

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Marion County
Honorable D. Craig Brown, Trial Judge
Honorable William H. Seals, Jr., Post-Conviction Relief Judge

Appellate Case No. 2023-000121

RICHARD A. WOODBURY, SCDC # 358878,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

- 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?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

- I. Did the post-conviction relief court properly find that Woodbury failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the trial court's jury instruction on mutual combat where there was sufficient evidence in the record to support the jury instruction, and, accordingly, the instruction was proper as given?
- II. Did the post-conviction relief court properly find that Woodbury failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the trial court's jury instruction on mutual combat in conjunction with an instruction on self-defense where the jury charge was proper as given because mutual combat relates primarily to the 'no-fault' element of the law of self-defense?

STATEMENT OF THE CASE

PROCEDURAL HISTORY

During the February 2013 term, the Marion County Grand Jury indicted Richard A. Woodbury ("Woodbury") for one count each of Murder and Attempted Murder (2013-GS-33-00069). (App. pp. 691-92). Ralph J. Wilson, Sr., Esquire, represented Woodbury. Twelfth Circuit Solicitor E. L. Clements, III, prosecuted the case. On February 18-21, 2014, Woodbury proceeded to trial before the Honorable D. Craig Brown, circuit court judge, and a jury. Woodbury was convicted of the lesser-included charge of Voluntary Manslaughter and acquitted of all other charges. (App. pp. 675-76). Judge Brown sentenced Woodbury to thirty years imprisonment. (App. p. 689).

Woodbury appealed his conviction and was represented on appeal by Appellate Defender Lara M. Caudy of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who raised the following issues on appeal:

- I. Did the court err by instructing the jury on mutual combat when there was no evidence of a mutual intent and willingness to fight including no evidence that Appellant and the decedent knew the other was armed or of any pre-existing ill will or dispute between Appellant and the decedent, and where there is a strong likelihood that this erroneous charge prejudiced Appellant by acting as a limitation on his ability to claim self-defense?
- II. Did the court err by refusing to instruct the jury on the lesser included offense of involuntary manslaughter where the evidence, in the light most favorable to Appellant established that Appellant fatally stabbed the decedent while he was lawfully acting in self-defense but acted recklessly when he was "swinging wildly" and struck the decedent?

The South Carolina Court of Appeals affirmed Woodbury's conviction on March 2, 2016. State v. Woodbury, Op. No. 2016-UP-111 (Ct. App. Filed March 2, 2016). The Remittitur was issued on March 21, 2016.

Woodbury then initiated this underlying post-conviction relief action by filing his *pro se* application on March 15, 2016, raising issues related to trial counsel's ineffectiveness. (App. pp. 695-702). In response to the application, Woodbury was appointed counsel to represent him in this post-conviction relief action, and Respondent the State of South Carolina filed a return and requested an evidentiary hearing to resolve the claims as set forth in the application. (App. pp. 703-07). On June 14, 2019, Woodbury, through counsel, filed an amended application, adding fourteen additional grounds for ineffective assistance of trial counsel and one ground for ineffective assistance of appellate counsel. (App. pp. 712-14).

An evidentiary hearing on this action was convened on June 26, 2019, before the Honorable William H. Seals, Jr., circuit court judge, at the Florence County Courthouse. Woodbury and his trial counsel testified at the hearing. Thereafter, the court denied relief, finding Woodbury failed to meet his burden of proof and failed to establish any constitutional violations or deprivations entitling him to relief. (App. pp. 791-825). Woodbury then filed a motion to reconsider the denial of relief pursuant to Rule 59(e), SCRPC. (App. pp. 826-31). Following a return in opposition from Respondent, the court summarily denied the motion. Woodbury then initiated this appeal.

SUMMARY OF TRIAL TESTIMONY

The testimony at trial established Ian Gause ("Ian"), Rishawn¹ Gause ("Rishawn"), and Ronnie Boatwright ("Boatwright") were visiting the home of Charles Wilson ("Wilson") on September 29, 2012, and they were under the carport listening to music. At some point that night, Woodbury, Ky Graham ("Graham"), and Lamont Davis ("Davis") went to Wilson's house in Woodbury's vehicle.

Wilson testified that Graham got out of the vehicle alone and walked up to the carport to

¹ Rishawn's name is spelled Rayshawn in the indictment but spelled Rishawn in the trial transcript.

speak with Wilson and the others. (App. pp. 295-99). Woodbury followed Graham up to the group a few minutes later and talked to everyone except Ian, which led to a verbal confrontation between Ian and Woodbury. Wilson testified that Woodbury walked back to the vehicle, and Ian stayed under the carport, so he thought everything was over. Woodbury then began another altercation with Ian, and Wilson got between them to keep them apart. Wilson repeatedly told Woodbury to leave, but he continued "trash-talking" and would not leave. Wilson stepped away when he saw Ian holding a gun down by his side, but he never saw Ian point the gun at anyone. (App. pp. 299-301).

Ian and Woodbury continued to argue; then they ran to the carport. Wilson heard scuffling noises, and suddenly, someone ran from the carport into the backyard. Ian then walked out to the front of the carport and told Rishawn he needed to go to the hospital. After Ian and Rishawn left for the hospital, Woodbury returned to the carport from the backyard, said he had left something and picked up a "bamboo stick" from the carport floor. Then, Woodbury and Graham left in Woodbury's vehicle. (App. pp. 303-13). Wilson testified Woodbury had three opportunities to leave before the second altercation turned violent. (App. pp. 299-303).

Boatwright testified he was at Wilson's house that night and corroborated Wilson's account of how the first altercation between Ian and Woodbury occurred. He stated the altercation broke up, and Woodbury walked back to his vehicle but then returned and started arguing with Ian again. Boatwright saw Woodbury holding something by his side but did not see Ian holding a gun. He heard Ian say, "You got something," to Woodbury. (App. pp. 384-90).

When efforts to break up the second altercation failed, Boatwright saw Rishawn take a gun out of his car trunk and fire one shot into the air, which seemed to calm things down for a couple of minutes, and Rishawn put the gun back in the trunk. Then Boatwright saw Woodbury, Ian, and

Rishawn run to the carport, and a few minutes later, Ian came out saying Woodbury stabbed him, but Boatwright did not see Woodbury. Approximately twenty minutes after Rishawn and Ian left for the hospital, Woodbury returned to the house, retrieved a knife from the carport floor, and had another knife in his hand. (App. pp. 390-93).

Boatwright testified Wilson and the people who came with Woodbury tried to get Woodbury to leave after the first altercation. He stated Woodbury had multiple opportunities to leave before the second altercation turned violent, but he "chose to stay." (App. pp. 395-400).

On cross-examination, Boatwright testified Ian and Rishawn were his cousins and agreed he was "not happy" about a family member getting killed. (App. pp. 403). He stated that law enforcement did not question him after the incident, and he did not talk to law enforcement or give a statement about the incident until approximately three to four months prior to trial. (App. pp. 404-05). He reiterated the first altercation was over when Woodbury went to his car, "got what he got," and came back. (App. p. 412). Boatwright also reiterated Woodbury came back to the carport after Ian and Rishawn left for the hospital and picked a knife up from the carport floor. He further testified Woodbury wiped the knife off with his shirt after he picked it up. (App. pp. 420-23).

Graham testified he had known Woodbury and Davis for a couple of years prior to the incident, but he did not know Ian or Rishawn. He did know Wilson and went to Wilson's house with Woodbury and Davis that night. He got out of Woodbury's vehicle first and walked up to the carport. Woodbury followed a few minutes later, and he and Ian "had a little words," which got "heated," but "it calmed down after that." (App. pp. 428-34). Woodbury and Graham walked back to the vehicle, and he tried to get Woodbury to leave, but Woodbury did not want to leave because Ian was standing in the carport "saying a little something." Woodbury then picked up the weapon, got back out of the vehicle, and started having "a few words" with Ian, who had walked down the

driveway when Woodbury got out of the vehicle. (App. pp. 435-38).

Both Graham and Davis unsuccessfully tried to get Woodbury to leave, but he pulled out the weapon he retrieved from the vehicle, and Ian pulled out a gun, so they backed away. At some point, Davis left the scene. Graham could not see what happened when the altercation continued in the carport. After Ian and Rishawn left, Graham saw Woodbury come around the house to the carport holding a knife, and another knife was lying on the carport floor. Then, he and Woodbury left in Woodbury's vehicle. (App. pp. 438-48).

Rishawn corroborated Wilson, Boatwright, and Graham's testimony regarding the events leading to the initial confrontation between Ian and Woodbury. He testified things used to be "cool" between Ian and Woodbury, but there appeared to be a problem between them that night. (App. pp. 477-83; p. 485).

Rishawn further testified Woodbury left in his vehicle after the first altercation but returned about three minutes later and got out. While Woodbury was "messing with his pants," Ian said, "You went and got something." When the second argument started, Rishawn got a gun out of his trunk and fired a shot in the air, "and that[']s] when they calm down." Rishawn and others tried to get Woodbury to leave, but Woodbury said he did not have a weapon and would just "fight" Ian. Thinking Woodbury and Ian would "fight" without weapons, Rishawn put his gun back in the trunk. (App. pp. 483-90).

When the physical fight started under the carport, Rishawn saw Woodbury "swinging wildly" and "real low," which appeared odd to him. He tried to get between Ian and Woodbury to break it up, and he heard Ian say, "So you're gonna cut me," and then saw "blood running down." Rishawn got cut on his back at some point while trying to break the fight up. Woodbury ran away after Ian realized he had been stabbed, and Rishawn drove Ian to the hospital, where Ian died from

the injuries inflicted by Woodbury. Rishawn testified Woodbury had multiple chances to leave before the fight broke out. (App. pp. 490-500).

On cross-examination, Rishawn admitted he lied to the police when they talked to him at the hospital and told them he did not know who stabbed him and Ian because he wanted to get revenge for Ian himself. He subsequently let the authorities handle it and ultimately told the police what he knew about the incident. (App. pp. 500-06).

A forensic pathologist testified that Ian sustained two major and two minor injuries. The first significant injury was a stab wound to the upper right side of Ian's chest. This wound was relatively shallow and did not penetrate any organs. The second significant injury was a stab wound centered on Ian's left nipple, which went through the chest muscle, a rib, and the sack around the heart and then punctured a main vein, which caused Ian to bleed to death. The other two wounds were a superficial cut on the back of Ian's right wrist and a scrape on the back of his left thumb, which could have been defensive wounds. (App. pp. 346-50).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The post-conviction relief court properly found Woodbury failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the trial court's jury instruction on mutual combat where there was sufficient evidence in the record to support the jury instruction, and, accordingly, the instruction was proper as given.**

On appeal, Woodbury asserts the post-conviction relief court erred by refusing to find trial counsel ineffective for failing to object to the trial court's jury instruction on mutual combat based on his belief that there was insufficient evidence in the record to support such an instruction. Specifically, Woodbury argues trial counsel was deficient for failing to object because there was no evidence in the record of an antecedent agreement to fight or of any pre-existing ill-will or dispute between Woodbury and Ian before this incident, and there was no evidence the men knew each other was armed at the time of the fight. Based on this purported lack of evidence to support the charge, Woodbury avers that the mutual combat instruction was improper and that trial counsel should have objected to this improper instruction. Woodbury further argues that he was prejudiced by trial counsel's failure to object because the mutual combat instruction hurt his self-defense claim and impermissibly shifted the burden to disprove self-defense in violation of State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). Woodbury's arguments are unpersuasive, as the record reveals the trial court properly instructed the jury on mutual combat based on the evidence presented during trial and controlling case law. Accordingly, the post-conviction relief court properly denied relief, and this Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286

S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[T]he trial [court] is required to charge only the current and correct law . . . and the law to be charged to the jury is determined by the evidence at trial." Taylor, 356 S.C. at 231, 589 S.E.2d at 3 (internal citations omitted). "[A] trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "In reviewing jury charges for error, [appellate courts] must consider the court's

jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 697 S.E.2d 578, 583 (2010).

The post-conviction relief court found trial counsel was not ineffective for failing to object to the trial judge instructing the jurors on mutual combat. Specifically, the PCR court found that trial counsel was not deficient because the evidence presented at trial and the record supported a mutual combat charge. (App. p. 807).

Woodbury's reliance on Taylor to support his argument is unpersuasive as Taylor is readily distinguishable from Woodbury's case. In Taylor, appellant Taylor was arrested for the murder of Kevin Carter. 356 S.C. at 229-31, 589 S.E.2d at 2-3. Taylor and Robert Murphy got off work and went to Angela Wallace's house to meet Wallace, Myranda Stillinger, and Carter for drinks. Id. at 229, 589 S.E.2d at 2. At some point in the evening, Carter and Stillinger began arguing; Taylor intervened in an attempt to stop the argument. Id. Thereafter, Taylor and Carter began to fight. The fight began inside but eventually moved outside. Id. at 229-30, 589 S.E.2d at 2. Eventually, Taylor drew a knife from his pocket and began stabbing Carter. Taylor stabbed Carter fifteen times. An autopsy report revealed that Carter died from a stab wound to the heart. Id. at 230, 589 S.E.2d at 2. At trial, Taylor admitted that he stabbed Carter but claimed he acted in self-defense. Id. The trial court charged self-defense; however, the trial court also charged mutual combat. Id. at 230-31, 589 S.E.2d at 2-3. The jury convicted Taylor of murder and possession of a weapon during the conviction of a violent crime. Id. at 231, 589 S.E.2d at 3. On appeal, this Court reversed Taylor's convictions, finding, "Because mutual combat requires mutual intent and willingness to fight if a defendant is found to have been involved in mutual combat, the 'no fault' element of self-defense cannot be established." 356 S.C. at 232, 589 S.E.2d at 3. The Taylor court concluded the mutual combat charge was unwarranted because there was no evidence Carter knew Taylor was

armed, and there was no pre-existing ill will between the parties. Id. at 234, 589 S.E.2d at 5.

In the case *sub judice*, Woodbury asserts there was no evidence of pre-existing ill will or conflict and relates the September 29, 2012, events as one continuous altercation. This assertion ignores the uncontroverted testimony of four eyewitnesses indicating there was an initial verbal confrontation, which ended when Woodbury left.

Woodbury's case is more akin to State v. Graham, 206 S.C. 449, 196 S.E.2d 495 (1973). In Graham, the testimony established the defendant and victim "met in town shortly before the shooting and engaged in a heated discussion, during which appellant waved a pistol in the face of the deceased." 260 S.C. at 451, 196 S.E.2d at 496. Thereafter, the victim drove home, retrieved a pistol, and drove back to the scene with the pistol in his hand. Id. As the victim exited his vehicle, the defendant "walked into the street, placing himself in a position where an encounter with the deceased could be expected." Id. In affirming the trial court's decision to give a mutual consent combat charge, the Supreme Court found "there was ill-will between the parties," it was inferable they armed themselves to settle their differences at gunpoint, and they were engaged in mutual combat at the time of the killing. Id. at 496.

This case is factually similar to Graham. Contrary to Woodbury's assertion, there was evidence of some animosity between Woodbury and Ian prior to the day of Ian's death. In furtherance of his supposition, Woodbury concludes that the record indicates Woodbury and Rishawn were "cool." However, Rishawn's testimony was not as precise as Woodbury would have this Court believe; rather, Rishawn testified that Woodbury and Ian "[were] cool at one point." (App. p. 485). The inference from this testimony and Rishawn's prior and latter testimony is that the two were cool at one point, but that night, they were not so cool because they argued during

their initial encounter under the carport. (App. pp. 477-86).²

Also, contrary to Woodbury's assertion, the record does not conclusively provide that Woodbury and Ian got into it *solely* because Woodbury did not shake Ian's hand when he arrived. While it is true that the testimony Woodbury cites—implies that Woodbury's not acknowledging Ian was a predicate to the confrontation—the record is not so clear that this was the only reason Woodbury and Ian had a confrontation. In any event, the record does provide that after the first confrontation, Woodbury removed himself from the situation. Again, the testimony is conflicting, as Wilson testified Woodbury ran down the street, but Rishawn testified that Woodbury drove away and returned a few minutes later. (App. p. 306; pp. 483-86). Boatwright testified that Woodbury and Ian got into it, left, returned, and got into it again with Ian. (App. pp. 389-90). The consistency between the testimony of the witnesses is that Woodbury left and returned; however, this time, he was armed with a weapon. Thus, just as in Graham, Woodbury created a situation where an encounter could be expected.

The jury could infer from the evidence presented that Woodbury and Ian had a pre-existing ill-will or conflict prior to the night of September 29, 2012, and certainly prior to the second altercation. Thus, the PCR court correctly found there was evidence to support a finding of pre-existing ill-will or conflict.

Next, Woodbury avers there was no antecedent agreement to fight between Woodbury and Ian. Again, Woodbury asserts that there was no previous argument when the record provides that

² Testimony from Wilson, Boatwright, and Graham confirmed that Ian and Woodbury got into an argument when Woodbury arrived. (App. pp. 299-301; 388-89; 434). Interestingly, none of these witnesses would identify exactly why the exchange between Woodbury and Ian became so heated and confrontational in the first encounter. While some provided testimony about Woodbury not acknowledging Ian, no one testified as to what the two were arguing about in the first altercation. (App. pp. 302; 388-89; 434).

there were two separate altercations between Woodbury and Ian; thus, the prior argument is the first altercation that night. Rishawn testified that Woodbury left and returned to the property minutes later, and Ian said, "You went and got something." (App. p. 486). Rishawn testified that Woodbury kept messing with his pants, and after he fired the first shot, Woodbury still "stood right there holding like to his pants like, 'I ain't going nowhere.'" (App. p. 500). Rishawn also testified that he thought Woodbury had a weapon, but Woodbury said he did not, and then Woodbury stated he would "fight [Ian]." (App. pp. 489-90).

Contrary to Woodbury's assertion that "no one, much less Ian, saw that Woodbury had retrieved a weapon," Graham actually testified that Woodbury took the sheathed sword out of his pants and brandished it while Ian brandished his gun. (App. pp. 437-40; pp. 454-57). Further, there was testimony that Woodbury and Ian were "nose to nose," "bowed up" in each other's face, and "trying to get at each other." (App. p. 302; p. 306; p. 521).

The record reveals that Woodbury and Ian had a mutual intent and willingness to fight, thereby supporting a mutual combat jury instruction. While there may not have been intent and willingness during the first verbal altercation, the situation clearly changed after Woodbury left, retrieved his weapon from the vehicle, and initiated the second altercation, which quickly turned physical and violent.

Moreover, Woodbury avers that the testimony is contradictory as to whether Woodbury and Ian both knew the other was armed at the time of the fight. However, the standard is not whether the evidence presented was uncontradicted to support a jury charge, it is the existence of the evidence, and, in this case, there certainly was such evidence. Any issues with contradictory issues are for the jury to resolve and have no bearing on whether to give a jury instruction.

The evidence presented indicates Ian knew Woodbury had retrieved something from his

car because he pulled out his gun in response. (App. p. 486). Boatwright testified to the same, seeing something at Woodbury's side. (App. pp. 384-90). Graham testified that Woodbury got his sword before Ian drew the gun. (App. p. 436; p. 447). Wilson testified that he saw Ian with a gun. (App. p. 440). Given the uniqueness of Woodbury's weapon, Ian may not have known exactly what type of weapon Woodbury retrieved—but given their close proximity and his reaction, it was clear Ian knew Woodbury had a weapon. Thus, as in Graham, there was ample evidence presented from which the jury could infer Woodbury and Ian knew each other was armed.

Lastly, Woodbury contends that trial counsel's failure to object was not reasonable and that he offered no valid reason for not objecting. Contrary to this assertion, trial counsel testified at the PCR hearing that he was familiar with the charge, believed it was appropriate under the facts, and that there was ample evidence to support the charge. The PCR court correctly agreed.

Woodbury has failed to prove trial counsel's performance fell below an objective standard of reasonableness. The post-conviction relief court properly denied relief, and this Court should deny certiorari.

II. The post-conviction relief court properly found Woodbury failed to meet his burden of establishing any constitutional ineffectiveness based on counsel's purported failure to object to the trial court's jury instruction on mutual combat in conjunction with an instruction on self-defense where the jury charge was proper as given because mutual combat relates primarily to the 'no-fault' element of the law of self-defense.

Next, Woodbury also argues that the post-conviction relief court improperly denied relief because trial counsel was also deficient for failing to object to the trial court's mutual combat jury instruction as being improperly given alongside a properly given self-defense instruction. Specifically, Woodbury argues trial counsel was deficient because the mutual combat jury instruction was antagonistic to and weakened the self-defense instruction given in violation of

Taylor. Woodbury further argues he was prejudiced by trial counsel's failure to object on this ground because the mutual combat instruction only served to confuse the jury regarding the meaning of self-defense and impermissibly shifted the burden of proof. However, Woodbury was not prejudiced because the trial court's jury instruction on mutual combat in conjunction with the instruction on self-defense was proper as given because mutual combat relates primarily to the 'no-fault' element of the law of self-defense. Therefore, the record and case law support the jury instructions as given. The post-conviction relief court properly denied relief, and this Court should deny certiorari.

During a charge conference, the State requested a mutual combat jury charge, and trial counsel stated if mutual combat was charged, self-defense should also be charged, "and then the jury would decide whether or not if there's a case made out for mutual combat, whether or not it can go to self-defense." After the State agreed, trial counsel stated, "I'm not agreeing that mutual combat should be charged," but if the trial court was inclined to give an instruction on mutual combat, he also wanted the jury to be instructed on self-defense. (App. pp. 574-75).

The trial court provided the State and trial counsel its proposed jury instructions to review overnight. When the charge conference resumed the following day, trial counsel requested charges on prior inconsistent statements, spoliation of evidence, involuntary manslaughter, voluntary intoxication, the right to act on appearances, the difference in size and age, no duty to retreat if doing so would increase the danger of being killed or harmed, and if the actions are justified by self-defense or defense of others, the person is justified in continuing the actions until the danger has completely ended. The trial court agreed to instruct the jury regarding prior inconsistent statements, the right to act on appearances, no duty to retreat, and continuing action until danger ends, but found an involuntary manslaughter charge was not warranted by the evidence. However,

there was no discussion relating to the mutual combat charge. (App. pp. 576-94).

The trial court charged the following on self-defense and mutual combat:

Now the defendant in this case, ladies and gentlemen, has raised the defense of self-defense. Self-defense is a complete defense; and if it is established, you must find the defendant not guilty. The State has the burden of disproving self-defense by proof beyond a reasonable doubt. If you have a reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant not guilty. On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence including the evidence of self-defense, then you must find the defendant guilty.

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 in bringing on the difficulty. Now for mutual combat there must be a mutual intent and willingness to fight. This intent may be shown by the acts and conduct of 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.

(App. pp. 654-58).

Woodbury maintains trial counsel was deficient for failing to object to the trial court's mutual combat charge being read along with the self-defense charge. The crux of Woodbury's deficiency argument relies on State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). Woodbury asserts Taylor stands for the proposition that mutual combat and self-defense should *never* be charged together. However, since Taylor, the South Carolina Court of Appeals has recognized

that self-defense and mutual combat are not mutually exclusive. See e.g., State v. Jackson, 384 S.C. 29, 38 n. 5, 681 S.E.2d 17, 21 n. 5 (2009) ("We do not suggest mutual combat and self-defense are mutually exclusive; rather, in Taylor, there was no evidence that the victim was willing to engage in mutual combat with Taylor.").

Recently, this Court found that the holding in Taylor must not be oversimplified and reduced to an interpretation "that it is improper for a trial court to charge both self-defense and mutual combat." Campbell v. State, ___ S.C. ___, 893 S.E.2d 492, 498 (Ct. App. October 18, 2023) (internal quotations omitted). Importantly, the Campbell court went on to find that "when evidence warrants a mutual combat charge, it may be charged to a jury even when read alongside a self-defense charge." Id. As previously discussed, Taylor is distinguishable from the instant case because there is evidence to support the mutual combat charge, and mutual combat and self-defense are not mutually exclusive; thus, trial counsel cannot be deficient for failing to object.

Furthermore, Woodbury was not prejudiced because the trial court's charge did not shift the burden of disproving self-defense away from the State. The trial court properly submitted to the jury the question of whether Woodbury was at fault in bringing on the difficulty. As previously stated, the trial court charged the jury with the elements of self-defense. In charging the first element of self-defense the trial court charged the law on mutual combat. The trial court charged that if the jury found Woodbury engaged in mutual combat, then the State had met its burden of disproving the first element of self-defense. The trial court's instructions did not shift the burden of proof away from the State; therefore, Woodbury was not prejudiced by the trial court charging mutual combat and self-defense.³

³ Woodbury contends that the post-conviction relief court did not address the duly raised issue of the mutual combat instruction being read within the self-defense jury instruction in its order of dismissal, and, accordingly, that he is entitled to a remand for the post-conviction relief court to

In conclusion, the post-conviction relief court correctly found trial counsel was not ineffective for failing to object to the trial court charging mutual combat. Accordingly, this Court should deny certiorari.

CONCLUSION

Because the post-conviction relief court properly determined Woodbury failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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make specific findings of fact and conclusions of law on this specific issue. However, a remand is not warranted or proper here because the post-conviction relief properly ruled on the propriety of the mutual combat instruction.