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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Circuit Court

Kristi F. Curtis, Circuit Court Judge

Case No. 2022-001428

State of South Carolina, Respondent,

v.

Joquell Myers,

Appellant.

FINAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

1. Whether the trial court erred by providing the jury with an instruction on mutual combat and thereby prejudiced Appellant's ability to plead his case for self-defense?

STATEMENT OF THE CASE

On September 25, 2019, Appellant, Joquell Myers, was arrested on warrants for murder, assault and attempted murder, and multiple weapon possession offenses in relation to events which transpired on September 8, 2019, at a gas station located at 1083 Broad Street in Sumter. (*See* "Arrest Warrants" at pp. 1-4.) Appellant was ultimately charged with murder, two counts of attempted murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. (*See* "Jury Charges" at p. 1.) The trial began on September 26, 2022, and concluded on October 4, 2022. A jury convicted Appellant of one count of attempted murder in violation of section 16-03-0029 of the South Carolina Code, unlawful carrying of a pistol in violation of section 16-23-0020 of the South Carolina Code, and possession of a weapon during the commission of a violent crime in violation of section 16-23-0490 of the South Carolina Code. (*See* "Sentencing Sheets" at pp. 1-6.) Judge Kristi F. Curtis presided over the trial and sentenced Appellant to twenty years for his conviction for attempted murder, one year for unlawful carrying of a pistol, and five years for possession of a weapon during the commission of a violent crime to run concurrently. (*See id.*)

During the trial, the State alleged that Appellant had engaged in mutual combat with other individuals present on the night of September 8, 2019, and asked the judge to provide the jury with an instruction on the doctrine of mutual combat. Defense counsel consistently objected to the inclusion of a mutual combat instruction as both unsupported by the facts of the case and unfairly prejudicial to Appellant's ability to plead self-defense. (*See* Tr. "10-03-2022" at pp. 160-175.) Counsel for both sides presented oral arguments and relevant case law to the court prior to the case being submitted to the jury. (*See* Tr. "10-04-2022" at pp. 4-5.) Ultimately, the court decided to provide an altered instruction on mutual combat alongside the instruction for self-defense to the

jury. Appellant now brings this appeal arguing that the trial court erred by providing the jury with a mutual combat instruction.

STANDARD OF REVIEW

To reverse a criminal conviction on the basis of an erroneous jury instruction, the court must find the error was a prejudicial error. *See State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (stating "the charge must be prejudicial to the appellant to warrant a new trial" (citing *State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013))). Prejudicial error in a jury instruction is an error that contributed to the jury verdict. *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). The question here is whether the erroneous jury charge affected the jury's deliberations on the charge and, thus, contributed to the verdict. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (stating, "[t]he key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (internal quotation marks omitted) (quoting *State v. Charping*, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993))). The appropriate test involves determining what a reasonable juror would have understood the charge to mean. *State v. Bowers*, 436 S.C. 640, 647, 875 S.E.2d 608, 611 (2022) (stating that the court had to determine whether the jury would have interpreted the trial court's instruction on mutual combat to mean that an appellant's mutual combat did not foreclose his claim of self-defense).

ARGUMENT

1. South Carolina precedent overwhelmingly supports the conclusion that mutual combat acts as a bar to self-defense

"The doctrine of mutual combat has existed in South Carolina since at least 1843," but has not been commonly used until its recent resurgence. *State v. Taylor*, 356 S.C. 227, 231, 589 S.E.2d 1, 3 (2003). To constitute mutual combat, there must be "mutual intent and willingness to fight." *State v. Graham*, 260 S.C. 449, 450, 196 S.E.2d 495, 495 (1973). The intent to fight is "manifested by the acts and conduct of the parties and the circumstances attending and leading up to the combat." *Id.* Additionally, "[t]he State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed." *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 519 (2020).

"Mutual combat relates primarily to the law of self-defense." *Bowers*, 436 S.C. at 647, 875 S.E.2d at 612. Self-defense comprises four elements—the first of which relates to the doctrine of mutual combat. *See id.* The first element, called the "no fault" element, requires a defendant to be "without fault in bringing on the difficulty." *Taylor*, 356 S.C. at 232, 235, 589 S.E.2d at 3, 5 (quoting *State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984)). "[I]f a defendant is found to have been involved in mutual combat, the 'no fault' element of self-defense cannot be established." *Taylor*, 356 S.C. at 232, 589 S.E.2d at 3. As such, "mutual combat acts as a bar to self-defense." *Id.* at 234, 589 S.E.2d at 4.

This conclusion is consistent with the overwhelming majority of South Carolina precedent addressing the relationship between mutual combat and self-defense. *See Jackson v. State*, 355 S.C. 568, 571, 586 S.E.2d 562, 563 (2003) ("Mutual combat bars a claim of self-defense because it negates the element of 'not being at fault.'"); *State v. Porter*, 269 S.C. 618, 622, 239 S.E.2d 641, 643 (1977) ("[T]he plea of self-defense is not available to one who kills another while engaging

in mutual combat."); *Young*, 429 S.C. at 157 n.1, 838 S.E.2d at 517 n.1 ("the mutual combat doctrine is most commonly used to negate self-defense"); *see also Davis*, 282 S.C. at 46, 317 S.E.2d at 453; *Taylor*, 356 S.C. at 235, 589 S.E.2d at 5; *Jackson*, 355 S.C. at 571, 586 S.E.2d at 563; *State v. Barksdale*, 311 S.C. 210, 217, 428 S.E.2d 498, 502 (Ct. App. 1993).

In *Taylor*, the South Carolina Supreme Court considered the precise question of whether it was proper for a judge to charge a jury with both a self-defense instruction as well as one for mutual combat. The court of appeals had found that charging mutual combat to the jury did not destroy the appellant's self-defense theory because the appellant could have proven that he withdrew from the fight in good faith. *Taylor*, 356 S.C. at 235, 589 S.E.2d at 5. This exception allowing a defendant to prove that he abandoned a mutual combat situation he previously entered into was recognized in *Graham* and requires the combatant to make known by word or act to his adversary that he declines to engage in further conflict. *Graham*, 260 S.C. at 451, 196 S.E.2d at 496.

However, the Supreme Court in *Taylor* found that the two instructions issued in the case were incompatible and improperly prejudiced the appellant's ability to plead self-defense. *Taylor*, 356 S.C. at 235, 589 S.E.2d at 5. The court's decision considered a line of cases placing great emphasis on the importance of a defendant's right to assert self-defense when there is "any evidence" to support it. *Id.* These cases, the court stated, take "pains to make sure the burden to disprove self-defense remains on the State." *Id.* (citing *State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002); *State v. Addison*, 343 S.C. 290, 540 S.E.2d 449 (2000); *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (1998)).

Ultimately, the court concluded,

> Although the court charged self-defense properly in Petitioner's case, that charge was negated by the court's unwarranted charge on mutual combat. We find that the court's mutual combat charge acted as a limitation on the Petitioner's ability to claim self-defense, and prejudiced him by transferring the *State's burden* to

> disprove self-defense onto the Petitioner, forcing him to prove self-defense in violation of *Burkhart*, *Addison*, and *Wiggins*.

Taylor, 356 S.C. at 235, 589 S.E.2d at 5 (emphasis in original).

It is worth noting that a very few cases have recognized situations in which it is permissible to provide both mutual combat and self-defense instructions to a jury. *See State v. Jackson*, 384 S.C. 29, 38 n.5, 681 S.E.2d 17, 21 n.5 (Ct. App. 2009); *Campbell v. State*, No. 5999, 2023 S.C. App. LEXIS 75, at *10-12 (S.C. Ct. App. July 19, 2023).[1] However, the context of those highly fact-specific scenarios should be at the forefront in the determination of whether such an exception to this State's general law should be permitted. First, in *Jackson*, the court followed its analysis of *Taylor*'s holding that the mutual combat charge negated the self-defense charge and created unfair prejudice against the appellant with a footnote stating, "[w]e 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." *Jackson*, 384 S.C. at 38 n.5, 681 S.E.2d at 21 n.5. This footnote became part of the basis for this court's holding in *Campbell*.

In *Campbell*, this Court considered an appellant's suit for ineffective assistance of counsel when his defense attorney did not object to a mutual combat instruction being offered to the jury alongside a self-defense instruction. *Campbell*, 2023 S.C. App. LEXIS 75, at *1. In that case, the appellant had quarreled with several individuals days prior to a shooting, had flashed his pistol at one of the individuals who was unarmed at the time, and then retrieved two shotguns and headed to the other parties' residence. *Id.* at *7. The appellant subsequently punched one of the victims in the face, and gunfire resulting in a death ensued. *Id.* This court found these facts very similar to

[1] While *Campbell* does not have an official reporter citation yet, the opinion appears to be pending only until the time expires for the parties to file any motions for rehearing. Therefore, Appellant believes citation to this case to be appropriate under Rule 220, as it will not remain "unpublished" and reflects this Court's latest comment on the issue presented in this appeal.

those in *Graham*, where "the apparent willingness of each to engage in an armed encounter with the other[] sustained an inference that they were engaged in mutual combat at the time of the killing[] and required that the issue be submitted to the jury for determination." *Graham*, 260 S.C. at 452, 196 S.E.2d at 496. Relying on this precedent, this Court held in *Campbell*, that "in the present case, the apparent willingness of each combatant, including Campbell, to engage in an armed encounter creates an inference of mutual combat that necessitated a corresponding charge to be submitted to the jury." *Campbell*, 2023 S.C. App. LEXIS 75, at *9. The court distinguished its holding from that in *Taylor* by stating:

> In *Taylor*, our supreme court found that the burden of proof impermissibly shifted to the defendant to prove self-defense when a self-defense "charge was negated by the court's *unwarranted* charge on mutual combat." 356 S.C. at 235, 589 S.E.2d at 5 (emphasis added). However, when evidence warrants a mutual combat charge, it may be charged to a jury even when read alongside a self-defense charge.

Id. at *11-12. In *Campbell*, the court found that because the charge was warranted, Campbell's trial counsel was not deficient in failing to object to its reading alongside the jury charge on self-defense. *Id.* at *12.

In sum, the overwhelming weight of precedent from South Carolina recognizes an inherent incompatibility between the doctrine of mutual combat and the theory of self-defense. As such, these instructions are very infrequently found to be appropriately given to the jury concurrently. This is due to this State's well-established protection of a defendant's right to plead self-defense if there is any supporting evidence in his or her case, and its refusal to improperly shift the burden of proof for establishing self-defense onto the defendant. *See Wiggins*, 330 S.C. 538, 500 S.E.2d 489 (first establishing that the State has the burden of disproving self-defense); *Addison*, 343 S.C. 290, 540 S.E.2d 449 (extending the holding in *Wiggins* that self-defense is no longer an affirmative defense and that current law requires the State to disprove self-defense, once raised by the

defendant, beyond a reasonable doubt to be controlling in the context of a jury charge); *Burkhart*, 350 S.C. at 260, 565 S.E.2d at 302 ("If there is any evidence in the record to support self-defense, the issue should be submitted to the jury.").

2. The mutual combat instruction given to the jury was in error because the facts of this case do not warrant such an instruction

When determining whether a mutual combat instruction and self-defense instruction were properly issued to a jury, courts consider whether the State has provided sufficient evidence that the combatants were willing to engage in mutual combat. Generally, there must be evidence of preexisting ill will and/or violent confrontations between the combatants in order to establish the parties intended to fight. *See Young*, 429 S.C. at 158, 838 S.E.2d at 517 ("Prior to the date of the gun battle, [the combatants] had a history of violent confrontations with one another."); *Graham*, 260 S.C. at 452, 196 S.E.2d at 496 ("There was ill-will between the parties. They had threatened each other and it is inferable that they had armed themselves to settle their differences at gun point."). The evidence of agreement to fight must be plain. *See Taylor*, 356 S.C. at 234, 589 S.E.2d at 4. The doctrine has most often been applied in situations where the defendant and the victim bear a grudge against each other before the fight occurs. *Id.* at 232, 589 S.E.2d at 4. The supreme court's decision in *Taylor* stated that evidence of mutual combat to support an instruction on the issue should be "like the evidence of mutual combat present in the *Porter*, *Graham*, and *Mathis* cases." *Id.* at 234, 589 S.E.2d at 4; *see also Campbell*, 2023 S.C. App. LEXIS 75, at *5-6 (finding the facts of the case in line with *Graham*, not *Taylor*).

In *Porter*, the combatants had engaged in a series of encounters arguing over a personal dispute, sometimes firing warning shots at each other. *Porter*, 269 S.C. at 620-21, 239 S.E.2d at 642. Despite this history of violent behavior, the defendant continued to make visits to the victim's property, eventually resulting in a shootout in which individuals on both sides of the fight were

wounded. *Id.* In *State v. Mathis*, 174 S.C. 344, 348, 177 S.E. 318, 319 (1934), the court found evidence of mutual combat where the appellant and a deceased victim were "on the lookout for each other . . . were armed in anticipation of a combat [and] each drew his pistol and each fired upon the other." In *Graham*, the court found sufficient evidence of mutual combat where:

> Appellant and deceased had quarreled prior to the day of the killing. Both had made threats against the other and appellant purchased a pistol on the night before the fatal encounter. They 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. The deceased, who apparently had no weapon at the time, then drove out of town in his truck, returning a short time later with his pistol. When the deceased returned, he parked his truck in front of a barber shop and got out with his pistol in his hand. As the deceased left his truck, appellant, who was in the barber shop and had observed the deceased's return, walked into the street, placing himself in a position where an encounter with the deceased could be expected. Appellant could see the weapon in the possession of the deceased, and the deceased knew that appellant was armed. As appellant entered the street from the barber shop, both parties fired at each other. The deceased was mortally wounded and died a short time thereafter.

Graham, 260 S.C. at 451, 196 S.E.2d at 496.

Conversely in *Bowers*, the court considered a case in which at least ten people shot at each other and at innocent bystanders wounding four individuals and killing two. 436 S.C. at 644, 875 S.E.2d at 610. The court found that, under the doctrine of mutual combat, if the defendant had engaged in mutual combat with a victim before they arrived at the place the shootout eventually occurred, then the defendant would be deemed to be at fault in bringing on the difficulty. *Id.* at 647-48, 875 S.E.2d at 612. Specifically, the court stated "[i]f Bowers and [another shooter] 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*," the doctrine would apply. *Id.* at 649, 875 S.E.2d at 612-13.

Turning to the facts of this case, there was absolutely no evidence presented at trial which reflected that Appellant had any ill will with respect to the other combatants and/or the victims

involved in the events of September 8, 2019, let alone that he had agreed to engage in deadly combat with anyone. Throughout every interview Appellant had with various detectives as well as his testimony at trial, Appellant maintained that he did not know who was inside the car he fired at. When Detective William McFadden asked Appellant what happened in their preliminary interview, Appellant replied "I don't even know how it started." (*See* Tr. "9-26-2022" at p. 85.) Appellant went on to say "I don't know whose red Charger that is. . .. I don't know who was in there." (*Id.* at pp. 87, 94.) Detective McFadden confirmed at trial that Appellant maintained throughout their conversations that Appellant did not know who had shot his brother, Dontrae Epps, and that Appellant did not know who was in the red Charger though he shot at it. (*See* Tr. "9-28-2022" at p. 54.)

The State's theory for evidence of ill will between Appellant and the other combatants centered exclusively around a Facebook video which was posted at some unknown time prior to the fight, featuring Appellant only briefly in the background without speaking or making any discernible threat toward anyone specific. The video featured Dontrae Epps rapping about "fighting," though he specifically and repeatedly stated that he did not "play with guns." (*See* Tr. "10-03-2022" at p. 8.) There was no credible evidence presented that any of the deceased victims or other combatants engaging in gunfire with Appellant ever saw the video, let alone that they interpreted the content as threatening. Furthermore, even the making of a video that was intended to serve as a threat to another individual in no way suffices as evidence of an intent on the part of both parties to meet and engage in deadly combat.

Timothy Scarbough, another individual present during the shootout, stated that his intentions were to "fight if anybody did anything," not shoot. (*See* Tr. "9-27-2022" at pp. 79-81.) Scarbough also testified that he never saw the deceased Michael Rogers with a gun while he was

in the car with Rogers. (*Id.* at p. 91.) It is hard to imagine that Appellant could have known Rogers was armed for deadly combat when another individual in the car with the victim did not even profess such knowledge. *See Young*, 429 S.C. at 160, 838 S.E.2d at 519 ("[t]he State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed."). When asked why Appellant had a gun with him in his car on the night of the shootout, he replied that it was a normal practice for him given the high-crime rate of the area. (*See* Tr. "10-03-2022" at pp. 40-41.) Appellant repeatedly stated that there was no agreement to meet at the gas station to settle any differences among the parties, and that he had no idea who was in the red car he shot at. (*Id.* at pp. 45-54.) He further confirmed that he had never spoken to Rogers and never had any problems or disputes with him. (*Id.* at p. 141.) The State never presented any evidence contradicting this assertion. Not one single mention of ill will between Appellant and any of the other combatants or deceased victims came to light during the trial.

In sum, the facts of this case as presented at trial in no way support a conclusion that Appellant engaged in mutual combat with any of the parties present at the shootout. There is no evidence established by the conduct of any of the individuals leading up to the fight that any of them intended to meet up that night to settle differences or engage in combat. To constitute mutual combat, there must be "mutual intent and willingness to fight." *Graham*, 260 S.C. at 450, 196 S.E.2d at 495. Not a single witness testified at trial that there had been any plan to fight on the part of themselves or any other individual present that night. There is certainly no evidence that any of the individuals knew the others were armed with deadly weapons and also intended to fight with them. "The State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed." *Young*, 429 S.C. at 160, 838

S.E.2d at 519 (citing *Taylor*, 356 S.C. at 233-34, 589 S.E.2d at 4-5). Rather, the situation devolved quickly into mass chaos in which there were an untold number of unidentified shooters firing in all directions for some period of time. This situation bears no resemblance to the individualized feuding and back-and-forth combat between combatants in *Porter*, *Graham*, and *Mathis*. *Taylor* requires the facts of a case to be "like the evidence of mutual combat present in the *Porter*, *Graham*, and *Mathis* cases" to support an instruction on mutual combat. *Taylor*, 356 S.C. at 234, 589 S.E.2d at 4. Instead, the facts here are far more similar to what occurred in *Bowers*, where the court found insufficient evidence to support an instruction because there was no indication that the defendant specifically had engaged in combat which led to the shootout. *Bowers*, 436 S.C. at 650-51, 875 S.E.2d at 613.

Because there is no evidence of an agreement between Appellant and any other individual to engage in mutual combat, no evidence that Appellant had any preexisting ill will or prior contact (let alone conflict) with any of the other participants in the fight, no evidence that Appellant's conduct in any way led to the shootout at the gas station, and no evidence that Appellant armed himself with a deadly weapon because he knew another individual had done so and planned to fight, there was no basis for the court to charge the jury with respect to mutual combat. Under *Taylor* and the other relevant precedent discussed herein, the jury instruction offered in Appellant's trial was unwarranted. According to South Carolina precedent, when a court issues an unwarranted mutual combat charge, that instruction acts "as a limitation on the [Appellant's] ability to claim self-defense, and prejudice[s] him by transferring the State's burden to disprove self-defense onto the [Appellant]." *Taylor*, 356 S.C. at 235, 589 S.E.2d at 5; *see also Jackson*, 384 S.C. at 38 n.5, 681 S.E.2d at 21 n.5 (clarifying that when "there [is] no evidence [a] victim [is] willing to engage in mutual combat[,]" charging mutual combat and self-defense creates unfair prejudice).

CONCLUSION

WHEREFORE, Appellant respectfully asks this Court hold that the instruction to the jury on mutual combat was issued in error, reverse his resulting convictions, and grant whatever other relief the Court believes appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

September 11, 2023

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