

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM MARION COUNTY
D. Craig Brown, Circuit Court Judge

2019-CP-33-00131

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S.C. SUPREME COURT

Malcolm A. Williams, # 372578,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Malcolm Williams, # 372578, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed October 26, 2020, and served on counsel on November 12, 2020 issued by the Honorable D. Craig Brown, Presiding Judge, Twelfth Judicial Circuit.



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December 2, 2020

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FILED

2020 OCT 26 AM 8:38

ALAN WILSON
ATTORNEY GENERAL

October 19, 2020

The Honorable Christy M. Gray
Marion County Clerk of Court
PO Box 295
Marion, SC 29571

Re: Malcolm A. Williams, #372578 v. State of South Carolina
2019-CP-33-131

Dear Ms. Gray:

Enclosed please find the original Order of Dismissal signed by the Honorable D. Craig Brown in the above-captioned case, for filing in your office.

In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

s/Samuel L. Key

Samuel L. Key
Assistant Attorney General

SLK/kw
Enclosure

cc: Jonathan D. Waller, Esquire

STATE OF SOUTH CAROLINA)
COUNTY OF MARION)
Malcolm A. Williams, # 372578)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

2019-CP-33-131

ORDER OF DISMISSAL

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I. Introduction

The matter before the Court is Malcolm A. Williams's (Applicant) action for post-conviction relief (PCR) commenced February 27, 2019. In his PCR application, Applicant alleged various allegations of ineffective assistance of trial and appellate counsel. The State made its return on May 28, 2019, requesting an evidentiary hearing.

A hearing into the matter convened on December 19, 2019, at the Florence County Courthouse before the undersigned. Applicant testified on his own behalf at the hearing. The State presented testimony from Chief Public Defender Scott Floyd (trial counsel), and Appellate Defender Susan B. Hackett (appellate counsel). Also before the Court were the Marion County Clerk of Court records of the underlying convictions; Applicant's records from the South Carolina Department of Corrections (SCDC); Applicant's direct appeal records which include the record on appeal, the *Anders*¹ brief, and the orders dismissing the appeal, relieving appellate counsel, and the remittitur; and the records of this PCR action. After thorough review of the records before the Court and observation of the testimony presented, the Court finds Applicant is not entitled to relief.

¹ 386 U.S. 738 (1967).

Therefore, for the reasons discussed below, this Court denies relief and dismisses the action with prejudice.

II. Facts & Procedural History

Applicant is confined in SCDC pursuant to orders of commitment of the Marion County Clerk of Court. Applicant was indicted at the November 2016 term of the Marion County Grand Jury for kidnapping, possession of a weapon during the commission of a violent crime, first-degree criminal sexual conduct (CSC), first-degree burglary, and resisting arrest. (2016-GS-33-00457). The case proceeded to a jury trial on May 8, 11–12, 2017, before Judge Michael G. Nettles. Applicant was represented by Chief Public Defender Scott Floyd (trial counsel). Assistant Solicitors John Holt and Patty Parker prosecuted the case.

Applicant's charges stem from an incident on January 8, 2016, involving Aisha Graves, his ex-girlfriend. Applicant and Graves dated from October 2015, until Graves broke up with him on December 24, 2015. Tr. 74–75.

On December 26, 2015, Graves went to the store alone to buy cigarettes and noticed a truck follow her car into the parking lot. Applicant exited the truck and walked into the store with Graves. Tr. 76–77. After Graves bought her cigarettes, they exited the store. Once in the store's parking lot, Applicant grabbed Graves who began crying. Tr. 77. Then, someone exited the truck Applicant arrived in and interveened. Graves walked back to her car, and Applicant followed. Before Graves could close the door to her car, Applicant "looked [her] in [her] face and said he was going to kill [her] and [her] kids." Tr. 77. Thereafter, Graves went home and called the police. Tr. 78. Applicant and Graves had no further contact until January 8, 2016. Tr. 78.

Graves lived with her mother, Cynthia Dean. Dean met Applicant, through Graves, in October 2015. Tr. 119–20. Dean knew Graves and Applicant dated from sometime in October to

December 24, 2015. Dean was around Applicant when he would come to her house to visit Graves, and Applicant would sometimes spend the night at Dean's house with Graves. Tr. 120. After Graves and Applicant broke up, Applicant kept coming around Dean's home to see Graves; however, Graves did not want to see Applicant, and Dean banished Applicant from coming to her house. Tr. 102-03; 126.

On January 8, 2016, Graves took her daughter to school and then picked up Marcus Graves (Marcus), her estranged husband. Tr. 79; 107-08. Marcus and Graves were separated; however, they co-parented and each saw their children every day. Tr. 107-08. Marcus knew that Graves and Applicant had dated. Tr. 108. After dropping their older daughter off at school, Graves and Marcus went back to Dean's house and took a nap together. Tr. 79; 109. Graves and Marcus awoke to a knock on the outside of the house. Tr. 79; 111. Graves told Marcus to stay in the bed. Tr. 79. Then, Graves and Marcus heard a knock on the bedroom door. Tr. 79; 111. Graves cracked open the door and saw Applicant with a gun. Tr. 79-80. When Applicant told her they were going for a ride, she agreed. Tr. 80. Graves then got dressed, told Marcus to stay quiet, and she left with Applicant. Tr. 80; 113.

Applicant took Graves's phone from her once she got into the car. Applicant then asked Graves for her phone's password, and, because Applicant had a gun, Graves complied. Applicant then turned off the phone's GPS location tracking ability and went through her text messages. Thereafter, Applicant drove around and proclaimed his love for Graves. Tr. 81. Applicant also claimed he was going to commit suicide. Tr. 83. However, Graves was able to calm Applicant down, and they eventually had sex. Tr. 83-85. After sex, Applicant began to drive Graves home. On the way back to Grave's home, Graves convinced Applicant to get rid of the gun. Tr. 85-86.

Once Applicant got rid of the gun, Graves was “basically at ease at that point.” Tr. 86. While returning to Graves’s house, they were pulled over by the police. Tr. 86–89.

After Graves left, Marcus got worried because Graves was not returning his text-messages. Tr. 113. Marcus went and spoke to Dean. Tr. 113; 123. Dean went outside and saw that her car, which Graves also uses, was still there. Tr. 124. Dean called Graves’s cell-phone, but there was no answer. Dean then texted Graves, but Graves did not respond. Tr. 124–25. This was unusual to Dean because her “daughter always answers [Dean’s] phone call.” Dean then called 911. After Dean called 911, she attempted to track Graves’s phone by its GPS; however, she was unable to do so. Tr. 125.

Deputy Robert Page was eating in Mullins when a call came over the radio referencing a person (Graves) possibly missing from the Scotch Community. Page had been to Dean’s home before to deal with Graves and Applicant, so instead of responding to Dean’s home, he called Dean and asked her what was going on. After speaking to Dean, Page responded to Applicant’s home. Tr. 131.

Page arrived at Applicant’s home and spoke to Applicant’s mother. Applicant’s mother informed Page that Applicant took her car without asking permission. Tr. 131. Thereafter, Page, and other deputies, drove around the area near Applicant’s home and looked for Applicant’s mother’s car. After about ten minutes of searching, Page called Graves’s phone number which was given to him by Dean. Graves answered. Tr. 132.

Graves told Page their location. Page also spoke to Applicant over the phone. Applicant asked Page twice if he was in trouble, to which Page responded “no” both times.² Tr. 133.

²Page’s response, however, was untrue as Page had previously notified Applicant not to go to Dean’s home, and Page could have arrested Applicant for trespassing. Tr. 133–34.

Applicant advised Page of their location, and Page drove to them with his blue-lights on while still remaining on the phone. As Page approached, Applicant asked why Page's blue-lights were on. Page then, still speaking to Applicant on the phone, asked Applicant to pull over. Applicant pulled over. Page pulled over in front of Applicant's car and another deputy pulled behind Applicant's car, boxing Applicant in. Tr. 134.

Page exited his patrol car and immediately went to Graves. Other deputies on the scene went to Applicant. Page spoke to Graves, and Graves told him what happened. Tr. 135. Page advised the other deputies to arrest Applicant after speaking to Graves. Applicant resisted until he was tazed. Instead of allowing officers to arrest him, Applicant was attempting to speak to Graves. Tr. 135. After arresting Applicant, Page again spoke to Graves. Tr. 136. Thereafter, Graves showed Page the place she convinced Applicant to hide the gun. Page found a shotgun, shotgun shells, and tape hidden underneath leaves. Tr. 136-37. Page then went to Applicant's mother's house and spoke to her about why Applicant took her car. Tr. 138. Finally, Page took Graves to the emergency room. Tr. 139.

The jury convicted Applicant of first-degree burglary, the weapons charge, and resisting arrest. However, the jury acquitted Applicant of kidnapping and first-degree CSC. Judge Nettles sentenced Applicant to concurrent terms of imprisonment of seventeen years for first-degree burglary, and time served for the weapons and resisting arrest charges. Applicant appealed.

Appellate Defender Susan B. Hackett (appellate counsel) perfected Applicant's appeal by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The court of appeals dismissed the appeal after *Anders* review. *See State v. Williams*, Op. No. 2019-UP-092 (S.C. Ct. App. filed Feb. 20, 2019). The case was remitted to the circuit court on March 12, 2019. Applicant commenced this PCR action February 27, 2019.

III. Allegations

Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial and appellate counsel. Specifically, Applicant claims trial counsel was ineffective for:

1. Failure to contact, investigate, and interview victims and witnesses;
2. Failure to argue lack of a nexus to sustain a first-degree burglary conviction;
3. Failure to present mitigating social history evidence, good character evidence, and good character witnesses;
4. Failure to object to the State's unconstitutional burden shifting closing argument and move for a mistrial;
5. Failure to request tailored jury instructions to support defenses;
6. Failure to impeach witnesses and victims;
7. Failure to interview victims and witnesses that testified (same as allegation 1);
8. Failure to investigate backgrounds of witnesses and victims (same as allegation 1);
9. Failure to call witnesses that were subpoenaed to testify;
10. Failure to object to the trial court's erroneous, prejudicial, and burden shifting jury instructions;
11. Failure to submit favorable evidence into evidence;
12. Opening the door to prejudicial evidence;
13. Failure to sequester witnesses at trial;
14. Failure to object to prejudicial evidence; and
15. Failure to object to witnesses comment on another witness's mental state.

Applicant claims appellate counsel was ineffective for:

1. Failure to file a merits brief on the issue of insufficient evidence to sustain a burglary first conviction;
2. Failure to brief the lack of a nexus for burglary first; and
3. Failure to raise the issue of charge of law for burglary first.

IV. Discussion

This Court has reviewed the entire record and evidence introduced at the hearing, and the Court has also observed the witnesses presented at the evidentiary hearing, judged their credibility, and weighed their testimony accordingly in its discussion below. Set forth below are findings of fact and conclusions of law as required by section 17-27-80 of the South Carolina Code (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To establish prejudice, the applicant must prove "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.

Further, a defendant is entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. Thus, the question becomes (1) whether appellate counsel's performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Strickland requires counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in

another.” *Id.* at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In making a fair assessment of attorney performance, a court must make every effort to “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689.

For the reasons discussed below, this Court finds Applicant has failed to prove that either trial counsel or appellate counsel were constitutionally ineffective. Therefore, the Court denies relief on all allegations and dismisses the action with prejudice.

a. Ineffective assistance of trial counsel

Applicant made fifteen allegations of ineffective assistance of trial counsel. Specifically, Applicant alleged trial counsel was ineffective for:

1. Failure to contact, investigate, and interview victims and witnesses;
2. Failure to argue lack of a nexus to sustain a first-degree burglary conviction;
3. Failure to present mitigating social history evidence, good character evidence, and good character witnesses;
4. Failure to object to the State’s unconstitutional burden shifting closing argument and move for a mistrial;
5. Failure to request tailored jury instructions to support defenses;
6. Failure to impeach witnesses and victims;
7. Failure to interview victims and witnesses that testified (same as allegation 1);

8. Failure to investigate backgrounds of witnesses and victims (same as allegation 1);
9. Failure to call witnesses that were subpoenaed to testify;
10. Failure to object to the trial court's erroneous, prejudicial, and burden shifting jury instructions;
11. Failure to submit favorable evidence into evidence;
12. Opening the door to prejudicial evidence;
13. Failure to sequester witnesses at trial;
14. Failure to object to prejudicial evidence; and
15. Failure to object to witnesses comment on another witness's mental state.

The Court disagrees, and finds trial counsel was not deficient and Applicant failed to prove prejudice in any respect. Therefore, as discussed below, these allegations are denied and dismissed with prejudice.

1. Failure to contact, investigate, and interview victims and witnesses

Applicant alleges trial counsel was ineffective for failing to contact, investigate, and interview victims and witnesses before trial. The Court disagrees, and, for the reasons discussed below, denies relief on this allegation and dismisses it with prejudice.

Counsel must, at a minimum, make some effort to interview potential witnesses identified by the defendant, and make an independent investigation of the facts and circumstances of the case. *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011); *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). To support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. *Id.*

Applicant alleges trial counsel was ineffective for failing to contact, investigate, and interview the victims and witnesses before trial. Applicant testified at the PCR hearing he informed

trial counsel that he was listed as the head-of-household, had clothes and property still at the residence, and he had witnesses who knew he was living there. Applicant testified he wanted trial counsel to look into that information because it was not possible for him to commit burglary on his own residence. Specifically, Applicant testified he asked trial counsel to speak to his aunt, Felicia Williams, his mother, his grandfather, his step-father, and his sister because they all knew he lived at the residence. Applicant also testified that he did not go into the house that day. Applicant testified he drove past the house, and Graves called him asking why he passed by. Applicant stated he turned around, parked on the side of the house, and went up to the steps of the house. However, Graves came outside to the steps, and he did not enter the home.

Trial counsel testified Applicant never told him he lived at the residence with Graves. Trial counsel stated Applicant informed him that he was living with his family members—either his uncle or his mother. Trial counsel also testified he explained each charge to Applicant. Trial counsel explained to Applicant the State's version of events, the warrants, indictments, and the discovery. Trial counsel explained to Applicant the State alleged that Applicant entered Graves's dwelling without permission on January 8 armed with a weapon, and committed first-degree burglary and kidnapping. Then, Applicant took Graves away from the home and committed first-degree CSC, and that Applicant was in possession of the weapon during those crimes. Finally, Applicant resisted arrest when stopped by law enforcement.

Trial counsel stated he thought there was a trespass notice indicating that Applicant was not allowed at the residence in the discovery. Trial counsel explained that even though it was daytime when Applicant entered the home, Applicant was charged with first-degree burglary because he allegedly entered the home with a shotgun. Trial counsel stated that at certain times during their discussions, Applicant told trial counsel he did not have a gun. However, Graves testified

Applicant had a gun when he entered the home. Additionally, trial counsel testified he was provided a video recording of Applicant's post-*Miranda* statement to law enforcement where Applicant acknowledged having a gun. However, the State did not seek to introduce this evidence at trial.

Trial counsel recalled discussing potential witnesses with Applicant, but did not specifically recall the names of the witnesses; however, trial counsel did remember that Applicant had family members present for trial, and recalled speaking to some of them. Further, trial counsel testified he decided not to call any other witnesses at trial believing it was the right thing to do at the time. Trial counsel stated that in hindsight, he probably would make the same decision.

Applicant has alleged trial counsel failed to investigate whether Applicant lived with Graves, because Applicant could not have burglarized his own home. This Court finds not credible Applicant's testimony he told trial counsel he was living at the residence at the time of the incident. Specifically discrediting is Applicant's own testimony that he never entered the home that day, and trial counsel's credible testimony that Applicant told him he did not live at the residence but lived with family members. Therefore, trial counsel reasonably did not investigate whether Applicant lived with Graves at the home because Applicant told trial counsel he did not live there but lived with family members.

Applicant has alleged trial counsel failed to interview and investigate potential defense witnesses. Applicant alleges the witnesses trial counsel should have contacted would have supported Applicant's assertion he lived with Graves. However, as discussed above, the Court finds not credible Applicant's testimony he told trial counsel he lived with Graves. The Court finds credible trial counsel's testimony that Applicant told him he lived with family members.

Therefore, trial counsel reasonably did not speak to witnesses about whether Applicant lived at the residence.

Further, Applicant presented no evidence or testimony other than his not-credible self-serving testimony supporting his assertion he lived with Graves at the time of the incident; therefore, Applicant has failed to show prejudice resulted from trial counsel's alleged failure to investigate and interview witnesses. *See Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence).

Finally, Applicant testified he told trial counsel his Aunt in North Carolina got pictures off of Facebook of the women (presumably Graves and Dean) with guns. Applicant failed to specify how these Facebook pictures could have supported his defense theory; therefore, Applicant has failed to meet his burden of proof as to deficiency. Further, Applicant has failed to provide these pictures or testimony from his Aunt in North Carolina regarding the pictures. *See Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). This Court finds Applicant has failed to show trial counsel was deficient in not contacting his Aunt regarding these pictures, and has failed to show how trial counsel's alleged deficiency prejudiced Applicant. Therefore, this allegation is denied and dismissed with prejudice.

Based on the foregoing, the Court finds trial counsel reasonably investigated the case, and Applicant has failed to show prejudice resulted from trial counsel's alleged deficiency of failing

to investigate and interview potential witnesses. Therefore, this allegation is denied and dismissed with prejudice.

2. Failure to argue lack of a nexus to sustain a first-degree burglary conviction

Applicant alleges trial counsel was ineffective for failing to argue the lack of a nexus to sustain a first-degree burglary conviction, *presumably*, at the directed verdict stages of the trial. The Court disagrees.

“A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged.” *State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (Ct. App. 2001). In reviewing a motion for a directed verdict, the trial court is concerned with the existence of evidence, not its weight. *Id.* If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove guilt, the case should be submitted to the jury. *Id.*

After the State rested its case, trial counsel moved for a directed verdict on all counts arguing “there’s been insufficient evidence to support [the] charges.” Tr. 197. The State responded that Grave’s testimony, “the DNA evidence, the evidence that backs up [Grave’s] story that was collected in the vacant lot, [and] the other witnesses that were to a party - - or a part of [Grave’s] version of events” taken in the light most favorable to the State supports the charges going to the jury. Tr. 197. Trial counsel renewed the motion for a directed verdict after the defense rested. Tr. 204-05.

Here, Applicant argues trial counsel was ineffective for failing to argue there was a lack of nexus for him to be convicted of first-degree burglary. However, there was no evidence at trial that Applicant was invited over to the home, or that Applicant lived at the home. Further, the only evidence at trial showed that Applicant was not allowed at the home as Applicant was previously put on trespass notice and told not to visit the home. There was no suggestion during the State’s case, either on direct or cross-examination, Applicant lived in the home or was allowed to enter

the home. Finally, as explained above in subsection section 1, Applicant never told trial counsel he lived in the home, rather, Applicant told trial counsel he was living with family members at the time of the incident. Finally, even though Applicant testified at the PCR hearing, he lived at the home and was allowed over there, he still asserted he did not even enter the home the day of the incident. Therefore, the Court finds trial counsel reasonably did not argue a lack of nexus to support a burglary conviction because he was never advised by Applicant he lived at the home. Accordingly, trial counsel was not deficient for failing to make this argument.

The Court finds Applicant cannot show prejudice because the direct and circumstantial evidence at trial, viewed in the light most favorable to the State, showed that Applicant entered the home with a gun after he had been put on trespass notice and told not to come back to the home. The case came down to Applicant's intent, which is a jury question. There was ample evidence presented by the State at trial to overcome a directed verdict motion. Therefore, even if trial counsel had made the lack of nexus argument asserted by Applicant, the trial court will still have been compelled, as a matter of law, to deny the directed verdict motion and submit the case to the jury. Accordingly, Applicant has failed to show he was prejudiced by trial counsel's alleged deficiency.

Based on the foregoing, the Court concludes trial counsel was not deficient for failing to make the argument asserted by Applicant. Further, the Court concludes that even if trial counsel had made the lack of nexus argument, it would not have made a difference at trial. Therefore, the Court denies this allegation and dismisses it with prejudice.

3. Failure to present mitigating social history evidence, good character evidence, and good character witnesses

Applicant asserts trial counsel was ineffective for failing to present mitigating social history evidence, good character evidence, and good character witnesses. The Court disagrees.

The credibility of a witness may be supported by opinion or reputation evidence; however, (1) the evidence may only refer to the witness's credibility, and (2) the evidence of truthful character is only admissible after the witness's credibility has been attacked. Rule 608(a), SCRE. Specific instances of a witness's conduct, offered to attack or support the witness's credibility—other than conviction of a crime as provided by Rule 609, SCRE—may not be proved by extrinsic evidence. Rule 608(b), SCRE. However, the witness may be cross-examined, in the court's discretion, about the specific instance if (1) the instance concerns the witness's credibility, or (2) the instance concerns the credibility of another witness "as to which character the witness being cross-examined has testified." Rule 608(b), SCRE. Extrinsic evidence is "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness." EVIDENCE, *extrinsic evidence*, BLACK'S LAW DICTIONARY 675 (10th ed. 2014).

First, as noted in subsection 1, Applicant alleged trial counsel failed to investigate whether there was evidence that Applicant lived with Graves at the time of the incident. This Court again finds reasonable trial counsel's failure to investigate these facts because Applicant told trial counsel he did not live with Graves; rather, he lived with some relatives. Because trial counsel reasonably relied on Applicant's assertion that he lived with relatives, trial counsel cannot be deficient for failing to present mitigating social history evidence that Applicant lived with Graves to attack the burglary charge. Accordingly, the Court denies relief on this allegation because Applicant failed to show trial counsel was deficient.

Second, Applicant has failed to show how trial counsel was deficient for failing to introduce good character evidence or good character witnesses at trial. Applicant merely asserts trial counsel was deficient for failing to do so. However, Applicant failed to testify or specify what

witnesses or good character evidence trial counsel should have introduced at trial. The Court finds Applicant has wholly failed to meet his burden as to this allegation.

Finally, as noted above in subsection 1, Applicant testified he told trial counsel his aunt in North Carolina got pictures off of Facebook of the women (presumably Graves and Dean) with guns. The Court interprets this testimony as Applicant alleging trial counsel should have gotten the Facebook pictures from the aunt and introduced them at trial to attack Graves' and Dean's character. However, Applicant failed to allege how trial counsel should have introduced these pictures at trial, and failed to show how the pictures were probative as to Graves' and Dean's credibility. This Court finds Applicant has failed to overcome the presumption that trial counsel acted reasonably in not introducing these pictures, if they exist, at trial. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."). The Court finds Applicant has failed to prove Counsel was deficient for failing to introduce the alleged pictures because he has failed to specify how the pictures could have legitimately been used to impeach the witnesses' credibility. Therefore, the Court denies relief as to this allegation.

Further, Applicant cannot succeed on this allegation as he cannot show prejudice because Applicant did not produce the mitigating good character evidence, witnesses, or the pictures at the PCR hearing. *See e.g. Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). This Court finds Applicant has failed to show trial counsel was deficient in failing to present mitigating good character evidence, witnesses, and for not contacting Applicant's Aunt regarding the pictures, and Applicant has failed to show how trial

counsel's alleged deficiency prejudiced Applicant. Accordingly, this allegation is denied and dismissed with prejudice.

4. Failure to object to the State's unconstitutional burden shifting closing argument and move for a mistrial

Applicant failed to produce any evidence regarding the State's closing argument or why trial counsel should have moved for a new trial. However, the Court has fully reviewed the State's closing argument and finds it was not burden shifting, and that Applicant was prejudiced in any way.

So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.

State v. Durden, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975), quoting 23 C.J.S. *Criminal Law* § 1107.

The State's closing argument is found on pages 206–19 of the transcript. This Court has reviewed the State's closing argument and finds nothing in the closing argument unconstitutionally shifted the burden of proof. Indeed, every time it brought up the burden of proof, the State indicated it had the burden of proving the charges against Applicant beyond a reasonable doubt. Tr. 208–09; 218. The Court concludes the State's closing argument was contained to the records and its

reasonable inferences. Because the State's closing argument was not unconstitutionally burden shifting, trial counsel was not deficient for failing to object.

Further, this Court is convinced that any alleged deficiency from trial counsel's failure to object to the State's closing argument did not result in Applicant receiving an unfair trial. *See Durden*, 264 S.C. at 93, 212 S.E.2d at 591 ("The test of granting a new trial for alleged improper closing argument of counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial."). Here, the jury clearly understood the State had the burden of proving all charges beyond a reasonable doubt. This is evinced by the jury acquitting Applicant of kidnapping and first-degree CSC. Therefore, Applicant cannot show prejudice from trial counsel's alleged failure to object to the State's closing argument because, ultimately, Applicant received a fair trial. Accordingly, this allegation is denied and dismissed with prejudice.

5. Failure to request tailored jury instructions to support defenses

Applicant alleges trial counsel was ineffective for failing to request tailored jury instructions to support defenses. Specifically, Applicant clarified at the PCR hearing that trial counsel should have requested a jury instruction for a lesser-included offense of first degree burglary. The Court disagrees.

"If there is any evidence to support a charge, the trial court should grant the request." *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (2005).

Here, the only evidence at trial was that Applicant unlawfully entered the house armed with a shotgun, and there was no evidence presented at trial to support a lesser included offense. Therefore, trial counsel reasonably did not request a lesser included offense be charged to the jury because there was no evidence to support the lesser included charge.

Further, Applicant has failed to show prejudice resulted in trial counsel's alleged deficiency of failing to request a lesser included offense. Because there was no evidence to support a lesser

included offense to the first-degree burglary charge, it would have been error for the trial court to give such a requested charge because it was not supported by the record. Accordingly, the Court denies relief on this allegation and dismisses it with prejudice.

6. Failure to impeach witnesses and victims

This Court finds this allegation is substantially the same as Applicant's allegations (a)(1), (6), (7), and (8) against trial counsel. Further, Applicant has failed to present any evidence on which victims or witnesses should have been impeached and on what issues they should have been so impeached. Therefore, the Court finds that Applicant has failed to meet his burden as to deficiency or prejudice on this issue. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."). Accordingly, this issue is denied and dismissed with prejudice.

7. Failure to interview victims and witnesses that testified, AND

8. Failure to investigate backgrounds of witnesses and victims

Allegations (A)(7), and (8) are discussed above in subsection (a)(1), *failure to contact, investigate, and interview victims and witnesses*; therefore, for the reasons discussed in subsection (a)(1), the Court denies relief on these allegations and dismisses them with prejudice.

9. Failure to call witnesses that were subpoenaed to testify

Applicant alleges trial counsel was ineffective for failing to call witnesses that were subpoenaed to testify at trial. The Court disagrees.

Here, Applicant failed to present anything concerning witnesses to be subpoenaed and there were no witnesses presented at the PCR hearing to support this allegation. *See Glover*, 318 S.C. at 498-99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). Further, trial counsel testified Applicant did not give him any witnesses to subpoena to

testify at trial. This Court finds credible trial counsel's testimony that Applicant did not name any witnesses to subpoena to testify at trial. Therefore, this allegation is denied and dismissed with prejudice because Applicant has failed to meet his burden of proof as to prejudice, and trial counsel was not deficient in failing to subpoena the witnesses because Applicant did not inform him of any witnesses to subpoena to testify at trial.

10. Failure to object to the trial court's erroneous, prejudicial, and burden shifting jury instructions

Applicant alleges the trial counsel was ineffective for failing to object to the trial court's erroneous, prejudicial, and burden shifting jury charge. However, Applicant failed to specify which portions of the charge were incorrect, prejudicial, and burden shifting. *See Butler*, 286 S.C. at 442, 334 S.E.2d at 814 ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application."). Even so, this Court has reviewed the trial court's jury charge, in its entirety, and finds that it presented the jury with correct statements of the law, and was not constitutionally burden-shifting. Accordingly, Applicant has failed to show trial counsel was deficient for failing to object to the trial court's jury charge, and trial counsel's alleged deficiency in failing to object to the charge did not prejudice Applicant. Therefore, this allegation is denied and dismissed with prejudice.

11. Failure to submit favorable evidence into evidence

Applicant asserts trial counsel was deficient for failing to submit favorable evidence at trial. However, Applicant failed to testify or specify what evidence trial counsel should have introduced at trial to aid the defense. Therefore, Applicant has failed to prove trial counsel was deficient.

Further, Applicant cannot show prejudice resulted from trial counsel's alleged deficiency because the alleged "favorable evidence" was not introduced at the PCR hearing. This Court does

not know what the alleged evidence is or how it would have changed the trial. Therefore, Applicant has failed to meet his burden of proof on this allegation. *See Glover*, 318 S.C. at 498–99, 458 S.E.2d at 540 (stating to support a claim that trial counsel was ineffective for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence). Accordingly, this allegation is denied and dismissed with prejudice.

12. Opening the door to prejudicial evidence

Applicant alleges trial counsel was ineffective for opening the door to prejudicial evidence. However, Applicant has failed to specify what prejudicial evidence trial counsel opened the door to. Therefore, Applicant has failed to meet his burden of proof as to deficiency or prejudice. Further, Applicant has failed to overcome the presumption that trial counsel acted reasonably and did not have a sound trial strategy for opening the door to certain, unknown, prejudicial evidence. *See Strickland*, 466 U.S. at 688–89. Therefore, Applicant has failed to show trial counsel was deficient, or that he was prejudiced by trial counsel's alleged deficiency. Accordingly, this allegation is denied and dismissed with prejudice.

13. Failure to sequester witnesses at trial

Applicant alleges trial counsel was ineffective for failing to request the witnesses be sequestered. The Court disagrees.

Here, the only fact witness that would have been subject to sequestration was Graves's estranged ex-husband, Marcus Graves, because Graves and Dean, her mother, were both victims of the first-degree burglary. The Court finds trial counsel was not deficient in failing to request sequestration because Marcus Graves could not, and did not, identify Applicant as the person who entered the home and knocked on the door of the bedroom. Further, Marcus Graves could not, and did not, testify that he saw Applicant with a gun. Therefore, Applicant has failed to show how

trial counsel was deficient in failing to request the witnesses be sequestered, and Applicant failed to show how he was prejudiced by trial counsel's alleged deficiency. Accordingly, this allegation is denied and dismissed with prejudice.

14. Failure to object to prejudicial evidence

Applicant alleges trial counsel was ineffective for failing to object to prejudicial evidence at trial; specifically, evidence of Applicant's prior bad acts. The Court disagrees.

At trial, the State proffered Graves's testimony regarding an incident that previously occurred between herself and Applicant. Tr. 65. Trial counsel moved to exclude evidence of Applicant's prior bad act because he was never charged with a crime and that the probative value of the evidence was substantially outweighed by the prejudicial effect of the evidence. Tr. 69-70. The trial court noted trial counsel's objection, but ruled the evidence was "closely related in time to the event." Tr. 69. During Graves's direct trial testimony, trial counsel contemporaneously objected to the prior bad act evidence coming in based on his pretrial arguments. Tr. 76. The trial court noted the objection and ruled the testimony was admissible.

Trial counsel was not deficient for failing to object to the prior bad act evidence because trial counsel did object to the evidence at trial. Therefore, trial counsel cannot be deficient for failing to make an objection that he actually made at trial. Accordingly, this allegation is denied and dismissed with prejudice.

15. Failure to object to witnesses comment on another witness's mental state

Applicant alleges trial counsel was ineffective for failing to object to Graves commenting on Applicant's mental state. The Court disagrees.

A statement is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement in either an individual or a representative capacity." Rule 801(d)(2)(a), SCRE. An exception to the rule against hearsay is

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Rule 803(3), SCRE.

Here, Graves testified at trial that Applicant showed her a letter he had written "to his mother and his younger siblings like he was telling them goodbye. Then when I got to the bottom of the letter, that's when he had – he said that he was going to leave the world with the one he loved most." Tr. 82. Graves testified that after reading the letter, "[she] thought he was going to kill me." Tr. 83. However, instead, Applicant told Graves to leave him in the woods alone. Graves thought Applicant was going to kill himself, so she did not leave him alone. Tr. 83.

The Court finds trial counsel was not deficient for failing to object to Grave's testimony regarding Applicant's mental state because her impression of Applicant's mental state came from his own words and actions. This clearly falls within an exception to the rule against hearsay. Therefore, trial counsel was not ineffective for failing to object. Further, had trial counsel objected, the testimony would have been admissible as an exception to the rule against hearsay. Accordingly, this allegation is denied and dismissed with prejudice.

b. Ineffective assistance of appellate counsel

Applicant has alleged ineffective assistance of appellate counsel. Specifically, Applicant alleged appellate counsel was ineffective for (1) failing to file a merits brief arguing there was insufficient evidence to sustain a first-degree burglary conviction; (2) the lack of nexus for first-degree burglary; and (3) the trial court erred in charging first-degree burglary. The Court disagrees, and for the reasons discussed below, the Court denies relief on all allegations of ineffective assistance of appellate counsel and dismisses them with prejudice.

A defendant is entitled to effective assistance of appellate counsel. *Southerland v. State*, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Generally, in analyzing a claim of ineffective assistance of appellate counsel, the court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Southerland*, 337 S.C. at 616, 524 S.E.2d at 836. Thus, the question becomes (1) whether appellate counsel's performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

At the PCR hearing, Applicant testified he spoke to appellate counsel several times. Applicant further testified he told appellate counsel what he wanted her to raise. Applicant testified he sent appellate counsel a copy of dismissal of the trespassing ticket, and appellate counsel already knew the trespassing charge was dismissed. Applicant stated he told appellate counsel was living at the home, and he told appellate counsel he wanted her to raise the directed verdict issue, but she did not.

Appellate counsel recalled representing Applicant. Appellate counsel testified her normal practice when receiving a case is to review entire transcript, any documents/exhibits she can get, and she looks for any issues that have been preserved. She stated she then researches to decide if any issues have merit, and then she selects issues and prepares a brief. Appellate counsel testified that in her professional opinion, there were no preserved issues with merit.

Appellate counsel testified she had notes regarding telephone calls with Applicant in which he requested for her to brief the trial judge's failure to direct verdict. Appellate counsel stated she did not brief the directed verdict issue because she did not think it was properly preserved because

it was a general motion without any specifics, and there is case law saying the motion needs to be a specific. Further, appellate counsel testified that based upon Graves's testimony alone, appellate counsel thought there was direct and substantial circumstantial evidence of the burglary.

All of Applicant's allegations against appellate counsel deal with her failure to brief the directed verdict issue. The Court finds these issues are without merit, appellate counsel was not deficient, and Applicant has failed to show he was prejudiced by appellate counsel's alleged deficiencies.

First, appellate counsel testified she reviewed the entire transcript, and, in her opinion, there was sufficient evidence presented at trial to survive a directed verdict motion for burglary. As discussed in subsection (a)(2) of this order, this Court agrees. Graves's testimony alone was enough to survive a directed verdict motion. There was evidence that Applicant unlawfully entered the home armed with a gun. Therefore, appellate counsel was not deficient in failing to file a merits brief on the directed verdict. Further, even if appellate counsel had briefed the directed verdict issue, Applicant's conviction would have been affirmed because the evidence at trial showed the question was properly submitted to the jury. Therefore this allegation is denied and dismissed with prejudice.

Second, as discussed in subsections (a)(1) and (2), there was no evidence presented at trial that Applicant lived with Graves in the home. Therefore, appellate counsel cannot be deficient for failing to present an issue that was never raised at trial, and that was not supported by any evidence in the record.

Finally, as discussed in subsection (a)(5) and (10), there was no evidence to support the trial court charging a lesser included offense and the trial court properly charged first-degree burglary. Therefore, appellate counsel cannot be deficient for failing to argue the trial court

improperly charged the jury where the charge was supported by the record, a lesser-included offense was not supported by the record, and the trial court properly charged first-degree burglary. Accordingly, this allegation is denied and dismissed with prejudice.

V. Conclusion

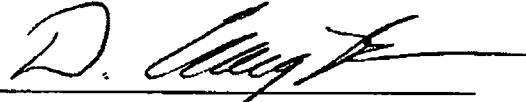
Based on all the foregoing, Applicant did not received ineffective assistance of trial or appellate counsel. Trial counsel was not deficient in any respect, and Applicant failed to show prejudice resulted from trial counsel's alleged deficiencies. Further, appellate counsel was not deficient in failing to file a merits brief on any of the directed verdict issues argued by Applicant because the record supported the trial court's decision to submit the case to the jury, and the trial court properly charged the jury on first-degree burglary. Accordingly, the Court denies relief on all allegations and dismisses this action with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, 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 appropriate procedures for appeal.

THEREFORE:

1. The Court denies relief and dismisses the action with prejudice; and
2. Applicant shall be remanded to the custody of the State.

AND IT IS SO ORDERED.



D. CRAIG BROWN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

Oct. 14, 2020.

FILED

STATE OF SOUTH CAROLINA)
COUNTY OF MARION)

2020 OCT 26 AM 8:33

Malcolm A. Williams, #372578)

Applicant,)

v.)

State of South Carolina)

Respondent,)

IN THE COURT OF COMMON PLEAS)
FOR THE TWELFTH JUDICIAL CIRCUIT)

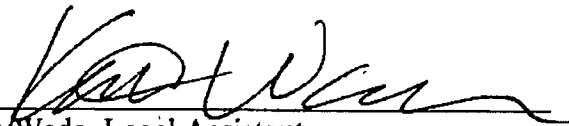
Case No.: 2019-CP-33-131

Certificate of Service by Mail

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Jonathan D. Waller, Esquire
Waller Law Group, LLC
1116 Blanding Street
Suite 2B
Columbia, SC 29201

DATED this 19th day of October, 2020.


Katie Wade, Legal Assistant
For Respondent