

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Marion County

Honorable William H. Seals, Circuit Court Judge

RICHARD A. WOODBURY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000121

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Did the PCR court err in finding that trial counsel provided effective assistance of counsel when counsel failed to object to the trial court charging the jury on mutual combat where there was insufficient evidence in the record to support the charge?

II.

In the alternative, if this Court finds that the record supported the mutual combat charge, did the PCR court err in finding that trial counsel provided effective assistance of counsel where counsel failed to object to the mutual combat charge being given as part of the charge on self-defense?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted during the February 2013 term of the Marion County grand jury for one count of murder and one count of attempted murder. App. 691-692. On February 18, 2014, the State called the case to trial before Honorable D. Craig Brown and a jury. The State was represented by Edgard Clements, III, and Petitioner was represented by Ralph J. Wilson, Sr. App. 1. At the conclusion of the four-day trial, the jury acquitted Petitioner of murder, attempted murder, and the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The jury found Petitioner guilty of the lesser included offense of voluntary manslaughter. App. 675, l. 12-App. 676, l. 2. Judge Brown sentenced Petitioner to thirty years imprisonment. App. 689.

Petitioner appealed his conviction and sentence. The South Carolina Court of Appeals affirmed Petitioner's conviction on March 2, 2016. State v. Woodbury, Op. No. 2016-UP-111 (S.C. Ct. App. 2016). Petitioner filed a *pro se* application for post-conviction relief on March 15, 2016. App. 694-702. The State filed a return dated February 2, 2017. App. 703-707. PCR Counsel Jonathan Waller filed a motion for discovery on November 13, 2017, which was granted by the Honorable Michael G. Nettles on May 7, 2018. App. 708-711. Counsel Waller filed an amended PCR application on June 18, 2019, raising fourteen grounds of ineffective assistance of trial counsel and one ground of ineffective assistance of appellate counsel. App. 712-714.

An evidentiary hearing was convened before the Honorable William H. Seals, Jr., on June 26, 2019. Petitioner was represented by Counsel Waller. The State was represented by Samuel Key. App. 715. An order of dismissal was signed by Judge Seals on July 17, 2022, finding Petitioner had failed to prove any of the grounds alleged for ineffective assistance of

counsel. App. 791-825. Counsel Waller timely filed a motion to alter or amend the PCR court's order pursuant to Rule 59(e), SCRCP. App. 826-831. The State filed a return to the Rule 59(e) motion dated October 9, 2022. App. 831-840. No hearing was held on the Rule 59(e) motion. An order denying Petitioner's Rule 59(e) was signed by Judge Seals on December 21, 2022. App. 841-844.

Summary of Trial Testimony

During the evening hours of September 29, 2012, Charles Wilson was at his home on South Withlacoochee Avenue in Marion County with the decedent, Ian Gause, Ian's brother Rishawn Gause, the Gause brothers' cousin, Ronnie Boatwright, and Tywana Grisham. The men were outside underneath the carport drinking, downloading music on a laptop computer, and burning CDs. App. 297, ll. 14-25; App. 324, ll. 8-12; App. 385, l. 24-App. 386, l. 10; App. 387, ll. 6-12; App. 408, ll. 14-25. The men were sitting around a table in the back of the carport, near the backyard, and a van was parked in front of them, partially covered by the carport. App. 318, ll. 8-17; App. 386, l. 21-App. 387, l. 3.

At some point during the evening, Petitioner arrived at Wilson's home in his black Jeep Cherokee with Ky Graham and Lamont Davis. Graham got out of the car first and greeted the men under the carport.¹ App. 298, ll. 2-25. Shortly thereafter, Petitioner also got out of the car and approached the men. Petitioner greeted everyone, but apparently did not individually acknowledge Ian, the decedent. Wilson testified that he had no idea why Petitioner did not greet Ian. App. 299, ll. 6-14.

¹ There were allegations at trial that Ky Graham went to the home to purchase marijuana. While Graham initially denied buying any drugs that night, he later admitted that he "bought one." App. 451, ll. 17-22.

According to Wilson, angered that he was ignored, Ian said to Petitioner, “you don’t see me, or something like that.” App. 299, ll. 15-17. Rather than argue with Ian, Petitioner walked away “back towards the Jeep,” that was parked in the driveway directly behind the van. App. 299, l. 18-App. 300, l. 8. Ian followed Petitioner and the two met by the side of Petitioner’s Jeep. App. 300, ll. 9-23. Then there was “a lot of trash talking.” App. 300, l. 24-App. 301, l. 5.

Wilson testified that he got in between Petitioner and Ian and told Petitioner “to go ahead and leave,” but the two were “still back and forth talking trash to each other.” App. 301, l. 9-App. 302, l. 3. Ian tried “to actually break passed” Wilson, but Wilson stuck his hands out to block Ian from reaching Petitioner. At this stage, the verbal argument “was real heated,” but Wilson had no “idea what it was about.” Wilson then “kind of turn[ed] around” and “almost start[ed] to wrestle [Ian].” “That’s when [Wilson] noticed [Ian] had a gun.” “He had it by his side.” App. 302, ll. 5-25

When Wilson noticed that Ian had a gun he moved out of the way because he did not want to get shot. After he backed away, Wilson heard a single gunshot. He did not know who fired the shot, but later heard it was Rishawn. He assumed Rishawn fired into the air. After the gunshot, “[e]verybody like froze.” App. 303, l. 11- App. 304, l. 25.

According to Wilson, Petitioner, who was still standing by his car, started “talking some more junk.” The men continued “talking trash.” App. 305, ll. 1-15. Somehow, Ian and Petitioner ended up in the road. They were “face to face talking to each other,” but they did not “start fighting” and neither threw any punches. App. 305, l. 25-App. 306, l. 6. Then all of a sudden Petitioner and Ian took off running. App. 306, ll. 13-19. They ran back towards the house and ended up under the carport. App. 306, l. 23-App. 307, l. 6.

Wilson could not see what happened under the carport because it was dark and the van was blocking his view. He “heard like chairs and stuff moving around” and “tussling.” App. 307, ll. 4-

23. “After that, after the tussling and stuff was over somebody shot [ran] through the backyard, and that’s when I see Ian coming back from underneath the car shed.” Ian told his brother, Rishawn, that he needed to go to the hospital and “he said something about, I should have shot him, or something like that.” App. 307, l. 25-App. 308, l. 22. Rishawn also said he “got cut” and the Gause brothers left to go to the hospital. App. 309, ll. 1-9.

Wilson testified that Petitioner eventually returned from the backyard and said, “he left something.” He claimed Petitioner picked up one half of “a bamboo stick thing” that turned out to be a knife.² App. 309, l. 10-App. 310, l. 13. This was the first time Wilson had seen Petitioner with a weapon. He never saw Petitioner with a weapon in the driveway or in the road before the men ran under the carport. App. 326, l. 19-App. 327, l. 8. After retrieving the knife, Petitioner left with Ky Graham. App. 310, ll. 14-20.

Rishawn Gause, Ian’s brother who was noticeably biased in favor of his brother, testified that he was at Wilson’s house that evening with Ian and Boatwright. He claimed that when Petitioner walked up to the carport, he shook hands with every one, except he “purposely . . . did not shake my brother[’s] hand, Ian.” Ian “had a smirk” and said, “[O]h, so you can’t shake my hand?” App. 482, l. 9-App. 483, l. 17. Petitioner said something in return and then walked away back towards his car. He and Graham both got into the car. Tr. 483, ll. 17-25. Rishawn was the only witness who claimed Petitioner pulled out of the driveway and left, but returned about three minutes later. App. 483, l. 25-App. 484, l. 7.

² When law enforcement searched Petitioner’s Jeep several hours after the altercation pursuant to a search warrant, they found a “Ninja sword” or knife used in marital arts. See App. 260, ll. 19-20; App. 437, ll. 18-25; see also App. 440, l. 6. It was “a long cylinder that when you actually pull it apart two blades are housed inside.” App. 263, ll. 21-23. When the blades are “removed from each other” they become “two separate weapons.” App. 264, ll. 2-10.

According to Rishawn, when Petitioner returned, he got out of the car and “was messing with his pants so Ian said, oh, oh, you went and got something. He said, you went and got something.” Rishawn claimed that he and Ian were still under the carport and that Ian never went up to the Jeep. App. 486, ll. 7-23. Rishawn then walked to his own car that was parked in the yard and got his gun from the trunk because he saw Petitioner “fidgeting with something.” He “was watching the whole situation” and eventually shot once into the air because they [Ian and Petitioner] were “kind of about to get into it.” App. 487, ll. 4-10.

Rishawn claimed that after he fired once into the air, he put his gun back into the trunk. He claimed to hear Petitioner say that he “didn’t have nothing” and was telling Ian he would “fight.” App. 489, ll. 9-25. He also claimed that he did not see Ian with a gun that night and that he knew Ian was not fighting with a gun in his hand, but he could not definitively say that Ian did not have a gun that night. App. 490, ll. 6-15. Eventually, Ian and Petitioner got into a “brawl” under the carport. Rishawn testified that he got in the middle of the altercation and Petitioner was “[s]winging wild.” App. 490, ll. 17-24. Ian eventually said that he had been stabbed and that he needed to go to the hospital. After Ian said he had been stabbed, Petitioner ran into the backyard. App. 492, ll. 5-25.

At the hospital, Rishawn spoke with three different law enforcement officers. He gave a different story to each of the officers. For example, he told one officer that he was in the house when the altercation took place and that he did not know who stabbed his brother. He told a different officer that the altercation happened on Huggins Street, not South Withlacoochee Avenue, and that they had not been at anyone’s house. Rishawn admitted on cross-examination that he was a liar and “whatever I told when I was at the hospital was, it was garbage.” App. 500, l. 22-App. 506, l. 11.

Ronnie Boatwright, who was also noticeably biased in favor of his cousins, testified that when Petitioner arrived at the residence that night he walked to the carport and “spoke to everybody.”³ App. 389, ll. 11-21; App. 403, ll. 11-25. Petitioner and Ian then “got into it” and were “running their mouths.” App. 389, l. 15-App. 390, l. 4; App. 411, ll. 18-25. Boatwright claimed Petitioner walked backed to his Jeep and then returned to the carport where he and Ian started “fussing again.” He claimed that the next thing he knew, Petitioner “was holding like something on his side” and Ian repeatedly said, “you got something, you got something.” Rishawn then went to his car, got a pistol, and shot into the air. After the gunshot, everyone “calmed down” for a couple of seconds to minutes. App. 390, l. 6-App. 391, l. 17.

Boatwright explained, “[s]o after that I don’t know what happened then. Just everybody end up in the road after that. Next thing I know people just took off running, took off running, ran in the car porch.” App. 392, ll. 3-6. On cross-examination, Boatwright admitted that Ian chased Petitioner into the road and then Ian and Rishawn chased Petitioner under the carport. App. 414, l. 12-App. 415, l. 5. He clarified that the only people who ran under the carport were Petitioner, Ian, and his brother, Rishawn. App. 392, ll. 8-9. Boatwright continued, “Probably like about five minutes [later] Ian came back out [from under the carport] and he said, man, I got stabbed, he stabbed me. Rishawn [also] came [out from under the carport], he said, he stabbed me too.” Ian and Rishawn then left for the hospital. App. 392, ll. 10-16. Boatwright testified that after about ten or twenty minutes, Petitioner “came back looking for his knife. He found his knife and he went on.” Boatwright explained that he saw the knife after the fight when it was laying on the ground in the

³ Boatwright was impeached with his prior convictions for safecracking, giving false information to law enforcement, breaking and entering into an automobile, and possession of a controlled substance. App. 401, ll. 10-21.

carport. He claimed Petitioner had one half of the weapon in his hand and picked up the other half from the ground near the carport. App. 392, l. 17-App. 393, l. 15.

Boatwright also explained that when the men were drinking and downloading music, the light under the carport was on. However, once Petitioner, Ian, and Rishawn ran under the carport during the altercation, “somebody cut the light off.” He said he thought Tywana Grisham turned the light off when Petitioner, Ian, and Rishawn were running because Grisham, who was standing under the carport at the time, “probably got scared and ran in the house and cut the light off trying to keep the heat down.” App. 394, ll. 5-25. Because it was so dark and the van was blocking his view, Boatwright could not see what happened under the carport. He explained, “I ain’t even see the stabbing.” All he knew was that “they were fighting” and “it was kind of chaos.” App. 395, ll. 1-15. Lastly, Boatwright claimed that the only person he saw with a firearm that night was Rishawn. He claimed he did not see Ian with a gun and did not see anyone else with a weapon. App. 399, ll. 6-25; App. 419, ll. 9-24.

Ky Graham testified that he went to Charles Wilson’s house on the night of September 29, 2012, with Petitioner and Lamont Davis. Petitioner was driving his black Jeep Cherokee. App. 429, l. 8-App. 430, l. 15. When they got to Wilson’s house, they parked in the driveway directly behind the van. App. 431, ll. 1-17. Graham got out of the car first, walked over to the carport, and “spoke to everybody.” App. 433, ll. 2-4. Petitioner also “got out [of the car] after a while” and greeted the men. App. 433, l. 16-App. 434, l. 4. According to Graham, Petitioner and Ian then “had a little words” and it was “a little heated.” App. 434, ll. 5-22. Ian “took offense” when Petitioner did not greet him. App. 453, ll. 10-21. Graham said he was not aware of “any trouble” between Ian and Petitioner in the past and had no idea why they exchanged words that night. App. 434, ll. 10-

14. Petitioner eventually walked away and went back to his Jeep. Graham followed and both men got back into the car. App. 435, ll. 3-9

Graham testified that when they were in the car, Petitioner retrieved his knife and “Ian was saying a little something.” App. 435, l. 24 – 436, l. 24. Petitioner concealed the knife in his pocket and no one could see that he had a weapon. App. 456, ll. 5-23. Petitioner and Ian “were having a few words” by the side of the car. Wilson got in between the two men and was holding Ian back. App. 438, ll. 7-22. According to Graham, Petitioner then pulled out his “sword,” but did not pull the two ends apart. The weapon remained closed. Graham claimed that after Petitioner pulled out his closed sword, Ian pulled out his gun and had it down by his side. App. 440, ll. 6-21. Rishawn then shot once into the air to try “to break everything up.” App. 440, l. 22 – 442, l. 13.

Graham then explained that “Ian had Richard [Petitioner] go down the street, you know, pointing the gun at him.” Ian and Rishawn both had their guns out and all three men, Petitioner, Ian, and Rishawn, ran towards the carport. App. 442, l. 18-App. 443, l. 1. When they got to the carport, the light went out, but he “didn’t see nobody turn the light out.” Graham could not see what happened under the carport because it was dark and the van was blocking his view, but he could hear “fighting and stuff.” He said he did not try to break up the altercation because “they [Ian and Rishawn] had guns on them.” App. 444, ll. 4-21. “[A]fter a while,” Graham thought he heard Ian say something to Rishawn and then the two left. App. 445, ll. 1-19. According to Graham, Petitioner then came out from around the back of the house. He “had one of his knives” and the other one “was on the ground in front of the car porch.” App. 445, l. 20 – 446, l. 9. After retrieving his knife, Graham and Petitioner left.

Nicholas Batalis, the forensic pathologist who conducted the autopsy, testified that Ian died from “a stab wound to the upper left side of the chest centered right on the left nipple.” The wound

was about five and a half inches deep and went through the muscle in the chest and “the sack that wraps around the heart, and then struck “one of the big blood vessels that drains blood back to the body.” Put more simply, Ian bled to death. App. 348, ll. 2-18. He also had a wound to the upper right chest that was about half an inch deep, a minor cut on his right wrist, and a scrape on his left thumb. App. 347, l. 11-App. 348, l. 1; App. 349, l. 20-App. 350, l. 4.

During Petitioner’s case in chief, his nephew, Robert Woodbury, testified that he collects samurai swords, medieval swords, and ninja swords and that he originally owned the “ninja sword” that Petitioner used during the altercation. App. 562, ll. 5-22. About two years ago, Robert gave the sword to Petitioner who “was gonna use it as decoration.” App. 563, l. 22-App. 564, l. 6.

Rosa Carmichael, who also testified during Petitioner’s case in chief, explained that Wilson’s house on South Withlacoochee Avenue is directly behind her house on Dunlop Street. App. 565, ll. 22-25. On the night of September 29, 2012, she was at home when she heard “someone behind my house . . . getting beat up and there were gun shots.” She heard four gunshots and called 9-1-1. App. 566, ll. 1-17. The only thing she saw were “shadows when they were coming back up towards the carport, okay, because all of a sudden the light went out. As soon as the argument really got started it went dark.” App. 566, l. 20-App. 567, l. 1. She explained further, “And I could see some shadows but . . . the closer they got back toward the house the less I could see. And I heard somebody say, well man, what you doing, I don’t have a knife. Then so I heard him getting all beat up and I heard somebody say, well how you like that now, how you like that now, then I heard something go pow, pow, pow. So I just put the window down and called 9-1-1.” App. 567, ll. 3-10. Despite giving the 9-1-1 dispatcher her name and address, she was never contacted by law enforcement. App. 567, l. 20 – 568, l. 2.

Jury Charge

During the discussion on jury instructions, the State requested the court charge the jury on mutual combat. App. 570, l. 19-App. 571, l. 12. The State initially suggested that the court should not charge both mutual combat and self-defense. Counsel Wilson argued that unless the court found as a matter of law that it was mutual combat then both charges should be submitted to the jury. The State agreed stating it would be satisfied if the court charged that if the jury found the parties entered into mutual combat, then self-defense would not apply. Counsel Wilson then stated, “[b]ut I’m not agreeing that mutual combat should be charged. That’s not what I’m agreeing to, I’m just saying.” App. 574, l. 16-App. 575, l. 20. At no point did Counsel Wilson formally object to the court giving the mutual combat charge.

During the jury charge the court instructed the jury on self-defense and mutual combat as follows:

Now the **following elements are required to establish self-defense**. First the defendant must be without fault in bringing on the difficulty. If the defendant’s conduct was the type which was reasonably calculated to and did provoke a deadly assault, the defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal based on self-defense. **If the defendant voluntarily participated in mutual combat for purposes other than protection, the killing of the victim would not be self-defense. This is true even if during the combat the defendant feared death or serious bodily injury. However, if before the killing is committed the defendant withdraws and tried in good faith to avoid further conflict and either by word or act makes that fact known to the victim, he would be without fault on bringing on the difficulty. Now for mutual combat there must be mutual intent and willingness to fight. This intent may be shown by the acts and conduct on the parties and the circumstances surrounding the combat. In addition, it must be shown that both parties were armed with deadly weapon, with a deadly weapon.**

Now the **second element of self-defense** is that the defendant was actually in imminent danger of death or serious bodily injury or the defendant actually believed he was in imminent danger of death or serious bodily injury. If the defendant was actually in imminent danger, it might be shown that the circumstances would have warranted a person of ordinary firmness and courage to

strike the fatal blow to prevent death or serious bodily injury. If the defendant believed he was in imminent danger of death or serious bodily injury it must be shown that a reasonably prudent person of ordinary firmness and courage would have had the same belief. In deciding whether the defendant actually was or believed he was in imminent danger of death or serious bodily injury, you should consider all the facts and circumstances surrounding the crime including the physical condition and characteristics of the defendant and the victim.

Now the defendant, ladies and gentlemen, does not have to show that he was actually in danger. It is enough if the defendant believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The defendant has the right to act on appearances even though the defendant's belief may have been mistaken. It is for you to decide whether the defendant's fear of immediate danger of death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

Now **the final element of self-defense** is that the defendant had no other probable way to avoid the danger of death or serious bodily injury than to act as the defendant did in this particular instance. The defendant had no duty to retreat if by doing so the danger of being killed or suffering serious bodily injury would increase. If a defendant is justified in defending himself then a defendant is also justified in continuing to defend himself until it is apparent that the danger of death or serious bodily injury has completely ended.

A person cannot be required to make an exact calculation as to the degree or amount of force which may be needed to avoid death or serious bodily injury. Therefore, in self-defense the defendant has the right to use the force needed to avoid death or serious bodily injury. The force used in self-defense does not have to be limited to the degree or amount of force used by the victim. The defendant has the right to use as much force as appeared to be necessary for complete self-protection in which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm.

App. 654, l. 25-App. 658, l. 2 (emphasis added).

While the jury was deliberating, it sent out a note asking, “[w]hat happens if we can’t agree on a verdict?” Judge Brown responded, without objection, by writing on the note, “[p]lease continue to deliberate” and sending the note back to the jury. App. 672, ll. 16-22. The court never issued an Allen charge.⁴ After several hours of deliberating, the jury acquitted Appellant of murder,

⁴ Allen v. United States, 164 U.S. 492 (1986)

attempted murder, and ABHAN, but found him guilty of voluntary manslaughter. App. 675, l. 12-App. 676, l. 5.

PCR Testimony

At the PCR hearing, Petitioner testified that prior to the jury coming into the court room Counsel Wilson whispered to his paralegal that he “let in a charge.” Petitioner did not know what this referred to but believed it was the mutual combat charge that Counsel Wilson failed to object to. App. 744, ll. 17-25. Counsel Wilson testified that he had researched mutual combat in the past but had not researched in regard to the specific facts of Petitioner’s case. He claimed there was ample evidence in the record to support the charge stating “[Petitioner] had every opportunity to walk away and he refuses to walk away and the other guy is armed with a weapon coming at him. And then he goes an arms himself and then comes back into the fray, if that ain’t mutual combat then it doesn’t exist.” App. 769, ll. 5-25.

The PCR court found that Counsel Wilson had offered a valid reason for not objecting to the mutual combat charge, mainly that he believed it was appropriate under the facts of the case. The PCR court noted portions of the record it believed supported the mutual combat charge, finding Petitioner’s case was akin to the facts in State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973). The PCR court ultimately ruled that the charge was appropriate and thus Petitioner could not show prejudice. App. 807-809.

Counsel Waller argued in the Rule 59(e) motion that the PCR court should amend its final order to include a ruling on Counsel Wilson’s failure to not only object to the mutual combat charge but to object to the structure and order of the mutual combat charge being because the charge was given as part of the self-defense charge instead of a stand-alone charge. Counsel Waller argued that the record did not support the finding that mutual combat was an appropriate

jury charge based on State v. Taylor, 356 S.C. 227 (2003) and that by acquiescing to the charge that Counsel Wilson “destroyed his stated sole theory of [self] defense.” App. 827. The PCR court denied the Rule 59(e) motion finding that no material fact or principal of law had been overlooked or disregarded and that the original order of dismissal contained the appropriate findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRPC. App. 843-844.

ARGUMENT

I.

The PCR court erred in finding that trial counsel provided effective assistance of counsel when counsel failed to object to the trial court charging the jury on mutual combat where there was insufficient evidence in the record to support the charge.

Counsel Wilson provided deficient representation when he failed to object to the mutual combat charge because there was no evidence in the record of an antecedent agreement to fight or of any pre-existing ill will or dispute between Petitioner and Ian before the incident. There was also no evidence that each man knew the other was armed at the time the men fought. The evidence in the record was insufficient to support the charge, therefore Petitioner was prejudiced by the erroneous jury charge because it acted as a limitation on his ability to claim self-defense and transferred the State's burden to disprove self-defense onto Petitioner. See State v. Taylor, 356 S.C. 227, 235, 589 S.E.2d 1, 5 (2003).

In general, the trial judge is required to charge only the current and correct law of South Carolina, Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998), and the law to be charged to the jury is determined by the evidence at trial. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). To warrant reversal, a trial judge's charge must be both erroneous and prejudicial. Ellison v. Parts Distributors, Inc., 302 S.C. 299, 395 S.E.2d 740 (Ct. App. 1990).

In Taylor, *supra*, our Supreme Court reviewed the law of mutual combat as it had developed in South Carolina. The Court noted that mutual combat had existed in South Carolina since "at least 1843, but [had] fallen out of common use in recent years." Taylor at 231, 589 S.E.2d at 3. Reviewing case law, the Court stated that it was established that "there must be 'mutual intent and willingness to fight' to constitute mutual combat." Id. (citing State v. Graham, 260 S.C. 449, 450,

196 S.E.2d 495, 495 (1973)). “Mutual intent is ‘manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat.’” Id. at 232, 589 S.E.2d 3. “Whether or not mutual combat exists is significant because ‘the plea of self-defense is not available to one who kills another in mutual combat.’” Id. (citing State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919)).

Notably, our Supreme Court wrote that “the doctrine has most often been applied in situations where the defendant and decedent **bear a grudge against each other before the fight** in which one of them is killed occurs.” Taylor at 232, 589 S.E.2d at 4 (emphasis added).⁵ While South Carolina had not “explicitly required that the fight arise out of a pre-existing dispute” our Court explained that other states had made a pre-existing dispute an explicit prerequisite to mutual combat. Citing to authority in Colorado, Texas, and Georgia,⁶ our Supreme Court found that “the restrictions placed on the applicability of mutual combat by the courts in Georgia, Colorado, and Texas [were] warranted. These limitations are consistent with the South Carolina case in which the mutual combat charges given were deemed proper.” Taylor at 233-234, 589 S.E.2d at 4. The Court adopted and clarified the limiting requirements for mutual combat that had been recognized by other jurisdictions. First, **“the fight [must] arise out of a pre-existing dispute.”** Id. at 233, 589

⁵ Citing State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (holding mutual combat precluded a plea of self-defense where Appellant returned to injured party's property at least twice with a gun despite prior verbal warnings not to return and accompanying gunshots); State v. Graham, 260 S.C. 449, 451, 196 S.E.2d 495, 496 (finding mutual combat charge proper where appellant and deceased had quarreled prior to the killing, each knew that the other was armed with a pistol, and each fired his gun at the other); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934) (finding mutual combat charge proper based on testimony that appellant and deceased were on the lookout for each other, that each was armed in anticipation of meeting the other, and that each drew and fired his pistol at the other).

⁶ Eckhardt v. People, 126 Colo. 18, 247 P.2d 673 (1952); People v. Cuevas, 740 P.2d 25 (Colo.App.1987); Lujan v. State, 430 S.W.2d 513, 514 (Tex.Crim.App.1968); Carson v. State, 89 Tex.Crim. 342, 230 S.W. 997 (1921); Flowers v. State, 146 Ga.App. 692, 247 S.E.2d 217, 218 (1978); Grant v. State, 120 Ga.App. 244, 170 S.E.2d 55, 56 (1969).

S.E.2d at 4 (emphasis added) (internal citations omitted). Second, “**an antecedent agreement to fight must exist** for the court to charge mutual combat.” Id. at 233, 589 S.E.2d at 4 (emphasis added) (internal citations omitted). And lastly, “mutual combat does not arise from a mere fist fight or scuffle, rather it arises only when the parties are armed with deadly weapons.” Id. at 233, 589 S.E.2d at 4 (internal citations omitted).

Applying the limiting requirements to the facts in Taylor our Supreme Court found there was insufficient evidence of a mutual intent and willingness to fight to submit the issue of mutual combat to the jury where there was no evidence the decedent was willing to engage in an armed encounter with Taylor or that the decedent even knew Taylor was armed with a knife. The Court further found the mutual combat charge was prejudicial as well as erroneous because Taylor had admitted to killing the decedent and relied entirely on self-defense at trial. Id. at 234-235, 589 S.E.2d at 5. The Court stated, “[the self-defense] charge was negated by the [trial] court’s unwarranted charge on mutual combat. We find that the court’s mutual combat charge acted as limitation on [Taylor’s] ability to claim self-defense, and prejudiced him by transferring the *State’s burden* to disprove self-defense onto [Taylor], forcing him to prove self-defense . . .” Id. at 235, 589 S.E.2d at 5 (emphasis in original).

Under the well settled law of mutual combat, the evidence in Petitioner’s case was insufficient to support a jury charge on mutual combat. First, there was no evidence produced of a prior existing dispute or prior ill will between Ian and Petitioner. The testimony in the record from Rishawn was that Petitioner and Ian were “cool” and that Petitioner had been to Ian’s home. App. 485, ll. 13-18. Ky Graham testified that he was not aware of any past trouble or beef between Petitioner and Ian. App. 434, ll. 12-14. The testimony indicated that the incident revolved solely around Petitioner not shaking Ian’s hand that evening when he arrived at Wilson’s house, which

upset Ian in the moment. App. 299, ll. 7-22; App. 411, l. 15-App. 412, l. 2; App. 453, ll. 4-21; App. 483, ll. 11-14; App. 486, ll. 4-6.

Second, there was no antecedent agreement to fight between Ian and Petitioner. There is no testimony in the record that either Petitioner or Ian knew they would see each other that evening nor that they had planned to see each other that evening in order to fight or settle a dispute. The two men were not on the lookout for each other, they had not armed themselves in anticipation of meeting, and they had not previously quarreled. The record evinced that the incident was a chance encounter between individuals where tempers flared, not a preplanned duel or agreement to fight with deadly weapons over some past dispute.

Finally, the testimony is at best contradictory that both Ian and Petitioner knew the other was armed at the time of the fight. Rishawn, the only person who somewhat saw the altercation between Ian and Petitioner, testified that he never saw Petitioner with a weapon, rather he simply saw Petitioner “fidgeting with something in his pants.” App. 496, ll. 18-25. He also testified, even more significantly, that Ian “didn’t know he [Petitioner] had it [the knife]” because it was dark and no one would have fought Petitioner if they “would have seen two long blades” in his hand. App. 493, ll. 21-22; App. 496, l. 21-App. 497, l. 5. According to Rishawn, Ian simply thought the men were fist fighting. Additionally, while Wilson and Graham testified that Ian was armed with a gun, Boatright stated he never saw Ian with a gun and Rishawn testified that Ian was not fighting with a gun in his hand. App. 302, ll. 23-25; App. 440, ll. 13-16; App. 399, ll. 21-22; App. 419, ll. 9-12; App. 490, ll. 8-15. Further, only Graham testified that he knew Petitioner had knife and he stated that no one, much less Ian, saw that Petitioner had retrieved a weapon. App. 436, ll. 20-22; App. 440, ll. 6-10.

The testimony elicited during Petitioner's trial did not support the charge of mutual combat. Counsel Wilson's PCR testimony evinced that he was unfamiliar with the requirements of mutual combat as he testified that the charge was appropriate merely because Petitioner did not leave when he could have left, that Petitioner knew Ian was armed, and that Petitioner then armed himself. However, he did not testify that there was pre-existing ill will, that an antecedent agreement to fight between the parties ever existed, or that the parties both knew the other was armed.

Notably, the PCR court's reliance on State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) was misplaced. The PCR court footnoted that "Rishawn's testimony that Applicant left and then returned makes these facts akin to the facts in Graham." App. 809. However, in Graham, just as in every other case of mutual combat in South Carolina, there was evidence that the parties had a pre-existing dispute or pre-existing ill will. Specifically in Graham, our Court wrote that "the parties had quarreled **prior to the day of the killing and made threats against each other.**" Graham at 451, 196 S.E.2d at 496. No such evidence of a prior fight or threats being made between Petitioner and Ian existed in the record. Thus, the probative evidence in the record did not support the PCR court's finding that mutual combat was an appropriate. "In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision." Edwards v. State, 392 S.C. 449, 455, 710 S.E.2d 60, 64 (2011) (internal citations omitted). "The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law." Id.

Despite Counsel Wilson's testimony at the PCR, there was not ample evidence within the record to support the charge and his failure to object was deficient performance. His belief that mutual combat was appropriate was not reasonable and he offered no valid reason for failing to

object. Petitioner was prejudiced because, like in Taylor, *supra*, the mutual combat charge negated his claim of self-defense and shifted the burden of proof from the State to Petitioner. This was ineffective assistance of counsel under the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). Petitioner respectfully requests this Court overturn the PCR court's denial of relief and remand this matter back to the Court of General Sessions of Marion County for a new trial.

II.

In the alternative, if this Court finds that the record supported the mutual combat charge, the PCR court erred in finding that trial counsel provided effective assistance where counsel failed to object to the mutual combat charge being given as part of the charge on self-defense.

Should this Court find that the mutual combat charge was not given in error, Petitioner submits that Counsel Wilson provided ineffective assistance of counsel by failing to object to the mutual combat charge being given as part of the self-defense charge. Including mutual combat as an element of self-defense was misleading and confusing to the jury and was prejudicial to Petitioner.

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). “The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury.” Id.

The critical issue at trial was not who had caused the death of Ian but why it had occurred. The State averred that Petitioner acted with malice and murdered Ian during mutual combat. Petitioner asserted he acted in self-defense. The jury was tasked with determining which of these legal theories the State had proven or disproven beyond a reasonable doubt. When the trial court instructed the jury on self-defense, it began by stating “the following **elements** are required to establish self-defense.” App. 654, l. 25-App. 655, l. 1 (emphasis added). The court proceeded to charge that the defendant could not be at fault in bringing on the difficulty and then immediately the court charged the jury on mutual combat, before turning to the other elements of self-defense. The jury charge improperly conflated mutual combat as an

element of self-defense. By comingled two separate and distinct principles of law, the trial court effectively shifted the burden of disproving self-defense from the State to Petitioner to disprove mutual combat. The jury should have been instructed to consider the elements of self-defense first and separately before considering whether there was evidence of mutual combat.

Counsel Wilson was defective for failing to object to the defective and confusing jury charge. See Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (where trial judge gave erroneous instruction on critical issue of intent, PCR applicant was prejudiced by counsel's failure to object); High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989) (holding counsel ineffective for failing to object to defective charge on intent that shifted burden from State to petitioner). This failure greatly prejudiced Petitioner because his entire defense at trial was self-defense and the comingling of the legal principles lessened the State's burden to disprove self-defense. Further, it cannot be reasonably claimed that the misleading charge did not impact deliberations or the verdict as the jury informed the court it was struggling with reaching unanimous verdicts. Counsel Wilson provided ineffective assistance of counsel when he failed to object and request that the jury properly instructed on the separate and distinct legal principles of self-defense and mutual combat. See Pauling v. State, 350 S.C. 278, 565 S.E.2d 769 (2002).

Notably, the PCR court failed to rule on this issue despite Counsel Waller filing a Rule 59(e) motion asking for findings of fact and conclusions of law on "the structure and order of the mutual combat charge...[being] within the trial court's charge on self-defense." App. 827. The PCR court declined to amend its final order finding it had adequately covered the issues raised by Petitioner. The failure of the PCR court to make specific findings of fact and conclusions of law regarding a duly raise issue at the PCR hearing is error. See, Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019); Pruitt v. State, 310 S.C. 254. 423

S.E.2d 127 (1992). Respectfully, Petitioner requests that this Court remand the matter back to the PCR court to make specific findings of fact and conclusions of law on this duly raised issue.

CONCLUSION

By reason of the foregoing arguments, Petitioner respectfully requests that this Court grant the petitioner for writ of certiorari to allow full briefing on these issues.


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Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of July, 2023.