THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Post Conviction Relief

Kristi F. Curtis, Circuit Court Judge

Lower Court Case No.: 2017-CP-26-05189

Carnail M. Graham #304093,...................................... Petitioner

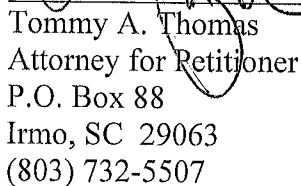
vs.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

The Appellant, Carnail M. Graham, appeals the Order of Dismissal signed by the Honorable Kristi F. Curtis, dated June 1, 2020 and filed on June 5, 2020. Appellant received written notice of entry of this order on September 22, 2020.

Respectfully submitted.



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October 20, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
Carnail M. Graham, S.C.D.C. No. 304093,	)	Case No.: 2017-CP-26-05189
Applicant,	)	
v.	)	**ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

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HORRY COUNTY
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RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed by Carnail M. Graham[1] ("Applicant") on August 14, 2017. Respondent made its return on or about November 20, 2017. The Court convened an evidentiary hearing into the matter on November 26, 2018, at the Horry County Government & Justice Center in Conway, South Carolina. Applicant was present at the hearing and represented by Tommy A. Thomas, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, David J. Canty, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Horry County Clerk of Court regarding the subject convictions, Applicant's direct appeal records (including the Record on Appeal), and the pleadings. The Court finds as follows:

[1] A/k/a "Dubba." (Tr. 202, ll. 3-19; Tr. 216, ll. 14-15; Tr. 430, ll. 17-23).

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Applicant was indicted at the July 2012 term of the Horry County Grand Jury for murder (2017-CP-26-05189). David J. Canty, Esq. represented Applicant, and Nancy Livesay, Esq., of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On October 13, 2014, Applicant proceeded to trial before the Honorable Steven H. John and a jury. The jury found Applicant guilty as indicted on October 13 ,2014. Judge John sentenced Applicant to imprisonment for a term of thirty-two years.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Lara M. Caudy, Esq., who raised the following issue:

> Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

By unpublished opinion decided October 29, 2016, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Graham, Op. No. 2016-UP-437 (S.C. Ct. App. filed Oct. 19, 2016). The Remittitur was issued on November 8, 2016.

Present Application

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

1. "Ineffective Assistance of Counsel"

By amendments provided to this court and formalized by filing December 3, 2018, Applicant supplemented the original application with the following grounds for relief:

1. "Counsel was ineffective in not properly preparing the case for trial."

2. "That Counsel was ineffective in not properly presenting Pre-Trial Motions to:"
    a. "Hire a ballistics' expert. That counsel failed to anticipate that a ballistic expert would be necessary."
    b. "Failure to locate and [subpoena] witnesses for trial."
3. "For ineffective cross-examination of the State's Star Witness, Keir Johnson."
4. "For failure to properly present at Trial the testimony of Conswella Smith. Ms. Smith was an eye witness to the two alleged perpetrators of the crime returning from the mobile home to the van. That her testimony would have been that the Applicant was not one of the individuals that she saw returning to the van."
5. "That counsel was ineffective for not properly using cell phone data and in examining the cell phone expert to show that the Applicant was not present at the scene."
6. "That Counsel was ineffective for not objecting to the Solicitor's closing argument in which she improperly bolstered the statements of Keir Johnson. She also appealed to the emotional interest of the jury rather than the factual evidence that was before the Court."
7. "That counsel was ineffective for not adequately explaining to Applicant his right to take the stand and testify."

Applicant requests relief as follows:

- "New Trial"

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed 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 records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a

just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough, 540 U.S. at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" Harrington, 562 U.S. at 111-12 (quoting Strickland, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." Id. at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

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. Strickland, 466 U.S. at 696. 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. Id. at 696-97.

1. Failure to Prepare for Trial

Applicant alleges generally that Counsel was ineffective in failing to adequately investigate and prepare the case for trial. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable

decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified he met with Counsel seven or eight times prior to trial. Applicant and Counsel reviewed all of the discovery turned over by the State, but Applicant noted that the "Fed guys" were not identified to Applicant. Applicant asked Counsel

to obtain video surveillance from a Walgreens in order to establish where he was located at a particular time, but Counsel told him such a video could be either helpful or harmful because it would establish Applicant was out and about in the community near the time of the burglary and killing. Applicant recalled that Counsel employed the services of a private investigator, and that when Applicant would ask for things, the PI would get relevant information.

Applicant denied giving Counsel any first-hand information as to who could have perpetrated the crime, but noted that his co-defendant Thomas Booker James (a/k/a "Cutty") brought up names, and that the identities of the perpetrators was "common knowledge" in the community. Applicant asserted that the home invasion and killing was perpetrated by "Bootsie" (a/k/a Keir Johnson), "Migo" (a/k/a Sha'Rah McCray a/k/a "Lil Manzy"), "110" (a/k/a Donavan Johnson), and "B-Wells." Applicant recalled that he brought the information to the attention of Counsel, but that Counsel could not put Applicant on the stand to testify to any of it because it was all based on hearsay.

Applicant emphasized that no weapon was ever traced to him. Applicant recalled that the victim, Keia Pertelle, was shot one time by a .357 caliber round, and that law enforcement recovered a rifle, a .44 revolver, and a .357 from Victim's bedroom; the .357 was hidden, wrapped in Victim's clothes. Applicant further recalled that SLED investigated the ballistics of the crime scene. Applicant asserted that he wore men's shoes sized 10 to 10 ½, whereas the door was kicked in by a size 6 ½ shoe imprint.[2] Applicant also noted there was no blood trail. Based upon this information, Applicant opined that the victim's boyfriend was the shooter, and moved Pertelle's body down the hallway. Applicant emphasized that no footprints, DNA, or anything

[2] This testimony is addressed more specifically in Section II.A.7, below.

else matched to him. Applicant also testified that his fingerprints were not found on the van, and that he was not such a genius as to be able to wipe away his own fingerprints and no others.

Applicant recalled Counsel attempted to obtain a continuance in order to retain a ballistics expert, and because witnesses were not present. Applicant also recalled Counsel also moved to sever the defendants' trials, but the motion was denied. Applicant testified Johnson ultimately received a probationary sentence after Applicant's trial and conviction. Applicant opined Johnson wanted to "save everybody else" and was afraid of the actual perpetrators.

Counsel testified he possessed some thirty-seven years of legal practice, half of which was in criminal law. Counsel concurred in Applicant's estimation that they met six or seven times. Counsel confirmed motions were filed pursuant to Rule 5, SCCrimP, and Brady, and that he received materials responsive to those motions. Counsel noted that the solicitor originally assigned to the case was Heather Von Herrmann, but that Nancy Livesay ultimately prosecuted the matter at trial. Counsel testified that he received ballistics reports on the eve of two different trial dates. The first trial date was continued. The motion for a second continuance was denied. Counsel opined that he had no need for any ballistics expert until he received the second, revised ballistics report from the prosecution.

Counsel articulated over the course of the hearing two concurrent theories of defense: (1) Applicant was not present at and thus did not participate in the home invasion and (2) the home invaders did not shoot Pertelle, but rather she was shot and killed by her boyfriend. Counsel testified he investigated the neighborhood where the shooting took place, including the trailer in which Pertelle was shot. Counsel also noted the phone tracking expert corroborated Applicant's alibi. Counsel subpoenaed Conswella Smith to testify at trial, but did not call her as a witness.[3]

[3] This subject is explored in greater detail in Section II.A.5, below.

Counsel recalled that Applicant told him he purchased diapers from a Walgreens store on the night of the killing. Counsel testified that Walgreens only retained video surveillance recordings for seventy-two hours. In any event, Counsel opined that the video, assuming it corroborated Applicant's story, would have been harmful to Applicant to the extent it demonstrated he was "out and about." Counsel believed the better strategy was to more simply argue that Applicant was not at the scene of the crime. On cross-examination, Counsel admitted he never heard or saw the video.

As to the jailhouse informants, Counsel asserted they were "self-impeaching." Counsel testified he learned about how informants and inmates would "sell stories" while incarcerated in order to enable testimony of the kind presented at trial. Counsel recalled that he felt very confident when the jury began deliberations.

Findings

The Court finds Counsel provided effective assistance. Counsel reviewed materials provided in discovery, visited the crime scene, and otherwise employed the services of a private investigator. Counsel's testimony reflects that he inquired into the existence of the Walgreen's surveillance, and that it was unavailable after the passage of seventy-two hours. In any event, Counsel articulated a reasonable strategic reason to not further pursue the video: it would provide evidence to show Applicant was "out and about" rather than at home all night on the night in question, potentially undermining one of the theories of defense. Applicant presents no evidence to this Court which, if investigated more thoroughly by Counsel, could have changed the outcome at trial. Applicant presents to this Court no surveillance video, no evidence the jailhouse informants developed their testimony from his discovery materials, no evidence of

probative value to support a theory of third-party guilt, nor anything else[4] Counsel could have obtained through additional investigation or preparation. Applicant has failed to meet his burden of proof as to either prong of Strickland. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Retain, Present Ballistics Expert

Applicant alleges Counsel was ineffective by failing to retain and present the testimony of an independent ballistics expert at trial. An applicant for post-conviction relief cannot show that he was prejudiced by counsel's failure to call a favorable expert witness to testify at trial if that witness does not later testify at the PCR evidentiary hearing or otherwise offer testimony within the rules of evidence; mere speculation as to what such testimony might be is insufficient to satisfy an applicant's burden of proof. Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d 771, 776-77 (2008) (citing Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 180-81 n.2, 810 S.E.2d 836, 839 n.2 (2018). The relevant testimony from the evidentiary hearing is summarized in the prior section.

The Court finds Applicant has failed to meet his burden as to prejudice, and need not further explore this allegation in great detail. Applicant did not present the testimony of an independent ballistics expert at trial, nor did he present what the substance of that testimony might be within the rules of evidence. Applicant offers, at best, mere speculation. Additionally, Counsel articulated a reasonable basis for not retaining an independent ballistics expert: prior to the revised report it was unnecessary, and after the revised report it was impossible after the

[4] Notwithstanding the testimony of Conswella Smith, addressed separately below.

Court denied his request for a continuance. Accordingly, Applicant's request for relief by way of this allegation is **DENIED.**

3. Failure to Locate and Subpoena Witnesses

Applicant alleges Counsel was ineffective for generally failing to locate and subpoena witnesses for trial. To whatever extent this allegation overlaps with Applicant's allegations regarding Conswella Smith, the allegations regarding Smith are addressed in Section II.A.5, below. Otherwise, the South Carolina Supreme 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 from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis original). Other than Smith, Applicant offered no witness testimony at the evidentiary hearing. Accordingly, Applicant failed to meet his burden of proof, and his request for relief by way of this allegation is **DENIED.**

4. Failure to Adequately Cross-Examine Witness Keir Johnson

Applicant alleges Counsel was ineffective in failing to adequately cross-examine witness Keir Johnson.

Trial

Keir Johnson, a/k/a "Bootsie" testified at trial to precisely what happened the night Keia Pertelle was murdered, and implicated both Applicant and James. Johnson testified that his and James' names were tattooed on Applicant's body. (Tr. 529-30). Johnson explained how Applicant called him from James' (or "Cutty's") phone and asked for a ride to buy some drugs on the night of the murder. (Tr. 531, ll. 18-19; Tr. 534-35). Johnson picked up Applicant and James, and they parked on a back road by "Splurge" and Pertelle's mobile home. (Tr. 531, ll.

19-21). Johnson testified that he spoke to Conswella Smith in the trailer park while Applicant and James went inside Splurge's trailer; when a neighbor emerged, Johnson circled the block and returned to the same spot and resumed chatting with Smith. (Tr. 531-32). Applicant and James emerged from the house, got back in Johnson's van, and he drove away at their direction. (Tr. 532, ll. 4-8). As they left the scene, a Horry County police officer "served around" to follow them; Applicant held a gun to Johnson's head and commanded him to make a getaway. (Tr. 532, ll. 9-12; Tr. 613, ll. 4-11). Johnson "hit the gas," evidently lost the police, and parked the van in "somebody's backyard[;]" all three men took off into the woods. (Tr. 532, ll. 9-15). During the getaway, Applicant expressed to his cohorts that he thought he "just killed that motherfucker" and threw two guns out the window. (Tr. 542-43; Tr. 585, ll. 1-25). Johnson recalled Applicant and James wearing blue latex gloves that they discarded in the woods, and that they did not wear masks. (Tr. 631, ll. 1-21).

Johnson later asked his girlfriend to call the police and report the van stolen, and he falsely explained to law enforcement that he was robbed of the van while at a gas station, concealing his involvement in the murder. (Tr. 543-44; Tr. 599-602). Johnson was charged with driving without permission with intention to deprive, and made bond the following day. (Tr. 544, ll. 7-12). Authorities later charged Johnson for his involvement in Pertelle's death. In addition to other charges, the murder charge remained pending at the time of Applicant's trial. (Tr. 544-47; Tr. 575-77). Johnson also admitted that he previously gave false statements to law enforcement out of fear, but that he also provided them a truthful version of events after hiring a lawyer. (Tr. 544-47; Tr. 553, ll. 3-12).

During his cross-examination of Johnson, Counsel immediately focused on Johnson's statements to detectives the morning after Pertelle was murdered, eliciting acknowledgment from

Johnson that he "lied through [his] teeth" and that it was a "[p]ack of lies[.]" (Tr. 604-05; Tr. 606, ll. 11-16). Counsel also drew contrast between Johnson's sworn claims of innocence and Johnson's intentions to admit culpability or claim innocence in the future, drawing a sustained objection but no cure. (Tr. 605-06). Pressed by Counsel, Johnson testified that he decided to be truthful only after talking to his lawyer. (Tr. 607-08). Counsel dove into the substance of Johnson's "truthful" statements to law enforcement and confronted Johnson with two inconsistencies in particular: Johnson denied knowing who 110 was even though a 110 was listed in Johnson's cell phone contacts; and Johnson denied knowing Billy Freshley even though he gave detectives Freshley's phone number and address. (Tr. 608-10; Tr. 616, ll. 2-17).

Counsel also noted that Johnson's charges for robbery and possession of a weapon during the commission of a violent crime, pending for two years, were dropped shortly after his statements to detectives inculpating Applicant and James. (Tr. 610-12). Counsel noted other, non-specific charges also resolved to Johnson's favor, to which Johnson only replied that he "got a good attorney, sir[;]" Counsel agreed. (Tr. 612, ll. 14-18). Counsel also questioned whether Johnson ever assisted law enforcement in recovering the murder weapon if, as Johnson testified, Applicant threw it out the window of the van at a known location; Johnson testified he told investigators where the gun was tossed. (Tr. 613-16). Counsel pointed out Johnson never mentioned Mike Pyatt in his statements to law enforcement, to which Johnson claimed that he did tell his lawyer and the solicitor that he had been picked up by Pyatt. (Tr. 616-17). Counsel also observed that even after inculpating Applicant and James, Johnson told investigators that he had been watching television with his girlfriend until 2 a.m., or had been sleeping at his girlfriend's house. (Tr. 617-18). However, Johnson alternately offered that he was called by Applicant at around 1:40 a.m. or 1:43 a.m., which Johnson asserted fell within the parameters of

"around 2 o'clock." (Tr. 619-20). When Counsel incorporated the phone records into his questioning regarding the timing of the first call, Johnson lost his patience as Counsel noted the call was recorded at 1 a.m. (Tr. 620-21).

Counsel then went back over Johnson's version of events in detail, with some emphasis on Johnson's indication that neither he nor Smith ever heard any gunshots. (Tr. 621-30). Applicant and James emerged from the home walking at a fast pace, but not running, such that Johnson was not suspicious. (Tr. 626-27). When Counsel touched on the detail of the "blue lights" on the patrolling police cruiser that passed and began to turn around after the men after the killing, Johnson downplayed them, explaining "I wasn't even paying them blue lights no attention. I just hit the gas when he told me to drive." (Tr. 627-28). Counsel pointed out Johnson's inconsistent claims in prior statements that he picked up Applicant and James "on Ninth Avenue" and, alternately, that he picked up Applicant at Applicant's house and was surprised to see James with him. (Tr. 630, ll. 7-13). Counsel reviewed how Johnson also varied as to precisely what it was that Applicant said during the getaway: in one statement, Johnson recalled Applicant claimed he shot a dog, and during trial Johnson recalled Applicant claimed he shot "the bitch" or alternately "that MF'er[;]" Johnson finally settled on "I think I just shot that motherfucker." (Tr. 630, ll. 14-25). Counsel also drew attention to Johnson's claim in his third statement that he had never seen Applicant with a gun before the night of the killing, and Johnson's claim in his fourth statement that Applicant was known to carry guns. (Tr. 632, ll. 5-13). Counsel probed Johnson's spotty memory against his prior statements that he had stopped to get gas on the way to the victim's home, and had purchased a cigar during that same stop. (Tr. 632, ll. 14-23). Counsel reminded Johnson that he denied Billy Freshley had nothing to do with the matter in his third statement to investigators, but that the phone records indicated Johnson

called him at 2:48 a.m., some seventeen minutes before Pertelle was killed—Johnson professed poor memory. (Tr. 633-34). Finally, Counsel drew contrast between Johnson's testimony that Applicant called him from James' cell phone, but told the detective that he was surprised that James was with Applicant when he picked them up. (Tr. 634-35).

Johnson was apparently exhausted by cross-examination. (Tr. 635, line 21).

In closing arguments, Counsel was blunt in his treatment of Johnson:

> Bootsie. I don't have to go on about Bootsie, he's a liar, he's a thief, he's a dope dealer. His story has changed over and over and over again. Every time he's confronted with a lie his story changes. Two different locations where he picked Carnail up. He said, and I thought this was remarkable, he said he was going to get himself an ounce of crack cocaine to resell, and he didn't hear any gunshots.
>
> And the two men that came walking out of the trailer, he said they were fast walking, but they weren't running. And they got in the van, and he started up the van. He had a very pleasant conversation with Conswella, they knew each other. And he drove up to Highway 548, Brown Swamp Road, he took a left, and nothing out of the ordinary, just scored some dope.
>
> Police car comes by, my client pulls out an automatic pistol, that's the first he suspected something had gone awry. Didn't hear any gunshots. I don't need to go in – I counted 192 lies that Bootsie told, and I don't – you don't want to hear 192 lies. But he's one of the rare people you can tell that they're lying because their lips are moving.

(Tr. 981, ll. 2-24). Counsel then listed the benefits Johnson had already received by virtue of his "cooperation" with the State. (Tr. 981-83). Counsel additionally observed that Johnson denied seeing the van since the killing, denied knowing Billy Freshley despite identifying Freshley's phone number and reciting Freshley's address to detectives, and failed to take law enforcement to the location of the murder weapon despite supposedly knowing of its location. (Tr. 983, ll. 9-24). Counsel offered that law enforcement never pursued Johnson's knowledge of the gun's location because they understood Johnson to be untruthful. (Tr. 983-84). Counsel briefly contemplated the thinking of the prior prosecutor, Heather von Herrmann, and again reviewed

the scope of the charges against Johnson which were dropped, and which were never pursued to start with. (Tr. 984-86). Counsel then moved on to address the jailhouse informants.

Findings

This Court finds Counsel provided effective assistance. This Court's review of the trial record reveals a cross-examination of Johnson that was exceedingly thorough. Johnson was impeached with innumerable inconsistencies between his myriad statements and his trial testimony, to the point that Johnson evidently began to lose composure while on the witness stand. Applicant fails to indicate what, if any, additional subjects could have been raised in cross-examination to further impeach Johnson, nor can this Court independently identify any. Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

5. Failure to Call Witness Conswella Smith

Applicant alleges Counsel was ineffective in failing to call Conswella Smith as a witness at trial. "[W]here evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced a trial, no prejudice results from counsel's failure to bring it forward." Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011).

Trial

Smith did not testify at trial, but was referenced in arguments and by other witnesses. Attorney Frederick summarized the substance of her expected testimony in his own opening statement. (Tr. 33-34). David Grissett, a neighbor and more distant witness to the getaway van, testified he called Smith to alert her that a suspicious van was parked outside of her house. (Tr. 123-24; Tr. 134, ll. 17-22; Tr. 138-41). Grissett also testified to hearing gunshots before men burst from the trailer and fled into the getaway van. (Tr. 127-28; Tr. 134-35; Tr. 141-42). Keir

Johnson testified he spoke with Smith, an old friend of Johnson's grandmother, outside of the trailer while waiting on Applicant and James to return from buying drugs. (Tr. 531-32; Tr. 541, ll. 7-18; Tr. 623, ll. 2-12; Tr. 623-26; Tr. 632-33). During closing arguments, both Frederick and Counsel attacked the adequacy of the State's case in part by pointing out that the State failed to call Smith as a witness, even though other witnesses confirmed she spoke to the men in the getaway van, heard the gunshots, and even pointed out to investigators where to take a cast of a shoeprint. (Tr. 325-26; Tr. 954, ll. 19-25; Tr. 974-75; Tr. 991, ll. 9-12).

PCR Evidentiary Hearing

At the evidentiary hearing, Applicant testified he brought to Counsel's attention that Conswella Smith was a potential defense witness. Applicant testified that Counsel did not put Smith up as a witness at trial because he believed the State had failed to meet its burden of proof. Applicant testified Smith's description of events was inconsistent with Johnson's, and would have helped him and would have changed the outcome of the case.

Applicant called Smith as a witness at the evidentiary hearing. Smith testified she received a phone call about a suspicious van outside of her house. Smith described her trailer as near that of Rodney McElveen's (a/k/a "Splurge") trailer where Pertelle was shot and killed. Smith walked outside, spoke to Johnson at the van, and additionally heard the voice of a person she identified as "Q." While talking to Johnson, shots rang out and the van cranked to life. Smith testified that she saw two people jump into the van, and that neither of them was Applicant. Smith could not recall speaking to Counsel, but testified she spoke to multiple detectives. Smith admitted she possessed a prior criminal record. Smith additionally admitted that she could not see the fleeing perpetrators very well, but described both of them as short and skinny. On cross, Smith testified she was outside talking to Johnson at sometime between two to

three a.m. Smith testified that the sound of gunfire nearly gave her a heart attack, and that she was scared. Smith described the neighborhood as peaceful, dark, and not very well lit.

Counsel testified he subpoenaed Smith to appear as a witness at trial, but ultimately chose not to call her for three reasons. First, Counsel was of the belief that she would not be well-received by the jury. Second, Counsel noted that Smith possessed a significant criminal record with which she could be impeached. Third, Counsel opined that the State had failed to prove its case, and that all of the objective data supported Applicant's alibi. Counsel testified her testimony would have been helpful. On cross, Counsel again testified that in retrospect, he believed he should have called Smith, but described his trial decision as a tactical one.

Findings

The Court finds Counsel provided effective assistance. First, Counsel articulated valid strategic reasoning for not calling Smith as a witness at trial, and no evidence was presented to this Court to refute or diminish his expressed concerns. Additionally, this Court notes the record corroborates Counsel's testified belief-at-the-time that the State had failed to meet its burden, and that not calling her supported his arguments to that end—Counsel argued the jury should draw favorable inferences from the absence of Smith as a witness, alongside the absence of other evidence. Second, this Court enjoyed the opportunity to closely observe Smith as a witness and weigh her credibility. The reliability of Smith's testimony was diminished significantly by the circumstances of her observations—by her own admission she could not see very well, as it was dark and unlit, and she was understandably terrified by the sound of gunfire. Other testimony at trial provided that the getaway van lacked a muffler and was very noisy. The Court finds Counsel's concerns about Smith as a witness is validated by the Court's own observations of her on the witness stand and its review of the record.

The Court *does* find credible Smith's testimony that she was prompted to go outside by a phone call, that she spoke with Johnson at the van, and that she heard the gunshots. The Court notes that Smith's testimony that she heard the gunshots is inconsistent with Johnson's bewildering and self-serving trial testimony that neither he nor Smith heard any such gunshots prior to the defendants emerging from the trailer. However, Smith's testimony to this point was merely cumulative and of little value for the purpose of impeaching Johnson as Grissett had already testified to hearing the gunshots from a location farther away from the trailer. Smith's other credible testimony is also merely cumulative to Grissett's description of what occurred.

For all of these reasons, Applicant cannot meet his burden of proof by way of this allegation, and his request for relief is **DENIED**.

6. Failure to Adequately Cross-Examine State's Cell Phone Expert

Applicant alleges Counsel was ineffective in failing to properly utilize cell phone location data to cross-examine expert witness Roger Boyell.

Trial

For context, much of Keir Johnson's testimony is summarized in detail in Section II.A.4., above. Of particular note, Johnson testified repeatedly that Applicant asked him, by way of a phone call from James' phone, to give him a ride to the scene of the killing for the purpose of purchasing drugs.

Co-defendant's counsel Frederick called Roger L. Boyell, an electronics engineer qualified as an expert witness in the field of "electronic communications, specifically cell phone tracking." (Tr. 803-12, quoted text at Tr. 812, ll. 9-10). Boyell explained at length to the jury how cell phones communicated with the nearest cell phone tower, often only a mile or two away, and that telecommunications companies recorded the towers utilized to connect calls. (Tr. 812-

18). Boyell reviewed the "cell sites" in the areas proximate to the killing and where the defendants' phones were tracked on the night in question, and prescribed them artificial labels of A-G. (Tr. 820-24; Tr. 838-39). Boyell testified he reviewed records provided by telecoms for six phone numbers corresponding to five individuals: Keir Johnson, Sha'Rah McCray, Michael Pyatt, codefendant James, and Applicant. (Tr. 825-38). By reviewing those records, Boyell was able to identify the proximate cell cite used by the phones at the times they made calls. (Tr. 839-63). With respect to Applicant's phone, Boyell noted that his phone was silent for much of the evening, but that he made calls at 2:16 a.m., 2:18 a.m., 6:24 a.m., and 6:28 a.m., with "nothing in between." (Tr. 851, ll. 18-20; Tr. 853-54). With respect to the first pair of overnight calls, Boyell explained they connected through a cell site "a mile and a half southwest of Conway[,]" which faced east-northeast, such that "the phone would have to be somewhere along Cates Bay Highway or Ninth Avenue." (Tr. 851-52). Boyell then clarified further that Applicant's phone would have been "east-northeast of this site which is on – where Fourth Avenue takes a turn, this is Fourth Avenue takes a turn to the south." (Tr. 852-53). Boyell testified Applicant's phone was tracked in approximately the same location during the second pair of sunrise phone calls. (Tr. 853, ll. 13-23).

On the first cross-examination, Counsel directed Boyell to consider State's Exhibits 75 and 76[5]—a Motorola "smartphone" and a Sanyo "flip-phone", respectively—acknowledge that they probably contained GPS capabilities, and that such capabilities could have been utilized to track the phone's location to within ten meters, such that the phone *could* have contained data to show that it "traveled from downtown Conway out to Brison Court, down Dirty Branch Road and then back up into Conway[.]" (Tr. 863-69, quoted text at Tr. 869, ll. 1-3).

[5] Keir Johnson testified they were both his phones. (Tr. 535-36).

On the second cross-examination, prosecutor Livesay elicited acknowledgements from Boyell that he was only provided one phone number associated with James, and if James possessed a second phone, he could not know where it was on the night in question. (Tr. 870, ll. 8-18). Boyell was also unaware that other witnesses had testified to receiving calls from James' phone only to hear a different person. (Tr. 870, ll. 19-23). As to Applicant's phone, Boyell was not aware that it was not recovered by law enforcement until sometime well after the killing. (Tr. 870-71).

Closing arguments proceeded with attorney Frederick going first, Counsel going second, and solicitor Livesay going last. Frederick plainly explained and summarized Boyell's extended testimony: the phone records showed the phones associated with Johnson, Sha'rah McCray, "Lil Manzy", and Mike Pyatt were proximate to the scene of the killing and/or where the getaway van was ditched; Applicant and James' phones were away in downtown Conway throughout the night. (Tr. 950-52). Frederick emphasized that the phone location records explicitly placed James in downtown Conway three minutes after Johnson could be definitively placed near Brison Court. (Tr. 952, ll. 4-21). Arguing against the culpability of *both* James and Applicant, Frederick asserted that if Applicant called Johnson from James's phone, since James' phone was in downtown Conway while Johnson was at the crime scene, that information would exonerate Applicant, and to the extent the testimony placed Applicant and James together it exonerated the both of them. (Tr. 952-53).

Counsel noted the phone records in his own closing arguments, and that they corroborated Johnson's admission of involvement in the crime, tracking him from downtown Conway, to the vicinity of the trailer park where the shooting occurred, and then to the location where the van was abandoned. (Tr. 977, ll. 5-13). Counsel also noted that the phone records

showed Sha'rah McCray following the same path at the same times, despite Johnson's testimony initially denying he knew McCray. (Tr. 977, ll. 14-25). Emphasizing the discrepancy, Counsel argued the State's "whole case hangs on Bootsie saying Carnail and Thomas James, nobody else, just three men. Sha'Rah McCray makes four. That means Bootsie's lying, again. We know Bootsie's a liar." (Tr. 977-78).

Later returning to the cell phone records, Counsel asserted the records totaled 26,000 pages, and criticized the State for failing to retain and present its own expert to present and explain the records. (Tr. 990-91). Furthermore, Counsel assailed, the State attempted to exclude the records because they simply did not fit with their theory of the case. (Tr. 991, ll. 4-8).

Counsel introduced his treatment of Boyell's testimony by generally characterizing his professional background as that of an electrical engineer, and that such engineers were the very stereotype of a nerd: "they got the coke bottle glasses, they got the pocket protector, they got the slide rule on their belt." (Tr. 992, ll. 4-17). Summarizing Boyell's findings, Counsel indicated Applicant's location on a map when he made calls at 2:18 a.m. and at 6:24 a.m. (Tr. 992, ll. 18-23). Like attorney Frederick, Counsel also pointed out that James' phone was in downtown Conway at the time Johnson was both (1) at the crime scene and (2) on call with James' phone. (Tr. 992-93). Third, Counsel argued Johnson's cousin, McCray, was at the crime scene a mere four minutes before the first 911 call, and was thereafter recorded at the scene where the van was ditched. (Tr. 993, ll. 5-16).

The State summarily dispensed with the value of the phone records by noting that Johnston testified James had not one, but two phones, and that he had not been using the phone number identified in the records as belonging to James on the night of the killing. (Tr. 1014-15). Livesay also pointed out the testimony of Terry Bease, a/k/a "Lil Papi," whose call with James'

phone was reflected in the phone records, but who testified that James was not the person he spoke to on the phone that night. (Tr. 1015-16). Livesay broadly declared the defendants "were not dumb enough to take their phones to Brown Swamp. I can tell you. Cutty did not take that phone with him, and we know it because everybody that talked to that phone number says it was not him." (Tr. 1016, ll. 16-20). Addressing Applciant's phone, the State similarly asserted that he had two phones, one of which was dead, and that he had not taken the phone reflected in the records with him to the scene of the killing. (Tr. 1016-17). "The only one that took and was caught with both his phones and, for some reason, drove the van out there, the same van he uses every day, was Bootsie, the one that was in special ed when he was a kid." (Tr. 1017, ll. 3-6). Again, Livesay argued Applicant and James "were too smart for that." (Tr. 1017, line 10).

PCR Evidentiary Hearing

As previously noted, at the evidentiary hearing, Applicant testified he did not give Counsel information about who else could have committed the crimes, but James told his attorney, who in turn communicated with Counsel. Applicant testified Johnson was the common element among the names proposed as potential perpetrators. Applicant speculated that Johnson had wanted to "save everybody else" and was afraid of "Migo," "110," and "B-Wells." Applicant generally opined that Counsel should have pushed evidence regarding the whereabouts of his phone harder. Applicant acknowledged that there was testimony he had set the crime in motion by a phone call from James' phone, but noted that Bease, a/k/a "Lil Papi", had denied talking to Applicant or James during the phone call.

Counsel testified that Boyell's trial testimony was consistent with Applicant's alibi, and noted that the jury was instructed on third-party guilt.

Findings

The Court finds Counsel provided effective assistance. A review of the testimony and arguments presented at trial show that everything which could have been elicited from the phone records appears to have been presented to the jury—namely (1) that the locations recorded for James' and Applicant's phones were not consistent with their perpetrating the home invasion and killing and (2) that the locations recorded for phones belonging to other individuals, such as McCray, *were* consistent with their involvement. The argument advanced by Applicant at the evidentiary hearing—that Johnson lied to the favor of the actual perpetrators—was advanced at trial. Applicant's suggestion that Counsel missed favorable testimony by Bease misapprehends th substance of Bease's testimony, and conflates multiple phone calls made by different persons to James' cell phone. Applicant presents no arguments which, if presented alongside the cell phone records at trial, would have changed the outcome at trial. For these reasons, Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

7. Failure to Object to Solicitor's Closing Argument

Applicant alleges Counsel was ineffective in failing to object to portions of the State's closing argument which (1) improperly bolstered the testimony of Keir Johnson and/or (2) improperly appealed to "the emotional interest of the jury." To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper argument so unfairly prejudiced the defendant as to deny him a fair trial. Fortune v. State, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant." Id., 428 S.C. at 550, 837 S.E.2d at 40 (quoting Simmons v.

State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the Applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v. Francisco, 35 F.3d 116, 120 (4th Cir. 1994); see also State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("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."). A prosecutor should "prosecutor with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." New, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." Id. "[I]mproper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger at 88.

"Generally, the assessment of witness credibility is within the exclusive province of the jury." Tappeiner v. State, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) (quoting State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). Solicitors may not make explicit personal assurances or indicate there is information not presented which supports the testimony, i.e. vouch, as doing so improperly invades the province of the jury and places the government's prestige behind the witness. Id., 416 S.C. at 250, 785 S.E.2d at 477 (citing

Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002)). "Thus, solicitors must confine their closing remarks to the record and the reasonable inferences that may be drawn therefrom." Id. (citing Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)).

Trial

At trial, the State offered an impassioned argument after hours of closing by both defense attorneys, focused primarily on defending Johnson's credibility and challenging Applicant and James' theories of third-party guilt:

> They want to tell you that Bootsie wants to tell a lie. Bootsie could have told any two names. If he wanted to tell you Little Manzy, he could. If he wanted to tell you 110, he could. These boys are his friends. He could have told you two people that he had no relationship to, or two people that he didn't like, or two people anything. He could have told you anybody, but he didn't. He told you these two people.
>
> *He has no reason to lie on these people. They are all friends, and they have been friends a long time. He's here telling on these people because it's the truth.*

(Tr. 1019, ll. 8-19) (emphasis added). After reviewing the disclosures made by Applicant to the jailhouse informant, Livesay returned to the subject of Johnson's credibility:

> They knew they shot her. Immediately they could have backed out of that house, but they didn't. And I'm here to tell you they didn't because that didn't come as a shock to them. They were ready for that to happen. They shot her and kept moving through that house, looking for whatever it was they wanted, drugs, money, guns, whatever it is they wanted.
>
> They want to tell you everybody in here has got a reason to lie, everybody. If these people had a reason to lie, they could have blamed it on anybody. But they didn't. Ironically, they blamed it on the same guy that Howard Parker saw out that night. Ironically, they blamed it on that same guy that's out at the jail bragging that we ain't got nothing on him and that he shot that girl. *Bootsie had no reason to lie.*
>
> They want to tell you that he's scared of a Crip, there are Crips in the car. This guy is a Crip. If he was going to blame it on somebody, it wouldn't be

somebody in the Crip that is a close friend of his. He came up here and told you the truth.

(Tr. 1021, ll. 6-25) (emphasis added). The State later once again returned to Johnson's credibility in the context of his pending charges:

> A woman has been killed. We are not here to worry about some trespassing or littering or filing a false police report charge. These people have killed somebody. That's what we're working on. Don't be fooled by that, don't be fooled by that. They want to tell you that Bootsie, we're up here playing make a deal. Bootsie is charged with murder, murder. And they want to tell you that he's been given some deal.
>
> That charge is still pending. He got up here and told you he was the driver in a murder charge. And they want you to believe he's getting some sort of deal. Don't believe them, do not believe that. If we wanted to do something for Bootsie, we could, we could. But yet he is still charged with murder. That has not been dismissed. If he wanted to get a deal, he would not be carrying a murder charge, I can tell you that much. It is ridiculous to think we are giving some guy a deal, and he is walking around charged with murder. That is nonsense, folks. Don't believe it, do not believe it.

(Tr. 1024-25).

PCR Evidentiary Hearing

Applicant briefly testified that the State vouched for Bootsie's credibility in closing arguments, noting the portions indicated above. Applicant did not testify to the allegations that the State improperly inflamed the passions of the jury.

Counsel testified that the State's closing broadly appealed to juror's emotions, but more specifically took issue with the evidence and arguments introduced regarding Applicant's gang tattoos. As to the claims of vouching, Counsel addressed each of the above excerpted arguments in turn. As to the emphasized testimony from page 1019, Counsel opined that the argument was arguably improper bolstering, but that it would fall within the scope of deference afforded to closing arguments. As to the emphasized testimony from page 1021, Counsel opined the argument could have been improper bolstering, but was facially farcical. As to the emphasized

testimony from pages 1024-25, Counsel testified that the murder charge was indeed still pending at the time of trial.

Findings

The Court finds Counsel provided effective assistance. This Court has thoroughly reviewed the Solicitor's closing arguments in their entirety and finds that the arguments complained of constituted fair inferences based upon the evidence presented at trial and did not contain any improper suggestions, insinuations, or improper assertions of personal knowledge. The Court finds the State's closing did not improperly appeal to the passions of the jury, but rather reflect the "earnestness and vigor" that is part of the State's prosecutorial duty. The Court finds the State did not vouch for Johnson's credibility, but rather appropriately argued for the credibility of its most key witness based upon the facts in the record and reasonable inferences therefrom. No valid basis existed for Counsel to object to the identified portions of the State's closing. Applicant cannot show any deficiency in Counsel's treatment of these portions of the State's closing argument, and accordingly his request for relief by way of this allegation is **DENIED.**

8. Failure to Adequately Explain Right to Testify

Applicant alleges Counsel was ineffective in failing to adequately explain to him his right to take the stand and testify in his own defense.

Trial

After some back-and-forth by attorney Frederick as to precisely when to conduct the colloquy, the trial court addressed both defendants together regarding their right to testify. (Tr. 893-99). The trial court opened by advising Applicant and James that if at any time they had any questions or concerns, that they would let him know or otherwise advise their attorneys of as

much; both men agreed. (Tr. 895, ll. 1-12). The trial court instructed the defendants that they had the right to present a defense, and that they had the right to not be a witness against themselves, explaining "that means nobody can make you testify in this case. You can testify if you want to, but nobody can make you do it." (Tr. 895, ll. 13-22). Both men confirmed they understood. (Tr. 895, ll. 22-25). The trial court continued by emphasizing that the decision to testify was to be made by the defendants, and that if they chose to testify the process would be as they observed for witnesses throughout trial, including cross-examination by the State; both men affirmed they understood. (Tr. 896, ll. 1-13). The trial court inquired as to past convictions, but the State was unprepared to answer. (Tr. 896, ll. 14-22). Attorney Frederick acknowledged James possessed a prior drug conviction and a prior conviction for pointing and presenting. (Tr. 896-97). Counsel generally described Applicant's prior record as "significant" and that there were a number of matters into which the State could inquire if it cross-examined Applicant. (Tr. 897, ll. 4-11). The trial court summarily explained the scope of the State's right to ask about prior convictions on cross-examination of defendants and the men affirmed they understood. (Tr. 897-98). The trial court also told Applicant and James that if they did not testify, he would instruct the jury to give no consideration to the fact that they did not testify, and to draw no conclusions from the fact. (Tr. 898, ll. 9-14).

The defendants denied they had any questions to ask of the trial court or that they needed to talk to their respective attorneys before the trial court asked them what they wanted to do. (Tr. 898, ll. 15-25). Both men declined to testify. (Tr. 899, ll. 1-6).

PCR Evidentiary Hearing

Applicant took the stand at the evidentiary hearing and was visibly nervous. As previously noted, Applicant was aware of the "common knowledge" in the community that other

men were thought to have committed the home invasion and killing, but that he understood from Counsel that he could not testify about hearsay at trial. Applicant testified that the door was kicked in by a size 6 ½ shoe,[6] but that he wore size 10 to 10 ½ shoes. Applicant indicated he and Counsel discussed the possibility of Applicant testifying: Counsel told him there was no need for his testimony and that Applicant had a prior record of convictions. Counsel was concerned about revealing a pattern of narcotics activity and flight from the law. Counsel told Applicant that testifying would be harmful to his case.

Counsel acknowledged the footprint issue. Counsel testified he and Applicant discussed on multiple occasions the possibility of Applicant testifying. Counsel advised against doing so, in part because Applicant had numerous, unrelated pending charges relating to crack cocaine.

Findings

The Court finds Applicant has failed to meet his burden of proving ineffective assistance. The testimony of both Applicant and Counsel on this point is consistent: they discussed Applicant's right to testify, explored the strengths and weaknesses of the options before them, Counsel advised against doing so, and Applicant opted not to do so. Applicant offered no testimony or other evidence at the evidentiary hearing to show that his decision to not testify at trial was not knowingly, intelligently, and voluntarily made. Additionally, other than the size of his own shoes, Applicant did not offer the substance of what he would have offered in testimony had he taken the stand at trial. Applicant's limited testimony as to his shoe size would not have

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[6] The Court is unable to find a basis in the record for this assertion by Applicant. There is testimony in the trial transcript about a cast of a shoe impression found where the getaway van was parked, (Tr. 325-26) but that would not provide the conclusion asserted by Applicant. In any event, the cast of the shoe impression was introduced at neither the original trial nor this evidentiary hearing, and the Court affords Applicant's hearsay testimony on this point no probative value.

changed the outcome at trial. Applicant has failed to meet his burden as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED.**

[*Conclusion and signature on following page*]

III. CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1st **day of** June**, 2020.**

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Sumter, South Carolina