STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JHARAUN WASHINGTON,

APPELLANT

APPELLATE CASE NO. 2023-000468

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the state bears the burden of producing competent evidence on each of the elements of mutual combat when electing to use mutual combat as the theory supporting a murder charge in its indictment?

STATEMENT OF THE CASE

Appellant was indicted under the doctrine of mutual combat for causing the death of Donovan Hays and for possession of a weapon during a violent crime by a Jasper County grand jury on February 24, 2022. R. *. Appellant was tried before the Honorable Robert J. Bonds and a jury from March 6 – 9, 2023. R. 1. During trial, Patrick Hall and Carolyn Carmody represented appellant, and Trasi Campbell appeared on behalf of the state. R. *. Following a guilty verdict, Judge Bonds sentenced appellant to thirty-four years for murder and five years on the possession of a weapon charge, to run consecutively. R. *.

This appeal follows.

STATEMENT OF FACTS

Shots were exchanged between individuals in a vehicle and persons gathered around the back porch of an apartment complex in Jasper County. The shooting was captured on surveillance video.[1] Donovan Hays was driving a vehicle with three other occupants, which stopped on the street close to the back porch area of an apartment behind some concealing hedges, and allowed Xavier Rivers to exit the rear of the vehicle and obtain an assault rifle from the trunk of the car just before the shooting.[2] State's Exhibit 15. In response to seeing the Hays vehicle, an individual the state claimed to be Appellant armed himself with a handgun from a white Cadillac parked at the apartment complex. State's Exhibit 15. As Rivers re-entered the Hays vehicle with the assault rifle, Hays began to drive down the street and shots were fired between appellant's group and the Hays vehicle. State's Exhibit 15. Hays was struck in the head and killed by the gunfire. Tr. 505, ll. 5 – 14.

The state elected to indict both Rivers and appellant under the theory that the two engaged in mutual combat leading to the death of Hays. R. * Indictments. At the close of the state's case in chief, counsel for both Rivers and appellant moved for a directed verdict based upon the failure of the state to introduce evidence on the required elements of mutual combat, including the lack of any evidence surrounding ill-will between the groups or a pre-existing dispute. Tr. 514 - 538.

In response to the directed verdict motion, the state argued there was no need under the law of mutual combat to show a prior dispute or prior ill-will between the combatants, since the combat could result from the "impulse of the moment." Tr. 525, ll. 9 – 24. In response to the trial court's

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1 State's Exhibits 11 and 15 are on file with this Court. State's 15 represents a composite video showing the movement of the two shooters.

2 Xavier Rivers was tried with appellant but was acquitted by the jury. Tr. 19, ll. 6 – 24; 657, ll. 1 – 9.

inquiry about the need for "animus or the bad blood" between the parties, the state argued that mutual combat contained no such element. Tr. 527, ll. 3 – 5. The state produced no evidence about an ongoing dispute or source of ill-will between the Hays vehicle and the occupants on the porch of the apartment leading up to the shooting. The trial court denied the directed verdict motion.[3] Tr. 538, ll. 15 – 18.

3 Appellant's counsel also moved for a directed verdict on the failure of the evidence to establish Appellant as the shooter depicted in State's Exhibit 15. Tr. 519, ll. 3 – 20. During closing argument, appellant's counsel argued that Appellant was the person shooting at the Hayes vehicle but argued Appellant was guilty of voluntary manslaughter and not murder resulting from mutual combat. Tr. 622, ll. 9 – 20.

STANDARD OF REVIEW

On appellate review, the denial of a directed verdict motion in a criminal case is reviewed under the any evidence standard of review. State v. Cain, 419 S.C. 24, 33, 795 S.E.2d 846, 851 (2017). "If there is any direct evidence or *any substantial circumstantial evidence* reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." State v. Harris, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (emphasis added). "The lower court should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty." State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000).

ARGUMENT

The state bears the burden of producing competent evidence on each of the elements of mutual combat when electing to use mutual combat as the theory supporting a murder charge in its indictment.

A. The offensive use of mutual combat as a basis for a murder charge as opposed to a jury charge to negate an element of self-defense.

Here, the state elected to charge both Rivers and appellant for murder under the theory that they were engaged in mutual combat leading to the death of Hays. R. * Indictments. While South Carolina has recognized the use of mutual combat as the basis for a jury charge to negate an assertion of self-defense, it has also recently extended the doctrine to encompass criminal liability based upon its use as a basis for criminal liability:

> Today, we extend our jurisprudence and hold that each participant who willingly engages in mutual combat may be held accountable for the death or injury of an innocent bystander resulting from that confrontation. As each combatant aids and encourages the others to fire and continue firing the hail of bullets that results in a victim's death or injury, each may be found guilty under the "hand of one is the hand of all" theory of accomplice liability. Accordingly, we affirm the court of appeals' decision upholding Young Jr.'s convictions and sentences.

State v. Young, 429 S.C. 155, 166, 838 S.E.2d 516, 522 (2020).

In Young, the defendants were charged with murder under the theory that they engaged in mutual combat. "Of course, mutual combat is not a stand-alone crime in South Carolina. Rather, it is a theory of criminal liability that underlies a recognized crime such as murder or manslaughter." Young, 429 S.C. at fn. 1, 838 S.E.2d at fn. 1.

In this case, the state adopted the offensive use of mutual combat in indicting Appellant and Rivers. Appellant's indictment reads:

> That in Jasper County, South Carolina, on or about April 22, 2020, the Defendant, JHARAUN MONTYCE WASHINGTON did willfully, unlawfully and with malice aforethought engage in mutual combat with XAVTER KENDRELL RIVERS and did thereby cause the victim DONOVAN HAY to be shot and killed in the area of the Walsh Drive Apartments, Hardeeville, South Carolina and that DONOVAN HAY did die in Jasper County as a proximate result thereof on April 22, 2020, all in violation of Section 16-3-10, et al. of the Codes of Law of South Carolina (1976), as amended.

R. * Indictment. The language from Appellant's indictment closely tracks the indictment issued in Young.[4]

B. The state was required to introduce evidence supporting the elements of mutual combat.

In adopting the Young language as the basis for the indictment in the present case, the state assumed the burden of establishing the elements of mutual combat. In South Carolina, "[i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Gunn, 313 S.C. 124, 136, 437 S.E.2d 75, 82 (1993). "A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it 'is not an element of the offense.'" Gunn, 313 S.C. at 136, 437 S.E.2d at 82 (*quoting* State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981)).

"[W]hile a conviction may be sustained under an indictment which is defective because it omits essential elements of the offense, such is not true when the indictment facially charges a complete offense and the State presents evidence which convicts *under a different theory* than that alleged." Bailey v. State, 392 S.C. 422, 433, 709 S.E.2d 671, 677 (2011) (emphasis added)

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4 The indictment at issue in Young added additional language regarding murder, including the malice aforethought requirement. The indictment in Young can be viewed in Appendix page 205 contained in the South Carolina Appellate Case Management System for State v. Young, Appellate Case No. 2018-001861 (2020). https://ctrack.sccourts.org/public/caseView.do?csIID=68570.

(*quoting* Thomason v. State, 892 S.W.2d 8, 11 (Tex.Crim.App.1994)). In Bailey, our Supreme Court held that an indictment charging "physical injuries resulting in Victim's death" required the state to produce evidence of such "physical injuries" rather than relying on "neglect" to support a conviction. Bailey, 392 S.C. at 435–36, 709 S.E.2d at 678. In State v. Smith, 406 S.C. 215, 219–20, 750 S.E.2d 612, 614 (2013), our Supreme Court ruled that an indictment under S.C. Code § 16-35-85(A)(1) (abuse or neglect causing death of a child) did not provide notice of a section (A)(2) charge (aiding and abetting abuse or neglect resulting in death of a child) requiring reversal of Smith's conviction.

Here, the indictment's theory was that mutual combat between Rivers and appellant resulted in the death of Hayes, making both appellant and Rivers criminally liable for murder. Much like the indictment in Young, the underlining theory of guilt was based upon mutual combat, requiring the state to meet the burden of production and proof on each aspect of mutual combat.

C. The trial court's ruling.

Following the close of state's case, counsel for both appellant and Rivers moved for a directed verdict since the state had failed to present evidence on each element of mutual combat. Specifically, counsel for appellant argued a failure to produce any evidence of pre-existing animosity or ill-will or any evidence of an agreement to engage in mutual combat:

> With respect to the mutual combat charge, I think with respect to proving all of the elements of mutual combat, if that existed, and, again, I'm not gonna go back through all of the case law that Ms. Carmody has cited. I know there was no evidence of the disagreement or a pre-existing ill-will between the appellant and the victim in that case.

Tr. 519, l. 21 – 520, l. 2.

In addition, counsel for appellant pointed out the failure of proof regarding the mutual knowledge each combatant was armed and ready to engage in combat:

> Now, Mr. Hatfield's testimony was he said something out loud, but of course he also couldn't verify that anybody heard him say, "Oh, look, that's Zay [co-defendant Rivers] in the car," or words to that effect. There's no testimony here from anyone that indicated at least at that point that anybody was armed.
>
> And fast-forward to getting around the curb where the car stops, and exits the vehicle and removes this assault vehicle and gets back in. It's -- up to that point, and, again, there's no proof, there's nothing that's indicated in the record that there's anything going on here, that there's any willingness to fight.
>
> There's absolutely zero evidence of any prior difficulties between Mr. Washington and Mr. Rivers.

Tr. 520, ll. 11 – 25.

In response, the state confirmed its use of offensive mutual combat from the indictments:

> And so at the outset mutual combat is first and foremost the basis for criminal responsibility and liability, and that would be indicted for a murder that is the killing that is committed during a mutual combat situation. And that is exactly how the State indicted both Mr. Rivers and Mr. Washington.
>
> They were indicted exactly the same, as the indictments that were issued in the Robinson and State v. Aaron Young Jr. and Aaron Young, Sr. cases. And so that is where we're a little off track with the Young case. And so, again, I've provided the Court with many different cases that address where we are with this as a liability criminal responsibility indictment as mutual combat.

Tr. 521, l. 20 – 522, l. 9.

The state asserted the video itself was sufficient evidence supporting mutual combat, based upon the two parties arming themselves. Tr. 523, l. 13 – 524, l. 18. The state also echoed the

language from State v. Brown,[5] that it was sufficient if the parties "willfully enter into the conflict upon the impulse of the moment, and that is exactly what you have in this case." Tr. 525, ll. 21 – 24. In response to the trial court's inquiry about the need for "animus or the bad blood" between the parties, the state argued that mutual combat contained no such element. Tr. 527, ll. 3 – 5. The state produced no evidence about an ongoing dispute or source of ill-will between the Hays vehicle and the occupants on the porch of the apartment leading up to the shooting.

The trial court ultimately ruled with the state. In its ruling, the trial court focused on the "impulse of the moment" concept eliminating the need for any evidence of prior dispute of ill-will:

> As far as to an agreement, I don't think there has to be a stated agreement, as in we sit down and say, hey, let's agree to duke it out, you get your gun, I'll get my gun, let's go for it. I think the agreement can be upon the impulse of the moment, and I think that's clear -- I think there's evidence that that could be what happened here.

Tr. 537, ll. 6 – 13.

The trial court noted it was "as far as meeting the elements, giving the State in this case quite frankly every benefit of the doubt, which I'm charged to do at this point, I believe that there's enough evidence for this case to move forward for the jury to consider." Tr. 538, ll. 9 – 14.

D. The trial court's error of law concerning evidence of prior difficulty between the combatants.

The trial court's error centers on the state's failure to meet its burden of production on an essential element of mutual combat: a pre-existing dispute or ill will. The basis for the

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5 "That, to constitute mutual combat, it is not necessary that there should be a positive agreement between the participating parties to enter the combat; it is sufficient if they willfully enter into the conflict, *upon the impulse of the moment.*" State v. Brown, 108 S.C. 490, 95 S.E. 61, 63 (1918) (emphasis added).

requirement of a pre-existing dispute has been addressed by our Supreme Court in State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). The Taylor court found that [a]lthough South Carolina has not explicitly required that the fight arise out of a pre-existing dispute, other states have made this prerequisite to mutual combat explicit. Texas and Colorado adhere to the rule that an 'antecedent agreement to fight' must exist for the court to charge mutual combat." Taylor, 356 S.C. at 233, 589 S.E.2d at 4. The Supreme Court reasoned it was "logical that the evidence of agreement to fight be plain, like the evidence of mutual combat present in the *Porter*; *Graham*, and *Mathis* cases." Taylor, 356 S.C. at 234, 589 S.E.2d at 4.

The Supreme Court in Taylor then reviewed the evidence presented at trial to determine if mutual combat was applicable:

> There is no evidence, and the State does not contend, that there was any pre-existing ill-will or dispute between Kevin and the Petitioner, and there is no evidence that Kevin was willing to engage in an armed encounter with Petitioner. In their determination of mutual willingness to fight, the South Carolina cases discussed emphasize that each party knew the other was armed. Here, there is no indication that Kevin knew Petitioner was armed with a knife, and there was no pre-existing ill-will between the parties. Under these circumstances, there is insufficient evidence of mutual willingness to fight to submit the issue of mutual combat to the jury.

Taylor, 356 S.C. at 234, 589 S.E.2d at 5.

This requirement of prior ill-will was also addressed in State v. Bowers, 436 S.C. 640, 875 S.E.2d 608 (2022). Our Supreme Court in Bowers noted:

> If Bowers and Michael Morgan *had a previous dispute, mutually agreed to fight at a later time, and otherwise satisfied the limitations on the doctrine of mutual combat* set forth in *Taylor,* and if the resumption of their conflict played a role in starting the shootout in which Bowers shot Green, then under the same theory that led us to apply the doctrine in *Graham* and *Young*, the doctrine would make Bowers responsible for the injury to Green.

Bowers, 436 S.C. at 649, 875 S.E.2d at 612-13 (emphasis added).

The required element of pre-existing ill-will is a common theme seen in South Carolina caselaw on mutual combat: State v. Porter, 269 S.C. 618, 239 S.E.2d 641 (1977) (finding the prior argument over livestock accompanied by threatening gunshots supported a finding of mutual combat); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973) (noting parties had quarreled prior to the day of the killing and had made threats against each other before the fatal encounter); State v. Mathis, 174 S.C. 344, 177 S.E. 318, 319 (1934) ("There was testimony that the appellant and the deceased were on the lookout for each other; that they were armed in anticipation of a combat; that each drew his pistol and each fired upon the other.").

As was the case in Taylor, here there is a complete lack of evidence of any pre-existing ill-will between the parties involved supporting a mutual willingness to fight. The state did not contend otherwise, arguing instead that the "upon the impulse of the moment" language, referenced in State v. Brown, 108 S.C. 490, 95 S.E. 61, 63 (1918), eliminated pre-existing ill-will or ongoing dispute as a required element of mutual combat. Tr. 527, ll. 2 – 5.

However, this expansive view of mutual combat, which effectively eliminates any need to show prior hostility or disagreement between the parties involved, has already been reviewed and rejected by our Supreme Court in State v. Taylor:

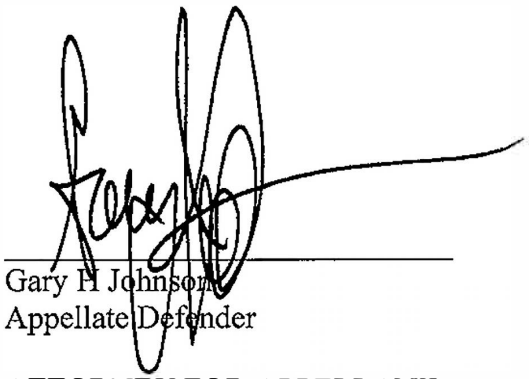
> As mentioned, mutual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection. This is inherently inconsistent with the concept of self-defense, and directly conflicts with the 'no fault' finding necessary to establish self-defense. As such, it is only logical that the *evidence of agreement to fight be plain*, like the evidence of mutual combat present in the *Porter*; *Graham*, and *Mathis* cases.

Taylor, 356 S.C. at 234, 589 S.E.2d at 4 (emphasis added). As noted, Porter, Graham, and Mathis all contained evidence of an ongoing dispute or prior ill-will between the parties involved.

Here, the state has embraced an expansion of mutual combat that removes the required element of pre-existing difficulty or ill-will. The state's position that the impulse of the moment concept allows it to circumvent this required element of mutual combat should be rejected by this Court. By directly charging offensive mutual combat in the indictment, the state was bound to produce evidence supporting the required elements of mutual combat, including pre-existing ill-will or an ongoing dispute. The trial court's finding that the state was not required to produce any evidence on this required element should be reversed.

CONCLUSION

Appellant's conviction and sentence for murder under the theory of mutual combat as set forth in the indictment should be reversed due to the trial court's error in refusing to grant a directed verdict. Appellant's conviction for possession of a weapon during the commission of a violent crime under S.C. Code Ann. § 16-23-490 (2010) is dependent upon the guilty verdict for murder under mutual combat. Since appellant was entitled to a directed verdict on the murder resulting from mutual combat charge, a directed verdict was also required for the charges under S.C. Code Ann. § 16-23-490 (2010).



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This 24th of April, 2024.