VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

WILLIAM DAVID CANNON,
Petitioner,

v. CASE NO. CL16-4979

DIRECTOR,
DEPARTMENT OF CORRECTIONS,
Respondent.

FINAL ORDER

This matter came before the Court on Petition for Writ of Habeas Corpus and Respondent's Motion to Dismiss. Upon mature consideration of the pleadings and exhibits, controlling legal authority, and the record in the case of Commonwealth v. William David Cannon, Case Nos. CR12-189-00, -89-01, 1640-00, -1640-02, -1640-03, -1640-04, CR14-83-00, and -83-02, which is hereby made a part of the record in this case, the Court makes the following findings of fact and conclusions of law in accordance with Virginia Code § 8.01-654(B)(5):

The petitioner, William David Cannon, is detained under a final order of the Court entered on September 25, 2014. (Case Nos. CR12-189-00, -89-01, 1640-00, -1640-02, -1640-03, -1640-04, CR14-83-00, and -83-02). A jury convicted Cannon of robbery, rape, armed burglary, abduction, and 4 counts of use of a firearm in commission of a felony on April 10, 2014 and recommended a sentence of fifty-eight years' incarceration.[1] At sentencing, the Court considered the presentence report and, after taking evidence and hearing argument from counsel,

[1] Cannon was acquitted by the jury on charges of object sexual penetration, use of a firearm in commission of object sexual penetration, and conspiracy to commit armed statutory burglary. Those charges are therefore not the subject of this petition. Additionally, Cannon states in his petition that he concedes the charge of robbery and does not challenge that conviction or the accompanying firearm conviction in this petition. (Pet. at 29-30).

imposed the sentence fixed by the jury. (Resp. Ex. A at 7-8; Sentencing Transcript of September 23, 2014).

The Court finds that Cannon's petition for appeal was denied by the Court of Appeals on May 4, 2015. The Court further finds that his petition for appeal to the Supreme Court of Virginia was denied on August 3, 2016. Cannon was represented at trial and on appeal by Melinda Glaubke, Esq.

PRESENT PETITION

The Court finds that on October 28, 2016, Cannon timely filed the instant petition for writ of habeas corpus. Specifically, Cannon raises the following claims:

I. The trial court abused its discretion by denying Cannon's motion to strike at the close of the Commonwealth's evidence;

II. There was insufficient evidence as a matter of law to sustain the verdicts against Cannon;

III. Ineffective assistance of counsel at trial;

   a. Trial counsel was ineffective for failing to object to the Commonwealth's statements;
   b. Trial counsel was ineffective for failing to object to the standard of review at the motion to strike;
   c. Trial counsel was ineffective for failing to make an appropriate argument to the jury;
   d. Trial counsel was ineffective for failing to submit a "correction of facts" on appeal;
   e. Trial counsel was ineffective for failing to establish the Commonwealth's misrepresentations of fact at the Motion to Set Aside the Verdict; and,
   f. Trial counsel was ineffective based upon the cumulative prejudice of her errors.

IV. Ineffective assistance of counsel on appeal;

   a. Appellate counsel was ineffective for failing to state that the facts were in dispute;

b. Appellate counsel was ineffective for failing to object to the misrepresentation of facts in the Commonwealth's Brief in Opposition;
c. Appellate counsel was ineffective for failing to assert Cannon's right to have the evidence viewed in his favor on appeal; and,
d. Appellate counsel was ineffective for failing to assert a lack of factual foundation to support the concert of action jury instruction.

V. Prosecutorial misconduct.

STATEMENT OF FACTS

The Court finds that on September 25, 2011, the victim was living at the Mansards Apartments in Virginia Beach. She arrived home at twelve o'clock that night and saw two men walking down the sidewalk. As she walked to her apartment, one of the men was in front of her and one was behind her. As she started to put her key in the door, she heard footsteps behind her. One of the men told her to "stop" and when she looked to her left, he had a gun pointed at her head. The victim identified the armed man as Ronaldo Goodman. Goodman asked her if anyone was home, or if she had a dog or alarm system. The victim answered that she didn't have any of that. Goodman then directed her to go inside and put down her belongings. While she did this, Goodman was pointing the gun at her chest and Cannon was standing at the door looking out of the door. When the victim tried to move the gun, Goodman pulled on her head, made her walk around the couch and told her to get down on all fours. Goodman then took the victim by her hair to the back bedroom. At this point, Cannon was still looking out the front door. Once she was in the back bedroom, Goodman made the victim lay on her stomach and he tried to tie her hands with a laptop cord. At that point, Cannon walked into the bedroom and asked Goodman where the victim's cash was. When she responded that she didn't carry a pocketbook, Cannon walked out and walked back in with brown electrical tape, which Goodman

then used to tie the victim's hands. After tying her hands behind her back, Goodman put a sock in the victim's mouth, searched her pockets, and then took her pants down. Goodman then stuck two fingers in the victim's vagina, then took off his pants and put his penis in her vagina. While Goodman raped her, the victim could hear Cannon going through the house opening drawers and closets. The victim thought about trying to get away, but knew that if she did, Cannon was still on the other side of the house. While Goodman was raping the victim, Cannon opened the door, laughed, and stated "Hurry up. I'm about to go get the car." She then heard the door shut as Cannon left. After Goodman ejaculated on the victim's leg, he stood up, turned on her TV, went through her closet and walked into the hall closet. When the victim heard the front door shut, she got up, went to a neighbor's house and called the police.

The victim testified that two class rings and a bracelet were missing from her apartment. She also identified an Xbox, a Wii, some games for those game systems, a laptop, a phone, and some tools as items that had been taken from her apartment. On cross-examination, the victim testified that she kept electrical tape in her home and that it was in the living room under the TV stand. She confirmed that she saw Cannon hand this tape to Goodman and that none of her clothing had been removed at that point. The victim also stated that the next time Cannon came in the room, her eyes were covered by her tank top, but she could barely see Cannon out of the corner of her eye. The victim also testified that after Cannon told Goodman to hurry up, Goodman stopped raping her and started going through her things.

In addition to the victim's testimony, the Court finds that the Commonwealth also presented testimony from Virginia Beach Master Police Officer Stephen Policella. Officer Policella testified that he executed a search warrant on Cannon's home and recovered a roll of brown electrical tape, as well as the Wii game system and the cell phone the victim identified as

having been taken from her apartment. Officer Policella also testified that he had interviewed Cannon and that the interview had been recorded. The Court finds that a portion of that recording was played for the jury and the interview was admitted into evidence. Cannon told Officer Policella that, while he and Goodman were on the way to Virginia Beach, Goodman displayed a firearm. Cannon also admitted to selling the victim's laptop to a pawnshop. Cannon then wrote an apology letter that was also introduced into evidence.

CANNON'S NON-COGNIZABLE CLAIMS

The Court finds that claims I and V are not cognizable in habeas corpus because Cannon could have raised them at trial or on appeal, but failed to do so. "A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." Slayton v. Parrigan, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974). So, claims that could have been raised at trial or on direct appeal, but were not, and do not implicate the court's subject matter jurisdiction cannot be raised in habeas corpus. Id.; accord Elliott v. Warden, 274 Va. 598, 601, 652 S.E.2d 465, 473 (2007); Strickler v. Murray, 249 Va. 120, 126, 452 S.E.2d 648, 651 (1995).

In claim I, Cannon alleges that the Court abused its discretion by using the wrong standard in ruling on his motion to strike at the close of the Commonwealth's evidence. The Court finds that this argument was available to Cannon to be raised on appeal, but was not. Thus, the Court holds that Cannon's due process claim is procedurally defaulted because he failed to raise it on appeal. Parrigan, 215 Va. at 29, 205 S.E.2d at 682. Additionally, the Court finds that Cannon does not challenge the Court's subject matter jurisdiction. See Virginia Code §§ 19.2-239 and 17.1-513.

Further, the Court holds that claim I is without merit. The Court finds that, in ruling on the motion to strike at the close of the Commonwealth's evidence, the Court stated that it was

viewing the evidence in the light most favorable to the Commonwealth. It is well established that, upon a motion to strike for insufficiency of the evidence, the trial court views the evidence in the light most favorable to the party opposing the motion. See Morrisette v. Commonwealth, 264 Va. 386, 396, 569 S.E.2d 47, 54 (2002). Here, the opposing party was the Commonwealth. Thus, the Court holds that the proper standard was used.

In addition, the Court finds that the evidence presented by the Commonwealth was clearly sufficient to support the Court's ruling. The Court finds that it is well-settled that a trial court should grant a motion to strike "only when it is conclusively apparent that [the Commonwealth] has proven no cause of action against defendant, or when it plainly appears that the trial court would be compelled to set aside any verdict found for the [Commonwealth] as being without evidence to support it." Avent v. Commonwealth, 279 Va. 175, 198-99, 688 S.E.2d 244, 257 (2010). Here, the Court of Appeals of Virginia expressly found that the Commonwealth's evidence was sufficient to support the rape, abduction, burglary, and accompanying firearms convictions. In light of that finding, the Court holds that Cannon cannot show that the Court's ruling was erroneous. Accordingly, claim I is DISMISSED.

In claim V, Cannon alleges prosecutorial misconduct in presenting false testimony to the Court. The Court finds that Cannon was aware of the alleged false statements when he filed for appeal, but failed to raise these arguments. Therefore the claim is procedurally defaulted. See Elliott, 274 Va. at 601, 652 S.E.2d at 473 (holding Brady and Napue violations are reviewable on direct appeal).

Further, the Court holds that claim V is without merit. The Court finds that "to find that a violation of Napue occurred, we must determine first that the *testimony* at issue was false, second that the prosecution knew of the falsity, and finally that the falsity affected the jury's judgment."

Lawlor v. Warden, 288 Va. 223, 224, 764 S.E.2d 265, 270 (2014) (emphasis added) (citing Teleguz v. Commonwealth, 273 Va. 458, 492, 643 S.E.2d 708, 729 (2007)). The Court finds that, while Cannon identifies a number of statements made by the prosecution with which he disagrees, Cannon fails to establish that any of these statements were testimony, that any of them were false, or that any of them were knowingly false.

The Court finds that it is well established that the arguments of counsel are not evidence. See, e.g., Westry v. Commonwealth, 206 Va. 508, 515, 144 S.E.2d 427, 432 (1965). Thus, the Court finds that counsel's arguments cannot form the basis of a violation under Napue. Even so, all of the statements Cannon complains of were supported by evidence on the record. The Court finds that the statement that Cannon was at the Mansards apartments to rob people was supported by his own statement as well as the evidence that he actually did steal things from the victim's apartment. The Court finds that the statements that Cannon took things from the victim, that he was the lookout, and that he was the getaway driver were supported by Cannon's statements to police, including that he was driving his girlfriend's SUV on the night these crimes were committed, and by the victim's testimony. The Court finds that the statement that Cannon said "hurry up" while the rape was in progress was supported by the victim's testimony. The Court finds that the statement that Cannon's presence caused the victim not to try to escape was supported by her testimony. The Court finds that the statement that Cannon was part of the burglary and abduction was also supported by the victim's testimony that he stood at the door while Goodman held a gun on her and forced her into the apartment and the bedroom. Thus, the Court finds that, even if Cannon could raise this claim, he has failed to establish any violation under Napue. Therefore, claim V is DISMISSED.

In claim II, Cannon asserts that that the evidence was insufficient. The Court finds that this claim was fully adjudicated in the Court of Appeals and Virginia Supreme Court on direct appeal, and Cannon is bound those decisions. The Court holds that this claim, therefore, is not cognizable on habeas review. See Henry v. Warden, 265 Va. 246, 248, 576 S.E.2d 495, 496 (2003). Accordingly, claim II is DISMISSED.

CANNON'S INEFFECTIVE ASSISTANCE CLAIMS

Standard of Review

In order to prevail on his ineffective assistance of counsel claims, Cannon must meet the highly demanding standard articulated in Strickland v. Washington, 466 U.S. 668 (1984). Strickland requires the petitioner to show that his attorney's performance was deficient *and* that he was prejudiced as a result. See Strickland, 466 U.S. at 687; accord Murray v. Griffith, 243 Va. 384, 388, 416 S.E.2d 219, 221 (1992). The petitioner also has the burden of proving his claims of ineffective assistance by a preponderance of the evidence. Sigmon v. Dir. of the Dep't of Corr., 285 Va. 526, 535, 739 S.E.2d 905, 909 (2013). This is a "substantially heavier burden . . . than on direct appeal." Stokes v. Warden, Powhatan Correctional Center, 226 Va. 111, 118, 306 S.E.2d 882, 885 (1983).

"The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). In evaluating such claims, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Therefore, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices

or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011) (quoting Strickland, 466 U.S. at 690).

Strickland's "performance" inquiry "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. A reviewing court "must be highly deferential in scrutinizing [counsel's] performance and must filter the distorting effects of hindsight from [its] analysis." Burket v. Angelone, 208 F.3d 172, 189 (4th Cir. 2000). See also Baker v. Corcoran, 220 F.3d 276, 293 (4th Cir. 2000) (competency of counsel is "measured against what an objectively reasonable attorney would have done under the circumstances"). "The Sixth Amendment's guarantee of assistance of counsel requires that counsel exercise such care and skill as a reasonably competent attorney would exercise for similar services under the circumstances." Frye v. Commonwealth, 231 Va. 370, 400, 345 S.E.2d 267, 287 (1986). See Poyner v. Murray, 964 F.2d 1404, 1423 (4th Cir. 1992) (law requires not perfect performance, "but only professionally reasonable performance of counsel").

In addition, Strickland's "prejudice" inquiry requires showing that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "That requires a substantial, not just conceivable, likelihood of a different result." Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (internal quotation marks omitted).

An ineffective assistance of counsel claim may be disposed of on either prong of the Strickland test because deficient performance and prejudice are "separate and distinct elements." Spencer v. Murray, 18 F.3d 229, 232-33 (4th Cir. 1994); see also Strickland, 466 U.S. at 697.

And conclusory allegations of ineffective assistance of counsel do not merit habeas relief. Fitzgerald v. Bass, 6 Va. App. 38, 44, 366 S.E.2d 615, 618 (1988) ("mere conclusions or opinions of the pleader" are not sufficient to state a claim for relief in habeas corpus) (quoting Penn v. Smyth, 188 Va. 367, 370-71, 49 S.E.2d 600, 601 (1948)); cf. Nickerson v. Lee, 971 F.2d 1125, 1135 (4th Cir. 1992) (a "bare allegation" of constitutional error not sufficient for relief). Thus, the habeas corpus petition must contain all of the allegations of fact upon which the petitioner relies in support of his habeas corpus claim. Virginia Code § 8.01-654(B)(2). Applying these standards, the Court finds that Cannon is not entitled to relief.

Analysis

In claim III(a), Cannon alleges that his trial counsel was ineffective for failing to object to the Commonwealth's statements that Cannon intended to "rob people." The Court finds that this claim is without merit.

The Court finds that Cannon has failed to establish that this argument was false. Cannon admitted to police that he and Goodman went to the Mansards apartments to steal from people's cars. Further, Cannon admitted that, once they were in the victim's apartment, his mindset was "whatever I can get, I can get." Cannon also admits in his pleading that he stole valuables from the victim's apartment. The Court finds that, given Cannon's admissions, he has failed to establish any good faith basis upon which his counsel could have objected to the Commonwealth's statements. Counsel is not ineffective for failing to make a frivolous objection. See Correll v. Commonwealth, 232 Va. 454, 469-70, 352 S.E.2d 352, 361 (1987) (holding counsel had no duty to object to admission of presentence report because it was admissible); cf. Sharpe v. Bell, 593 F.3d 372, 383 (4th Cir. 2010) ("'Counsel is not required to engage in the filing of futile motions.'") (quoting Moody v. Polk, 408 F.3d 141, 151 (4th Cir.

2005)). Therefore, the Court holds that Cannon has failed to establish that his counsel's performance was deficient under Strickland.

In addition, the Court finds that Cannon has failed to demonstrate how such a frivolous objection would have changed the outcome of his case. Cannon has neither alleged nor demonstrated that such an objection would have been successful. Further, the Court finds that, given Cannon's admitted involvement in the robbery, his knowledge that Goodman was armed, his watching at the door while Goodman threatened the victim with a gun and forced her inside the apartment, his active participation in burglarizing her apartment, and the evidence that Cannon gave Goodman tape to bind the victim's hands and urged him to "hurry up" as he raped her, Cannon has not established a reasonable probability that, but for his counsel's alleged errors, the result of the proceeding would have been different. See Teleguz v. Commonwealth, 279 Va. 1, 12-13, 688 S.E.2d 865, 875 (2010). As a result, the Court holds that Cannon has failed to satisfy either prong under Strickland. Accordingly, claim III(a) is DISMISSED.

In claim III(b), Cannon alleges that counsel was ineffective for failing to object to the Court's use of the wrong standard of review at his motion to strike. The Court finds that this claim is without merit.

The Court finds that, at the motion to strike at the close of the Commonwealth's evidence, Cannon's counsel argued that Cannon was only present to take things from cars and that the rape and abduction were not a natural and probable consequence of that original intent to steal from cars. Cannon's counsel also noted Cannon's statement that he was shocked by what he saw Goodman doing and left the apartment after he saw it. Cannon's counsel moved to strike the armed burglary and firearms charges based upon Cannon's statement that he entered the apartment after Goodman and the victim were already there. She further argued that, since the

tape was given to Goodman before he started raping the victim, that act was not done in furtherance of the rape. In denying the motion to strike, the Court noted that Cannon was standing there when Goodman pulled a gun on the victim, that they went to the apartments with the intention to steal things, that Cannon stood at the door while everything was going on in the living room, and that he brought Goodman the tape in the bedroom. In addition, the Court noted that the determination of "whether the offense was a natural and probable result of the intended wrongful act is usually for the jury." The Court finds that the appropriate standard was used in ruling on Cannon's motion to strike at the close of both the Commonwealth's evidence and at the close of all evidence. Rule 3A:15. Thus, the Court holds that Cannon's counsel was not ineffective for failing to make a frivolous objection. See Correll, 232 Va. at 469-70, 352 S.E.2d at 361.

Further, the Court finds that Cannon has not established that he was prejudiced by his counsel's failure to object. The Court finds that Cannon has failed to allege, much less demonstrate, that such an objection would have been successful. Additionally, Cannon only argues that such an objection would have alerted the Court to the error and preserved it for appeal. Thus, the Court finds that Cannon has failed to allege and demonstrate that the outcome of the trial would have been any different but for his counsel's alleged error. See Sigmon, 285 Va. at 536, 739 S.E.2d at 910 (holding ineffective assistance of counsel claims were "facially lacking" under the "prejudice" prong of the two-part test in Strickland, for "fail[ing] even to assert, much less demonstrate, that but for counsel's alleged errors, the result of his trial would have been different"). Indeed, the Court finds that subsequent review by the Virginia Court of Appeals and the Virginia Supreme Court squarely forecloses this argument. The Court of Appeals expressly found the evidence sufficient to support the Court's judgment, thus defeating

any argument that application of a different standard would have yielded a different result. Thus, the court holds that Cannon has failed to satisfy either prong of the Strickland test. Accordingly, Claim III(b) is DISMISSED.

In claim III(c), Cannon alleges that his counsel was ineffective for failing assert the actual facts and circumstances of the case to the jury. The Court finds that this claim is without merit.

Selecting which arguments to advance and which to ignore is a tactical choice reserved for counsel and is not subject to second-guessing on collateral review. See Gonzalez v. United States, 553 U.S. 242, 249 (2008) ("Numerous choices affecting conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for trial."); Strickland, 466 U.S. at 689, 699 (stating that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and holding that counsel made a reasonable strategic decision at sentencing to raise certain arguments to the exclusion of others). Here, the Court finds that what Cannon characterizes as the "material and exculpatory facts" were in evidence for the jury to consider. Furthermore, the Court finds that Cannon's counsel pursued a reasonable defense in attempting to convince the jury that even though Cannon embarked with Goodman on a scheme to steal from cars, the decision to abduct and rape the victim was entirely Goodman's and Cannon did nothing to aid and abet that separate scheme. The fact that his defense was unsuccessful does not demonstrate that counsel's performance was deficient. See Richter, 562 U.S. at 109-10; Lawrence v. Branker, 517 F.3d 700, 716 (4th Cir. 2008); Wright v. Angelone, 151 F.3d 151, 161 (4th Cir. 1998).

The Court finds that, at closing, Cannon's counsel emphasized that: 1) Cannon was only there to rob cars; 2) there were no fingerprints or other evidence establishing that the tape found in Cannon's apartment was the same tape used to bind the victim; 3) Cannon was not in the room when Goodman raped the victim; and 4) Cannon was shocked and horrified by Goodman's actions. Thus, the Court finds that, of the five "facts" that Cannon now complains his counsel failed to raise, she actually presented four of them for the jury's consideration. With respect to the fifth "fact," that Cannon was not even in the apartment when the victim was raped, the Court finds that the record does not support his claim. To the contrary, Cannon's statement to police established that he "knew what [Goodman] was doin[g]" and that he "[saw] him having sex with her." Further, Cannon's apology note indicates that he "should [have] been a bigger man and stop what was going on." In addition, the Court finds that the victim's testimony that Cannon entered the room while she was being raped further contradicts this claim. Thus, the Court finds that Cannon has failed to establish that his counsel's performance was deficient under Strickland.

The Court further finds that Cannon also has failed to allege and demonstrate that the jury would have reached a different verdict had his attorney emphasized the arguments he suggests. See Sigmon, 285 Va. at 536, 739 S.E.2d at 910. Indeed, the Court finds that Cannon's counsel did argue that the Commonwealth had failed to establish that Cannon was a principal in the second degree or that there was a concert of action with respect to the rape and abduction. Further, the jury had the opportunity to hear Cannon's version of events through his recorded interview with police. Considering all the evidence, the jury convicted Cannon of these crimes. The Court holds that the fact that Cannon's counsel did not make the argument or present the evidence the same way Cannon or another attorney would have does not demonstrate ineffective

assistance, nor does it establish that, but for counsel's alleged errors, the jury would have reached a different verdict. See Teleguz, 279 Va. at 6, 688 S.E.2d at 871; Strickland, 466 U.S. at 694. As a result, the Court holds that Cannon has failed to satisfy either prong of Strickland. Accordingly, claim III(c) is DISMISSED.

In claim III(d), Cannon alleges that his counsel was ineffective for failing to file a "correction of facts" with his petition for appeal. The Court finds that this claim is without merit.

The Court finds that Cannon has failed to establish that his counsel's actions were deficient. While Cannon complains that his counsel failed to file a "correction of facts" pursuant to Supreme Court Rule 5A:8, the Court finds that the section to which he refers addresses a written statement *in lieu* of transcripts. Since the transcripts of this case were submitted to the Court of Appeals in accordance with Rule 5A:8(b), the Court finds that there was no need for Cannon's counsel to submit a written statement. Further, the Court finds that Cannon has failed to identify with specificity any errors that existed in the transcripts that required correction pursuant to Rule 5A:8(d). The Court holds that habeas corpus relief is not warranted where the petitioner fails to "articulate a factual basis to support [his] claim." Muhammad v. Warden, 274 Va. 3, 17, 646 S.E.2d 182, 194 (2007); cf. Mallory v. Smith, 27 F.3d 991, 995 (4th Cir. 1994) (stating that, in order to properly exhaust specific claims in state court, a petitioner must do more than make "[o]blique references which hint that a theory may be lurking in the woodwork"). Thus, the Court holds that Cannon's mere conclusion that his counsel's performance was constitutionally unreasonable is insufficient to merit relief.

Additionally, the Court finds that Cannon has failed to establish that he was prejudiced by his counsel's alleged failure to correct the record. The Court finds that Cannon neither

alleges, nor demonstrates, that the outcome of the case would have been different had his counsel filed an objection to the record on appeal. See Sigmon, 285 Va. at 536, 739 S.E.2d at 910. In the context of an appeal, the Court further finds that Cannon has failed to demonstrate how such an objection would have changed the rulings of either the Court of Appeals or the Supreme Court. Indeed, Cannon makes the same argument here that he presented on appeal: that he was not an active participant in the burglary, abduction or rape of the victim. However, the Court of Appeals held that Cannon "aided Goodman in accomplishing the burglary and abduction" by standing guard at the door, and that "[t]he evidence fully support[ed] the jury's conclusion that [Cannon] aided and abetted and was guilty of the offenses as a principal in the second degree." The Court finds that Cannon's conclusory argument fails to establish how the evidence at trial failed to support the jury's verdicts. Thus, the Court holds that Cannon has failed to establish a violation of either prong of Strickland. Accordingly, claim III(d) is DISMISSED.

In claim III(e), Cannon alleges that his counsel was ineffective for failing to establish, during the motion to set aside the verdict, that the Commonwealth's case was based upon misrepresentation of material facts. The Court finds that this claim is without merit.

The Court finds that Cannon has failed to establish that his counsel's performance was deficient under Strickland. The Court finds that, at the motion to set aside the verdict, Cannon's counsel argued that the evidence was insufficient to establish that the rape and abduction were natural probable consequences of Cannon's participation in a robbery. Counsel also argued that Cannon's presence when Goodman raped the victim was insufficient for him to be convicted as a principal in the second degree. The Court finds that, while Cannon asserts in conclusory fashion that his counsel should have presented the "real facts" to the Court, he has failed to proffer what alternative arguments his counsel should have made, or provide any evidence to contradict the

facts established at the trial, including his voluntary statements to the police. The Court finds that this failure to proffer is fatal to his claim. Muhammad, 274 Va. at 17, 646 S.E.2d at 194.

To the extent that Cannon relies upon his summary of facts to support this claim, the Court finds that his allegations are unsupported by the evidence.

Cannon alleges that the Commonwealth misrepresented the fact that he had come to the Mansards apartments to rob people; however, the Court finds that Cannon himself admitted that his intent was to break into people's cars and steal their personal property. Further, the Court finds that he concedes that he entered the victim's apartment and took property from the apartment after he saw Goodman threaten the victim with a gun. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper v. Warden, 281 Va. 277, 299, 707 S.E.2d 290, 309 (2011).

Cannon alleges that the Commonwealth misrepresented him as the "get-away driver," however the Court finds that his proffered evidence establishes that he drove his girlfriend's SUV on the night of these offenses, and that he drove Goodman to Portsmouth after they left the victim's apartment. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

Cannon alleges that the Commonwealth misrepresented the fact that he and Goodman were side-by-side when Goodman pulled the gun and commenced the burglary and abduction. However, the Court finds that Cannon admits that he saw Goodman present the gun and none of the victim's testimony contradicted that statement. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

Cannon alleges that the Commonwealth misrepresented the fact that he handed Goodman the tape that was used to bind the victim. But, the Court finds that the victim testified to that fact at trial. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

Cannon alleges that the Commonwealth misrepresented the fact that his presence in the apartment during the rape was an act in furtherance of the crime. The Court finds that that argument, however, did not assert a fact but a conclusion of law that the Commonwealth asked the jury to find from the evidence presented. Counsel is entitled "to argue as to conclusions which they thought the jury might draw from the evidence." Westry, 206 Va. at 515, 144 S.E.2d at 432. Indeed, the Court of Appeals agreed that Cannon's presence in the room during the rape, as well as his providing the tape to bind the victim and exhorting Goodman to "hurry up," were acts that assisted Goodman in the commission of the crimes. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

Cannon alleges that the Commonwealth misrepresented the fact that he said "hurry up" while the rape was ongoing. The Court finds that the victim testified that, while Goodman was raping her, Cannon walked into the room, laughed, and said "hurry up." Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

Finally, Cannon alleges that the Commonwealth misrepresented the fact that his telling Goodman to "hurry up" was an act in furtherance of the crime. Again, the Court finds that this was not a statement of fact, but a conclusion of law for the jury's determination. Further, the Court of Appeals agreed that the jury was entitled to conclude that Cannon's suggestion that

Goodman "hurry" was an act that assisted Goodman in completing the rape. Thus, the Court holds that Cannon has failed to establish that the Commonwealth misstated the evidence or misled the court. See Juniper, 281 Va. at 299, 707 S.E.2d at 309.

As a result, the Court finds that Cannon has failed to identify any misrepresentations that his counsel could have corrected. To the extent that Cannon's theory of the case differed from the Commonwealth's theory, the Court finds that that argument was thoroughly presented to the Court and the jury. The fact that the jury did not believe Cannon's self-serving version of events, or that it chose to believe the victim's account instead of his, does not establish that his counsel's efforts were deficient. Thus, the Court holds that Cannon has failed to satisfy Strickland's performance prong.

Further, the Court finds that Cannon has failed to establish that he was prejudiced by his counsel's actions. The Court finds that Cannon cannot demonstrate that the outcome of the motion to set aside the verdict would have been different had his counsel asserted the "real facts." The Court finds that Cannon's opinion and bare assertion that the Court would have ruled differently had his counsel made some other unidentified argument is insufficient to merit relief. Elliott, 274 Va. at 613, 652 S.E.2d at 480. As established above, the facts of the case and theory of defense were well developed at trial. The Court finds that the appropriate standard of review was applied to the motion to set aside the verdict and that the jury's verdict was not plainly wrong or without evidence to support it. Thus, the Court holds that Cannon's claim fails to establish a violation of either prong of Strickland. Therefore, claim III(e) is DISMISSED.

In claim III(f), Cannon argues that the cumulative effect of his counsel's deficiencies resulted in an unfair trial and entitles him to relief. The Court finds that Virginia law does not recognize such a claim. "Having rejected each of petitioner's individual claims, there is no

support for the proposition that such actions when considered collectively have deprived petitioner of his constitutional right to effective assistance of counsel." Lenz v. Warden of the Sussex I State Prison, 267 Va. 318, 340, 593 S.E.2d 292, 305 (2004). See also Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) ("Having just determined that none of counsel's actions could be considered constitutional error, . . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial."); Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999) (applying Fisher and concluding that the "cumulative effect" argument was "squarely foreclosed" by that decision). Therefore, because claim III(f) does not set forth a cognizable basis for habeas corpus relief, it is DISMISSED.

In claim IV(a), Cannon alleges that his appellate counsel was ineffective for failing to assert on appeal that the facts were in dispute. The Court finds that this claim is without merit.

The Court finds that, on appeal, Cannon's counsel argued that "the evidence [was] insufficient to support his convictions for abduction, burglary, rape, and three of the four counts of use of a firearm during the commission of a felony." Thus, Cannon's argument on appeal was not over what facts were presented at trial, but whether those facts were sufficient to support the jury's findings of guilt. The Court finds that it is well-established that selecting issues for appeal is a matter of strategy, and counsel need not raise every possible issue. See, e.g., Jones v. Barnes, 463 U.S. 745 (1983). As the Supreme Court has noted, "The effect of adding weak arguments [on appeal] will be to dilute the force of the stronger ones." Jones, 463 U.S. at 752. Moreover, it is well-established in Virginia law that when reviewing a challenge to the sufficiency of the evidence, the appellate court reviews the evidence in the light *most* favorable to the party that prevailed at trial; here, the Commonwealth. See, e.g., Vasquez v. Commonwealth, 291 Va. 232, 247, 781 S.E.2d 920, 929 (2016). The Court credits counsel's

averment that she selected the arguments that she felt "were supported by the trial evidence and the law." The Court holds that Cannon has therefore failed to establish that his counsel's actions were deficient for failing to state that the facts were in dispute.

Further, the Court finds that Cannon has failed to establish that he was prejudiced by his counsel's actions. Cannon alleges that had his counsel asserted that the facts were in dispute, the Court of Appeals would have recognized that an evidentiary hearing was necessary. The Court finds that this assertion is wrong because Cannon is not entitled to an evidentiary hearing on appeal. To the contrary, the Court of Appeals and the parties are bound by the record. Further, the Court finds that the Court of Appeals had access to the entire record of trial, including transcripts. Indeed, the Court of Appeals noted that "[t]he Commonwealth's evidence was competent, was not inherently incredible, and was sufficient to prove beyond a reasonable doubt that [Cannon] was guilty of abduction, burglary, rape and three counts of use of a firearm during the commission of a felony." Thus, the Court holds that Cannon has failed to allege or establish that any further recitation of the facts on appeal would have changed the outcome of his case. See Sigmon, 285 Va. at 536, 739 S.E.2d at 910. As a result, the Court holds that Cannon has failed to establish that he was prejudiced under Strickland. Accordingly, claim IV(a) is DISMISSED.

In claim IV(b), Cannon alleges that his counsel was ineffective for failing to object to what he characterizes as "the misrepresentations and falsification of facts" in the Commonwealth's brief in opposition to his petition for appeal. The Court finds that this claim is without merit.

The Court finds that Cannon has failed to identify any rule of Court that would permit his counsel to object to the Commonwealth's statement of facts in its brief in opposition. Further,

the Court finds that he has failed to allege, much less demonstrate, that any such objection would have been successful. As previously detailed, the trial record amply supported the Commonwealth's statements of fact and arguments. Thus, the Court holds that Cannon's counsel was not ineffective for failing to make a frivolous objection. See Correll, 232 Va. at 469-70, 352 S.E.2d at 361.

Additionally, the Court finds that Cannon fully presented the facts and his arguments to the Court of Appeals in his petition for appeal. The Court of Appeals then reviewed the entire record and found the evidence sufficient to support his convictions. Thus, the Court finds that Cannon's opinion and conclusory allegations of deficient performance are therefore inadequate to merit relief. Elliott, 274 Va. at 613, 652 S.E.2d at 480.

Furthermore, the Court finds that Cannon's argument that his appeal would have been granted had his counsel objected to the Commonwealth's recitation of facts is conclusory and unsupported by any facts. Fitzgerald, 6 Va. App. at 44, 366 S.E.2d at 618. What is more, the Court finds that Cannon has failed to establish that any objection to the Commonwealth's statement of facts would have changed the outcome of his appeal. See Sigmon, 285 Va. at 536, 739 S.E.2d at 910. Indeed, the governing standard of review not only required the appellate courts to view the evidence in the light most favorable to the Commonwealth, but also to "discard" Cannon's conflicting evidence. Vasquez, 291 Va. at 247, 781 S.E.2d at 929. Thus, the Court holds that Cannon has failed to satisfy either prong of Strickland. Accordingly, claim IV(b) is DISMISSED.

In claim IV(c), Cannon alleges that his counsel was ineffective for failing to assert that it was his right to have the evidence heard in his favor on appeal. The Court finds that this claim is without merit.

The Court finds that it is well-settled that, on appeal, the sufficiency of the evidence is viewed in the light most favorable to the prevailing party in the trial court. Vasquez, 291 Va. 232, 247, 781 S.E.2d 920, 929. Here that party was the Commonwealth. Thus, since any argument that Cannon was entitled to a different standard of review would have been frivolous, the Court finds that his counsel had no duty to advance such an argument. Correll, 232 Va. at 469-70, 352 S.E.2d at 361. Further, the Court finds that Cannon's claim that his proffered jury instructions were denied is not supported by the record. While the transcript reveals that Cannon's counsel objected to several of the Commonwealth's instructions, the Court finds that it does not reveal that any of Cannon's proposed instructions were refused. Thus, the Court finds that there is no factual basis for his claim. Muhammad, 274 Va. at 17, 646 S.E.2d at 194. As a result, the Court holds that Cannon has failed to establish any deficient performance by counsel.

Further, the Court finds that Cannon has failed to prove any prejudice as a result of his counsel's actions. Based upon the well-settled standard of review, the Court finds that Cannon was not entitled to a different standard of review and that such an argument would not have been successful. Thus, the Court finds that there was no reasonable probability of a different outcome on Cannon's petition for appeal even if his counsel had made this frivolous argument. Strickland, 466 U.S. at 694. The Court finds that Cannon's mere opinion that he would have been exonerated had his counsel asserted a different standard of review is therefore inadequate. Elliott, 274 Va. at 613, 652 S.E.2d at 480. Thus, the Court holds that Cannon has failed to demonstrate that his counsel violated either prong of Strickland. Accordingly, claim IV(c) is DISMISSED.

In claim IV(d), Cannon alleges that his counsel was ineffective for failing to raise on appeal the argument that the concert of action jury instruction was unsupported by the facts. The Court finds that this claim is without merit.

The Court holds that selecting issues for appeal is a matter of strategy, and counsel need not raise every possible issue. See, e.g., Jones, 463 U.S. at 751. Indeed, "the process of 'winnowing out weaker claims on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Burger v. Kemp, 483 U.S. at 784 (other citations omitted). In applying the Strickland test to claims of ineffective assistance of counsel on appeal, reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993); accord Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000).

Here, the Court finds that counsel selected the arguments she felt were supported by the law and the evidence. Further, the Court finds that Cannon has failed to establish that the argument he proposes would have been successful. The Court finds that it is well-established that an individual may be convicted of a crime as a principle in the second degree where there is concert of action. See McMorris v. Commonwealth, 276 Va. 500, 505-06, 666 S.E.2d 348, 351 (2008). In defining concert of action, the Virginia Supreme Court has stated:

> All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable, in the nature of things, a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. . . . Hence, it is not necessary that the crime should be a part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose.

Thomas, 279 Va. at 157, 688 S.E.2d a 234 (quoting Brown v. Commonwealth, 130 Va. 733, 738, 107 S.E. 809, 811 (1921)). Further, the Virginia Supreme Court has noted that "it is well settled in Virginia that each co-actor is responsible for the acts of the others, and may not interpose his personal lack of intent as a defense." Carter v. Commonwealth, 232 Va. 122, 126, 348 S.E.2d 265, 267-68 (1986). Thus, the Court finds that, although Cannon's counsel objected to the instruction at trial, the jury instruction was supported by precedent and the evidence at trial. Additionally, the Court finds that the Virginia Supreme Court has previously examined this instruction and found that it "did not establish an improper presumption but merely stated a permissive inference." Thomas, 279 Va. at 166, 688 S.E.2d at 239 (quoting Schmitt v. Commonwealth, 262 Va. 127, 145, 547 S.E.2d 186, 198-99 (2001)). Therefore, the Court finds that Cannon has failed to establish that his counsel's decision not to raise this argument on appeal was deficient. Further, given this established precedent, the Court finds that Cannon cannot establish that, but for his counsel's failure to present this frivolous argument on appeal, the outcome of that proceeding would have been different. Therefore, the Court holds that Cannon has failed to demonstrate that his counsel violated either prong of Strickland. Accordingly, claim IV(d) is DISMISSED.

The Court holds that Cannon's allegations can be disposed of on the basis of recorded matters, and no plenary hearing is necessary. Code § 8.01-654(B)(4); Yeatts v. Murray, 249 Va. 285, 455 S.E.2d 18 (1995); Arey v. Peyton, 209 Va. 370, 164 S.E.2d 691 (1968).

Accordingly, the Court holds that the petitioner is not entitled to the relief sought. It is, therefore, ORDERED that the petition for a writ of habeas corpus be, and hereby is, DENIED and DISMISSED WITH PREJUDICE.

It is further ORDERED that petitioner's endorsement of this order is dispensed with in accordance with Rule 1:13 of the Supreme Court of Virginia.

It is further ORDERED that the Clerk serve by mail a certified copy of this Order to the petitioner and to J. Christian Obenshain, Assistant Attorney General, counsel for respondent.

This order is FINAL.

ENTERED this ____ day of _____, 2017.

_____

Judge

I ask for this:

_____

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was signed
April 17, 2017

Appendix B US Supreme Court

§8.01-654 Petition For Rehearing - VA S. Ct.

+ VA. S. Ct. Refusal Petition For Appeal CL16-4979

+ Commonwealths letter Record no. 170821

Rule 14. 1(i)(i)

Subp. 1.(g)(i)

4 pages

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 5th day of March, 2018.

William David Cannon, Appellant,

against Record No. 170821
Circuit Court No. CL16-4979

Director of the Department of Corrections, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: _____

Deputy Clerk

Received
March 6, 2018

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 10th day of May, 2018.

William David Cannon, Appellant,

against Record No. 170821
Circuit Court No. CL16-4979

Director of the Department of Corrections, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of March, 2018 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: 

Deputy Clerk

received may 11