he did not request the direct versus circumstantial jury instructions because he did not want to emphasize to the jury that circumstantial evidence can be just as influential as direct evidence. Trial Counsel testified he believed such charge would make it more likely for the jury to convict Applicant as the evidence in Applicant's case was circumstantial.

This Court finds Counsel's testimony on this issue very credible. As Counsel testified, he strategically decided to not request the direct versus circumstantial evidence charge because it likely would have made the jury more likely to convict Applicant because the charge would have emphasized the fact that circumstantial evidence is just as valid as direct evidence. Additionally,

this Court finds Applicant's jury charge was overall legally correct. Accordingly, Applicant has failed to show this Court how Trial Counsel was deficient.

This Court further finds Applicant failed to meet his burden to show any resulting prejudice, which requires Applicant to show this Court that an alleged deficiency regarding the jury charge changed the outcome of his case. Accordingly, this allegation is denied and dismissed with prejudice.

3. *Failure to Object to Hearsay Testimony*

In his application for post-conviction relief, Applicant alleges Trial Counsel failed to object to hearsay testimony at various points throughout his trial.

"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). Further, decisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). 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." *Abney*, 408 S.C. at 48, 757 S.E.2d at 547 (Ct. App. 2014) (Pieper, J., concurring). 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. *Id.*

3(a) Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer's suspicions

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony from Officer Hess:

> "he comes to me and says, Officer Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there." (Trial Tr. 99).

Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted so it was questionable as to whether the comment was hearsay. Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark, was going to testify at the trial to the same facts. Trial Counsel testified that he generally does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony on this issue very credible. Even assuming the comment was objectionable hearsay, Trial Counsel gave a valid strategic reason for not objecting. Trial Counsel testified he does not object to every single objectionable statement as could make his client appear unfavorable to the jury. Trial Counsel also testified he knew Doug, was going to testify to the same information provided by Officer Hess.

Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

3(b) Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property

Applicant argues that Trial Counsel was ineffective for failing to object to the following testimony of Officer Hess: "This is the clock that Mr. Clark advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle." (Trial Tr. 129).

Trial Counsel testified he did not believe the testimony was given to prove the truth of the matter asserted so it was questionable as to whether the comment was hearsay. Once again, Trial Counsel testified that regardless, he made a strategic decision to not object to this statement because the declarant, Doug Clark (Doug), was going to testify at the hearing to the same facts. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds the testimony of Trial Counsel as to this allegation very credible. Trial Counsel Trial gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement as it could have a negative effect on his clients. Additionally, as Trial Counsel noted, Doug was expected to testify at trial regarding the missing items from Clark's home, and in fact did testify at his trial regarding the clock that was taken from Clark's home. (Trial Tr. 167). Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of

Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Doug testified regarding the clock that was found in the stolen car Applicant was driving. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

3(c) Trial Counsel actually elicited testimony concerning missing property

Applicant alleges Trial Counsel was ineffective for eliciting hearsay testimony during Trial Counsel's cross-examination of Officer Hess, in which Officer Hess testified the following:

Trial Counsel: Did you notice the missing washer?

Officer Hess: I didn't [know], sir, not until prior.

Trial Counsel: I'm sorry?

Officer Hess: Not until prior to.

Trial Counsel: Not until prior to....

Officer Hess: Ms. Clark coming and telling me other things that were missing.

Trial Counsel: Okay. So there was a missing washer and a missing dry[er]?

Officer Hess : According to Ms. Clark, yes, sir.

(Trial Tr. 146).

Trial Counsel testified he did not purposefully elicit this testimony, but that the testimony given was simply the answer to his question. Trial Counsel testified that, once again, Clark, was going to testify at trial to the same information so he did not object to that statement. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony as to this allegation very credible. Trial Counsel gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement as it could have a negative effect on his clients. Additionally, as Trial Counsel noted, Clark was expected to give nearly identical testimony regarding the missing washer and dryer, and Clark did in fact testify regarding the washer and dryer. (Trial Tr. 193, 197). Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency as Clark testified to the same information regarding the missing washer and dryer. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

3(d) Trial Counsel failed to object to hearsay from a witness regarding what another witness told her

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony: "I remember the phone rang and it was my grandson Doug. And he said, Grandma, you need to come down here, there's been a robbery at Nan's house. He called her Nan. I got dressed and started down there, and he was outside waiting for me in his truck."
(Trial Tr. 187).

Trial Counsel testified he did not object because of the way the question was phrased. Trial Counsel testified he was not expecting her to say what Doug said as the question was not designed to elicit a hearsay response. Trial Counsel testified he theoretically could have objected and moved to strike, but he did not. As previously noted, Trial Counsel testified that he does not object to everything that is objectionable because it could make his client appear unfavorable to the jury.

This Court finds Trial Counsel's testimony as to this allegation very credible. Trial Counsel gave a valid strategic reason for not objecting to the testimony. Trial Counsel testified he does not object to every single objectionable statement because it could make his client appear unfavorable to the jury. Additionally, Doug testified to the same conversation and his own statements made when he told Clark about the burglary. (Trial Tr. 163). Fundamentally, the statements testified to by Clark and Doug merely articulate the basic premise of the trial - that Clark's home was burglarized - and the statements in no way implicate Applicant as the perpetrator. Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding his representation of Applicant. Applicant has also failed to establish any resulting prejudice from the alleged deficiency as Doug testified to the same conversation as Clark testified to and the statements did not implicate Applicant as the suspect of the burglary. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

4. *Trial counsel did not object to a police officer testifying that the pry marks found on a door were "lining up" with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony*

Applicant alleges Trial Counsel was ineffective for failing to object to the following testimony of Officer Hess:

> Hall: Okay. State's 16?
>
> Officer Hess: This is the entrance where he – well, the pry marks itself were lining up I took the pry bar itself, went back to where the break-in was at, and lined the pry bar with it and took a picture.
>
> (Trial Tr. 122).

Trial Counsel testified he did not object because Officer Hess was describing a photo that was zoomed in so far that the tool marks and the tool clearly matched up. This Court finds Trial Counsel's testimony on this issue very credible. This Court finds Applicant has failed to prove deficiency on behalf of Trial Counsel as he has failed to provide an expert at the evidentiary hearing showing the pry marks did not match.

Additionally, Applicant has also failed to establish any resulting prejudice from the alleged deficiency. As such, Applicant cannot meet his burden to show this Court that the outcome of his trial would have been different had Trial Counsel objected to Hess's testimony or had Trial Counsel utilized an expert witness at trial. *See* Rule 71.1(e), SCRCP (an applicant has the burden of proving the allegations in his or her application); *Caprood*, 338 S.C. at 109, 525 S.E.2d at 517 (an applicant has the burden of proving both deficiency and prejudice). *See also State v. Decker*, 275 Kan. 502, 507, 66 P.3d 915, 920 (2003) (internal citations omitted). Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Trial Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

5. *Failure to Quash "Sham Indictments"*

Applicant alleges Trial Counsel was ineffective for failing to quash his indictments. Applicant testified he read his indictments and believed the indictments were not legitimate because one of the indictments was dated July 2, 2015, and there was not a term of court held on July 2, 2015. Applicant testified he had contacted Aiken County and he believed that no one was in court that day, and therefore, the Grand Jury could not have met that day. Trial Counsel testified he reviewed Applicant's indictments and did not see anything wrong with them. Trial Counsel testified he looked at the calendar and the July 2nd date on the indictments was consistent with the

fact that the grand jury typically meets on the Thursday before the term of court. Trial Counsel testified he discussed this with Applicant.

This Court finds Trial Counsel's testimony on this issue very credible, while also finding Applicant's testimony not credible. Trial Counsel testified he reviewed Applicant's indictments and believed they were valid indictments. This Court also does not see any irregularities in the indictments that would make them invalid. Accordingly, this Court finds Applicant has failed to show how Trial Counsel was deficient in any way regarding this allegation. Applicant has also failed to establish any resulting prejudice from the alleged deficiency. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Counsel and, therefore, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief pursuant to the Uniform Post Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10 to -160. Counsel was not deficient in any manner regarding her performance before or during trial, nor was Applicant prejudiced by Counsel's representation. Accordingly, all allegations are denied and dismissed with prejudice.

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 (providing the appropriate procedure to perfect an appeal). 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. Further, 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 Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;

2. Applicant shall be remanded to the custody of SCDC.

AND IT IS SO ORDERED.

Courtney Clyburn Pope

COURTNEY CLYBURN POPE
Presiding Circuit Court Judge
Second Judicial Circuit

March 6, 2020.