

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**RECEIVED**

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

NOV 22 2021

Jennifer B. McCoy, Circuit Court Judge **S.C. SUPREME COURT**

Case No. 2018-CP-02-0759

Frank Muns #335883.....Applicant/Appellant

v.

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

**NOTICE OF APPEAL**

This is a post-conviction relief case. Appellant appeals from the Order of Dismissal entered in this case on October 25, 2021. Appellant received written notice of the Order of Dismissal entered on October 25, 2021, by email on October 19, 2021. A copy of the Order of Dismissal appealed from is attached.

November 17, 2021



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**ATTORNEYS FOR RESPONDENT**

STATE OF SOUTH CAROLINA )  
 COUNTY OF AIKEN )  
 )  
 Frank Muns, #358883, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
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IN THE COURT OF COMMON PLEA  
 FOR THE SECOND JUDICIAL CIRCUIT

Case No.: 2018-CP-02-0759

**ORDER OF DISMISSAL**

FILED 10-25 20 2111:34

Robert J. White  
 C.C.P. & G.S.  
Shodell Parks  
 Deputy Clerk

This matter comes before this Court by way of an application for post-conviction relief filed on April 2, 2018, by Frank Muns (Applicant). The State (Respondent) filed a return and partial motion to dismiss on July 11, 2018, requesting an evidentiary hearing. An evidentiary hearing into the matter was convened on January 22, 2020, at the Aiken County Courthouse. Applicant was present at the hearing and represented by Arthur K. Aiken, Esquire. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office appeared on behalf of Respondent. At the hearing, Applicant testified on his own behalf. Assistant Public Defender Michael D. Routzong (Counsel) of the Third Circuit Public Defender's Office<sup>1</sup> also testified. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof and denies and dismisses this application with prejudice.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. During the October 2013 term, the

<sup>1</sup> Assistant Public Defender Michael D. Routzong was a public defender with the Second Circuit Public Defender's Office at the time he represented Applicant, however, he is currently employed by the Third Circuit Public Defender's Office.

Aiken County Grand Jury indicted Applicant for attempted murder (2013-GS-02-01657) and possession of a firearm during the commission of, or attempt to commit a violent crime (2013-GS-0201664).

Applicant was represented by Counsel. Assistant Solicitors Virginia Sheftall and Jeffrey "Jay" Slocum, Jr., of the Second Circuit Solicitor's Office prosecuted the case. On February 4, 2014, Applicant proceeded to trial before the Honorable Doyet Early III, and was found guilty as indicted. Judge Early sentenced Applicant to fifteen years' imprisonment for attempted murder and five years' imprisonment for possession of a firearm, to run concurrently.

Applicant filed a timely notice of appeal. Kevin R. Eberle, Esquire, and Nicholas Shalosky, Esquire, represented Applicant on appeal. On appeal, Applicant argued the trial court erred in refusing to issue a self-defense charge, the trial court erred in refusing to issue an accident charge, and the weapons charge should be retried because his attempted murder conviction was invalid. The South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion filed June 22, 2016. Applicant filed a petition for rehearing on July 7, 2016, which the Court of Appeals denied on August 22, 2016. Applicant filed a Petition for Writ of Certiorari on September 21, 2016. The State filed its Return to Petition for Writ of Certiorari on October 21, 2016. The Supreme Court of South Carolina denied the petition for writ of certiorari on May 30, 2017. The remittitur was issued June 12, 2017.

Applicant filed a timely application for post-conviction relief on April 2, 2018, alleging:

1. Ineffective Assistance of Counsel:

- i. Failure to file a motion to have a pre-trial hearing to determine if applicant was entitled to immunity
- ii. Failed to investigate and present all of the facts in a pretrial hearing that could have established Applicant was immune from prosecution under the Castle Doctrine by a preponderance of the evidence

- iii. Failed to argue and present in a pretrial hearing that Applicant did not create the need for force and was rightfully defending himself from the dangerous actions he encountered from Victim
- iv. Failed to move the court to determine in a pre-trial hearing whether or not Applicant obligated to remove himself from the confrontation
- v. Failed to ask the court for a pre-trial hearing to determine if Applicant could have removed himself from the dangerous situation
- vi. Failed to object to and file pre-trial motion in limine impeachment evidence showing contradiction in Victim's statements at trial
- vii. Failed to properly argue and show Applicant was in lawful possession of the handgun and was not engaged in unlawful activity and had the right to self defense
- viii. Failed to ask the court for a lesser included charge of assault and battery with high and aggravated nature.
- ix. Refused to respond to Applicant's request to speak with him before trial was both unreasonable and prejudicial
- x. Refused to accept Applicant's motion to request that he be relieved of his trial counsel (filed Oct 25, 2013)

2. IAC – Appellate Counsel

- i. Failure to accurately argue trial court error in self-defense determination
- ii. Failure to investigate and present a proper argument on direct appeal makes Applicant's conviction and sentence unreliable.

3. Denial of Due Process of Law

4. Trial Court Error

On January 24, 2019, Applicant filed an amended application setting forth two additional allegations of ineffective assistance of counsel:

1. Ineffective Assistance of Counsel

- i. Counsel was ineffective for failing to object to the trial court's failure to give the permissive inference instruction.
- ii. Counsel was ineffective for failing to object to the absence of the specific intent to kill instruction

On January 22, 2020, Applicant proceeded to an evidentiary hearing before the Honorable Courtney C. Pope at the Aiken County Courthouse. Applicant was represented by Arthur K. Aiken. Assistant Attorney General Janell H. Gregory of the South Carolina Attorney General's Office represented the State. At the hearing, Counsel and Applicant testified. At the conclusion of the evidentiary hearing, this Court took the matter under advisement.

## SUMMARY OF FACTS

Applicant and Kim Turner (Victim) are divorced, but, at the time of the incident, they were living together and raising their children as a family. (Trial Tr. 94-95.) Victim was remarried to Tony Turner (Turner), but the two were separated at the time of the incident. (Trial Tr. 94-95.) On April 5, 2013, Victim spent the night with Turner at a motel in Georgia. (Trial Tr. 95.) Victim testified Applicant had shown up at her motel and ripped the side mirror off of the vehicle she borrowed from her mother. (Trial Tr. 96.) Victim also testified Applicant called her several times and sent her text messages that scared her. (Trial Tr. 96.) On April 6, 2013, Victim returned home to check on her children and get ready for work. (Trial Tr. 97.)

As Victim approached the property, she observed Applicant's truck in the backyard, but did not see him. (Trial Tr. 100.) Victim could not drive into the driveway because it was blocked with a cable, so she attempted to enter the property on a go-kart path. (Trial Tr. 100-101.) As Victim pulled onto the path, Applicant's truck came out of nowhere and blocked her. (Trial Tr. 101.) Applicant jumped out of the truck with a pistol in his hand and started arguing with Victim and attempted to bang on the car window. (Trial Tr. 101-102.) Victim rolled her window down to prevent Applicant from breaking the window. (Trial Tr. 102.) Applicant began to hit Victim through the window and Victim rolled the window back up. (Trial Tr. 102.) Applicant was still yelling at Victim through the closed window when he pointed the gun at her, looked her straight in the face, and pulled the trigger. (Trial Tr. 102.) Victim heard the gun go off, and felt the spray of the glass. (Trial Tr. 102.) Victim looked up and saw Applicant still had the gun pointed at her and believed he was going to shoot her again. (Trial Tr. 102.) Victim floored her vehicle and jumped over some yard debris to get away from Applicant. (Trial Tr. 103.) Victim's eleven year-old daughter, Lydia Muns (Daughter), testified she heard a gunshot and came running out of the

residence and saw her mother pulling up to the house. (Trial Tr. 146.) Daughter testified Victim told her to call the police and that Applicant shot her. (Trial Tr. 146.) Daughter testified she observed Applicant running to the school bus on the property with a long gun in his hand. (Trial Tr. 146.)

Victim fled the property after she observed Applicant yelling and coming at her with the gun again. (Trial Tr. 106-107.) Victim drove to a nearby residence where Lisa Mason (Mason) was visiting her boyfriend, Dawson Mullins (Mullins). (Trial Tr. 39.) Victim pulled into Mullins' yard and told Mason she had been shot and asked her to call 911. (Trial Tr. 39.) Aiken County EMS arrived at Mullins' residence and found Victim sitting in the front seat suffering from a puncture wound directly under her left breast. (Trial Tr. 40.)

Victim testified she was in the hospital two or three days. (Trial Tr. 118.) Victim testified she eventually had the bullet removed in November of 2013 because she could feel it every day and it was causing her pain. (Trial Tr. 118-119.)

Applicant testified on the morning of April 6, 2016, he observed Victim attempt to pull into the driveway, but swerve to avoid the cable across the driveway and proceed to the go-kart path. (Trial Tr. 161, 165.) Applicant blocked Victim with his truck because she was about to run over the septic tank. (Trial Tr. 165.) Applicant testified he walked over to Victim's vehicle, she cursed at him and refused to stop trying to maneuver her car onto the property. Applicant testified he was afraid Victim was going to "smush" him between their vehicles. (Trial Tr. 167.) Applicant testified the front of Victim's vehicle was pinning him between his truck and her vehicle, but she would not respond to his repeated commands to stop. (Trial Tr. 167.) Applicant testified he pulled out his revolver to hit her window in an effort to get her to stop. (Trial Tr. 168.) Applicant testified he was not trying to kill Victim, and was only trying to get her to stop. (Trial Tr. 168.) Applicant

testified after the gun went off, he dropped it as Victim drove past his truck and over the septic tank. Applicant testified Victim drove onto the property and yelled for someone to call police before driving off the property through his mother's yard. (Trial Tr. 169.) Applicant then picked up the gun and walked to the bus that was also on the property. (Trial Tr. 170.) Applicant testified he did not know Victim was shot until about three hours later, however, he did not turn himself in to the police. (Trial Tr. 170.) Applicant was eventually arrested in Augusta, Georgia on April 28, 2013. (Trial Tr. 170.)

### ALLEGATIONS RAISED

On January 22, 2020, Applicant's post-conviction relief hearing was held at the Aiken County Courthouse. During the hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Counsel
  - a. Counsel refused to accept Applicant's motion to request that he be relieved of his trial counsel.
  - b. Counsel failed to respond to Applicant's request to speak with him before trial and that prejudiced him.
  - c. Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.
  - d. Counsel failed to file a pre-trial motion in limine for impeachment evidence showing contradiction in the victim's statements at trial.
  - e. Counsel failed to argue Applicant was in lawful possession of a handgun and had the right to self-defense.
  - f. Counsel failed to ask the court for a lesser included charge of assault and battery of a high and aggravated nature.
  - g. Counsel failed to request a permissive inference instruction to the jury.
  - h. Counsel failed to object to the trial court's failure to give the specific intent to kill instruction at Muns's trial.

### APPLICABLE LAW

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his or her 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

### FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject

convictions, the trial transcript, the appellate records, the application for post-conviction relief, and the legal arguments made by the attorneys. Set forth below are the relevant findings of fact and conclusion of law as required by S.C. Code Ann. § 17-27-80 (2003).

**Ineffective Assistance of Counsel**

*Counsel refused to accept Applicant's motion to request that he be relieved of his trial counsel and Counsel refused to respond to Applicant's request to meet with him prior to the trial.<sup>2</sup>*

Applicant alleges he filed a motion to have Counsel relieved as his attorney, and Counsel failed to respond to his requests to meet with him prior to the trial.

Applicant testified he filed a motion to have Counsel relieved, however, Counsel told him the motion was "no good." Applicant testified he only saw Counsel during his bond hearing and on the Saturday before trial. Applicant testified he did not tell the court he was unhappy with his representation of Counsel. Applicant testified he proceeded through the trial without telling the court he did not want Counsel as his attorney.

Counsel testified he did not specifically recall Applicant filing a motion to have him relieved. Counsel testified the policy of the Second Circuit Public Defender's Office is not to reassign cases just because a client has an issue with the attorney. Counsel testified they would normally have a status of counsel hearing if a client wanted an attorney relieved. Counsel testified he does not recall telling Applicant his motion to relieve him was "no good." Counsel testified he spoke to Applicant on the phone and met with him at the jail several times. Counsel testified he would not have refused to meet with Applicant as that would have been silly. Counsel testified he explained the elements of Applicant's charges and potential sentences to Applicant.

This Court finds the testimony of Counsel credible as to this allegation. This Court finds

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<sup>2</sup> This section addresses Applicant's allegations a and b.

Applicant's testimony regarding Counsel's failure to meet with him and his claim that Counsel told him his motion to relieve counsel was "no good" not credible. This Court finds Counsel was not constitutionally ineffective as he met with Applicant numerous times prior to trial and discussed his charges and potential sentences with him during those meetings. Applicant has failed to establish any deficiency on behalf of Counsel or any resulting prejudice. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective and this allegation is denied and dismissed with prejudice.

***Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.***

Applicant alleges Counsel failed to file a pre-trial motion to determine if Applicant was entitled to immunity.

Applicant testified he believes he was entitled to immunity under the Castle Doctrine. Applicant testified the shooting occurred at his residence as he was leaving to go to the store before work. Applicant testified Victim was coming in as he was leaving and he backed his truck up to let her in, but she went past him to a vacant lot beside his residence. Applicant testified Victim was trying to force her way onto the property and she would not stop. Applicant testified she pinned him against his truck, so he used his revolver to try to break her window. Applicant testified he never intended to shoot her. Applicant testified he did not provoke this encounter. Applicant testified he believed he was in imminent danger. Applicant testified he believes he used reasonable force.

Counsel testified Applicant maintained the shooting was an accident. Counsel testified he does not believe he should have made a motion for immunity because Applicant maintains – and continues to maintain – the shooting was an accident. Counsel testified Applicant would have to

meet the elements of self-defense, with the exception of retreat, in order to be entitled to immunity. Counsel testified a motion for immunity would be inconsistent with the facts.

Here, the record and testimony before this Court fails to establish the Protection of Persons and Property Act applied to Applicant's case. Applicant presented no evidence or testimony to support a finding the presumption afforded by S.C. Code Ann. § 16-11-440(A) would apply. S.C. Code § 16-11-440(A) states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

(1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and

(2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A)(emphasis added).

“Consistent with the Castle Doctrine and the text of the Act, *a valid case of self-defense must exist*, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity” save the duty to retreat. State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013) (emphasis added). Notwithstanding the Act or other provisions of law, in order to establish self-defense, Applicant must show (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; and (4) he had no other probable means of avoiding the danger. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997).

Here, Applicant testified at trial and during the evidentiary hearing that the shooting was an accident. The record also shows Applicant was not without fault in bringing about the difficulty. Applicant testified at trial he blocked Victim from driving onto the property from the go-kart path, which is what led to the altercation between Applicant and Victim that ultimately resulted in the shooting. (Trial Tr. 166.)

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. This Court finds Counsel evaluated Applicant's case for a motion for immunity, however, the facts of the case did not support such a motion in Applicant's case. Applicant has failed to show how Counsel was deficient as to this allegation as Applicant's own testimony at trial and the evidentiary hearing show he was not entitled to immunity since he maintains the shooting was an accident and he was not without fault in bringing about the difficulty in this case. Further, Applicant has failed to show any resulting prejudice from the alleged deficiency as Applicant has failed to establish the outcome of his trial would have been different had Counsel pursued an immunity hearing prior to trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

***Counsel failed to file a pre-trial motion in limine for impeachment evidence showing contradiction in the victim's statements at trial.***

Applicant alleges Counsel was ineffective for failing to file a motion in limine for impeachment evidence showing contradiction in the victim's statements. Applicant testified Victim made inconsistent statements and Applicant did not realize it until after trial. Applicant testified Counsel did not realize the inconsistencies in Victim's statements. On cross-examination,

Applicant could not provide any specific examples of Victim's inconsistent statements, but claimed Victim changed her story about what happened during the incident.

Counsel testified there were some inconsistencies in Victim's statements, however, Counsel testified he would not have wanted to keep out those inconsistent statements at trial. Counsel testified he cross-examined Victim on her inconsistent statements during the trial.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Gentry, 540 U.S. at 8 (quoting Massaro, 538 U.S. at 505). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith, 386 S.C. at 567, 689 S.E.2d at 632. See also Ingle, 348 S.C. at 470, 560 S.E.2d at 402 (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "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, 308 S.C. at 122, 417 S.E.2d at 531.

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. After reviewing the record and Counsel's testimony, this Court finds Counsel did cross-examine Victim on her inconsistent statements. Further, Counsel credibly testified he would not want to keep those statements from being addressed at trial and this Court finds that is a valid trial strategy. This Court finds Applicant has failed to prove deficiency on behalf of Counsel.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to show this Court how Counsel moving to keep Victim's inconsistent statements from being addressed during the trial had a reasonable probability of changing the outcome of his trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

***Counsel failed to argue Applicant was in lawful possession of a handgun and had the right to self-defense.***

Applicant alleges Counsel failed to argue Applicant was in lawful possession of a handgun and had a right to self-defense. Applicant testified he was in lawful possession of a handgun because he was not a felon and only had a conviction on his record from Georgia.

Counsel testified Applicant had a conviction of domestic violence in 2005, so he could not be in lawful possession of a handgun in South Carolina. Counsel testified he made the argument to the trial court regarding the ambiguity between federal and state law. However, despite Counsel's argument, the trial court found Applicant was a convicted felon and under the law of "this state and federal law, a convicted felon cannot be in possession of a weapon." (Trial Tr. 194.) Counsel testified Applicant's case did not meet the elements of self-defense because Applicant repeatedly claimed he did not intend to shoot Victim. Counsel testified he requested an instruction on self-defense, but the trial court denied his request.

This Court finds the testimony of Counsel credible as to this allegation, whereas Applicant's testimony is not credible. After a review of the record, this Court finds Counsel presented argument to the trial court that Applicant was acting lawfully in possessing a firearm during the incident, however, the trial court disagreed and found Applicant was unlawfully in possession of the firearm despite Counsel's argument. (Trial Tr. 194-195.) This Court finds

Applicant has failed to prove deficiency on behalf of Counsel as Counsel testified Applicant was not in lawful possession of a firearm, but presented an argument to the trial court attempting to justify Applicant's possession of a firearm.

Further, Applicant has failed to prove any resulting prejudice from the alleged deficiency as Applicant failed to show this Court what Counsel could have argued or presented to the trial court that would have had a reasonable probability of changing the outcome of his trial. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

***Counsel failed to ask the court for a lesser included charge of assault and battery of a high and aggravated nature.***

Applicant alleges Counsel was ineffective for failing to ask the trial court for a lesser-included charge of assault and battery of a high and aggravated nature (ABHAN).

Counsel testified the State requested the lesser-included offense of ABHAN. Counsel testified the State did not provide evidence to substantiate a charge on ABHAN as they did not prove serious bodily injury. Counsel testified he requested the lesser-included offenses of assault and battery first degree and second degree. Counsel testified that it would be completely speculative to say Applicant would have been convicted of ABHAN had the trial court agreed to charge that to the jury. Counsel testified Applicant was provided with a plea offer prior to trial for assault and battery, first degree, but he turned that down.

A review of the record shows Counsel also asked for a jury charge on accident and self-defense. The trial court ruled that Applicant was not entitled to the charge of accident or self-defense. (Trial Tr. 188.) The trial court also found the State failed to prove beyond a reasonable doubt that the victim suffered serious bodily injury under the new statute. (Trial Tr. 190.) The

trial court did not charge assault and battery, first degree, because the lack of evidence of "great bodily injury." (Trial Tr. 190.) Finally, the trial court did charge assault and battery, second degree, because the evidence in the record supported the victim suffering "moderate bodily injury." (Trial Tr. 191.)

The law to be charged is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). "A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed." State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012). "The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tends to show the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 608, 635 S.E.2d 669, 674 (Ct. App. 2006).

This Court finds the testimony of Counsel credible as to this allegation. This Court finds, based on the record and Counsel's credible testimony, that the lesser-included offense of ABHAN was requested and subsequently rejected by the trial court. Further, Counsel asked for assault and battery, first degree, and second degree on Applicant's behalf, and the trial court agreed to provide a charge on assault and battery, second degree. (Trial Tr. 190.) Applicant has failed to show this Court how Counsel was deficient for failing to request the ABHAN charge when the ABHAN

charge was requested and rejected by the trial court. Furthermore, this Court finds Applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

*Counsel failed to request a permissive inference instruction to the jury*

Applicant alleges Counsel was ineffective for failing to request a permissive inference instruction to the jury. Applicant argued under State v. Elmore, 279 S.C. 417, 803 S.E.2d 781 (1983) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991)), Counsel was ineffective for failing to request the trial court give a permissive inference charge to the jury.

Counsel testified he did not want the jury to imply malice from the use of a deadly weapon in Applicant's case. Counsel testified he does not know why Applicant would want him to request such an instruction.

A review of the record shows the State requested the permissive inference charge be provided to the jury. (Trial Tr. 198-199.) The trial court explained it was going to only provide the jury with the charge explaining the two types of malice, implied and express. (Trial Tr. 199.) The trial court stated, "And I'm not going to use the [inference] can be from the use of a deadly weapon." (Trial Tr. 199.)

In Elmore, the Supreme Court of South Carolina held that the trial court's instruction on malice as it related to the use of a deadly weapon constituted a mandatory presumption, and set forth a jury charge consistent with the Due Process Clause for trial courts to utilize in the future:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt,

sufficient to raise an inference of malice to your satisfaction, this inference would simply [be] an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Elmore, 279 S.C. at 421, 308 S.E.2d at 784. The Elmore Court firmly advised the bench “that hereafter only slight deviations from this charge will be tolerated.” Id.

The Supreme Court returned to the inference of malice from the use of a deadly weapon more than 25 years later in State v. Belcher, and held that the first sentence of the above charge could not be instructed to juries where the record contained evidence to reduce, excuse, mitigate, or justify a homicide or assault and battery with intent to kill. 385 S.C. 597, 685 S.E.2d 802 (2009). The Court distinguished the remainder of the charge as the “general permissive inference instruction,” and noted that it remained valid. Id., 385 S.C. at 612, n. 9, 685 S.E.2d at 810, n. 9.

A few years later, in Gibson v. State, the Supreme Court reversed a denial of post-conviction relief where the trial court charged the inference of malice from the use of a deadly weapon, but failed to include the remainder of the Elmore charge. 416 S.C. 260, 785 S.E.2d 121 (2016). Gibson was decided without briefing or oral arguments, based on the observation that total omission of the general permissive inference language was no “slight deviation” from the Elmore charge, in clear disregard for Elmore’s admonition.

Here, in Applicant’s case, the inference of malice from the use of a deadly weapon was not charged. In its instruction to the jury, the trial court defined malice and explained to the jurors that malice may be “shown by expressed evidence or inferred from the circumstances which were proven.” (Trial Tr. 230-231.) As the trial court did not provide the charge that malice may be inferred from the use of a deadly weapon, the trial court did not have to provide Elmore’s general permissive inference instruction. The general permissive inference of malice portion of Elmore was only necessary and required as part of a complete instruction on the inference of malice from

the use of a deadly weapon, and there is no requirement to charge the language in a stand-alone fashion.

This Court finds there is no obligation under our current jurisprudence to charge the general permissive inference of malice instruction where, consistent with Belcher, there is no charge on the implication of malice from the use of a deadly weapon. The language of the Elmore charge is specifically tailored to deal with the perceived and real dangers in instructing the jury that inference may be inferred *from the use of a deadly weapon*, and represents a solution to the then-recurring problem of jury instructions which provided for burden-shifting presumptions in violation of the United States Constitution. The second part of the Elmore charge serves as a cautionary restraint on the first part, and is of little instructional value standing alone. Standing alone, the instruction demanded would be confusing. Furthermore, even if the Supreme Court subsequently holds that the general permissive inference instruction was required in every case involving malice aforesaid, the absence of any clear precedent to that effect at this time and at the time of trial provides that Counsel could not have possibly known to demand the language, or object to its exclusion. For all of these reasons, Applicant cannot show any deficiency on the part of Counsel by way of this allegation.

As to prejudice, even if the charge were required, the Court finds Applicant has failed to show how he was prejudiced by the absence of the general permissive inference instruction. The Court finds there is no reasonable probability the outcome of trial would have been different if only Counsel had requested, and the trial court had charged the jury with a general permissive inference instruction. Thus, Applicant has failed to meet his burden of showing Strickland prejudice.

***Counsel failed to object to the trial court's failure to give the specific intent to kill instruction at Applicant's trial.***

Applicant alleges Counsel was ineffective for failing to object to the trial court's failure to give the specific intent to kill instruction to the jury at trial. Applicant argued that there was no clear statement from the trial court that there must be a specific intent to kill, which is required pursuant to State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

Counsel testified the judge charged specific intent to the jury when providing the instruction on the attempted murder charge. Counsel testified he did not see an issue with the jury instructions overall.<sup>3</sup>

Attempted murder is defined by statute as: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. In 2017, the Supreme Court decided King, 422 S.C. at 56-57, 810 S.E.2d at 23 (2017), aff'g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), and found "[T]he Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder...."

During its instruction, the trial court stated:

In the first indictment, we're dealing with the charge of attempted murder. Our law defines the word attempt as an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation and intent; there must be some overt act committed in

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<sup>3</sup> Applicant relies on King in support of this allegation. However, the Court of Appeals' decision in King was delivered in June 2015 and the Supreme Court's decision in October 2017, well after Applicant's trial in February 2014. Importantly, the relevant lens for analysis is "counsel's perspective at the time" of trial. Strickland, 466 U.S. at 689; see also Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 766 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later when a witness modifies her original statements."). Further, attorneys are not required "to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765.

the effort to commit the crime. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

(Trial Tr. 228-229.) The trial court goes on to state,

The State must prove beyond a reasonable doubt that the defendant attempted - - and I defined attempt to you already - - to kill another person with malice aforethought, and that malice must be either expressed or implied.

(Trial Tr. 229.)

This Court finds the testimony of Counsel credible as to this allegation. This Court finds that the trial court's instruction on attempted murder was proper and instructed the jury that attempt requires the State to prove specific intent. The trial court later refers to that definition in defining the State's burden to prove Applicant's intent to kill another with malice aforethought. (Trial Tr. 229.) "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2003). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. at 318, 577 S.E.2d at 464; State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). A jury charge that is substantially correct and covers the law does not require reversal. State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

This Court finds Applicant has failed to show any deficiency on behalf of Counsel for failing to object to the trial court's instruction. Furthermore, this Court finds Applicant has failed to carry his burden of establishing how he was prejudiced by any alleged deficiency. Therefore, based on the standard set forth above, this Court finds Applicant has failed to meet his requisite

burden of establishing Counsel was constitutionally ineffective as to this allegation and this allegation is denied and dismissed with prejudice.

**CONCLUSION**

Based on the foregoing, the Court finds and concludes 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.

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

**IT IS THEREFORE ORDERED THAT:**

1. The application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant is to remain in the custody of Respondent.

AND IT IS SO ORDERED this 12 day of October, 2020. <sup>cr</sup>

Courtney C. Pope  
COURTNEY C. POPE  
Presiding Judge  
Second Judicial Circuit

Aiba, South Carolina